

IN THE
UNITED STATES SUPREME COURT

18-7065

PETITION FOR REHEARING PURSUANT TO
S. Ct. RULE 44.2

FABIO PORFIRIO LOBO #92384-054
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PROCEEDING PRO-SE

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JURISDICTION

Petitioner's writ of certiorari was denied by the Court on January 14, 2019, and was timely filed after the Second Circuit's decision in United States v. Romero, U.S. App. LEXIS 27158 (2d Cir. 9/20/2018).

GROUNDS FOR REHEARING

Petitioner argues After pronouncing Petitioner's sentence, the district court asked: "Does either .. Counsel know of any legal reason why this sentence - should not be imposed as stated," to which Lobo's .. Counsel stated, "No, your honor." J. App. 219. The district Court in this case considered Petitioner was not similarly situated to his co-defendants pursuant to 18 U.S.C. § 3553(a)(6) because defendant's offense conduct warranted harsher sentence given that this - Petitioner was the son of the President of Honduras, and he used his position to forge corrupt connections between drug traffickers and the upper echelons of Government. However, Counsel for fabio failed to .. argue and preserve that Petitioner's relevant conduct was subject to Amendment 790.

Further, at the petitioner's sentencing, the district court did not have the benefit of the clarifying amendment to the relevant conduct sentencing guideline, U.S.S.G. § 1B1.3, which went into effect on November 1, 2015, and is to be given retroactive effect. See U.S.S.G. Suppl. to App. C, Amend. 790.16

Section 1B1.3 provides that a defendant's "relevant conduct" for sentencing purposes includes "all acts and omissions committed, aided, abetted ...or willfully caused by the defendant." U.S.S.G. §1B1.3(a)(1)(B), which the district court applied ... here, 17 specifically provided that "in the case of a jointly undertaken criminal activity" defendants are also accountable for "all reasonably foreseeable acts and omissions of others in furtherance of the . jointly undertaken criminal activity." U.S.S.G. ... §1B1.3(a)(1)(B)(2014).

However, Amendment 790 struck that definition, and . § 1B1.3(a)(1)(B) now defines "relevant conduct" in .. the 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

criminal activity; that occurred during the

commission of the offense of conviction, in ...

preparation for the 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 in the text ("all reasonably

foreseeable acts and omissions of others in ...

furtherance of the jointly undertaken criminal

activity"), Amendment 790 "restructure[d] 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
the Application Notes of how the three-part...
functions. Id.

Furthermore, 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 jointly
undertake." U.S.S.G. § 1B1.3, cmt. n.3(B) 2015
(emphasis added). Findings about the scope of
the conspiracy as a 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 coextensive 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. (emphasis added).

In making this determination, the district
court may consider any explicit or implicit ...
agreement fairly inferred from the conduct of .
the defendant and others. Id. Therefore,
[a]cts of others that were not within scope of
the defendant's agreement, even if those acts ..
were known or reasonably foreseeable to the ...
defendant, are not relevant conduct" under this
subsections. Id. (emphasis added). 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 of the conduct. Id.

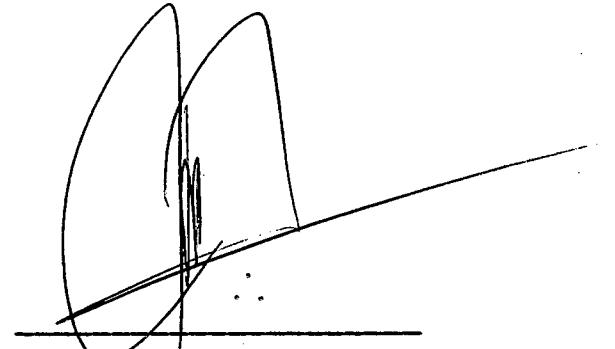
Here, the record reflects that the district ... court confined its relevant-conduct analysis to the question of reasonable foreseeability and conflated the scope of the conspiracy for criminal liability purposes with the scope of the criminal activity agreed to or embraced by a particular defendant for sentencing accountability purposes. Without the benefit of Amendment 790, the district court did not .. make individualized findings on the record concerning the scope of criminal activity each particular defendant agreed to undertake, as it is now required to do under § 1B1.3(a)(1)(B).

See id. Instead, the district court made an .. implicit determination that the scope of the .. criminal activity that these particular defendants agreed to to undertake was identical to overarching conspiracy. The district court did not address this discrepancy on the record or make any other factual finding.

CONCLUSION

For the reasons stated above, Petitioner moves the Court to rehear the case, grant the writ of ... certiorari, and remand for further proceedings.

January 30, 2019

A handwritten signature in black ink, appearing to read "FABIO LOBO", is written over a horizontal line. The signature is somewhat stylized and includes a small drawing of a person's head and shoulders to the right of the name.

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