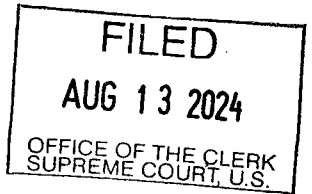


24-5476



No.

IN THE

SUPREME COURT OF THE UNITED STATES

In Re William Wright, JR. - PETITIONER

ON PETITION FOR A WRIT OF HABEAS

United States District Court for the
Middle District of Florida

D.C. Docket No. 8:21-cv-02691 KKM-SPF

"EMERGENCY MOTION"

PETITION FOR A WRIT OF HABEAS

William Harold Wright, JR.

Reg No. 67722-018

ECI Otisville

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QUESTION(S) PRESENTED

DID THE DISTRICT COURT ERRED DISMISS-
ING WRIGHT'S AMENDED § 2255 MOTION TO
VACATE SET ASIDE OR CORRECT SENTENCE
CONSTRUCTIVE AMENDMENT (2ND CLAIM)
AS PROCEDURALLY BARRED

LIST OF PARTIES

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RELATED CASES

United States v. Wright, No. 8:16-
CR-0422(KKM)(SPF)(M.D. Fla. June 22, 2018)
U.S. Dist. Court.

Wright v. United States, 2020 U.S. App.
LEXIS 4148 No. 19-12493-D.

Wright v. United States, 847 Fed Appx
823; 2021 U.S. App LEXIS 4783 No. 19-14088

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A. William Harold Wright, JR. v. United States, No. 8:21
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e.g., "APPENDIX A." Court Order

B. William Harold Wright, JR. v. United States, No. 24-11091
Order denying petition for mandamus (11th Cir 7/22/2024)
e.g., "APPENDIX B." viii

OPINION BELOW

The opinion of the Court of appeal (No. 2A-11191) has been designated for publication but is not yet reported; or, Unpublished. The opinion of the district Court Order (Dkt. 58) is reported at Case No. 8:21-cv-2691-KKM-SFF Case No. 8:16-cr-432 KKM-SFF.

JURISDICTION

The judgment of the Court of appeal was entered July 22, 2024.

The jurisdiction of this Court is invoke under 28 U.S.C.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provide in relevant part:

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

STATEMENT

Petitioner ("Wright") after being denied the motion to dismiss Wright was convicted of Charges arising from an alleged Conspiracy to possess heroin with intent to distribute it and six Counts of possessing heroin and aiding and abetting another in possessing it with intent to distribute. The entire foundation for his conviction rest on evidence that went beyond what was contained in the indictment. Wright move for a new trial and judgment of acquittal, which was denied January 29,

2018 Wright timely filed notice of appeal on June 22, 2018, and filed his appeal brief on June 28, 2019, on August 26, 2019 the prosecution filed its opposition to Wright appeal. Which the facts was "erroneous."

HOW THE WRIT WILL BE IN AID OF THE COURT APPELLATE JURISDICTION

The Writ will be in aid of the Court Appellate Jurisdiction both at Common law and in the Federal Courts to confine an inferior court to a lawful exercise of its prescribe jurisdiction or compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 87 L. Ed 1185, 63 S. Ct. 938 (1943); *Ex parte Peru*, 318 U.S. 578, 584 87 L. Ed 1014, 63 S. Ct. 793 (1943).

The writ of mandamus is an appropriate remedy to require the district court to

entertain that petitioner can only be indicted by a Grand Jury. See *Keller v. United States*, 916 F.2d 628, 634 (11th Cir. 1990). Repeated decision of this Court have establish the rule: "... that the writ lie in a proper case to direct a subordinate Federal Court to decide a pending case," *Insurance Co. v. Comstock*, 16 Wall 258, 270 21 L Ed 493 (1873), or to require "a Federal Court of inferior jurisdiction to reinstate a case, and to proceed to try and adjudicate the same," *McClellan v. Carland*, 217 U.S. at 280, 54 L Ed 762 30 S. Ct 501.

There is nothing in this Court later Cases dealing with the extraordinary writ that leads us to question the availability of mandamus in circumstances where the district Court has refused to properly adjudicate a case.

EXCEPTIONAL CIRCUMSTANCES WARRANT THE EXERCISE OF THE COURT DISCRETIONARY POWER

The crucial question is whether Wright was convicted of an offense not charge in the indictment. *United States v. Keller*, 916 F.2d 628 (11th Cir. 1990) cert denied, 131 S.Ct. 1628, 113 L Ed 2d 724 (1991). It lies to compel a ministerial act which concern the "public".

REASON FOR GRANTING THE APPEAL

The issue in the instant case is whether the trial court's jury instruction permitted the jury to convict him if they determined that he had conspired with anyone, which it has undoubtedly done. While the indictment only alleges that he conspired with known and unknown, which the known was not identify in the indictment. The general rule is the existence of the conspiracy agreement rather than the identity of those who agree is the essential element to prove conspiracy. *United States v. Davis*, 679 F.2d 845, 851 (11th Cir 1982), cert denied 459 U.S. 1207, 103 S.Ct. 1198 (1983).

The record is irrefutable that Court 1 does not allege a conspiracy between any of the government allege co-conspirators it call as witnesses, which means that it was inevitable that the government as well as the district court in effect impermissibly broaden the scope of the indictment to convict Wright. See *Keller v. United States*, 916 F.2d 628, 634 (11th Cir 1996). See also *United States v. Skirone*, 361 U.S. at 217-19 80 S. Ct. at 273-74 (Similarly relying on *Ex parte Bain*, 121 U.S. 1 30 L. Ed 849, 7 S. Ct 781 (1888)).

Additionally, in order for the jury to have found Wright guilty, needed to conclude that Wright conspired with at least one of the allege co-conspirators that was not named in the indictment, which was "fatal error". Wright was convicted of a charge the grand jury

never made against him. See *Cale v. Arkansas*, 333 U.S. 196, 92 L. ed 644, 68 S. Ct. 513; *Dejonge v. Oregon*, 299 U.S. 353, 81 L. ed 278, 57 S. Ct. 255.

Here, as in *Wright Case* we cannot know whether the grand jury would have included in its indictment a charge that Wright conspire with these alleged co-conspirator(s). Yet because of the Court's admission of evidence and under its charges this was the basis upon which the trial jury convicted Wright. which was "Fatal error."

While, as the trial judge stated, "Issue dispose of on appeal will not be reviewed again by way of a 28 U.S.C.A. § 2255 motion". Id. This rule require that the issue presented on appeal and in the habeas corpus

be the same before one act to operate as a bar against the other. The issue presented in this motion are not identical to those presented on direct appeal. While petitioner did attack the legality of his conviction and sentence on appeal to the United States Court of Appeal for the Eleventh Circuit, he did not contend that the district court impermissibly broadens the scope of the indictment on direct appeal.

A Federal Court of appeal has jurisdiction under 28 U.S.C. § 1361, otherwise known as The Mandamus Act, which provides: "The Court of Appeals shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the petitioner." *Cash v. Barnhart*, 327 F.3d 1257 (11th Cir 2003).

Mandamus is the traditional writ designed to compel government officers to perform nondiscretionary duties. See *Marbury v. Madison*, 5 W.S. (1 Cranch) 137, 168-69, 2 L. Ed. 60 (1803). The power granted under 28 W.S.C. § 1361 extend only to mandamus action filed against officers and employees of the executive branch. *Trackwell v. United States, Gov't*, 472 F.3d 1242-47 (10th Cir 2007); see also, *Liberation News Service v. Eastland*, 426 F.2d 1379 (2d Cir 1970) ("in enacting § 1361... Congress was thinking solely in term of the executive branch").

Hence, the "practicalities and peculiarities" of this case, constructive amendment, require reversal. *United States v. Keller*, 916 F.2d at 633. There is simply no cogent argument or applicable authority to the contrary. The Fifth Amendment Due Process Clause, to only be indicted by a presentment or indictment by a Grand jury - involve a matter of "Public Interest".

However, mandamus is an extraordinary remedy reserved for extraordinary situations. *Serrano v. United States AG*, 655 F.3d 1260, 1263 (11th Cir 2011) (per curiam); *United States v. Cey*, 19 F.3d 629, 635 (11th Cir 1994). In order to establish that mandamus relief is proper, a petitioner must demonstrate the following: (1) a clear right to relief sought (2) a clear duty by the respondent to do the particular act requested. *Serrano, Supra*; *In re Stone*, 118 F.3d 1032, 1034 (5th Cir 1997); *Green v. Heckler*, 742 F.2d 237, 241 (5th Cir 1984), and (3) the lack of any other adequate remedy.

To qualify for mandamus relief the respondent must owe the party a clear, non-discretionary duty to perform a particular act. *Heckler v. Piniger*, 466 U.S. 602, 606, 104 S. Ct. 2013, 80 L Ed 2d 622 (1984).

i.e. Because the issue that the district court impermissibly¹¹ broaden the scope

of the indictment has not been, and could not be previously adjudicate, there is no legal bar to it being considered under the present petition. Nor can it properly be concluded that the Court of Appeals decision in the same manner act as an estoppel on the issue raised therein, as the trial judge seem to imply. Simply put, the appeal Court and the trial Court have never had the opportunity to address the issue presented herein because it was never raised by petitioner's pretrial counsel or appellate counsel on direct appeal.

Similarly, the appeal Court never addressed the issue on direct appeal because it was not presented in the record before the appeal Court nor in petitioner's brief. The Court of Appeals was never asked to resolve the conflict between the precedent set forth in *United States v. Keller*, 916 F.2d 628, 634 (11th Cir 1990).

The United States Court of Appeals for the Eleventh Circuit instructed all district court in its Circuit to resolve all claims for relief raised in a petition for writ of habeas Corpus pursuant to 28 U.S.C. § 2254 (1988), regardless whether habeas relief is granted or denied. A claim for relief for purpose of this instruction is any allegation of a "Constitutional violation". See *Clisby v. Jones*, 960 F.2d 925 (1992).

The petitioner now seeks to challenge his conviction in the present motion based on fact that the trial court jury instruction constituted a constructive amendment of the indictment and therefore violated Wright Fifth Amendment right to be only indicted by a grand jury indictment. Such a violation is reversible error per-se. *United States v. Peel*, 637 F.2d 975, 979 (11th Cir 1988); *United States v. Figueroa*, 666 F.2d 1375, (11th Cir 1992).

Acceptance of the trial judge conclusion that Wright is barred from challenging his amended motion to vacate to set aside or correct sentence pursuant to 28 U.S.C. § 2255. Constructive Amendment (2d Claim) because Wright already attacked this claim on direct appeal, resulted in violation of Wright's constitutionally protected right to procedural due process. By failing to allow Wright to adequately defend his interest in his 28 U.S.C. § 2255 motion, and then refusing to allow him to challenge the claim in the present habeas corpus motion.

Wright lose the opportunity to test the legality of his conviction the petitioner's claim was not procedurally barred, and this Court is respectfully urged to reject the trial judge conclusion which the record reflects was clearly "erroneous" read in its entirety.

Wright respectfully, urged this Honorable Court to review (Ltr. Doc. 56; 33). Which clearly reflects the district Court deliberately misconstrued the substance of Wright's Amended Motion. Under 28 U.S.C. § 2255 to Vacate his Conviction, Constructive Amendment (2nd Claim).

These motions were filed several months before adjudication on Wright's Constructive Amendment (2nd Claim), which was clear cut to clarify any misinterpretation of Wright's claim. Without doubt was clearly ignored, and a deliberate abuse of discretion.

At the outset, the Eleventh Circuit has long held that, when considering filing by pro-se prisoner, the Court should "look behind the label" and determine whether the filing is cognizable under a different approach. *Hall v. Warden, FCC*

Coleman - USP 1, 571 Fed Appx, 826, 2014
WL 305892, *2 (11th Cir 2014) (Citing
United States V Jordan, 915 F.2d 622,
624-25 (11th Cir 1990).

This is so because "Prisoners are often unlearned in law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standard of the legal art, which this Court place on the members of the legal profession. *Id.* (quoting *Price v. Johnston*, 334 U.S. 246, 292, 68 S. Ct. 1049, 1063 92 L Ed 1356 (1948)).

28 U.S.C. § 1291 only allows appeals of Final decision. A writ of mandamus is appropriate to "enforce the performance of a ministerial duty." The district court has

failed to perform a ministerial duty by Statute. The appeals Court does not have discretion on whether or not to issue confirmation that the district Court impermissibly broaden the scope of the indictment. The Statute require, "The Fifth Amendment provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand jury. U.S. Const. amend V.

Upon receipt of petitioner ("Wright") Amended petition to Vacate Set Aside Or Correct Sentence Pursuant to 28 U.S.C. § 2255 Constructive Amendment (2nd Claim) requesting written confirmation that Government as well as the district Court constructively amended the indictment by its jury instruction and inter alia.

Where the written confirmation of the constructive amendment is a ministerial

act writ of mandamus is appropriate.

Finally, Wright is prejudiced by the district court's failure to timely issue a confirmation that the district court constructively amended the indictment. The U.S. Const. amend. VI guarantees the right to be only indicted on a presentment or indictment by a Grand Jury has long been recognized as a Fifth Amendment Due Process right.

United States v. Stirone, 321 U.S. at 217-19, 80 S. Ct. at 273-74 (similarly relying *Ex parte Bain*, 121 U.S. 130, 7 Ed. 849, 7 S. Ct. 781 (1888)).

The right to be only indicted on a presentment or indictment by a Grand Jury is an important substantive right. The district court's refusal to comply and issue Wright a confirmation that the Government as well as the district court con-

structively amended the indictment has prejudiced him by denying him his Constitutional protected right to be only indicted by a Grand Jury indictment. See *United States v. Keller*, 916 F.2d 628 (11th Cir., 1990).

A demand for decision pursuant to the Fifth Amendment Due Process was made on December 1, 2021. The Statute required the district Court to act. The district Court refused to issue a decision, and made an erroneous finding of fact and conclusion of law that Wright's claim was procedurally barred.

On April 8, 2024, Wright requested "Written Confirmation that the District Court Constructively amended the indictment pursuant to the Fifth Amendment Due Process, the Court of Appeals again took no action. The

appeals court had a ministerial duty pursuant to the Fifth Amendment Due Process to confirm Wright's constructive amendment claim, and issue the writ of mandamus. The appeals court made an "erroneous" finding of fact and denied Wright's petition for a writ of mandamus as frivolous was erroneous. Without doubt it is undisputed that Wright is entitled to the writ of mandamus as a matter of law.

Moreover, the Fifth Amendment's Due Process Clause forbids the Courts to deprive Wright of substantial "procedural safeguards", such as those connected with criminal trial or conviction. *Zadvydas II*, 533 U.S. at 690, ("the freedom from imprisonment - from government custody, detention, or other forms of physical restraint - lies at the heart of the liberty that Clause protects") (citing *Foucha v.*

Louisiana, 504 U.S. 71, 80 112 S. Ct, 1780, 118 L. Ed. 2d 437 (1992) (internal marks omitted).

The record is irrefutable that the district Court denied Wright of Substantial "procedural Safeguards" by denying him to adequately defend his interest in his Amended § 2255 motion. Constructive Amendment (2nd claim). And inter alia,

In United States V. Keller, 916 F.2d the Court of Appeals held that the Fifth Amendment right to be only indicted in conjunction with the Due Process Clause of the Fifth Amendment, require that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. U.S. Const. amend V. Under Supreme Court Case law interpreting a

right, "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him, *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 273 A.1 Ed.2d 252 (1961).

An amendment of the indictment occurs when the charging terms of the indictment are altered literally or in effect by the prosecution or court after the Grand Jury has last passed upon them. Constructive amendment of the indictment is per-se reversible error. *Keller v. United States*, 916 F.2d at 633, *Flynt*, 15 F.3d at 1005.

The trial court's instruction in effect expanded the indictment to include other individual not named in the indictment.

The prosecution opening and closing argument definitely gave the effect that the witnesses called at trial were the individual named in the indictment. The indict-

ment failed to identify the alleged co-conspirator(s), the Gov't called as witnesses. Which was Fatal error.

This court had distinguished Miller from Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the seminal case involving an amendment, by stating that "in Stirone the offense proved at trial was not fully contained in the indictment, for trial evidence had amended the indictment by broadening the possible bases for conviction from that which appeared in the indictment.

The district court impermissibly broadened the scope of the indictment, see United States v. Keller, 916 F.2d 628, 63A (11th Cir 1990).

Certainly, a liberal construction of Wright claim should have indicated to the trial

Court that his constructive amendment claim was one, not procedurally barred; See *United States v. Wright*, 825 Fed. Appx. 676 (11th Cir. 2020) (stating that "While Wright's indictment did not name specific co-conspirators, the district court noted that the government identified in "discovery" ("patently absurd") the co-conspirator(s) it intended to call as witnesses . . . and we held that "absent a discovery order, the government has no general obligation to disclose the names of unindicted co-conspirator(s) who will not be call as witnesses" (emphasis added).

The record shows in Wright's case that his requests did not concern "unindicted co-conspirator(s)" but those "the district court noted the Gov't identified as co-conspirators) it intended to call as witnesses. See *Wright*, *supra*. Therefore, the district court constructively amended

the indictment because it alter the essential element of the offense to broaden the possible basis for conviction beyond what was contained in the indictment. See (Civ. Doc. 5 at 12-14).

Viewing Wright's argument in the proper context should have alerted the district court that Wright was not re-arguing an issue raised on appeal, as contended by the government, and therefore the issue was not procedurally barred. See Cruz v. Gomez, 202 F.3d 592, 587 (2nd Cir 2000) (Stating a pro-se litigant's pleading should be construed to raise the strongest argument it suggests).

Thus, given that the district court misconstrued the substance of Wright's claim and failed to liberally construe his argument, even if found to be "less clearly" stated than that of an attorney.

the district court's failure to address his claim amounted to a Clisby error, see Hefffield v. United States, 760 Fed. Appx. 834, 835 (11th Cir. 2019) (reasoning a pro-se litigant is entitled to have his claim liberally construed even if "argued less clearly" than that of an attorney violates the Eleventh Circuit's Clisby rule).

Moreover, a Clisby error can reach claims denied on procedural grounds because "a Clisby error is, by its term, a procedural error." See United States v. Senter, 2019 W.S. LEXIS 10655 (11th Cir. 2019).

Wright's Amended § 2255 motion for Constructive Amendment (2nd Claim) should have been properly construed and directly addressed under the well-established standard of liberal construction. See e.g., Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) (stating the liberal construction rule means

When a court can reasonably read pro-se pleadings to state a valid claim it should do so notwithstanding a failure to cite legal authority, confusing a legal theory, use of poor syntax or sentence construction or not being familiar with specific requirements when pleading. See (Civ. Doc. 5 at 12-14).

In this pro-se movant's case, the record "irrefutably" demonstrates that his constructive amendment claim was not procedurally barred and the district court "deliberately" misconstrued the substance of his claim(s) as attempted to be raised in his liberally construed and pro-se pleadings. (See Civ. Doc. 56; 33).

With all due respect to Shaw this Honorable Court the "shenanigans" of the Eleventh Circuit Court of Appeals, which again have made an erroneous finding of fact that has prejudice Wright, and denied him of procedural due process. Order of the Court, stating, "Here, to the extent that Wright's petition

is not timely to appeal from the February 15, 2023 Final order and judgment because it was not filed within 60 days of entry of that judgment. Clearly erroneous. The record clearly reflects Wright filed a timely 59(e), and 52(b) tolling motion for the entry of the April 10, and 15, 2023 post judgment orders on May 8, 2023. Which means that Wright was denied the right to exercise the adequate alternative remedy of appealing that denial. Id. at

Likewise, Wright never had, and exercised, the adequate alternative remedy of filing his first amended § 2255 motion to challenge the Court "Constructive amendment" of the indictment. Id. The record is irrefutable that the district court deliberately misconstrued the substance of Wright's Amended § 2255 motion, and procedurally barred the claim. Clearly erroneous and a "abuse of discretion". Id.

at. (Civ. Doc. 58). Without doubt the record clearly reflects that Wright has been denied Procedural Due Process in Violation of the Fifth Amendment Due Process Clause of the Federal Constitution. The district court has denied Wright of a Substantial "procedural safeguards". By denying him his Constitutional protected right to defend his interest in his Amended § 2255 motion. Constructive Amendment (2nd Claim). See Zachry v. U.S., 333 U.S. at 690. The appeals court finding of fact that Wright's claim is Frivolous, "clearly erroneous".

ADEQUATE RELIEF CANNOT BE OBTAIN IN
ANY FORM OR FROM ANY OTHER COURT

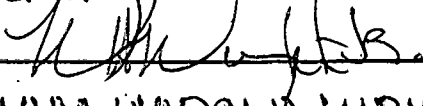
This is the Court of last results
Wright has exhausted all available avenues
for relief there is no other Court to obtain
Confirmation that the Court of Appeals error,

not granting Wright Confirmation that the district Court impermissibly broaden the scope of the indictment, and failed to perform a ministerial duty.

CONCLUSION

This is a case where, having considered the issue, the appeal Court abused its discretion by failing to issue the writ. Instead, it relied on its "mistake" that the appeal was frivolous, without any support of the record. For the foregoing reasons Wright respectfully asks this Honorable Court to grant this petition and release the prisoner. In the interest of fairness and justice.

Respectfully Submitted,

By: /s/ 

WILLIAM HAROLD WRIGHT, JR.