

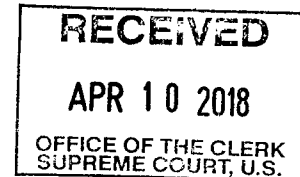
NO: _____

DISTRICT COURT CASE NO. 1:05-CR-00271-1

APPEAL NO: 07-1616

IN THE
SUPREME COURT OF THE UNITED STATES

MARK C. CLARK
Petitioner,
vs
UNITED STATES OF AMERICA
Respondent.



IN THE SEVENTH CIRCUIT COURT
OF APPEALS

WRIT OF MANDAMUS AND/OR PROHIBITION AS
APPROPRIATE PURSUANT TO 28 U.S.C.S. §
1651(A) SUPREME COURT RULE(20)

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RELIEF SOUGHT

Petitioner prays for writ of mandamus or Prohibition as appropriate before this Honorable Court requesting relief from **Amendment(790)** of the United States Sentencing Guidelines that's clearly a (Retroactive Amendment) that (now) calls into serious questions of the Seventh Court of Appeals' previous findings in petitioner's direct appeal at published opinion U.S v. Mark Clark 309 Fed. Appx. 60, 2009 U.S. App. Lexis 2688 (7th cir. 2009), discussed more further.

UNAVAILABILITY OF RELIEF IN OTHER COURTS

No other court can grant the relief sought by petitioner because; 1) U.S.S.G. Amendment (790) cannot be raised in a 18 U.S.C. § 3582(c) proceedings, because it's a "Clarifying Amendment" not listed in U.S.S.G. § 1B1.10(d), 2) "Clarifying Amendments" are properly raised in a direct appeal proceedings, but petitioner's direct appeal has been affirmed since 2009. See United States v. Clark 309 Fed. Appx. 60, 2009 U.S. App. Lexis 2688 (7th cir. 2009); And 3) A 28 U.S.C. § 2255 proceedings do not cover claims of non-constitutional dimensions, in which Amendment (790) is not cognizable under a 28 U.S.C. § 2255 motion.

Therefore, this is the only court that can aid this matter at this time to be consistent with petitioner's 1st Amendment Rights to the U.S. Constitution that provides: "Congress shall make no law respecting an establishment..." the right of the

make no law respecting an establishment...the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

UNSUITABILITY OF ANY OTHER
FORM OF RELIEF

No other form of relief will be sufficient to protect the rights of the Petitioner or preserve the ability to seek review of the lower court's jurisdiction but this Honorable Court's **(Rule 20)** because: 1) Petitioner's U.S.S.G. Amendment (790) issue is not cognizable under 28 U.S.C. § 2255, because of it's non-constitutional dimension, 2) Petitioner's only form of relief is before this Honorable Court, because **A)** Habeas Corpus and/or 28 U.S.C. § 2255 cannot cover this matter, **B)** 18 U.S.C. § 3582(c)(2) cannot trigger jurisdiction for this Amendment because it's not listed in U.S.S.G. § 1B1.10(d), however, Amendment (790) is established to be "retroactive" by Circuit Court of Appeals, as discussed further, and 3) Petitioner submitted a **(Recall Mandate)**. However, the Seventh Court of Appeals denied this motion. Appendix (B) in less than 2-weeks.

Therefore this is the only form of relief before this Honorable Court pursuant to it's **(Rule 20)**, more is discussed further.

LIST OF PARTIES

Petitioner:

(Mark Clark)

DISTRICT COURT JUDGE:

(Am. J. st. Five.)

A.U.S.A.:

(Rachel Cannon)

And all parties in case numbers: 1:05-cr-00271-1

07-1616

Published opinion:

U.S. v. Mark CLark 309 Fed.

Appx. 60; 2009 U.S. App. Lexis

2688 (7th cir. 2009).

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JURISDICTION STATEMENT

This Honorable Court has jurisdiction of and to issue the request writ under 28 U.S.C. Section 1651(A) and Supreme Court Rule 20. See this Court's Rule 20.

CITATION OF LOWER COURT

DECISIONS

The decision of the lower courts reflecting this petition are at U.S. v. Mark Clark, 309 Fed. Appx. 60, 2009 U.S. App. Lexis 2688 (7th cir. 2009) Appendix (A). The recent opinion is at Appendix (B) from the Seventh Circuit Court of Appeals.

CONTROLLING PROVISIONS/

STATUTES

The 1st Amendment to the U.S. Constitution provides: "Congress shall make no law respecting an establishment of... the right of the people peaceably to assemble and to petition the Government fro a redress of grievances".

The Fifth Amendment to the U.S. Constitution Due Process Clause provides: ... No person shall be... deprived of life, liberty, or property, without due process of law;

STATEMENT OF THE CASE AND
GOVERNING FACTS

The procedural history of the case and Governing facts are at published opinion U.S. v. Mark Clark, 309 Fed. Appx. 60, 2009 U.S. App. Lexis (7th cir. 2009). Also marked as Appendix(A).

ARGUMENT/QUESTION

WHETHER THIS HONORABLE COURT WOULD INTERVENE IN PUBLISHED OPINION U.S. v. Mark Clark, 309 Fed. Appx. 60, 2009 U.S. App. Lexis 2688 (7th cir. 2009) ISSUED BY THE SEVENTH CIRCUIT COURT OF APPEALS THAT'S (NOW) CLEARLY IN (DIRECT CONFLICT) WITH U.S.S.G. "CLARIFYING AMENDMENT" (790) THAT CALLS INTO SERIOUS QUESTIONS OF THE FINDINGS THAT WERE MADE PURSUANT TO "RELEVANT CONDUCT" UNDER U.S.S.G. § 1B1.3 BY THE SEVENTH CIRCUIT?

First, the Seventh Circuit Court of Appeals previously in United States v. Mark Clark, 309 Fed. Appx. 60, 2009 U.S. App. Lexis 2688 (7th cir. 2009) issued the following relevant circumstances to this proceedings:

...As noted, the government did not need to show that Clark possessed a dangerous weapon during the specific

drug transaction for which he was convicted, the increased applies if he possessed a gun during any relevant conduct... in fact, since Clark was not working alone, the government did not ever have to prove it was Clark who possessed a weapon: codefendant Gonzale's admission that he carried a gun while protecting Clark was, by itself, enough to apply § 2D1.1(b)(1) because Clark's relevant conduct included the reasonably foreseeable acts of others committed in furtherance of jointly undertaken criminal activity. See U.S.S.G. § 1B1.3. Id. at 309 Fed. Appx. 62 Appendix(A).

However, after this holding, on November 1, 2015 Amendment (790) struck that definition above, and §1B1.3(A)(1)(B) in which now defines "relevant conduct" in a case of jointly undertaken criminal activity to include:

All acts and omissions of others that were:
(i) within the scope of the jointly undertaken criminal activity,
(ii) in furtherance of that criminal activity,
and
(iii) reasonably foreseeable in connection with that criminal activity, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. U.S.S.G. § 1B1.3(A)(1)(B)(2015). In its commentary to Amendment 790, the Sentencing Commission explained that, where the prior version of § 1B1.3(A)(1)(B) focused on a seemingly two-part test ("all reasonably foreseeable acts and omissions of other on furtherance of the jointly undertaken criminal activity"), Amendment 790 "restructured the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under § 1B1.3(A)(1)(B), " U.S.S.G. Suppl. to App. C. Amend 790, reason for Amendment. While the "scope" element was previously articulated in the commentary to §1B1.3, Amendment 790 now placed the "scope" element in the text of the guideline itself and provided several examples in the application notes of how the three-part test functions. Id.

Thus, the post-amendment guidelines commentary now directs that "[I]n order to determine the defendant's accountability for the conduct of others under subsection(A)(1)(B), the [district] court must first determine the scope of the criminal activity the particular defendant agreed to undertake," U.S.S.G. § 1B1.3, cmt n. 3(B)(2015). Finding about the scope of the conspiracy as whole are not sufficient under §1B1.3(A) because, while a co-conspirator is often criminally liable for all of the acts done in furtherance of a conspiracy, the limits of sentencing accountability are not co-extensive with the scope of criminal liability. See *Id.* ("explaining that the scope of the jointly undertaken criminal activity" is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant").

More clearly now for sentencing purposes, the scope of each defendant's jointly undertaken criminal activity depends on the scope of the specific conduct and objectives embraced by the defendant's agreement". *Id.* Therefore, "act of others that were not within the scope of the defendant's agreement", even if those acts were known or reasonably foreseeable to the defendant, are not "relevant conduct" under this subsection. Thus, further, a defendant's relevant conduct does not include conduct of members of a conspiracy prior to the defendant's joining of the conspiracy, even if the defendant knows the conduct. *Id.*

However, the record in this case reflects that the district

court confined it's relevant conduct analysis to the question of reasonable foreseeability (without the benefit) of Amendment 790, as now calls into serious questions of this Honorable Court's opinion in Clark, 309 Fed. Appx. 60 (7th cir. 2009).

Second; Amendment 790 is clearly a "Clarifying Amendment" as Stipulated to by the sentencing Commission, moreover another Court of Appeals has supported this same conclusion.⁽¹⁾ Barona-Bravo v. United States, 2017 U.S. App. Lexis 640 (11th cir. 2017)(Footnote 16), "As a 'Clarifying Amendment'", Amendment 790 is given retroactive effect and may be considered regardless of the Sentencing date. See U.S.S.G. Suppl. to app. (Amendment 790, Reason for Amendment)(Stating that the Amendment made "Clarifying" revision to § 1B1.3). Also see United States v. Thomas, 155 F.3d 833 (7th cir. 1998)(Although the amendment became effective after Thomas' sentencing, we may consider it because it "clarifies" rather than substantively changes the Guidelines... This argument might find some support in the plain language of the Amendment... compare § 1B1.3(A)... remanded in part). Also see United States v. Mansouri, 304 F. 3d 635 (7th cir. 2002)(Pursuant to U.S. Sentencing Guidelines (Manual § 1B1.11(b)(2), a court should consider guideline Amendments made subsequent to defendant's offense to the extent that such "Amendments are clarifying" rather than substantive changes...Vacated sentences and remanded action for resentencing).

(1) This court adopts its sister-circuit holding. See United States v. Suarez, 644 F. 3d 55 (7th cir. 2011)("But we see no reason to depart from the well-reasoned decision of our sister-circuit").

And Third, Petitioner could not have brought this writ sooner until **Amendment 790** came into effect November 1, 2015, however this Court has held that a defendant is entitled to equitable tolling. See Holland v. Florida, 130 S. Ct. 2549, 2562, 177 L.Ed. 2d 130 (2010)(The flexibility inherent in equitable procedures enables courts to meet new situations (that) demand equitable intervention, and to accord all relief necessary to correct particular injustices"). Therefore, Petitioner's reasonable diligence must be viewed in light of the profound change in **Amendment 790** that (now) calls into serious questions of this court's previous finding in Clark, 309 Fed. Appx. 60 7th cir. 2009). Appendix(A).

CONCLUSION

WHEREFORE Petitioner respectfully request this Honorable Court to invoke it's Rule 20 and Direct the Seventh Circuit Court of Appeals to revisit it's previous opinion in U.S. v. Mark Clark, 309 Fed. Appx. 60 (7th cir. 2009) that's now clearly in (Direct-Conflict) with U.S.S.G. **Amendment (790)**, and/or any other relief this Honorable Court deems fit. See Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 645, 96 L. Ed. 856 (1959)(The requisite of Due Process of law is the opportunity to be heard).