

No 23 - 6929

IN THE SUPREME COURT OF THE UNITED STATES

FILED
FEB 02 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Herve Wilmore, Jr.,

Petitioner,

V.

United States of America,

Respondent.

On petition for a writ of Certiorari to the United States court of appeals

For the Eleventh Circuit .

Herve Wilmore, jr.#02634-104

Pro se, Petitioner

Federal correctional complex -camp

P.O. Box 1027 Coleman, FL 33521

QUESTION PRESENTED

Whether the district court's pre-filing injunction violates the suspension clause of the United States Constitution since it prevents the Petitioner from litigating his ineffective assistance of counsel claim was misconstrued by the court?

Herve Wilmore, jr. V. United States

Case No.

Corporate disclosure statement as required

By Rule 29.6

United States of America, Appellee

Robert N. Scola, jr., United States District Court judge for the Southern district of Florida.

Patrick A. White, former Magistrate Judge

Herve Wilmore, Petitioner

Table of contents

Questions Presented	i
Certificate of interested persons.....	ii
Table of contents.....	iii
Opinion Below.....	iv
Jurisdiction.....	v
Constitutional and Statutory provisions involved.....	1
Rules involved.....	2
Table of authorities.....	3
Statement of the case.....	4
Reasons for Granting the Writ.....	5
Conclusion.....	9
Verification.....	10
Certificate of service.....	10

Index to Appendix

Appendix A-District Courts order. **See record (Cv-Doc.103)**

Appendix B- U.S. court of appeals for the Eleventh Circuit order **See(12-6-2023 order @p.1).**

Table of authorities

	Pages
Gonzalez v. Crosby, 545 U.S. 524, 535-38, 125 S.ct. 2641, 162 L.Ed 2d 480(2005).....	7
Peterson v. Sec'y Dept.of Corr.,676 Fed. Appx.827 829 (11th Cir. 2017).....	6

**In The Supreme Court of the United
States petition for a writ of Certiorari**

Opinion Below

[] For cases from Federal Courts:

The opinion of the United States court of appeals appears at Appendix B to this petition and is

[] unpunished

The opinion of the United States district court appears at Appendix A to this petition and is

[] unpublished.

Jurisdiction

[✓] For cases from Federal Courts:

The date on which the United States court of appeals for the Eleventh Circuit decided my case was : **12-6-2023**

The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The U.S. court of appeals for the Eleventh Circuit denied the Petitioners motion for a certificate of appealability on :**12-6-2023. This petition is timely filed. See Appendix B**

Constitutional and Statutory provisions involved pages

Constitutional provisions: Suspension clause. Article 1, section 9, clause 2. "The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it".....1,4,8

Statutory provisions: Title 28 U.S.C. 2255

(A) A prisoner in custody under sentence of a court established by an act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in the excess of the maximum authorized by law, or is otherwise subject to collateral attack may move the court which imposed the sentence to vacate, set aside or correct the sentence.....passim

Rules Involved

Federal rules of civil procedure	Pages
----------------------------------	-------

Rule 60(b) On Motion and upon such terms as are just, the court May relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:

(B) Any other reason justifying relief from the operation of the judgment.

.... 4, 6, 7, 8

Statement of the Case

The petitioner filed a motion for leave to file his fourth motion for relief from a final judgment under Federal rules of civil procedure rule 60(b)(6) to reopen his motion to vacate his sentence under 28 U.S.C. 2255 because "his only habeas corpus claim has been mischaracterized which prevents a merit adjudication" **See Record (Cv-Doc.102 at p.1)**.

The District Court struck the petitioners motion for leave to file another rule 60(b)Motion because according to the court's Pre filing injunction order the petitioner did not "Raise A new issue that has not already been rejected by the court (Ecf No.79 at p.3) The issue movant raises concerning the post office box numbers has been litigated and rejected by the court (Ecf Nos.42,45)"**See Appendix A**

But The petitioner did not raise any litigation concerning post office box numbers as determined by the court, because to the contrary, the allegation presented by the Petitioner is that the indictment alleged that he "Registered and caused to be registered 5 separate P.O. Boxes:" **See Record (Cv-Doc.1 at 4)**

Clearly There aren't any p.o. box numbers Litigated in the allegation presented by the Petitioner from his section 2255 petition. Therefore the petitioner did not Receive the privilege of habeas corpus review as required by the constitution. **See Article I, Section 9, Clause 2. " The privilege the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it".**

The petitioner prays that a writ of Certiorari is issued.

Reasons for Granting the Writ

The petitioner sought relief under Federal rules of civil procedure rule 60(b) to reopen his motion to vacate his sentence under 28 U.S.C. 2255 because the district court decided a factually different habeas corpus claim for the following reasons:

The petitioners motion to vacate his sentence under 28 U.S.C. 2255 presents a sole claim which alleges that " trial counsel and appellate counsel we're ineffective because neither raise the issue of a constructive amendment (constitutional issue) based upon evidence presented at trial" **See Record (Cv-Doc.1 at p.4)** in support of this claim the petitioner States that his indictment alleges that he "registered and caused to be registered 5 separate P.O. boxes:

4747 Hollywood Blvd, suite 101, Apt 128

4747 Hollywood Blvd, suite 101, Apt 152

4747 Hollywood Blvd, suite 101, Apt 191

4747 Hollywood Blvd, suite 101, Apt 198

4747 Hollywood Blvd, suite 101, Apt 199

Mr. Wilmore's charges contained these addresses:

Count 4 (1040 tax form) 4747 Hollywood Blvd, Suite 101, Apt 1

Count 5 (1040 tax form) 4747 Hollywood Blvd, Suite 101, Apt 12

(Actual innocence)" See Record (Cv-Doc.1 at p.4)

However when the district court assessed the facts in support of the petitioners ineffective assistance Of counsel claim, The court determined the petitioner alleged that the indictment alleges That he "Caused to be registered five different P.O. boxes at 4747 Hollywood Blvd. With specific numbers "**See Record (Cv-42 at p.5)**. A careful review of the district court's version of the petitioners ineffective assistance of counsel claim reveals that the court's allegation begins with the word "Caused" See record (Cv-doc.42 at p.5) Whereas the allegation presented by the petitioner begins with the word "Registered" **See Record (Cv-Doc.1 at p.4)**

Let's now take our attention to focus on the word P.O. boxes. The district courts version of the Petitioners habeas corpus claim State "P.O. Boxes at 4747 Hollywood Blvd. With specific numbers" **See record (cv-doc.42 at p.5)** whereas the petitioners version state "P.O. boxes:" **see record (cv-doc.1 at p.4)** A careful review of the petitioners ineffective assistance of counsel claim reveals that there is a colon mark after the words P.O.boxes:. A colon Mark is used to separate two independent clauses when the second clause illustrates or explains the first. The District Court did not acknowledge the colon marks presented by the petitioner after the words P.O. boxes, and as a result the court was able to add " at 4747 Hollywood Blvd. With specific numbers " to the allegation presented by the petitioner. **see record(Cv-Doc.42 at p.5)** The courts errors were significant because they ultimately changed The narrative of the habeas corpus claim to focus on the specific numbers placed after the colon marks. For example, after the district court assessed the facts in support of the ineffective assistance of counsel claim, the court determined " here, review of the superseding indictment reveals that, contrary to movants assertion, it did not specify that any particular boxes were used. (Cr-De #246). Rather, it's simply alleged that movant used boxes at 4747 Hollywood Blvd. (ID.). Thus, Movants claim is arguably subject to summary denial on this basis alone" **see record (Cv-Doc.42 at pp.6-7)** but the petitioner did not specify that any particular boxes were used in the allegation presented in his section 2255 petition, because to the contrary of the courts legal conclusions found in its report, the petitioner alleged in his 2255 petition that his indictment asserted that he " registered and caused to be registered 5 separate P.O. boxes:" **see record (Cv-Doc.1 at p.4)** There are no specific numbers in this allegation, therefore the district court clearly "misconstrued" the petitioners ineffective assistance of counsel claim when it overlooked the colon marks after the words P.O. boxes:. **See Peterson v. Sec'y Dept. Of Corr., 676 Fed. App. 827 829 (11th cir.2017)** (District Court abused its discretion in denying a rule 60 (b) motion for reconsideration where the movant contended the court fail to consider or misconstrued one of the movants claims in his underlying habeas corpus petition).

A habeas petitioner seeking relief for “any other reason ” under rule 60(b) must demonstrate “Extraordinary circumstances” Justifying the reopening of the final judgment see **Gonzalez v.Crosby 545 U.S. 524, 535 125 S.Ct 2641,162 L. Ed. 2d 480 (2005)** (**citations omitted**). Extraordinary is synonymous with the words unusual and uncommon it is unusual for a court to ignore the functions of a colon mark and it is uncommon for a court to mischaracterize facts which would ultimately lead it to a judgment. Extraordinary circumstances that justify reopening of the final judgment in the petition to vacate the sentence under 28 U.S.C 2255 are present in this instant case. We now turn to The District Court’s prefiling injunction order which state

“(1) the petitioner is enjoined and prohibited from filing any future documents in this case (case No. 17-60278-Civ-Scola, Southern District of Florida).

2) in any future motions for leave, described in paragraph(1), the petitioner:

- A. Shall not exceed two pages;
- B. Shall attach the proposed filing;
- C. Shall explain why the proposed filing is not frivolous;
- D. Shall explain why the proposed filing is not an attack on any previous order entered in this case; and
- E. Shall certify, by affidavit and under the penalty of perjury, that the proposed filing raises a new issue that has not already been rejected by the court. **See Record (Cv-Doc.79,at P.3).**

Subsection D of the district courts injunction order requires the petitioner to “Explain why the proposed filing is not an attack on any previous order entered in this case” **See Record (Cv-Doc.79 at p.3)** This criteria from the district courts pre-filing injunction order prohibits the petitioner from attacking any previous order entered in this case, this includes the District Court’s report which misconstrued the Petitioners ineffective assistance of counsel claim. The petitioner’s only hope in obtaining a merit adjudication during his habeas corpus proceedings is to attack the erroneous district court report. Therefore any order that protects the erroneous ruling which misconstrued the petitioners ineffective assistance of counsel claim is effectively violating the petitioners privilege to challenge the legality of his detention through the writ of habeas corpus. **See Article 1, Section 9, Clause 2. “The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it”.**

However when the district court struck the Petitioners motion for leave to file another rule 60(b) motion, the Court’s reasoning for doing so was because the petitioner did not “raise a new issue that has not already been rejected by the court (Ecf No. 79,p.3) The issue movant raises concerning the post office box numbers has been litigated and rejected by the court (Ecf Nos.42,45)”. **See record (Cv-Doc.103)**.

But the petitioner did raise a new issue that has not already been rejected by the court, and that issue is the merit of his underlying habeas corpus claim, which is whether p.o. box "1" in count four and p.o. box "12" in count five contained any applications to support "registered and caused to be registered" as alleged in the superseding indictment **See record (Cv-Doc.1 at p.4).**

Last but not least the district court also erroneously determined that the petitioner States that his "charges" contained "only three p.o. boxes" **See record (Cv-Doc.42 at p.5).** However to the contrary, the petitioner alleged that his "charges" contained single and double digit P.O. box numbers, meaning P.O. box "1" in count four and P.O. box "12" in count five **See record (Cv-Doc.1 at p.4).**

Conclusion

The petition of prays that a writ of Certiorari is issued