No. 22-6041

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID WILLIAMS III,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Prepared and submitted by,

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Pro se petitioner

QUESTIONS PRESENTED

Whether a defendant's conviction and sentence for nonexistent crimes: (1) violates the Fifth And Eighth Amendments, (2) constitute extraordinary and exceptional circumstances that warrant equitable tolling, and (3) merit correction at any time?

Whether government official misconduct which resulted in a conviction for nonexistent crimes also constitutes extraordinary and exceptional circumstances that warrants equitable tolling under 28 U.S.C. Section 2255's time limitations period?

Whether Congress's intent in enacting 28 U.S.C. Section 2255(f)(4) was to provide a ground for tolling of the limitations period, or as defining another triggering date, moving it from the time when the conviction became final to the later date on which the particular claims accrued?

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner David Williams III ("Williams") respectfully requests this Court to grant him a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

ORDERS BELOW

The Eleventh Circuit Court of Appeals's order denying Williams's certificate of appealability ("COA") appears at Appendix A1, and is unpublished.

The district court's order and judgment denying Williams's Section 2255 Motion appears at Appendix B, and is unpublished.

The Eleventh Circuit Court of Appeals's order denying Williams's motion for reconsideration appears at Appendix C1, and is unpublished.

JURISDICTION

Williams sought post-conviction relief under 28 U.S.C. Section 2255(f)(4) and equitable tolling. The district court denied relief and denied Williams a COA (at Appendix B). Williams timely filed a notice of appeal. He then timely filed a COA with the Eleventh Circuit Court of Appeals. The Eleventh Circuit denied Williams's COA (at Appendix A1). Williams timely filed a motion for reconsideration (at Appendix C2). The Eleventh Circuit denied Williams's reconsideration motion on August 3, 2022 (at Appendix C1). As such, this Court has jurisdiction under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution's Fifth Amendment provides in relevant part:

> "No person shall be ... deprived of life, liberty, or property without due process of law;..."

The United States Constitution's Sixth Amendment provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to ... an impartial jury ... and be informed of the nature and cause of the accusation;..."

The United States Constitution's Eighth Amendment prohibits the use of:

> "cruel and unusual punishments inflicted."

Title 18 U.S.C. Section 2(a) states:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

Title 18 U.S.C. Section 287 states:

> Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned not more than five years and shall be subject to a fine in the amount provided in this title.

Title 18 U.S.C. Section 372 states:

> If two or more persons in any State, Territory, Possession, or District conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof, or to induce by like means any officer of the United States to leave the place, where his duties as an officer are required to be performed,

or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties, each of such persons shall be fined under this title or imprisoned not more than six years, or both.

Title 18 U.S.C. Section 1341 states in relevant part:

Whoever, having devised or intending to devise, any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or article or attempting so to do, place in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

Title 18 U.S.C. Section 1503(a) states:

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand jury or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injuries any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threat or force, or by any threatening letter or communication, influences, obstructs,

> or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

The statute Williams sought habeas corpus relief under was Title 28 U.S.C. Section 2255(f)(4), which states:

> (f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

STATEMENT OF THE CASE

A. Williams's Relevant Pretrial and Trial Proceedings

In May 2007, a federal grand jury for the Middle District of Florida, Orlando Division returned a twelve count indictment against Williams and co-defendant Janet Bridley ("Bridley"). The indictment charged Williams and Bridley with nine counts of aiding and abetting mail fraud by explicit reference to 18 U.S.C. Sections 1341 and 2 (Counts 1-9); one count of aiding and abetting obstruction of justice by explicit reference to 18 U.S.C. Sections 1503(a) and 2 (Count 10); one count of conspiracy to obstruct justice by reference to 18 U.S.C. Section 372 (Count 11); and one count of aiding and abetting filing a false claim by explicit reference to 18 U.S.C. Sections 287 and 2 (Count 12).

Since the government charged aiding and abetting and conspiracy offenses, it tried Williams and Bridley together in September 2007. Consistent with the

indictment's explicit reference to 18 U.S.C. Section 2 (within Counts 1-10 and 12), the government's attorney brought and maintained an accomplice liability/joint participation theory of criminal liability for committing the substantive offenses under Section 2(a) throughout Williams's entire trial.

At the conclusion of Williams's trial, the district court acquitted Bridley of all charges. As a result, the government's attorney dismissed the conspiracy charge (Count 11) against Williams.

The district court then held a charge conference. After which, the court instructed the jury on aiding and abetting soley under Section 2(a)'s accomplice liability/joint participation theory of criminal liability for convicting Williams of the substantive offenses, then turned the case over to the jury for deliberations.

At no time during the charge conference through the case being turned over to the jury for deliberations, did either the district court or government's attorney notify Williams that the indictment would be redacted before it was given to the jury. Nor did either the district court or government's attorney provide Williams with a copy of the redacted indictment before it went to the jury. Nor was Williams given an opportunity to be heard regarding the indictment's redaction. Put simply, neither the district court nor government's attorney ever make Williams aware of the existence of the redacted indictment that the jury analyzed during deliberations. The relevant trial record substantiates these facts.[1]

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[1] See Trial Transcript, pp. 263-313 (September 5, 2007), located within Appendix A2. It is within the Supporting Exhibits (at Ex. D) to Williams's COA

The jury convicted Williams of the aiding and abetting the substantive offenses alleged in Counts 1-10 and 12 of the redacted indictment.

On January 7, 2008, the district court sentenced Williams to a total of 235 months imprisonment to run consecutive to a federal sentence he was already serving on another case.

Williams did not file a direct appeal.

B. Williams's Freedom of Information Act Proceedings

In March 2016, Williams mailed a Freedom of Information Act (FOIA) request to the Executive Office for United States Attorneys (EOUSA). Williams's request sought five categories of specific documents.[2]

In April 2016, the EOUSA received Williams's FOIA request and assigned it number FOIA-2016-02412.

In January 2018, Williams filed an FOIA complaint against the EOUSA for non-compliance with the Freedom of Information Act. Williams filed his FOIA complaint with the United States District Court for the District of Columbia. The clerk docketed Williams's FOIA complaint as Civil Action No. 1:18-cv-00019-UNA.

In September 2018, the EOUSA mailed Williams 558 pages of documents related to his FOIA request. Contained within those documents was a copy of the redacted indictment that government officials gave to the deliberating jury at

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Application.

[2]Williams's FOIA request is located within Appendix A2. It is within the Supporting Attachments to his Section 2255 Motion (at Attachment-A).

the close of Williams's trial. This was the first time Williams became aware of the redacted indictment's existence.[3]

C. Williams's Relevant Section 2255 Proceedings

On September 10, 2019, Williams filed a Section 2255 Motion. Williams also filed a Supporting Declaration and Attachments with his Section 2255 Motion. The motion raised two grounds for relief. These were: (1) the government stealthily submitted a defective redacted indictment to the petit jury during deliberations; and (2) the government's stealthy submission of a defective redacted indictment constitutes prosecutorial misconduct.[4]

The government filed two responses to Williams's Section 2255 Motion.[5]

No United States Magistrate Judge ever issued a Report and Recommendation to grant or deny Williams's Section 2255 Motion.

In August 2021, the district court issued an order and judgment denying Williams relief and denying a COA.

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[3] Williams's acknowledgment of when him receiving the redacted indictment is also contained within his Opposition Statement of Material Facts in Dispute to be Litigated at p. 6, filed in December 2018 in FOIA Civil Action No. 1:18-cv-00019-UNA. This document is also located within Appendix A2. It is within the Supporting Exhibits (Ex. C) to his COA Application.

[4] Williams's Section 2255 Motion is located within Appendix A2. It is within the Supporting Exhibits (Ex. A) to his COA Application.

[5] See Case No. 6:19-cv-1800-CEM-GJK, at Doc. Nos. 8 and 22 (Middle District of Florida, Orlando Division).

REASONS FOR GRANTING THE PETITION

Preliminary Summary

This petition involves the scope and application of the Fifth, Sixth and Eighth Amendments, and Fed. R. Crim. P. 43(a), taken together with the undisputed key facts of Williams's case. These facts are as follows.

During the jury deliberations stage of Williams's trial, either the trial court or government's attorney redacted the indictment in Williams's case. No one ever informed Williams of this action, however. Then an official provided the redacted indictment to the deliberating jury but never provided Williams with a copy of it before or after the jury received it. Moreover, neither the trial court nor government's attorney ever notified Williams of the redacted indictment's existence or that someone filed it with the clerk's office. And neither the trial court nor government's attorney ever provide Williams with an opportunity to be heard regarding the indictment's redaction before or after the deliberating jury received it. These facts are revealed in the relevant portion of Williams's trial record. Trial Transcript, pp. 292-313 (September 5, 2007), at Civ. Doc. No. 8-2, pp. 73-122, Page ID 330-79, located within Appendix A2. It is within the Supporting Exhibits (Ex. D) to Williams's COA Application.[6]

In fact, Williams did not become aware of the redacted indictment's existence until years later after filing a Freedom of Information Act request. That was when he discovered, for the first time, that the redacted indictment

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[6]This portion of the record is from the charge conference through the case being turned over for deliberations.

provided to the deliberating jury during his trial did not charge federal crimes. Neither the district court nor government's attorney disputed these key facts in Williams's Section 2255 proceeding. Therefore, these key facts determine the legal questions the Court should answer and what legal principles are necessary to answer the questions. In re Borchers, 1968 U.S. Dist. LEXIS 12860, *15 (S.D. Ohio, Dec. 20, 1968) ("Obviously, the facts of a case determine what legal principles are necessary to a decision by a court.").

Analysis of Principles Supporting Facts

A. The defective redacted indictment

Was a defective redacted indictment provided to the deliberating jury during Williams's trial proceeding? Yes.

The redacted indictment provided to the deliberating jury during Williams's trial failed to allege facts sufficient to establish federal crimes. "In determining whether an indictment is sufficient, [the Eleventh Circuit] read[s] it as a whole and give it a common sense contruction." United States v. Jordan, 582 F.3d 1239, 1245 (11th Cir. 2009) (per curiam) (emphasis added); United States v. Sharpe, 438 F.3d 1257, 1263 (11th Cir. 2006) (the sufficiency of an indictment is determined from its face). With this understanding, the redacted indictment provided to the deliberating jury in Williams's case affirmatively cited aiding and abetting charges but it reads as if Williams aided or abetted himself. This is not a federal crime. United States v. Martin, 747 F.2d 1404, 1408 (11th Cir. 1984); United States v. Shear, 962 F.2d 488, 495 n.10 (5th Cir. 1992) (acknowledging same); United States v. Verners, 53 F.3d 291, 295 n.2 (10th Cir. 1995) ("One cannot aid and abet an aider and abetter, nor can one

aid and abet oneself") (citation omitted). Thus the redacted indictment in Williams's case is defective on its face and Eleventh Circuit precedent agrees on this subject.

In United States v. Martin, the Eleventh Circuit addressed the same issue and facts pointed out here. 747 F.2d 1404 (11th Cir. 1984). This case involved a business owner who attempted to discredit and impede an IRS agent from auditing his business. The grand jury indicted Martin for his actions. Count One charged him with violating 21 U.S.C. Sections 841(a)(1) and 846, and 18 U.S.C. Section 2. Count Two charged him alone with violating 26 U.S.C. Section 7212(a), and 18 U.S.C. Section 2. Count Three charged him with violating 26 U.S.C. Section 7212(a). Id. Ultimately, the Court found Martin's indictment defective and reversed his aiding and abetting convictions for Counts One and Two. Id.

The difficulties in Williams's case regarding all the counts in the redacted indictment arise from the same factors addressed in Martin. These are: (1) the affirmatively inclusion of aiding and abetting in every count,[7] though it was not required to be alleged, (2) the failure to charge any person other than Williams with the substantive crimes,[8] and (3) the giving of a jury instruction on aiding and abetting "other persons"[9] when under the evidence no

[7]The redacted indictment is located within Appendix A2. It is within the Supporting Attachments to Williams's Section 2255 Motion (at Attachment-C).

[8]See redacted indictment, supra.

[9]The trial court in Williams's case gave the exact aiding and abetting instructions given in Martin. See Trial Transcript, pp. 311-12 (September 5, 2007), at Civ. Doc. No. 8-2, pp. 120-21, Page ID 377-78 (located within Appendix A2, at Ex. D); see also Martin, 747 F.2d at 1407-08 (quoting the same aiding and abetting jury instructions).

person other than Williams committed the substantive crimes.[10] Martin, 747 F.2s at 1407. Thus Martin's holding applies on all fours with the facts surrounding the redacted indictment in Williams's case. Applying this precedent makes one important thing obvious: The redacted indictment provided to the deliberating jury during Williams's trial stage was "so defective that it does not, by any reasonable construction charge ... offense[s] for which [Williams] is convicted." United States v. Trollinger, 415 F.2d 527, 528 (5th Cir. 1969)[11] (emphasis added). As a result, the district court was obligated to apply the

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[10]Here, the trial court found that no one other than Williams committed the substantive crimes charged by acquitting codefendant Bridley of all charges. See Trial Transcript, pp. 259-60 (September 5, 2007), at Civ. Doc. No. 8-2, pp. 68-69, Page ID 325-26. Thus "since [the court found] that [Bridley] is not guilty of the underlying crime[s], it is apparent that [Williams] cannot be convicted of aiding and abetting her. One cannot aid and abet an aider and abetter, nor can one aid and abet oneself." Verners, 53 F.3d at 295, n.2; United States v. Hassoun, 476 F.3d 1181, 1183 n.2 (11th Cir. 2007) ("a defendant can only be liable on an aiding and abetting theory if the government proves that the substantive offenses, which the defendant allegedly aided and abetted, was actually committed by someone else.") (citing Martin, 747 F.2d at 1407).

Moreover, the facts and proceedings of Williams's case stand in contrast with the reasoning in United States v. Standefer, 447 U.S. 10 (1980). There, this Court upheld Standefer's aiding and abetting conviction. Id. The reasons being are because the jury acquitted the principal in an earlier trial (Id. at 12-13); therefore, the trial court in Standefer's later trial gave instructions that required the jury to find the principal (who had been acquitted in an earlier trial) guilty of the substantive offense in order to convict Standefer of aiding and abetting. Id. at 13 n.6, and 20 n.14. But the facts are different in Williams's Case.

In Williams's case, the trial court acquitted Bridley and the jury convicted Williams of aiding and abetting all in the same trial. Thus, as to the aiding and abetting counts in the redacted indictment, there was no crime for Williams to have abetted. Standefer, 447 U.S. at 20 n.14 (distinguishing instant case, where the government proved the codefendant had committed the substantive violation, from cases holding that "there can be no conviction for aiding and abetting someone to do an innocent act") (citing Shuttlesworth v. Birmingham, 373 U.S. 262, 265 (1963)).

[11]"Decisions by the United States Court of Appeals for the Fifth Circuit made prior to the court's split at the close of business on September 30, 1981

Eleventh Circuit's Martin precedent to the facts of Williams's case. United States v. Rudolph, 570 F. Supp. 3d 1277, 1287 (N.D. Ala., Nov. 8, 2021) ("federal district courts are bound by precedent of their circuit") (quoting Brownlee v. United States, 2018 U.S. Dist. LEXIS 231360 (S.D. Fla., Apr. 24, 2018).

B. Williams's conviction for nonexistent crimes

Did Williams's conviction for nonexistent crimes constitute a miscarriage of justice, and violate the Fifth and Eighth Amendments? Yes.

"A defendant cannot be convicted of a non-existent offense." Senter v. United States, 983 F.3d 1289, 1294 (11th Cir. 2020) (citing Adams v. Murphy, 653 F.2d 224, 225 (5th Cir. 1981); Casey v. State, 925 So. 2d 1005, 1006 (Ala. Crim. App. 2005)). Yet the government convicted Williams of several nonexistent crimes. Unbeknown to Williams, someone provided the jury with a redacted indictment during the deliberations stage of his trial. The jury then used that indictment as "a road map for [its] deliberations." United States v. Roy, 473 F.3d 1232, 1237 n.2 (D.C. Cir. 2007) (quoting Ralph A. Jacobs, White Collar Pretrial Motions, 16 Litig., Jan. 1990, at 17, 20) (emphasis added). However, the problem is that every count in the redacted indictment charged Williams alone with aiding or abetting himself, and the jury applied its aiding and abetting instructions to that indictment. Evans v. Michigan, 568 U.S. 313, 328 (2013) ("[A] jury is presume to follow its instructions."); In re Price, 964

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are 'binding as precedent in the Eleventh Circuit.'" Jones v. Governor of Florida, 950 F.3d 795, 823 n.11 (11th Cir. 2020) (quoting Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc)).

F.3d 1045, 1049 (11th Cir. 2020) ("... we must, presume that juries follow their instructions."). This in turn caused the jury to convict Williams of Non-existent[12] crimes alleged in the redacted indictment.

American jurisprudence has long settled that no one can aid or abet himself. Martin, 747 F.2d at 1408 ("One cannot aid or abet himself."); Shear, 962 F.2d at 495 n.10 (acknowledging same); Verners, 53 F.3d at 295 n.2 (acknowledging same). This is obvious when analyzing the elements of 18 U.S.C. Section 2(a). The Supreme Court and every federal appellate Circuit acknowledge that in order to convict under an aiding and abetting theory connected with substantive crimes, the government must prove three primary elements. These are: (1) someone other than the defendant committed the substantive crime; (2) the defendant contributed to and furthered the crime; and (3) the defendant intended to aid in its commission. Nye & Nissen v. United States, 336 U.S. 613, 619 (1949); United State v. Rodriguez-Adormo, 695 F.3d 32, 42 (1st Cir. 2012); United States v. Willis, 2021 U.S. App. LEXIS 21071, *18 (2nd Cir., Jul. 16, 2021); United States v. Mercado, 610 F.3d 841, 846 (3rd Cir. 2010); United States v. Pasquantino, 336 F.3d 321, 335 (4th Cir. 2003); United States v. Moore, 708 F.3d 639, 649 (5th Cir. 2013); United States v. Blood, 435 F.3d 612, 628 (6th Cir. 2006); United States v. Carter, 695 F.3d 690, 697 (7th Cir. 2012), cert. denied, 568 U.S. 1112 (2013); United States v. Bradshaw, 955 F.3d 699, 706 (8th Cir. 2020); United States v. Buck, 2022 U.S. App. LEXIS 724, *19 (9th Cir.,

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[12]The term "noneistence" is defined as: "1. absence of existence. 2. a thing that has no existence." Nonexistence, The American Family Reference Dictionary, p. 825 (Random House, Inc., 1964).

Jan. 11, 2022); United States v. Little, 829 F.3d 1177, 1184 (10th Cir. 2016); United States v. Sosa, 777 F.3d 1279, 1292 (11th Cir. 2015); United States v. Teffera, 985 F.2d 1082, 1086 n.3 (D.C. Cir. 1993).

Here, using the first ten counts of the redacted indictment as examples, they charge Williams alone with aiding and abetting mail fraud by explicit reference to 18 U.S.C. Sections 1341 and 2. Therefore, in order for the government to convict Williams of these crimes, it must demonstrate that Williams: "(1) voluntarily associated with the criminal enterprise; (2) voluntarily participated in the venture; and (3) sought by independent action to make the venture succeed." United States v. Bonham, 1999 U.S. App. LEXIS 40207, *18 (5th Cir., Jun. 22, 1999) (citation omitted); United States v. Pennington, 168 F.3d 1060, 1064 (8th Cir. 1999) (acknowledging same elements for aiding and abetting mail fraud); United States v. Rini, 229 Fed. Appx. 841, 844 (11th Cir. 2007) (same). However, despite the redacted indictment's explicit citation to Section 2, it failed to allege facts sufficient to establish aiding and abetting crimes. And neither the government's presentation of its case, nor the trial court's aiding and abetting instructions cured the defects in the redacted indictment.

As a result, Williams's conviction for the nonexistent crimes alleged in the redacted indictment cannot be allowed to stand. To do otherwise would constitute a clear miscarriage of justice. Cooper v. United States, 199 F.3d 898, 901 (7th Cir. 1999) (noting that a conviction of a nonexistent crime is "in anyone's book ... a clear miscarriage of justice,..."). It would also violate the Eighth Amendment as just one day imprisonment for nonexistent crimes constitutes cruel and unusual punishment. Robinson v. California, 370 U.S. 660,

667 (1962) ("even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."). And it would violate the Fifth Amendment's protection against "arbitrary action of government." Wolff v. McDonnell, 418 U.S. 509, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.").

C. The indictment's stealthy redaction and submission

Did the indictment's stealthy redaction and submission to the deliberating jury, without Williams's knowledge, constitute misconduct and violate his constitutional and statutory rights? Yes.

Misconduct occurs in a case when a government official's conduct is improper and it prejudicially affects a defendant's substantive rights by depriving him of a fair trial. United States v. Foley, 508 F.3d 627, 636-37 (11th Cir. 2007) (discussing two-part test to determine prosecutorial misconduct). Foley's two-part misconduct test applies to the key facts of Williams's case.

When a government official redacted the indictment and provided it to the deliberating jury without first notifying Williams or providing him with a copy of it, this conduct was improper. United States v. Hernandez, 730 F.2d 895, 902 (2nd Cir. 1984) ("A change in a document to be submitted to the jury should never be made without notice to opposing counsel..."). This conduct also prejudicially affected Williams's rights by depriving him of an opportunity to be present and participate during communications[13] with the jury. Said differently,

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[13]Redacting an indictment then providing it to the jury is a form of communication. Webster's New World Dictionary and Thesaurus defines "communication" as "1 a transmitting 2 ... a giving or exchanging of information, etc.... 3 a means of communcation ..." Communication, Webster's New World Dictionary and

either the trial court or the government's attorney should have notified Williams and allowed him to be present and heard once the decision was made to redact the indictment before it was provided to the deliberating jury. See e.g., Rogers v. United States, 422 U.S. 35 (1975) (this Court held that defendant's right to be present and participate during communications between judge and jury was plainly violated by trial court's unprompted ex parte supplemental communication in response to jury question.). Williams's substantive rights surrounding this matter are recognized constitutionally and statutorily.

Constitutionally, the Fifth Amendment required Williams's personal presence at every critical trial stage. Rushen v. Spain, 464 U.S. 114, 117-18 (1983) (describing right to personal presence at all critical stages of trial as a "fundamental right[] of each criminal defendant"). It also guaranteed Williams procedural fairness embodied in the essential elements of "notice and an opportunity to be heard." Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (citation omitted); Jacobs v. Roberts, 223 U.S. 261, 265 (1912) ("The essential element of due process of law is an opportunity to be heard, and a necessary condition of such opportunity is notice.") (citation omitted). Moreover, the Sixth Amendment required conduct according to procedures and limitations assuring fundamental fairness within the Fifth Amendment's guarantee of due process in Williams's case. Velez Scott v. United States, 890 F.3d 1239, 1251-52 (11th Cir. 2018) (The Sixth Amendment "... guarantees criminal defendants a fair trial." [Thus] "[p]rocedural fairness is necessay to the preceived legitimacy of law.")

Thesaurus, p. 123 (Second ed. 2002).

(emphasis added)(citation omitted).

Statutorily, Fed. R. Crim. P. 43(a)(2) required Williams to be present at every critical trial stage. Id.; United States v. Benabe, 654 F.3d 753, 771 (7th Cir. 2011) (Fed. R. Crim. P. 43 builds on defendant's constitutional right to be "present at all stages of the trial where his absence might frustrate the fairness of the proceedings" [quoting from Faretta v. California, 422 U.S. 806, 819 n.15 (1975)]).

The key facts surrounding the matter makes clear the following. First, when an official redacted the indictment and provided it to the deliberating jury without first notifying Williams or providing him with a copy of it, at that critical trial stage, this constituted misconduct. Second, this misconduct prejudicially deprived Williams of his rights secured by the Fifth and Sixth Amendments, and Fed. R. Crim. P. 43(a)(2).

D. Williams's motion under Section 2255(f)(4)

Given the facts surrounding Williams's discovery of the redacted indictment, was his motion timely under Section 2255(f)(4)? Yes.

The main triggering date for filing a Section 2255 motion is found in Section (f)(1). However, the three other triggering dates--those found in Sections (f)(2), (f)(3) and (f)(4)--"rest[] the limitations period's beginning date, moving it from the time when the conviction became final ... to the later date on which the particular claim accrued." Wims v. United States, 225 F.3d 186, 190 (2nd Cir. 2000). The facts surrounding Williams's issues fall squarely under Section 2255(f)(4). Under this section, the time limitations period begins on the date "which the particular claim[s] accrued." Wims, 225 F.3d at 189-90 (emphasis added). This is clear from reading its statutory language. Section

2255(f)(4) states that "[a] 1-year period of limitation shall[14] apply to a [2255] motion ... from ... the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."

Here, the facts supporting Williams's issues in his Section 2255(f)(4) motion were discovered on or about September 14, 2018. This was due to a government official stealthily[15] redacting the indictment during Williams's critical trial stage, then providing it to the deliberating jury, and then filing it with the clerk's office, but somehow "forgetting" to inform Williams of these actions or even give him a copy of the redacted indictment. Despite this, Williams filed his Section 2255(f)(4) motion within the year of him discovering these facts. "Nothing in [Section 2255(f)(4)] ... required [Williams] to seek habeas relief sooner than one year after the limitations period [had] begun to run" under that section. "Nor [was Williams] required to show that he diligently pursued his claim[s] during that period so long as he file[d] his petition before it end[ed]." Wims, 225 F.3d at 189 (emphasis added). As a result, the district court's finding for dismissing Williams's Section 2255(f)(4) motion as untimely is incorrect for a number of reasons.

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[14] Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 35 (1998) (observing that "'shall'" typically "'creates an obligation impervious to ... discretion").

[15] Because neither the trial court nor government's attorney ever notified Williams of the plan to redact the indictment, or gave him a copy of the redacted indictment before or after the jury received it, this amounted to stealthy action. The term "stealth" is defined as "secret or furtive action." Stealth, Webster's New World Dictionary and Thesaurus, p. 621 (Second ed.

The first error was that the district court dismissed Williams's motion as untimely under the provisions of Section 2255(f)(1), despite Williams explicitly invoking the provisions of Section 2255(f)(4). This reasoning "deprived [Williams] of the one year during which, under the AEDPA, he was entitled to rest on his claim[s]." Wims, 225 F.3d at 190-91 (emphasis added).

The next error is the district court's conclusion that because Williams could have checked the docket any time after his trial, the delay in discovering the redacted indictment did not meet the exercise of due diligence. This conclusion is not in harmony with the facts of Williams's case and the true nature of Section 2255(f)(4). Based on the facts of Williams's case, due diligence under Section 2255(f)(4) "did not require" (225 F.3d at 189) him to check the court docket and look for a document that neither the trial court nor government's attorney ever: (1) informed him existed, (2) provided him a copy of, or (3) gave him an opportunity to be heard concerning it. The district court's conclusion also permits an unfair game of hide-and-seek between government officials and pro se defendants.

The last error is that "the district court interpreted [Section 2255(f)(4)] as if it provided a ground for tolling of the limitations period, rather than as defining the time when the limitations period began." This approach caused "the court [to] examine[] [Williams's] conduct for diligence after January 22, 2009. Wims, 225 F.3d at 189-90 (emphasis added). This interpretation was wrong. "Section [2255(f)(4)] is not a tolling provision that extends the length of ... available filing time ..." but instead, "it resets the limitations period's

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2002). Therefore, the government official's actions were stealthy toward Williams.

beginning date, moving it from the time when the conviction became final [under Section 2255(f)(1)], to the later date in which the particular claim[s] accrued." Wims, 225 F.3d at 190 (citing Smith v. McGinnis, 208 F.3d 13, 15 (2nd Cir. 2000)) (distinguishing tolling provisions from those that restart the limitations period) (emphasis added).

Based on the foregoing, the district court's dismissal of Williams's Section 2255(f)(4) motion as untimely cannot stand.

E. Williams's entitlement to equitable tolling based on extraordinary and exceptional circumstances

Were there extraordinary and exceptional circumstances in Williams's case that also warranted equitable tolling? Yes.

The AEDPA's statutory limitations perios "is subject to equitable tolling in appropriate cases." Holland v. Florida, 130 S.Ct. 2549, 2560 (2010). (joining "all courts of appeals that have considered the question"). Williams is entitled to equitable tolling by demonstrating "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." Id. at 130 S.Ct. at 2562 (internal quotation marks omitted).

Webster's New World Dictionary and Thesaurus defines "diligent" in part as "done carefully." Diligent, Webster's New World Dictionary and Thesaurus, p. 175 (Second ed. 2002). Black's Law Dictionary defines "extraordinary" as "[b]eyond what is usual, customary, regular, or common." Extraordinary, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary also defines "exceptional circumstances" as "[c]onditions which are out of the ordinary course of events;

unusual or extraordinary circumstances." Exceptional circumstances, Black's Law Dictionary (Abridged 6th ed. 1991). Williams's predicament meets these definitions wholly.

The fact that an official redacted the indictment during Williams's critical trial stage, then provided it to the deliberating jury, and then filed it with the clerk's office, but never informed Williams of these actions or provided him with a copy of the redacted indictment, is extraordinary and exceptional circumstances. Because by the official doing these things, it was "beyond what is usual" and resulted in "conditions ... out of the ordinary course of" established procedures[16] and related principles.

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[16]There are cases supporting Williams's point. For instance, in United States v. Skilling, the trial court acknowledged that if it "decides either to read or ... provide the redacted indictment to the jury, the court will provide for all parties an opportunity to address the form of the redacted indictment to be presented to the jury." 2006 U.S. Dist. LEXIS 5292 at *9 (S.D. TX., Jan. 26, 2006).

In United States v. Fawwaz, once the jury went into deliberations, the trial "court ... asked whether the parties had settled on a redacted version of the indictment to provide to the jury." The prosecutor then "informed the court that it was 'going to work with the defense to get that done as soon as possible.'" 2015 U.S. Dist. LEXIS 59839, at *4-5 (S.D. NY, May 6, 2015).

In United States v. Snipes, "the [trial] court ... created a redacted version of the Superseding Indictment to provide to the jury ... [that] was previously approved by counsel for all parties." 2007 U.S. Dist. LEXIS 101997, at *4 (M.D. Fla., Dec. 24, 2007).

And even the Eleventh Circuit while addressing issues in In re Coffman, acknowledged that:

> Because the United States failed to introduce any evidence at trial that Coffman intended to manufacture the drug, the district court suggested that it redacted "to manufacture" from the indictment before providing it to the jury for deliberations. The parties agreed, and the court redacted the indictment,... and gave it to the jury.

Moreover, Williams exercised reasonable diligence appropriately in his situation. He acted promptly in a manner which a person of common knowledge would in presenting his claims surrounding the facts and circumstances of his case as soon as he became aware of them. Thus the district court's reasoning that no equitable tolling existed employed fallacies that negated key facts supporting Williams's claims. And in essence, the district court's reasoning held Williams accountable for matters not disclosed to him. This unfairly placed the burden of discovering a document (redacted indictment) on Williams, and released the government official responsible from his/her duty of disclosing that document to him.

There are other reasons that establish equitable tolling in Williams's case as well. These are misconduct, actual innocence, and the fundamental miscarriage of justice exception.

Government misconduct warrants equitable tolling. See, e.g., Kendrick v. Sullivan, 784 F. Supp. 94, 104-05 (S.D. N.Y. 1992); DeBrunner v. Midway Equipment Co., 803 F.2d 950, 952 (8th Cir. 1986) (noting that equitable tolling arises upon some positive misconduct by the party against whom it is asserted). Thus equitable tolling is appropriate in Williams's case because an official hindered his

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Id. at 766 F.3d 1246, 1347-48 (11th Cir. 2014).

All the above cases acknowledge three important things supporting Williams's claim. First, he had a right to be notified that the indictment would be redacted before it went to the jury. Second, he had a right to see a copy of the redacted indictment before it went to the jury. And third, he had a right to an opportunity to be heard in order "to address the form of the redacted indictment [before it was] presented to the jury" during that critical stage of his trial. Skilling, 2006 U.S. Dist. LEXIS 5292 at *9 (emphasis added).

constitutional and statutory "rights by acting in a ... clandestine way" when he/she redacted, then provided, an indictment to the deliberating jury without Williams's knowledge. Canales v. Sullivan, 936 F.2d 755, 758 (2nd Cir. 1991) (quoting Wong v. Bowen, 854 F.2d 638, 631 (2nd Cir. 1988) (per curiam); Pliler v. Ford, 542 U.S. 225, 235 (2004) ("... if the petitioner is affirmatively misled, either by the court or by the state, equitable tolling might well be appropriate.") (J. O'Connor, concurring). In essence, the district court's determination failed to recognized that the official misconduct in Williams's case created extraordinary and exceptional circumstances that warranted equitable tolling.

Moreover, Williams's claim that he was convicted of nonexistent crimes is broadly construed as a claim of actual innocence for purposes of equitable tolling. And a sufficiently supported claim of actual innocence "creates an exception to the procedural barrier posed by the AEDPA's limitations period." Lopez v. Trani, 628 F.3d 1228, 1230-31 (10th Cir. 2010). This is so because a conviction for nonexistent crimes result in a complete fundamental miscarriage of justice. Davis v. United States, 417 U.S. 333, 346-47 (1974) ("There can be no room for doubt that [a conviction for an act that the law does not make criminal] inherently results in a complete miscarriage of justice and present(s) exceptional circumstances that justify collateral relief under § 2255."); Mills v. United States, 36 F.3d 1052, 1055-56 (11th Cir. 1994) ("... under the fundamental miscarriage of justice exception, 'in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a

showing of cause for the procedural default.'") (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)); Cooper, 199 F.3d at 901 (a conviction for "a non-existent crime [is] in anyone's book ... a miscarriage of justice.") (emphasis added).

As such, the equitable tolling procedure enabled the district court to provide "the relief necessary to correct [the] particular injustices" in Williams's case. Holland, 130 S.Ct. at 2565 (emphasis added).

F. The district court's order

Did the district court squarely address the merits of Grounds One and Two in Williams's Section 2255(f)(4) Motion? No.

Webster's New Pocket Dictionary defines "merits" in part as "... [t]he actual facts of a legal case other issue." Merits, Webster's New Pocket Dictionary, p. 174 (Houghton Mifflin Co., MA, 2007). Moreover, this Court explained the criteria of an "on the merits adjudication" in Semtek International Inc. v. Lockheed Martin Corp. as follows:

> The original connotation of an "on the merits" adjudication is one that actually "pass[es] directly on the substance of [a particular] claim" before the court... That connotation remains common to every jurisdiction of which we are aware... ("The prototyp[ical] [judgment on the merits is] one in which the merits of [a party's] claim are in fact adjudicated [for or] against the [party] after trial of the substantive issues".

Id. at 531 U.S. 497, 501-02 (2001).

Weighing these interpretations with the order denying Williams's Section 2255 motion creates a dilemma for the district court. Because they expose the district court's failure to squarely address the merits of

Williams's fact-based claims.

For instance, as it relates to Ground One of Williams's Section 2255 motion, it is an "actual fact" that the redacted indictment provided to the deliberating jury charged Williams alone with aiding and abetting crimes by explicit reference to Section 2 in every count.[17] It is also an "actual fact" that Williams cannot aid or abet himself as this is not a crime. And it is an "actual fact" the Eleventh Circuit precedent applies on all fours with the facts surrounding the redacted indictment's deficiencies in Williams's case (discussed in Part A, supra). However, despite these "actual facts," the district court expressly avoided them by using misapplied reasoning.

The district court attempted to make it appear as though it addressed the merits of Ground One in Williams's Section 2255 motion by summarily reasoning that the redacted indictment charged Williams with substantive crimes only, instead of aiding and abetting those substantive crimes. Id. at Appendix B (at pp. 12-14 within order). This reasoning is not based on "actual facts" or supporting authority. Factually, every count in the redacted indictment charged Williams alone with aiding and abetting substantive crimes by explicit reference to Section 2. Authority-wise, since the redacted "indictment specifically refers to the statute[s] on which the charge[s] [were] based, the statutory language may be used to determine whether [Williams] received adequate notice." United States v. Stefan, 784 F.2d 1093, 1101-02 (11th Cir. 1986) (quoting United States v. Chicole, 724 F.2d 1498, 1504 (11th Cir.

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[17] It is also an "actual fact" that from the beginning through the close of the government's case against Williams, it maintained an accomplice/joint theory of criminal liability under § 2 connected with the substantive crimes.

1984)) (emphasis added). This "adequate notice" understanding equally applied to the district court and deliberating jury provided with the redacted indictment in Williams's case. Therefore, the district court's disregard of the explicitly cited statute (Section 2) in the redacted indictment is not supported by facts or authority and does not establish an "on the merits adjudication" of the matter raised in Ground One of Williams's Section 2255 motion.

Next, as it relates to Ground Two of Williams's Section 2255 motion, the district court never attempted to address the merits of the claim. Instead, the district court simply stated that "[a]ny of Petitioner's allegations not specifically addressed herein have been found to be without merit." Id. at Appendix B (at p. 14 within order). This conclusion is not based on any fact, evidence in the record, or authority.

The district court's failure to address the merits of Williams's Section 2255 claims also violated the Eleventh Circuit's precedent in Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992). Clisby directs district court's to address the merits of all constitutional violation claims raised, regardless of whether relief is granted or denied. Id. at 935-36. Thus at a minimum, the Eleventh Circuit should have granted Williams a COA on the following question:

> Whether the district court erred by making no factual findings as to Williams's misconduct argument (Ground Two) in his Section 2255 motion?

See Williams's COA application at Appendix A2.

G. The Eleventh Circuit's order

Did the Eleventh Circuit squarely address the merits within Williams's COA application? No. And does the Eleventh Circuit's action conflict with its own precedent? Yes.

Although Williams based his COA on actual facts and supporting authorities, the Eleventh Circuit denied it without contradicting the facts or citing any authorities supporting its conclusion. This is problematic. Id. at Appendix A1.

Anytime a court denies a motion without contradicting the facts and citing authorities supporting its conclusion, the basis for the denial cannot be determined. This violates the moving party's procedural due process rights. Therefore, the Eleventh Circuit's action regarding Williams's COA did not "observe ... fundamental fairness essential to the very concept of justice"[18] guaranteed by the Fifth Amendment. Its action also conflict with this Court's interpretation of an "on the merits adjudication" explained in Semtek International Inc., 531 U.S. at 501-02. Based on this interpretation, the Eleventh Circuit's denial did not pass "directly on the substance of" the claims Williams presented to the court. Id.

Moreover, the Eleventh Circuit's denial of Williams's COA application without addressing the merits was improper under its own precedent in Clisby v. Jones, 960 F.2d 925 (11th Cir. 1992). According to Clisby, since Williams's COA application raised claims for relief based on constitutional violations,

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[18] Lisenda v. California, 314 U.S. 219, 236 (1941) (emphasis added).

the Eleventh Circuit's failure to address these defects "arising from ... [the] operative facts" supporting Williams's COA resulted in "an unjust resolution," and undermined the judicial economy. Id. at 936-97 (emphasis added). As such, Clisby establishes an obligation to address the merits of all constitutional violation claims raised by Williams. This obligation equally applies to Section 2255 proceedings[19] which includes the certificate of appealability stage. Therefore, the Eleventh Circuit was bound to follow its own precedent and address all the constitutional violation claims raised in Williams's fact-based COA. In re Lambrix, 776 F.3d 789, 794 (11th Cir. 2015) ("'a prior panel's holding is binding on all subsequent panels unless and until it is over-ruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc.'") (quoting United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008)).

CONCLUSION

Williams's conviction and sentence for nonexistent crimes violates the Fifth Amendment's prohibition against deprivation of liberty without due process of law and the Eighth Amendment's prohibition against cruel and unusual punishment. Thus, failure to review would raise serious constitutional questions and undermine significant constitutional protections afforded to Williams. Because it would sanction him to have to spend an additional 235 months in prison for nonexistent crimes. This type of extreme conduct should be intolerable in a

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[19] Rhode v. United States, 583 F.3d 1289, 1291 (11th Cir. 2009) (applying Clisby to a § 2255 motion).

civilized society.

Wherefore, Williams respectfully requests that this Court grant him a writ of certiorari to review the orders below. The orders below conflict with constitutional principles, as well as decisions of this Court, other federal appellate circuits, and even the Eleventh Circuit's own precedent.

Williams also requests this Court to hold this Petition for Writ of Certiorari and its Supporting Appendices "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam).

Dated and mailed on November 3, 2022.

Respectfully submitted by,

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