

No. _____

Appeal No. 17-10065

IN THE
SUPREME COURT OF THE UNITED STATES

Mr. Dino M. Gentile, Petitioner "Pro Se"
(Your Name)

vs.

United States of America, Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS
(Name of Court that last Ruled on the Merits of your case)

PETITION FOR WRIT OF CERTIORARI

Mr. Dino M. Gentile, Fed.Reg.No.14711-112
(Your Name)

Federal Correctional Institution
(FCI) Terminal Island
P.O. Box 3007
(Address)

San Pedro, Ca. 90733
(City, State, Zip Code)

QUESTION(S) PRESENTED

I

Whether the District Court and the Circuit Court of Appeals caused a split between other Circuit Courts' legal precedence when both Courts denied the applicability of a Federal Rule of Criminal Procedure, **Rule 36** motion to correct Clerical error (vs.) Clerical error that causes bias, prejudice, and continues to affect substantial rights; and would the denial by both Courts violate Congressional intent enacted in **Rule 36**, and would that violate Equal Protection and the Due Process of Law Clause of the Constitution ?

II

Whether the Supreme Court is obligated under the laws of the Constitution to properly govern the interpretation of Congressional intent of a Federal Rule of Criminal Procedure, **Rule 36** motion, in order to cure a split between Circuit Courts' legal precedence to prevent a manifest miscarriage of justice, as a thorough review of Supreme Court precedence proves that the Justice(s) of this Court has never established appropriate interpretation of the **Rule 36** procedure(s) ?

LIST OF PARTIES

- [] All parties appear in the caption of the case on the cover page.
- [X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF PENSACOLA, FLORIDA
WINSON E. ARNOW FEDERAL BUILDING
100 NORTH PALAFOX STREET, 2nd FLOOR
PENSACOLA, FL 32502

United States v. Dino M. Gentile, Case No. 3:99-cr-10-001-LAC

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "A" to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the United States district court appears at Appendix "B" to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

[X] For cases from federal courts:

The Date on which the United States Court of Appeals decided my case was January 12, 2018.

[X] No petition for rehearing was timely filed in my case.

1. Original jurisdiction for the U.S. District Court for the Northern District of Pensacola Florida over the criminal case was set forth pursuant to 18 U.S.C. §3231; and the Federal Rule of Criminal Procedure, **Rule 36**;
2. Jurisdiction for the Eleventh Circuit Court of Appeals was set forth pursuant to 18 U.S.C. §3742, 28 U.S.C. §1291, and 28 U.S.C. **§2106**, and the Federal Rule of Criminal Procedure, **Rule 36**;
3. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(a), and 28 U.S.C. **§2106**.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- A. Equal Protection and Due Process of Law Clause of the Fifth Amendment to the Constitution;
- B. Congressional intent of the Federal Rules of Criminal Procedures, **Rule 36** enactment: Clerical error (vs.) Clerical error that causes bias, prejudice, and affects substantial rights of hundreds, if not thousands of criminal defendant(s) every year.

Congressional intent of the Federal Rules of Criminal Procedure, Rule 36 enactment

"After giving notice it considers appropriate, the court may at **any time** correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission". See Rule 36 Id.

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STATEMENT OF THE CASE

Mr. Dino Gentile (Mr. Gentile) is a concerned federal prisoner. He is uneducated in law, proceeding indigent without assistance of counsel. He has no prior criminal history, and has been serving a 495 month prison sentence.

The record and court files of this case will show that the Northern District Court of Florida corrected a Clerical error in Mr. Gentile's **first** Federal Rule Criminal Procedure, Rule 36 motion issuing an order amending the "original judgment" in this criminal case by adding statutory charges of aiding and abetting, pursuant to 18 U.S.C. §2— and— §2113(a) & (d) to **Count II**, both of which were not charged in the indictment, nor found in any other court document(s) until this amending occurred. Initially, the **Count II** charge of 18 U.S.C. §924(c) stood alone. Docket [151] Id. ¹

When Mr. Gentile discovered the District Court amended the judgment with these additional charges, he immediately filed his **second** Federal Rule Criminal Procedure, Rule 36 motion seeking to correct all Clerical errors within the District Court's document(s) because they continued to cause bias, prejudice, and affected his substantial rights, resulting into a miscarriage of justice. See Docket [152] Id.

But the District Court declined to correct the substantive prejudicial Clerical errors raised in Mr. Gentile's **second** Rule 36 motion by stating in it's denial order that Rule 36 of the Federal

1. The Criminal Docket Report Entries; Case No. 3:99-cr-10-001-LAC will be identified as Docket [number] Id., to assist in evaluation.

Rule of Criminal Procedure only allows a Court to correct minor Clerical errors. See Docket [153] and [154] Id.

Thereafter, the Eleventh Circuit Court of Appeals affirmed the District Court's order denying Mr. Gentile's **second** Rule 36 motion, presumably holding that Rule 36 of the Federal Rules of Criminal Procedures was enacted by Congress to only correct minor Clerical errors. See Docket [162] Id.

Federal Rule Criminal Procedure, Rule 36 states:

"After giving any notice it considers appropriate, the court may **at any time correct** a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission." See Rule 36 Id.

No where in the language of Rule 36 did Congress state that only minor Clerical errors may be corrected. And since the record and court files of appeal proves the District Court presumptively corrected a substantive Clerical error in Mr. Gentile's **first** Rule 36 motion, then the District Court's failure to correct the Clerical errors raised in his **second** Rule 36 motion would amount to a miscarriage of justice in conflict with Congressional intent established in Rule 36 of the Federal Rules of Criminal Procedure.

The Memorandum of Law accompanying this petition for writ of certiorari will prove the aforementioned denials of both Court(s) to correct Clerical errors in Mr. Gentile's **second** Rule 36 motion causes a Circuit Court split on the applicability of Congressional intent of a Federal Rule of Criminal Procedure, Rule 36 motion. Id.

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Supreme Court precedence has not yet established appropriate procedures to properly Govern applicability of Congressional intent of the Rule 36 enactment

Respectfully, a thorough review of Supreme Court precedence proves that the Honorable Justice(s) of this Court have never established appropriate procedures on how District and Appellate Court(s) are to interpret the applicability for Congressional intent of a Federal Rule of Criminal Procedure, Rule 36 motion to correct Clerical errors (vs.) Clerical errors that continue to cause bias, prejudice, and affects substantial rights of Criminal defendant(s). See Supreme Court precedence Id.

Factual Background

The record and court files in this case reveals Mr. Gentile was a Pastor of the Ark Church in Chatsworth, California. During trial, Mr. Gentile testified under oath that the information herein is the truth, the whole truth, and nothing but the truth, and will continue to declare under penalty of perjury, pursuant to 28 U.S.C. §1746 that these facts presented are true and correct.

Mr. Gentile testified that he was assisted at the church by his wife; Mrs. Debra Gentile who was also a licensed minister and performed religious services, and assisted in evangelical education for school students. Id.

Students from Cal State Northridge brought a troubled student, Ms. Kari Meredith to attend church services. One day, the services were interrupted by Kari's Mother stating it was an emergency, and informed Mr. and Mrs. Gentile of Kari's depression and threat of suicide. Mr. Gentile was also a licensed counselor for the church,

and he and Mrs. Gentile calmed the situation. Id.

Kari Meredith then went on vacation to her roots of Florida. Unbeknownst to Kari, she met a man named Stephen Carney (alias—real name Jeffrey Durham (hereinafter Durham), whom the FBI later discovered to be a notorious bank robber impersonating an active ATF Agent). See Id.

Durham (aka Stephen Carney) offered to drive Kari back to California, and Kari fell in love with him. When they arrived in California, Kari invited Durham to attend church services, and Kari introduced Durham to Mr. and Mrs. Gentile as Stephen Carney, where Kari and Durham would help the church school with the K-12 teen outreach. For approximately eight months, Durham started donating financial support to the church and school, leading Kari, Mr. and Mrs. Gentile, and the rest of the church group to believe Durham was a kind and generous man. Subsequently, Kari became pregnant resulting into a common law marriage with Durham (Stephen Carney).

Mr. Gentile testified that he often went on evangelical trips since 1984, sometimes with, or without members of the church. Mr. Gentile was supposed to preach services in Jasper Alabama, in South Bend Indiana, and Carrollton Kentucky. Kari repeatedly asked Mr. Gentile to try and bring Durham closer to God, especially for the future of their new family. Id.

Mr. Gentile's testimony reflects that Durham offered to drive his RV-Motorhome to the church events in Alabama, Indiana, and Kentucky. But a surprise party was planned for Mr. Gentile on Pastor appreciation day, so arrangements were made to allow Mr. Gentile

to fly, and Durham would drive his Motorhome with Mr. Gentile's cousin; Mr. Frank Blaciforte and meet with Mr. Gentile in Houston. The record shows Mr. Blanciforte then flew back to California from Texas. Id.

Once in Houston, Durham told Mr. Gentile he had to pick up some money for the sale of his boat, and convinced Mr. Gentile to first travel with him through Alabama into Pensacola Florida, but while in route, the Motorhome's transmission broke down. Id.

Please remember, Durham continued to use his alias; Stephen Carney, and presented himself to Mr. Gentile as an active ATF Agent with his identification, badge, and full ATF gear. (Court records reveals that FBI Agents found Durham in possession of his Stephen Carney identification, badge and full ATF attire in the trunk of Durham's car upon his arrest). Id., see also FBI Evidence Reports.

While awaiting the repair on the Motorhome, Durham convinced Mr. Gentile to rent two cars, a Hotel room, and pay for the repairs on the Motorhome once it was fixed by using Mr. Gentile's business Credit cards. Durham assured that the expenses would be reimbursed when payment for the boat sale was received, and the court records reflect Mr. Gentile never had any plans to go to Florida, nor to conceal his reasons for being there. Id.

Durham continued to impersonate an ATF Agent under his alias, revealing his badge, and informed Mr. Gentile that he was going to conduct undercover surveillance on several banks, and at times with Mr. Gentile present in the car. Approximately three days past, and the Motorhome was repaired, so Durham instructed Mr. Gentile

to return one of the rental cars as Durham followed, then they returned back to the Hotel. Id.

Mr. Gentile testified; that on the morning of October 15, 1998, Durham dressed in full ATF gear, and told Mr. Gentile to follow him closely in the rental car while Durham drove the Motorhome. They parked at an undisclosed location. Durham exited the Motorhome in full ATF gear (with a Duffle bag) and jumped into the backseat of the rental car and instructed Mr. Gentile to drive him to Monsanto Federal Credit Union. Id.

Durham became irate, and started screaming at Mr. Gentile saying he (Durham) was going to rob the bank. Durham pulled out a gun, pointed it to the back of the rental car's driver seat and forced Mr. Gentile to park across the street from the bank at a Geico insurance company parking lot. Durham then pulled out what appeared to be a BOMB with three sticks of dynamite attached. It had a metal clasp with an activation lighting system and a belt clip. While still in the back seat of the rental, Durham pushed a remote control, and Mr. Gentile seen the armed light activate on the BOMB. Id.

Mr. Gentile was extremely scared and upset, as he tried to refuse to be a part of Durham's scheme. But Durham continued to threaten Mr. Gentile with his gun, and threatened the lives of Mr. Gentile's family and friends. Durham told Mr. Gentile that his brother-in-law was a SWAT Team member in Texas, and was keeping Durham informed of law enforcement activities. Durham said if anyone tried to call the Police, his brother-in-law would find out, and destroy their families. Id.

Durham told Mr. Gentile the remote control for the BOMB worked at great distances, and if Mr. Gentile tried to leave the area, he (Durham) would detonate the BOMB, and take hostages. Mr. Gentile was terrified and forced to comply. The record reflects Mr. Gentile had every reason to believe the BOMB was real and still under the backseat of the rental car. (FBI Agents found the make shift BOMB in the bank after the robbery). Id.

While parked at the Geico insurance company parking lot, Durham forced Mr. Gentile to wear a fake wig and mustache disguise, and gave Mr. Gentile a walkie-talkie radio. Durham told Mr. Gentile to keep close communications while he (Durham) was in the bank, or else. They sat in the insurance company parking lot watching the bank tellers arrive for work and enter the bank. (When Durham was arrested two months after the robbery, FBI Agents found several firearms, and a receipt dated after the robbery with instructions on how to convert firearms to fully automatic weapons. FBI determined one of the guns; AR-15 assault rifle may have been used during the robbery). Id. see also FBI evidence reports. Id.

Mr. Gentile further testified that they waited in the rental car until one of the last bank tellers arrived, and again, Durham started screaming, telling Mr. Gentile to pull up quickly to the bank, but Mr. Gentile froze and hesitated, Durham pointed the gun at Mr. Gentile and forced him to comply. Durham then jumped out of the backseat of the rental car, ran up to the teller at gun-point, and forced her into the bank. Id.

Still believing the BOMB was under the backseat, Mr. Gentile was forced to comply with Durham's demands. While Durham was in

the bank, he contacted Mr. Gentile through the walkie-talkie radio, telling Mr. Gentile to keep an eye out for the Cops, and to check in every minute or he (Durham) would detonate the BOMB, and take hostages. Id.

Durham radiod again, and told Mr. Gentile to pull the rental car up to the door of the bank. Mr. Gentile was terrified, and didn't respond, deep in thoughts of just leaving Durham at the bank. Id. After about a minute or so, Durham radioed again, and Mr. Gentile complied for fear that another tirade would erupt, and Durham would detonate the BOMB, kill hostages, and Mr. Gentile's family. Id.

When Mr. Gentile pulled up to the bank door, Durham jumped in the back seat of the rental car carrying the duffle bag, and again, started screaming as they drove away from the bank. Durham proved himself to be a real psychopath, and told Mr. Gentile that if he ever told anyone, he (Durham) would have Mr. Gentile's family killed. Id..

Durham told Mr. Gentile to return the rental car, and take a bus to Alabama, and he (Durham) would meet Mr. Gentile at the bus station in Mobile Alabama or else. When Mr. Gentile arrived at the Alabama bus station, Durham was already there waiting, and again, Durham told Mr. Gentile that he better not have said anything to anyone, because his brother-in-law would find out. Id.

Durham escorted Mr. Gentile back to Durham's Motorhome, and never let Mr. Gentile out of his sight. They both got into the Motorhome and attempted to drive back to California, while Durham repeatedly apologized the whole time they traveled trying to justify his actions. Id.

Mr. Gentile was still terrified, but refused to believe this lunatic (Durham). To further compound matters, the Motorhome broke down again, and Durham forced Mr. Gentile to rent another car for the trip to California, abandoning the Motorhome, which Durham said he would pick up later. Id.

As they traveled back to California, Durham still continued to apologize, and told Mr. Gentile to tell the truth if they were ever caught, but don't tell anyone that Durham threatened Mr. Gentile at gun point, with the BOMB, nor the threats made against Mr. Gentile's family. Id.

After arriving in California, Durham called Mr. Gentile and said he was on his way over to Mr. and Mrs. Gentile's house. Durham came up to the house carrying a paper bag, handing it to Mr. Gentile, which contained \$6,500 dollars. Durham told Mr. Gentile:

"this is for your troubles Pastor, put it to use in the church and school".

In side the bag was also a note from Durham (entered into evidence) that said;... "be quite or else, I now own 50% of your business." Id.

Mr. Gentile remained in complete fear of Durham, he feared for the lives of his family and friends, and feared for Kari Meredith and her new born baby. Durham took advantage of these facts through his manipulation. Thereafter, Durham was featured on America's Most Wanted. The program discribed how dangerous Durham was, and that he was wanted for multiple armed bank robberies. The program went on to affirm that Durham was a member of the notorious Aryan Brotherhood Nation. (A White Supremacist Gang). Id.

EVIDENCE:

Durham repeatedly threatened Mr. Gentile at gun point and used a make shift BOMB for intimidation, to cause Mr. Gentile to aid and abet Durham in the commission of the bank robbery, however the evidence proves Mr. Gentile never personally possessed any of the guns at issue, and the evidence shows Durham was the subject principle of this case, and court document(s) proves that Durham had never been charged with the use of a machinegun during the bank robbery. See 18 U.S.C. §924(c)(1)(B)(ii) Id.

ARREST:

FBI established surveillance on Mr. Gentile's home and church. After America's Most wanted aired, Durham was arrested on December 18, 1998, after he ignited his Motorhome into flames, and escaped only to be caught at a Hospital seeking medical attention for the burns suffered during the explosion of the Motorhome. FBI Agents located Durham's rental car in the Hospital parking lot and seized the evidence stated above. Id.

FBI Agents then arrested Mr. Gentile without incident. No fire-arms or bank robbery contraband was found. Mr. Gentile was released on bail pending trial. Although Durham was in custody, Mr. Gentile remained fearful of Durham, his brother-in-law, and any member of the Aryan Brotherhood Gang that may have been involved with Durham. Thus, in order to protect his family, Mr. Gentile attempted to remain silent when he met with Prosecutors on several occassions. Two days prior to trial, Mr. Gentile flew to Florida, and through his attorney, they tried to reach a Plea deal. But the Prosecutor refused a Plea bargain unless Mr. Gentile testified against Durham. Id.

INDICTMENT:

COUNT ONE

The Grand Jury charges, that on or about October 15, 1998,
in Northern District of Florida, the defendant,

DINO M. GENTILE,

by force, violence, and intimidation, did aid and abet Jeffery S. Durham, a/k/a/ Stephen Carney in knowingly taking from the persons and presense of another, approximately TWO HUNDRED-NINETY SEVEN THOUSAND, EIGHT HUNDRED DOLLARS (297, 800.00) in United States currency belonging to and in the care, custody, control, management, and possession of the Monsanto Employees Credit Union, 144 Creighton Road, Pensacola Florida, the deposits of which were then insured by the National Credit Union Administration, and committing such offense, Jeffery S. Durham did assult and put in jeopardy the life of another person by use of a dangerous weapon, namely an assult rifle, in violation of Title 18, United States Code, Section 2113(a) and (d), and 2.

COUNT TWO

That on or about October 15, 1998, in the Northern District of Florida, the defendant,

DINO M. GENTILE,

aided and abetted by Jeffery S. Durham a/k/a/ Stephen Carney, during and in relation to a crime of violence for which the defendant may be prosecuted in a court of the United States, that is, armed robbery of a federally insured credit union as charged in Count One of this indictment, did knowingly use and carry a firearm, that is a machine gun, in violation of Title 18, United States Code, Section 924(c).

See Docket [2] Id.

CLERICAL ERRORS:

The billets below describes the Clerical errors that caused bias, prejudice, and continued to affect Mr. Gentile's substantial rights, proving the District Court and Eleventh Circuit's denial(s) to correct these Clerical errors were in conflict with Congressional intent of the **Rule 36**, Federal Rules of Criminal Procedures, creating a Circuit Court split on the proper interpretation of the Rule:

1. Count Two: Clerical error in the indictment began by altering subject principal Durham, erroneously charging Durham as the aider and abetter of Mr. Gentile:... did knowingly use and carry a firearm, that is a machinegun, in violation of Title 18 United States Code, Section 924(c). See Docket [2] Id.
- a. Count Two: Clerical error of the indictment failed to charge the aiding and abetting statute of Title 18, United States Code. Id.
- b. Count Two: Clerical error was confirmed by the District Court, when the Court granted Mr. Gentile's **first** Federal Rule of Criminal Procedure, **Rule 36** motion, and constructively amended the charges of the indictment within the Judgment of this Criminal case, adding the aiding and abetting statute of 18 U.S.C. §2113(a), (d) and §2, to Count II of indictment. See Docket [148], [150] and [151] Id.
2. Count Two: Clerical error of the indictment failed to correctly charge Congressional mandate of 18 U.S.C. §924(c)(1)(A); the prohibition of use of a firearm in relation to violence or a drug-trafficking crime, pursuant to 18 U.S.C. §924(c)(1)(B)(ii) if the firearm was a machinegun, an element required to trigger 30-year mandatory minimum sentence. Id.
- a. Count Two: Clerical error is confirmed in the Jury instructions, as they re-altered the indictment charging Mr. Gentile aided and abetted Durham in the use of a machinegun during the robbery, and again, constructively amended the indictment, by adding a violation Title 18, United States Code, §2. See Docket [20], pages 11, 12, and 13 Id., and compare to Docket [2] Id.

CLERICAL ERRORS:

- b. Count Two: Clerical errors deliberately misled the Jury as the Jury verdict form of Guilty relied on the charges of in the indictment that altered the subject principal Durham as aiding and abetting Mr. Gentile, which did not charge 18 U.S.C. §2113(a), (d) and §2. Nor did the indictment, Jury instructions, or Jury verdict form contain the machinegun element provision of 18 U.S.C. 924(c)(1)(B)(ii), as required by Congress to trigger the 30-year mandatory minimum of the statute. See Docket [20], [21], and again compare to Docket [2] Id.
- c. Count Two: Clerical errors resulted into the above constructive amendments to the indictment, causing jurisdictional defects. Id.
3. Count Two: Clerical errors continued through **Rule 29** motion for a Judgment of Acquittal of the Federal Rules of Criminal Procedures, proving the Prosecution repeatedly misled the Court(s) through the manipulation of these Clerical errors, vaguely stating a violation of Title 18 of the United States Code. See Docket [25], [26], and [27] Id.
4. Count Two: Clerical errors continued through Mr. Gentile's Pre-Sentence Report ("PSR"), to cause bias, prejudice, and affected his substantial rights throughout Mr. Gentile's term of imprisonment. See Docket [28] Id.
5. Count Two: Clerical errors resulted into Mr. Gentile's FOUR HUNDRED AND NINETY FIVE ("495") MONTH term of incarceration for statutory charges never presented in his indictment, nor found by the Jury beyond a reasonable doubt, in violation of Due Process of Law, and Congressional mandate of the 18 U.S.C. §924(c)(1)(B)(ii) machinegun provision of the statute. See Docket [29] Id.
6. Count Two: Clerical errors resulted into a ONE HUNDRED AND FIFTY SEVEN THOUSAND, ONE HUNDRED AND EIGHTY DOLLAR (\$157,180.00) FINE, that was never charged in the indictment, in the Jury instructions, nor within the Jury verdict form. See Docket [29] and [31] Id.

CLERICAL ERRORS:

7. Count Two: Clerical errors continued through direct appeal, and throughout the post conviction proceedings to cause bias, prejudice, and affecting substantial rights, violating Mr. Gentile's First Amendment right to petition the Government to redress grievances, by being repeatedly denied by the Court(s). See Docket Id.

SUMMARY ARGUMENT

It has long been the rule of law, elements of a crime must be charged in the indictment, subjected to the Rule of Evidence, and proved to a Jury beyond a reasonable doubt. Jones v. United States, 526 U.S. 277 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Ring v. Arizona, 536 U.S. 584 (2002) Id.

As shown above, the Clerical errors in Count Two of indictment violated due process of law, depriving Mr. Gentile of life, liberty, and property, as it was unconstitutional for the Government to remove the statutory assessment of facts (18 U.S.C. §2113(a) & (d), §2, and 18 U.S.C. §924(c)(1)(B)(ii) machinegun provision) that increased the prescribed range of penalties to which Mr. Gentile was exposed.

With respects to 18 U.S.C. §924(c)(1)(A)'s prohibition use of a firearm in relation to a violent or drug trafficking crime where the firearm was a machinegun, the earlier 1988 version of 18 U.S.C. §924(c) previously found a machinegun to be an element of offense, not a sentencing factor. But §924(c) had since been amended in 1988 to clarify this fact. Thus, the Government cannot claim the benefit of any shift in how the law traditionally treated firearm type from the U.S. Sentencing Guidelines, for that shift would have occurred before the 1988 version of §924(c) was enacted. Id.

In 1988, Congress mandated a drastic sixfold increase to the 18 U.S.C. §924(c) statute, strongly suggesting an offense using a machinegun: 18 U.S.C. §924(c)(1)(B)(ii) was a serious crime that must be charged in an indictment, and guilt had to be proved to a Jury beyond a reasonable doubt to trigger the 30-year mandatory minimum of the statute. Id.

However, the Government relied on the above **Clerical errors** in choosing not to charge the essential element(s) of the machinegun statute: 18 U.S.C. §924(c)(1)(B)(ii) in Count II of Mr. Gentile's indictment, to cause bias, prejudice, and affect his substantial rights. These Clerical errors are proven by Court document(s) when the District Court sentenced Mr. Gentile to FOUR HUNDRED AND NINETY FIVE MONTHS of incarceration on statutory charges never presented in the indictment, nor proved to the Jury for guilt beyond a reasonable doubt. Id.

RESEARCH REFERENCES:

18 U.S.C.S. §924(c)(1), which provides in part:

- "(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during the relation of any crime of violence or drug trafficking crime.. for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who in the furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime-;
- (i) be sentenced to a term of imprisonment of not less than 5 years;
 - (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
 - (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years". Id.

RESEARCH REFERENCES:

18 U.S.C.S. 924(c)(1)

"(B) If the firearm possessed by a person convicted of this subsection-;

- (i) is a short-barreled rifle, short-barreled shotgun, or semi-automatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or
- (ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years".

STATUTE INTERPRETATION(S):

In United States v. O'Brien, 560 U.S. 218 (May 24, 2010), the Justice(s) of this Court reached a unanimous 9-0 decision regarding the machinegun provision of 18 U.S.C. §924(c)(1)(B)(ii), that the statutory charges must be presented by indictment, to trigger the mandatory minimum, and proved to a Jury beyond a reasonable doubt. "When the United States Supreme Court construes a statute, it is explaining its understanding of what the statute continuously meant since the date it became law". O'Brien [supra] Id., (Kennedy, J., joined by Roberts, Ch., J., and Stevens, Scalia, Ginsburg, Alito, and Sotomayor, JJ.). see also Alleyne v. United States, 133 S.Ct. 2151 (2013) Id.

UNCONSTITUTIONALLY VAGUE:

In Johnson v. United States, 135 S.Ct. 2551 (2015), the Justice(s) of this Court ruled portions of 18 U.S.C.S. §924 unconstitutionally vague: (192 L.Ed. 2d 569) "Imposing increased sentence under residual clause of 18 U.S.C.S. §924(e)(2)(B), Armed Career Criminal Act of 1984, held to violate Fifth Amendment's guarantee of due process because the residual clause denied fair notice to defendants and invites arbitrary enforcement by Judges" Id.

HOLDING:

"[1]-Where defendant plead guilty to being a felon in possession of a firearm in violation of 18 U.S.C.S. §922(g) and received a 15-year prison term under the Armed Career Criminal Act, remand was warranted because imposing an increase sentence under Title 18 U.S.C.S. §924(e)(2)(B)'s residual clause violated the Fifth Amendment's guarantee of due process since the indeterminacy of the wide-ranging inquiry required by the residual clause both denied fair notice to defendants and invited arbitrary enforcement by judges";

"[2]-The residual clause did not survive the prohibition of vague criminal laws, because the residual clause left grave uncertainty about how to estimate the risk posed by a crime and left the uncertainty about how much risk it took for a crime to qualify as a violent felony".

"[3]-Standing by prior decisions would undermine to goals that stare decisis was meant to serve". Id., Judgment reversed and case remanded. 6-3 decision; 2 concurrences; 1 dissent.

Johnson v. United States [supra] Id.

Similarly to Johnson [supra] Id., the above Clerical errors presented in Mr. Gentiles' **second** Federal Rule of Criminal Procedure, Rule 36 motion, proves he was deprived of the most basic fundamental protection of Due Process of law, as the record shows the Government took advantage of these Clerical errors by deciding not to charge the essential machinegun element in Mr. Gentiles' indictment as required, pursuant to Congressional mandate in 18 U.S.C.S §924(c)(1)(B)(ii), raising the level of concern of void for vagueness, i.e., Rule 36 of the Federal Rules of Criminal Procedures; Clerical error (vs.) Clerical errors that causes bias, prejudice, and continues to affect substantial rights of Criminal defendant(s). See Docket [2] Id., and compare to the Record on Appeal Id.

MEMORANDUM OF LAW

APPLICABILITY OF RULE 36:

"After giving notice it considers appropriate, the court may **at any time** correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission". **Rule 36**, of the Federal Rules of Criminal Procedures. Id.

EQUALLY UNCONSTITUTIONALLY VAGUE:

Rule 36, of the Federal Rules of Criminal Procedures have proven to be unconstitutionally vague, allowing the Government and Court(s) to interpret Congressional intent of Rule 36 any way it please(s), providing an option to pick and chose Clerical errors they wish to correct:

- [1] What charges to present in a judgment, order, or other part of the record, such as an indictment;
- [2] Or correct an error in the record arising from oversight or omission; i.e., Jury instructions; Jury verdict form; the Pre Sentence Report ("PSR"); the Record during Sentencing; the Record on Direct Appeal; and the Record throughout the post conviction proceeding(s).

Hence, as shown in Mr. Gentile's case, Clerical errors can cause defects to the integrity of the judicial process, inviting arbitrary enforcement by Judge(s), resulting into split(s) between Circuit Court precedence.

ARGUMENT

As shown (page 4 above) "NO WHERE" in the language of Rule 36 did Congress state Rule 36 was enacted to correct only minor Clerical errors. (emphasis added). See Rule 36 Id.

In United States v. Mackay, 757 F.3d 195 (5th Cir. 2014), the 5th Circuit proved a different interpretation of Rule 36, and reversed the District Court's decision that denied the Rule 36 motion Mackay filed. Id.

Mackay filed his Rule 36, Federal Rule of Criminal Procedures motion "thirteen years" after the entry of judgment due to Counsel neglect, based upon Clerical errors in his Pre Sentence Report, as these Clerical errors affected substantial rights and caused prejudice to Mackay. Id.

In Mackay the Fifth Circuit conducted a **basic common sense** interpretation into the language of Rule 36, rejecting the Government's argument to the contrary. As it was shown, the Government failed to cite any authority in support of it's position, and the Fifth Circuit was unable to find any either. Mackay [supra] Id.

In Mr. Gentile's case, the District Court and Eleventh Circuit both failed to conduct a **basic common sense** interpretation of the Rule 36 language in Mr. Gentile's **second** Rule 36 motion, and declined to grant relief by presumably holding: Rule 36 was enacted by Congress to correct "only minor" Clerical errors. See Appendix "A" & "B" Id.

The District Court and Eleventh Circuit's interpretation of Rule 36 was clear error, to cause bias, prejudice, and continue to affect Mr. Gentile's substantial rights , resulting into a Circuit Court split to Congressional intent of the Rule 36, Federal Rules of Criminal Procedures. Id.

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REASONS FOR GRANTING THE WRIT

A thorough review of Supreme Court precedence does not reveal any authoritative interpretation as to how Court(s) should interpret the **basic common sense** language of the Rule 36, Federal Rules of Criminal Procedures: Clerical errors (vs.) Clerical errors that caused bias, prejudice, and continues to affect substantial rights of Criminal defendant(s), resulting from a fundamental miscarriage of justice.

RELIEF SOUGHT

Mr. Gentile seeks judicial intervention in the interest of justice, and asks this Honorable Court to:

1. Order a response from the Solicitor General to effectively determine the Government's position on the Rule 36, Federal Rules of Criminal Procedures;
2. Grant this petition for writ of certiorari to establish legal precedence to direct the Court(s) to the proper interpretation of Congressional intent of the Rule 36, Federal Rules of Criminal Procedures, to cure the split(s) between Circuit Court(s) legal precedence;
3. Reverse and remand this case back to the District Court and/or the Eleventh Circuit for further proceeding(s) , and order the Court(s) to correct the Clerical errors raised herein, pursuant to Congressional intent of Rule 36;
4. Or whatever else this Court deems appropriate in support of Equal Protection and Due Process of Law.

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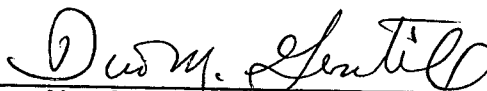
CONCLUSION

For the foregoing reasons, Mr. Gentile continues to pray this Court grants the relief sought herein out of a concern for fundamental fairness to the United States Constitution.

DECLARATION

I, Dino M. Gentile, federal registration number 14711-112, am the concerned person in this cause, and I declare (certify, verify, or state) under penalty of perjury of law, pursuant to 28 U.S.C. §1746, that the information contained herein is true and correct.

EXECUTED, THIS THE 9th DAY OF APRIL, 2018; FROM (FCI) TERMINAL ISLAND, CALIFORNIA. 90733.



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Petitioner "Pro Se"

cc personal legal file