U.S. Department of Justice

Criminal Division

Appellate Section *Washington, D.C. 20530*

January 15, 2021

VIA ECF

Hon. David J. Smith
Clerk of Court
United States Court of Appeals for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: *United States* v. *Fred Clark, Jr.*, No. 16-10811 (argued January 15, 2020)

Dear Mr. Smith:

The government writes to notify the Court that on January 13, 2021, the President of the United States commuted the prison sentence of appellant Fred Davis Clark, Jr., and otherwise left his sentence intact. The warrant of commutation, attached to this letter, states in relevant part:

> I, Donald J. Trump, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant clemency to the said **FRED DAVIS CLARK, JR.**: I commute the prison sentence imposed upon the said **FRED DAVIS CLARK, JR.** to time served. I leave intact and in effect the remaining unpaid balances, if any, of the $179,076,941.89 restitution obligation, $700 special assessment, and the entirety of the forfeiture obligation. I also leave intact and in effect the five-year term of supervised release with all its conditions, and all other components of the sentence.

The warrant further directs the Bureau of Prisons (BOP), "upon receipt of this warrant, to effect the immediate release of the said **FRED DAVIS CLARK, JR.** with all possible speed."

Clark was released from BOP custody on January 13, 2021.

Sincerely,

/s/ Daniel J. Kane

Daniel J. Kane
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Executive Grant of Clemency

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS **FRED DAVIS CLARK, JR.**, Reg. No. 05441-104, was convicted, in the United States District Court for the Southern District of Florida on a second superseding indictment (Docket No. 13-10034-CR-MARTINEZ) of violations of Sections 982(a), 1014, 1344, 1512(c)(2), Title 18, and Section 2461(c), Title 28, United States Code, for which a total sentence of 480 months' imprisonment, five years' supervised release, $179,076,941.89 restitution, a $700 special assessment, and a forfeiture of money and property totaling between $311,555,776 and $311,655,776 was imposed on February 22, 2016, as amended on February 25, 2016, and June 23, 2016; and

WHEREAS the said **FRED DAVIS CLARK, JR.** had been confined continuously since his arrest on June 18, 2014, pursuant to an arrest warrant and indictment filed in the United States District Court for the Southern District of Florida, and he is presently incarcerated at the Federal Correctional Institution—Coleman Medium in Sumterville, Florida; and

WHEREAS it has been made to appear that the ends of justice do not require the said **FRED DAVIS CLARK, JR.** to remain confined until his currently projected release date of August 14, 2048, and the safety of the community will not be compromised if he is released;

NOW, THEREFORE, BE IT KNOWN that I, **DONALD J. TRUMP**, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant clemency to the said **FRED DAVIS CLARK, JR.**: I commute the prison sentence imposed upon the said **FRED DAVIS CLARK, JR.** to time served. I leave intact and in effect the remaining unpaid balances, if any, of the $179,076,941.89 restitution obligation, $700 special assessment, and the entirety of the forfeiture obligation. I also leave intact and in effect the five-year term of supervised release with all its conditions, and all other components of the sentence.

I HEREBY DESIGNATE, direct, and empower, the Acting Pardon Attorney, as my representative, to deliver to the Bureau of Prisons, to the United States District Court for the Southern District of Florida, and to the said **FRED DAVIS CLARK, JR.** a certified copy of this document as evidence of my action in order to carry into effect the terms of this grant.

I ALSO DIRECT the Bureau of Prisons, upon receipt of this warrant, to effect the immediate release of the said **FRED DAVIS CLARK, JR.** with all possible speed.

IN TESTIMONY WHEREOF I have hereunto signed my name and caused the seal of the Department of Justice to be affixed.

Done at the City of Washington in the District of Columbia this thirteenth day of January in the Year of Our Lord Two Thousand and Twenty-one and of the Independence of the United States the Two Hundred and Forty-fifth.

DONALD J. TRUMP
President

Nos. 16-10811 & 16-14410

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRED DAVIS CLARK, JR.,
Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of Florida, Key West Division
Case No. 4:13-cr-10034, Hon. Jose E. Martinez

TIME-SENSITIVE MOTION FOR SUPPLEMENTAL BRIEFING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Arteaga-Gomez, Manuel A.
2. Burns, Thomas A.
3. Caruso, Michael
4. Clark (nee Coleman), Cristal
5. Clark, Jr., Fred Davis
6. Duffy, Jerrob
7. Feldman, Peter
8. Ferrer, Wifredo
9. Foster, Todd
10. Graham, Barry J.
11. Greenberg, Benjamin G.
12. Jung, William F.
13. Lehr, Alison Whitney
14. Lewin, Jordan M.
15. Martinez, Hon. Jose E.
16. McAliley, Hon. Chris M.
17. Mulick, Nicholas Wayne

18. O'Sullivan, Hon. John J.
19. Padula, Michael D.
20. Pastorius, Claudia Teresa
21. Rector, Ashley Nicole
22. Rodriguez, Jr., Valentin
23. Rubio, Lisa Tobin
24. Schwartz, David
25. Shipley, John C.
26. Shirley, Madeleine R.
27. Silvers, Marcia J.
28. Simonton, Hon. Andrea M.
29. Smachetti, Emily M.
30. Snow, Hon. Lurana S.
31. Stokes, Ricky
32. Torres, Hon. Edwin G.
33. Watts-FitzGerald, Thomas Austin
34. Weinstein, David Stuart
35. Zimmerman, Warren Abbey

No publicly traded company or corporation has an interest in the outcome of this appeal.

April 19, 2021

/s/ Thomas Burns
Thomas A. Burns

TIME-SENSITIVE MOTION FOR SUPPLEMENTAL BRIEFING

Defendant-Appellant, Fred Davis Clark, Jr., through undersigned counsel and pursuant to Federal Rule of Appellate Procedure 27 and Eleventh Circuit I.O.P. 28-5, respectfully requests leave to file supplemental briefing to address restitution and forfeiture.[1]

Background

This is a very complicated white collar appeal with a very extensive record. Mr. Clark, who had been an entrepreneur and real estate developer for decades in Florida and Nevada, ran a successful network of destination resorts called Cay Clubs Resorts and Marinas. Cay Clubs commenced in 2004 and operated successfully until early 2007, when the housing market crashed during the economic recession. Shortly thereafter, Cay Clubs ceased doing business. Years later, Mr. Clark was charged with conspiracy, bank fraud, and obstruction of an SEC investigation while operating that company.

Initially, the government prosecuted Mr. Clark under a wide-ranging indictment that charged him with schemes related to Cay Clubs (involving destination resorts) and CMZ (involving pawn shops in the

[1] The government opposes this motion and plans to file a response.

Caribbean). At any rate, the first lengthy jury trial ended in a hung jury on all counts for Mr. Clark and a full acquittal for his wife and only co-defendant, Cristal Coleman Clark.[2] Docs. 325 at 1; 326 at 1.

Thereafter, the government obtained a brand new indictment against Mr. Clark. With respect to Cay Clubs, it charged him with conspiracy to commit bank fraud (count 1), bank fraud (counts 2-4), false statement (counts 5-7), and obstruction of an SEC investigation (count 12). The bank fraud and false statement convictions involved only four transactions for the sale of four condominiums. *See* Clark Principal Br. 4-5. With respect to CMZ, the second superseding indictment charged him with mail and wire fraud (counts 8-11).

Before trial, Mr. Clark and the government agreed to sever the CMZ charges,[3] so the case proceeded on only the Cay Clubs and obstruction charges. At any rate, the second lengthy jury trial ended in Mr.

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[2] At that first trial, Mr. Clark's former business partner, Mike Rosen, admitted on cross-examination that Mr. Clark ran their development for 10 years successfully and made them $100 million. The government didn't call Mr. Rosen as a witness at the second trial.

[3] From Mr. Clark's perspective, litigation of the CMZ charges would expose the government to serious claims of prosecutorial misconduct regarding discovery violations and misrepresentations, as demonstrated by emails his legal team discovered through an abandoned email server.

Clark's acquittal on the conspiracy count and convictions for bank fraud, false statement, and obstruction of an SEC investigation. Doc. 468 at 1-2. He was sentenced to 40 years' imprisonment and ordered to repay $179,076,941.89 in restitution and forfeit $308,878,581 via a forfeiture money judgment. *See* Docs. 524 at 1-3 (forfeiture); 631 at 2 (restitution).

On appeal, Mr. Clark briefed 10 issues regarding his conviction and sentence. *See* Clark Principal Br. 1 (listing issues). Namely, he asserted trial errors involving evidentiary rulings and jury instructions, contended there was prosecutorial misconduct during cross-examination and closing argument, and challenged the sentence imposed. *See id.*; U.S. Br. 1. In challenging the loss calculation enhancement, the sentencing issue challenged the scope of the scheme (and hence the scope of the relevant conduct that could be considered for loss calculation purposes). *See* Clark Principal Br. 65-68; Reply Br. 37-38. None of those issues, however, directly concerned the $179 million restitution award (Doc. 631 at 2) or the $309 million forfeiture money judgment (Doc. 524 at 1-3).

On January 15, 2020, the Court convened oral argument. The appeal remained pending until January 13, 2021, when former President

Trump commuted Mr. Clark's sentence.[4] As a result, Mr. Clark is no longer incarcerated. *See* 11th Cir. R. 27-1(a)(6). Nevertheless, he remains required to pay his restitution obligation and forfeiture money judgment. *See* Warrant of Commutation ("I leave intact and in effect the remaining unpaid balances, if any, of the $179,076,941.89 restitution obligation, $700 special assessment, and the entirety of the forfeiture obligation.").

Argument

I. The Court should grant leave to file a supplemental brief

Now that his sentence has been commuted, Mr. Clark's main dog in this fight is whether he should be required to pay the remaining unpaid balances of his $179,076,941.89 restitution obligation or his $308,878,581 forfeiture money judgment.[5] As it happens, however, those issues weren't raised in Mr. Clark's 16,000-word appellant's brief. That's because there wasn't any space for those arguments after briefing his other meritorious

[4] Two days later (and exactly one year after oral argument), the Court issued a jurisdictional question and ordered the parties to address "what effect, if any, the commutation may have on this appeal." After an extension, Mr. Clark's response is currently due April 20, 2021.

[5] Mr. Clark has always maintained his innocence and has fought hard for years to clear his name. But making a painful choice to live with a wrongful conviction and avoid many more years away from friends and family can at least somewhat softened by at least having the ability to fight for a fair restitution obligation and forfeiture money judgment.

trial and sentencing issues, which concerned the conduct itself as opposed to monetary reparations for it. The lawyers' thinking was that it was unnecessary to challenge restitution and forfeiture on appeal because, if Mr. Clark prevailed on appeal, the judgment (and its corresponding restitution and forfeiture obligations) would be vacated anyways.

But circumstances changed dramatically after former President Trump's unprecedented clemency decision while the direct appeal remained pending.[6] Now that Mr. Clark's sentence has been commuted and he has been freed from prison, the main issue in dispute doesn't concern the counts of conviction or the length of the imprisonment. Instead, the main issue in dispute now concerns his nine-figure restitution and forfeiture obligations.

[6] The clemency decision during the direct appeal was unprecedented because, until former President Trump's administration, the Department of Justice had a policy of not considering clemency decisions until after a conviction had become final on direct appeal. *See* 28 C.F.R. § 1.2; *see also* DOJ Manual § 9-140.113, *at* https://tinyurl.com/hyzk56ak (visited Apr. 16, 2021) ("Nor are commutation requests generally accepted from persons who are presently challenging their convictions or sentences through appeal or other court proceeding.").

A. This Court's precedent neither requires nor prohibits granting leave to file supplemental briefs when a commutation has occurred during a direct appeal

Alas, if this Court's prior practice were extended to this situation, Mr. Clark might not be granted leave to file a supplemental brief about any issues his principal brief hadn't addressed. *United States* v. *Hembree*, 381 F.3d 1109, 1110 (11th Cir. 2004) ("a party may not raise through a supplemental brief an issue not previously raised in his principal brief"). That's because it had once been the rule here that litigants weren't entitled to supplemental briefing on direct appeal even if an issue didn't become plausible until after an intervening Supreme Court or Eleventh Circuit decision. *See id.* (denying motion for leave to file supplemental brief to address intervening Supreme Court decision).

But that strict practice was replaced with a much more charitable one in *United States* v. *Durham*, 795 F.3d 1329 (11th Cir. 2015) (en banc). In *Durham*, this Court adopted a new rule to be applied prospectively:

> [W]here there is an intervening decision of the Supreme Court on an issue that overrules either a decision of that Court or a published decision of this Court that was on the books when the appellant's opening brief was filed, and that provides the appellant with a new claim or theory, the appellant will be allowed to raise that new claim or theory in a supplemental or substitute brief provided that he files a motion to do so in a

> timely fashion after (or, as in this case, before) the new decision is issued.

Id. at 1330-31. On the other hand, *Durham* left "intact" this Court's prior law regarding entitlement to a supplemental brief "insofar as any issue that was not previously foreclosed by binding precedent is concerned." *Id.* at 1331.

For that reason, *Durham* is not on all fours with the situation here, and it neither requires nor prohibits granting Mr. Clark leave to file a supplemental brief. That's because the *Durham* rule is triggered only in a situation where an appellate court (either this Court or the Supreme Court) overrules a prior precedent while an appeal is pending. Here, the situation doesn't involve any intervening judicial decision; instead, it involves an unprecedented executive commutation that has dramatically changed the nature of the litigation and sharply narrowed the scope of the dispute to something that was not previously briefed.

But that doesn't mean *Durham* or any other prior panel precedent forecloses this Court from granting Mr. Clark leave to file a supplemental brief. *See, e.g.*, *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001) (describing prior-panel-precedent rule). Far from it. That's because, to Mr. Clark's knowledge, this Court has never addressed a factual scenario

involving a request for supplemental briefing after a commutation. Thus, this Court has never addressed whether a criminal defendant may be entitled to supplemental briefing to address a new issue after his sentence has been commuted. And because no prior case has addressed that factual scenario, there by definition can be no prior panel precedent on this issue. *Edwards* v. *Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010) ("We have pointed out many times that regardless of what a court says in its opinion, the decision can hold nothing beyond the facts of that case."); *see also* BRYAN C. GARNER *ET AL.*, THE LAW OF JUDICIAL PRECEDENT 47 (2016) ("no court has the power to establish a legal rule on facts not before it").

B. In light of that precedential void, the Court should adopt the Third Circuit's *Albertson* practice

To fill that precedential void, the practices of other sister circuits might be persuasive. Now, truth be told, no other circuit has addressed a similar situation involving a commutation either (again, at least to Mr. Clark's knowledge). Still, sister circuits have adopted practices that provide some flexibility in determining whether to grant supplemental briefing in extraordinary circumstances such as those present here.

Take, for instance, the practice of the Third Circuit. Like this Court, the Third Circuit generally prohibits appellants from raising a new issue

in a supplemental brief. *United States* v. *Albertson*, 645 F.3d 191, 195 (3d Cir. 2011). But that general prohibition "does yield in 'extraordinary circumstances.'" *Id.* (citation omitted). Of course, there can be no "explicit standards" for determining whether circumstances that might justify a supplemental brief are merely ordinary or truly extraordinary. *Id.* Still, there are some "'obvious'" considerations, such as "'whether there is some excuse for the failure to raise the issue in the opening brief; how far the opposing party would be prejudiced; and whether failing to consider the argument would lead to a miscarriage of justice or undermine confidence in the judicial system.'" *Id.* (citation omitted).

This Court should adopt the *Albertson* standard, which would give the Court flexibility to grant leave for Mr. Clark to file a supplemental brief.[7] As explained below, each of the three considerations listed in

[7] Alternatively, if the Court doesn't want to decide whether litigants are entitled to supplemental briefing in the unique circumstances present here (*i.e.*, where a commutation occurred after briefing in a direct appeal concluded), the Court could simply sidestep the whole issue by denying this motion and *sua sponte* ordering Mr. Clark and the government to submit supplemental briefs on restitution and forfeiture. *See* 11th Cir. I.O.P. 28-5 ("The court may, particularly after an appeal is orally argued or submitted on the non-argument calendar, call for supplemental briefs on specific issues.").

Albertson weighs in favor of granting Mr. Clark leave to file a supplemental brief on restitution and forfeiture.

C. The *Albertson* standard is met here

The *Albertson* standard is met here.

1. There's a good excuse for not raising the restitution and forfeiture issues earlier

As to *Albertson*'s first consideration, there's a good excuse for not raising the issues earlier. It has to do with this appeal's extensive record and complexity, which necessitated a brief 3,000 words beyond the usual 13,000-word limit. Even with those extra words, there was no room left for arguments about restitution and forfeiture. And that's not surprising because, at the time, challenging restitution and forfeiture were far less important than challenging the convictions and 40-year sentence.

Mr. Clark was sentenced at the age of 57, so the 40-year sentence was effectively a life sentence. And if Mr. Clark failed to prevail on the challenges to his conviction, the restitution and forfeiture orders would have had virtually no impact on the remainder of his life in custody. Thus, the restitution and forfeiture issues were subsumed under his challenges to the judgment itself. (In other words, if Mr. Clark won his other

appellate issues, the judgment would be vacated, which would solve his restitution and forfeiture problems.)

Now that his sentence has been commuted, however, the circumstances have changed. *See supra* note 5.

2. There's no possible prejudice to the government

As to *Albertson*'s second consideration, there's no possible prejudice to the government. The restitution and forfeiture issues were litigated below, and, in response to Mr. Clark's supplemental brief, the government would of course have the opportunity to file its own brief. *See Albertson*, 645 F.3d at 196 (government wasn't prejudiced where issue was litigated below and it was "permitted to file a surreply").

3. The denial of supplemental briefing would lead to a miscarriage of justice and undermine confidence in the judicial system

As to *Albertson*'s third factor, the denial of supplemental briefing would lead to a miscarriage of justice and undermine confidence in the judicial system. *See id.* (third factor was met where refusal to consider issue omitted from appellant's brief would require that "we turn a blind eye" to a ruling that was "directly contrary to [a] line of cases").[8] That's

[8] The importance of obtaining judicial review of the restitution and forfeiture orders in this direct appeal is paramount to Mr. Clark. That's

because, as explained below, the restitution award and forfeiture obligation are riddled with serious legal errors. *See* Doc. 574. And, to be sure, the restitution award of $179 million and forfeiture money judgment of $309 million—which amount to almost half a billion dollars—are eye-popping figures that should be subject to appellate review lest there be a miscarriage of justice or confidence in the judicial system is undermined. Indeed, even if Mr. Clark hadn't preserved for appellate review the problems with the restitution award and forfeiture money judgment (of course, he did preserve review), it would meet the plain-error standard. *See infra* Argument I.C.3.a-b.

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because he couldn't collaterally attack the restitution or forfeiture orders in a motion to vacate under 28 U.S.C. § 2255, *Mamone* v. *United States*, 559 F.3d 1209, 1210 (11th Cir. 2009) (§ 2255 motion can't be used to bring a collateral challenge addressed solely to noncustodial punishment, such as restitution, forfeiture, or fines), or in a petition for a writ of habeas corpus under 28 U.S.C. § 2241, *Arnaiz* v. *Warden, Federal Satellite Low*, 594 F.3d 1326, 1330 (11th Cir. 2010) ("habeas corpus cannot be used to challenge just the restitution part of a sentence when the custody supporting our jurisdiction is actual imprisonment"). Relatedly, it's unsettled whether a petition for writ of *coram nobis* could be used to collaterally attack the restitution or forfeiture. *Arnaiz*, 594 F.3d at 1329 n.3 ("We also express no opinion on the availability of other writs, such as a writ of *coram nobis*, to bring collateral attacks against restitution orders.").

a. There are serious appellate problems with the restitution award

With respect to restitution, the restitution order is clearly erroneous on its face and, in the interests of justice and fairness, must be vacated. The restitution order sets forth that Mr. Clark "shall pay restitution in the amount of $179,076,941.89 as set forth in the Government's Exhibit 158 (under seal), less the amount of any Chase mortgages assigned for sale as mortgaged backed securities." Doc. 630. But the government never entered into evidence the "amount of any Chase mortgages assigned for sale," and the district court failed to make a specific factual finding on the *actual* amount of losses. The restitution order is thus subject to vacatur because it's indefinite; that is, the actual amount of losses isn't supported by or ascertainable from the record evidence,[9]

[9] At the restitution hearing, the court requested additional information from the government and probation related to the approximately $66.3 million in losses claimed by J.P. Morgan Chase bank, which were not presented by affidavit. Doc. 641 at 171-74. Mr. Clark presented documentary evidence that multiple loans initially submitted as loss claims by Chase were erroneously included in the unverified spreadsheet of Chase loans related to Cay Clubs and sold by Chase to RMBS pools. Further, Chase was subject to a DOJ settlement that required compensation to Fannie Mae and Freddie Mac on loans included in the loss claims and was also required to provide loan forgiveness or modification on loans included in the loss claims. A great number of loans in the Chase loss claims involved a loss claim significantly greater than the original loan

and the district court failed to timely make the requisite, specific findings of fact. *United States* v. *Cavallo*, 790 F.3d 1202, 1240 (11th Cir. 2015); *United States* v. *Huff*, 609 F.3d 1240, 1249 (11th Cir. 2010); *United States* v. *Sheffield*, 939 F.3d 1274, 1278 (11th Cir. 2019).

Mr. Clark also preserved for appellate review serious questions about the proper scope of the scheme.[10] *See* Doc. 574 at 1-3. As a foundational matter, "a criminal defendant cannot be compelled to pay restitution for conduct committed outside of the scheme, conspiracy, or pattern of criminal behavior underlying the offense of conviction." *United States* v. *Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004). On the other hand, "when the crime of conviction includes a scheme, conspiracy, or pattern of criminal activity as an element of the offense, the court may order

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amount. Although hearsay testimony by a government agent who spoke to a representative of Chase bank was introduced, no setoff calculations were provided by Chase or submitted by the government to substantiate how the Chase loss claims were arrived at relative to the original loan amounts. Doc. 641 at 65-77, 83-85, 120-27; *see also* Clark Restitution Hr'g Exs. A1-A9, A11, A21-A22. No additional information or data or total amount of loans was received, submitted, or entered into the record after the restitution hearing.

[10] In the district court, Mr. Clark repeatedly but unsuccessfully requested a bill of particulars. *E.g.*, Docs. 130; 131; 165; 170; 181; 190; 384; 394; 402. If granted, that might have cleared up some of the confusion about the scope of the scheme.

restitution for acts of related conduct for which the defendant was not convicted." *Id.* at 1293.

Those rules from *Dickerson* beg the questions of how to define the scheme and whether conduct was "sufficiently related" to it. *United States* v. *Edwards*, 728 F.3d 1286, 1293 (11th Cir. 2013). "While we do not appear to have defined a test for relatedness, we have considered whether the victim and purpose of each scheme were the same, whether the schemes involved the same modus operandi, and whether the schemes involved common participants." *Id.* at 1293. As Mr. Clark argued below and would like to argue on appeal (now that his sentence has been commuted), the conduct that triggered the $179 million restitution[11] obligation wasn't sufficiently related to the overarching "scheme," as the government and the district court defined it, because it didn't involve the same victims, purpose, modus operandi, and participants. *See id.*

Furthermore, it's undisputed that, at sentencing, the district court established the loss amount for the sentencing guidelines calculation by

[11] The loss figure associated with the scheme and relevant conduct presented at sentencing was $169,267,355.08, approximately $10 million less than the amount of losses claimed at the restitution hearing. Doc. 526 at 19 ¶44.

considering relevant conduct that almost exclusively involved uncharged and acquitted conduct.[12] Doc. 532 at 81-84. In effect, Mr. Clark was sentenced and ordered to pay restitution under the loss figures associated with the conspiracy allegations in both the first trial on the first superseding indictment, which alleged a bank fraud Ponzi scheme affecting

[12] Presently, the use of acquitted conduct at sentencing is permitted. *United States* v. *Campbell*, 491 F.3d 1306, 1314-15 (11th Cir. 2007); *United States* v. *Faust*, 456 F.3d 1342, 1347- 48 (11th Cir. 2006); *United States* v. *Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005). But its use is incredibly controversial. *E.g.*, *United States* v. *Bell*, 808 F.3d 926, 928 (D.C. Cir. 2015) (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial."); *Faust*, 456 F.3d at 1349 (11th Cir. 2006) (Barkett, J., concurring) (its "most pernicious effect" is "its implicit and often hopeless demand that, in order to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once"); *United States* v. *Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., dissenting) (it is "uniquely malevolent" and "violates [defendants'] due process right to notice and usurps the jury's Sixth Amendment fact-finding role"); *United States* v. *Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring) (it is "a shadow criminal code" in which defendants "receive[] few of the trial protections mandated by the Constitution"); *United States* v. *Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (it "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment"). Perhaps for that reason, Congress is currently exploring a legislative fix in the form of the Prohibiting Punishment of Acquitted Conduct Act of 2021. *See* Ellen Podgor, *Prohibiting Punishment of Acquitted Conduct Act of 2021*, White Collar Crime Prof Blog, *at* https://tinyurl.com/3ckdu5d8 (visited Apr. 15, 2021).

1,400 investors (*see* Doc. 65), and the evidence presented in the second trial on the second superseding indictment, which alleged a bank fraud scheme involving straw borrowers (*see* Doc. 351).

But Mr. Clark had a hung jury on all counts in the first trial and was acquitted of the conspiracy count in the second trial. Whether or not Mr. Clark's exorbitant restitution order represents actual losses caused by the offense conduct thus presents substantial, meritorious issues that warrant judicial review under established precedent.[13] *See* Docs. 574; 641 at 147-74. As one district court summarized that precedent:

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[13] Another way of framing the appellate concern is that the restitution and forfeiture obligations are a tail that wags the dog of the substantive offenses. The victims' loss for the four transactions that were the subject of the counts of conviction was $0—in fact, Chase sold those loans to RMBS pools for a profit—yet the restitution and forfeiture obligations somehow became almost half a billion dollars. *See United States* v. *Watts*, 519 U.S. 148, 156 (1997) (acknowledging pre-*Booker* circuit split regarding loss calculations that wag the dog of the substantive offense) ; *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88, 92 n.8 (1986); *see also United States* v. *Cavallo*, 790 F.3d 1202, 1233-34 (11th Cir. 2014). And the dog-wagging effect is even more heightened because the temporal element: most of the loans used for restitution and forfeiture purposes occurred *before* the four transactions at issue here closed. Finally, none of the monetary obligations relate to the SEC obstruction conviction, because this Court already affirmed the dismissal on statute-of-limitations grounds of the SEC's enforcement action insofar as it sought monetary relief. *See SEC* v. *Graham*, 823 F.3d 1357, 1364 (11th Cir. 2016) ("the SEC is time-barred from proceeding with its claims for declaratory relief and disgorgement").

> Significantly, restitution need not arise solely from offense conduct, but "a criminal defendant cannot be compelled to pay restitution for conduct committed outside of the scheme, conspiracy, or pattern of criminal behavior underlying the offense conduct." *United States* v. *Valladares*, 544 F.3d 1257, 1269-70 (11th Cir. 2008) (quoting *United States* v. *Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004)). In other words, a "restitution award 'must be based on the amount of loss actually caused by defendant's conduct.'" *United States* v. *Huf*, 609 F.3d 1240, 1247 (11th Cir. 2010) (quoting *United States* v. *Liss*, 265 F.3d 1220, 1231 (11th Cir. 2001)). *See also United States* v. *Singletary*, 649 F.3d 1212, 1221 (11th Cir. 2011) ("The Government had the burden of proving, with respect to each of the mortgages for which it sought restitution, that the mortgage was the product of a fraudulent misrepresentation.").

United States v. *Jordan*, 2013 WL 1333506, at *8 (M.D. Ga. Mar. 29, 2013) (vacating restitution order where government failed to prove restitution claims were *related to offense conduct* and *caused* the claimed losses).

Similarly, Mr. Clark preserved for appellate review additional serious questions whether the restitution award provided offsets for sold collateral. *See Robers* v. *United States*, 134 S. Ct. 1854, 1856 (2014) ("a sentencing court must reduce the restitution amount by the amount of money the victim received in selling the collateral, not the value of the collateral when the victim received it"). In the district court, Mr. Clark demonstrated that certain lenders, such as Chase, had miscalculated restitution by failing to produce data regarding proceeds from sales to

residential mortgage-backed securities entities (sometimes abbreviated as RMBS entities), foreclosure or short sale proceeds, or collateral values of properties held. *See* Docs. 574 at 3; 641 at 120-27. Likewise, the government hadn't accounted for the effect of the terms of a DOJ settlement in claiming losses for Chase. *See id.*

b. There are serious appellate problems with the forfeiture money judgment

With respect to forfeiture, Mr. Clark preserved for appellate review numerous legal and factual challenges to the $309 million forfeiture. *See* Doc. 495 at 1-26. For instance, Mr. Clark argued, all the specific forfeitures "relate far more to the CMZ segment of the case than to the Cay Clubs segment," which were the only counts of conviction. Doc. 495 at 9. Similarly, as to the forfeiture money judgment, Mr. Clark further argued:

> If a money judgment were available, which it plainly is not, the amount of it would be limited to the gross amount of the loans described in Counts 2 through 4 or at most the gross amount of all of the loans to insiders who can be found by a preponderance of the evidence to be straw purchasers. That is the scheme set forth in the Second Superseding Indictment (D.E. 351), and the government's effort to resurrect the much broader scheme set forth in the First Superseding Indictment (D.E. 65) is inappropriate. After the first jury trial resulted in a mistrial, the government ran from that indictment. It obtained yet another superseding charge, which defined a very different and much narrower scheme. The Second Superseding Indictment effectively denied the defendant his right to a

> retrial of the mistried charges under Fed. R. Crim. P. 31. Even recognizing the factfinder's power to rely upon evidence of acquitted conduct to find by a preponderance that which the government cannot hope to prove beyond a reasonable doubt, the broadening of the scheme for which forfeitures will be imposed is nothing short of an amendment of the indictment in violation of the Fifth Amendment and the infliction of punishment for something other than a count of conviction.

Doc. 495 at 23-24.

D. The Court should rule before it issues its opinion

Finally, Mr. Clark respectfully requests a ruling about his potential entitlement to supplemental briefing on restitution and forfeiture *before* the Court issues its opinion in this appeal.[14] Such a ruling would greatly inform his decision whether to proceed with his appeal as it now stands.

Right now, he's weighing the potential danger that, if he prevails in this appeal and obtains a new trial, it might be a Pyrrhic victory in which he wins the battle but loses the war. In other words, the commutation of Mr. Clark's current sentence might not protect him from a subsequent conviction and subsequent sentence. If the Court grants him leave to file a supplemental brief, that may (or may not) persuade him to discontinue seeking the appellate relief requested in his current briefs (*i.e.*, if

[14] Ideally, Mr. Clark would prefer a ruling before his jurisdictional response is due. Earlier today, Mr. Clark filed an unopposed motion to extend that deadline from April 20, 2021 to May 20, 2021.

supplemental briefing is allowed, he might dismiss his appeal insofar as it's seeking a new trial and just address restitution and forfeiture alone).

II. If the Court grants leave to file supplemental briefing (or *sua sponte* calls for briefs), it should set a briefing schedule

If the Court grants leave to file supplemental briefing (or *sua sponte* calls for briefs), it should set a briefing schedule for the parties' briefs.

Conclusion

This is an extraordinary situation that is calling out for appellate review. The Court should grant leave for the parties to submit supplemental briefing regarding restitution and forfeiture.

Respectfully submitted,

/s/ Thomas Burns

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume, typeface, and type-style requirements of Federal Rules of Appellate Procedure 27(d)(2)(A), 32(a)(5), and 32(a)(6). It contains 4,874 countable words, and its text is prepared in 14-point Century Schoolbook font.

April 19, 2021

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this motion and the notice of electronic filing was sent by CM/ECF on April 16, 2021, to;

United States
DOJ attorney Daniel Kane
AUSA Emily Smachetti

Fred Davis Clark, Jr.
Marcia Jean Silvers
Claudia T. Pastorius

April 19, 2021

/s/ Thomas Burns
Thomas A. Burns

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case Number: 23-10027-CIV-MARTINEZ
(Case Number:13-10034-CR-MARTINEZ-1)

FRED DAVIS CLARK, JR.,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER DENYING MOTION TO VACATE – 28 U.S.C. § 2255

THIS CAUSE came before this Court on Movant Fred Davis Clark Jr.'s Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, (ECF No. 1), ("Motion"). Movant claims three grounds for relief from the forfeiture and restitution orders, (ECF-Cr Nos. 524 and 631), in his underlying criminal case[1]: (1) the use of acquitted and other conduct to determine the amount of restitution and forfeiture violates his constitutional rights; (2) the restitution order violates his due process rights because it is vague and indefinite; and (3) the restitution and forfeiture orders violate the Constitution's prohibition against excessive fines. (*See* Mot.). Upon careful consideration of the Motion, the Government's Response, (ECF-Cr No. 751; ECF No. 4-6), Movant's Reply (ECF-Cr No. 754; ECF No. 4-9), and the record, the Court finds that Movant is not entitled to relief.

I. BACKGROUND

On December 11, 2015, a jury convicted Movant on three counts of bank fraud in violation of 18 U.S.C. § 1344; three counts of making false statements in connection with federally insured loans in violation of 18 U.S.C. § 1014; and one count of obstructing an official proceeding in violation of 18 U.S.C.

[1] Citations to Movant's underlying criminal case, 13-10034-CR-JEM, are referred to herein as "ECF-Cr."

§ 1512(c)(2). (ECF-Cr Nos. 468 and 631). The jury found Clark not guilty of conspiracy to commit bank fraud. (*Id.*).

At sentencing, Movant was held accountable for losses totaling $169,267,355.08 (or, alternatively, a personal gain of between $25,000,000 and $49,000,000). (ECF-Cr No. 603 at 148, 153). On June 23, 2016, Movant was sentenced to 480 months' imprisonment, followed by five years of supervised release. (ECF-Cr No. 631). Following extensive briefing, (ECF-Cr Nos. 480; 495; 509), the Court also ordered forfeiture of money and property totaling between $311,555,776 and $311,655,776 (ECF-Cr No. 524). And later, following further briefing, (ECF-Cr Nos. 574), and an evidentiary hearing (ECF-Cr Nos. 640 and 641), Magistrate Judge Lurana Snow issued a report recommending that the Court order restitution in the amount of $179,076,941.89, less the amount of two Chase mortgages if the government later determined that Chase had assigned those mortgages to mortgage-backed securities, (ECF-Cr No. 613). After Movant filed objections, (ECF-Cr No. 625), the Court noted the objections and adopted the report and recommendation (ECF-Cr Nos. 630 and 631).

Movant filed notices of appeal from both the original judgment (ECF-Cr No. 523; 11th Cir. No. 16-10811), and the amended judgment, which incorporated the restitution order (ECF-Cr No. 632; 11th Cir. No. 16-14410). He then moved to consolidate the appeals (16-10811, ECF No. 32 (July 14, 2016)). The Eleventh Circuit granted the motion (*Id.*, ECF No. 34 (July 20, 2016)). Movant did not challenge the forfeiture or restitution orders on appeal.

On January 13, 2021, the President of the United States commuted Movant's prison sentence. The warrant of commutation states in relevant part:

> WHEREAS it has been made to appear that the ends of justice do not require the said **FRED DAVIS CLARK, JR.** to remain confined until his currently projected release date of August 14, 2048, and the safety of the community will not be compromised if he is released;
>
> NOW, THEREFORE, BE IT KNOWN that I, **DONALD J. TRUMP**, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons me thereunto moving, do hereby grant clemency to the said **FRED DAVIS CLARK, JR.**: I commute the prison sentence imposed upon the said **FRED DAVIS**

> **CLARK, JR.** to time served. I leave intact and in effect the remaining unpaid balances, if any, of the $179,076,941.89 restitution obligation, $700 special assessment, and the entirety of the forfeiture obligation. I also leave intact and in effect the five-year term of supervised release with all its conditions, and all other components of the sentence.

(*Id.*, ECF No. 133 (Jan. 15, 2021)). Clark was released from Bureau of Prisons custody on January 13, 2021. Movant moved for leave to file a supplemental brief regarding the Court's restitution and forfeiture orders, (16-10811, ECF No. 141 (Apr. 19, 2021)). That motion was subsequently denied (*Id.*, ECF No. 145 (Apr. 28, 2021)). Movant then filed a motion requesting that his appeals be dismissed (*Id.*, ECF No. 146 (May 17, 2021)), which was granted (*Id.*, ECF No. 148 (May 18, 2021)).

On May 18, 2022, Movant filed the instant § 2255 Motion (ECF No. 1). On October 6, 2022, the Government filed its Response. (ECF No. 4-6). The Government concedes that the Motion is timely but argues that it should be denied on the merits and as procedurally barred. The Government also argues that Movant's challenge to the restitution and forfeiture orders are not cognizable under § 2255. On October 20, 2022, Movant filed a Reply. (ECF No. 4-9).

II. LEGAL STANDARD

Because collateral review is not a substitute for direct appeal, the grounds for collateral attack on a final judgment, pursuant to 28 U.S.C. § 2255, are extremely limited. *See Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004). A prisoner is entitled to relief under section 2255 if the court imposed a sentence that: (1) violated the Constitution or laws of the United States; (2) exceeded its jurisdiction; (3) exceeded the maximum authorized by law; or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a). Thus, relief under § 2255 "is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn*, 365 F.3d at 1232 (citations omitted). If a court finds a claim under section 2255 valid, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence." 28 U.S.C. § 2255(b).

The burden of proof is on the movant—not the government—to establish that the sentence must be vacated. *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017).

III. DISCUSSION

The Eleventh Circuit has routinely held that "collateral" challenges to noncustodial punishment, such as challenges to restitution, cannot be addressed under § 2255. *See, e.g., Mamone v. United States*, 559 F.3d 1209, 1211 (11th Cir. 2009) (finding that § 2255 motion cannot be used to bring a collateral challenge addressed solely to noncustodial punishment, such as restitution, forfeiture, or fines); *Arnaiz v. Warden, Fed. Satellite Low*, 594 F.3d 1326, 1330 (11th Cir. 2010) ("habeas corpus cannot be used to challenge just the restitution part of a sentence when the custody supporting our jurisdiction is actual imprisonment"); *Blaik v. United States*, 161 F.3d 1341, 1342 (11th Cir. 1998) ("Here we are faced with the motion of a prisoner who does not request a release from custody but only a reduction in the amount of restitution he was ordered to pay. If granted this request would require us to take an action that is not authorized by the plain language of the statute. A reduction in restitution is not a release from custody."). While Movant cites to cases from other Circuits that discuss the possibility of raising an argument that restitution orders are not categorically excluded from § 2255, the Court sees no reason to disturb the well-set precedent of the Eleventh Circuit. Movant's claim is not cognizable under § 2255.

IV. EVIDENTIARY HEARING

Movant is not entitled to an evidentiary hearing because "the motion and the files and records of the case conclusively show that [Movant] is entitled to no relief." 28 U.S.C. § 2255(b); *see also Schriro v. Landrigan*, 550 U.S. 465, 473–75 (2007) (holding that if the record refutes the factual allegations in the petition or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing).

V. CERTIFICATE OF APPEALABILITY

A prisoner seeking to appeal a district court's final order denying his section 2255 motion has no absolute entitlement to appeal, and to do so, must obtain a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1). A Court may issue certificate of appealability only if Movant makes "a substantial showing

of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). Where a district court has rejected Movant's constitutional claims on the merits, Movant must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Upon consideration of the record and for the reasons explained above, this Court denies certificate of appealability.

VI. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that:

1. The Motion, (ECF No. 1), is **DENIED**.
2. A certificate of appealability is **DENIED**.
3. This case is **CLOSED**, and all pending motions are **DENIED AS MOOT**.
4. A final judgment in Respondent's favor shall enter via separate order.

DONE AND ORDERED in Chambers at Miami, Florida, this 14 of February 2025.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

October 28, 2025

Claudia T. Pastorius
Claudia Pastorius PA
720 E NEW HAVEN AVE STE 12
MELBOURNE, FL 32901

Appeal Number: 25-10955-E
Case Style: Fred Clark, Jr. v. USA
District Court Docket No: 4:23-cv-10027-JEM
Secondary Case Number: 4:13-cr-10034-JEM-1

The enclosed copy of this Court's order denying the application for a Certificate of Appealability is issued as the mandate of this court. See 11th Cir. R. 41-4. Counsel and pro se parties are advised that pursuant to 11th Cir. R. 27-2, "a motion to reconsider, vacate, or modify an order must be filed within 21 days of the entry of such order. No additional time shall be allowed for mailing."

Any pending motions are now rendered moot in light of the attached order.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

Enclosure(s)

DIS-4 Multi-purpose dismissal letter

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-10955

FRED DAVIS CLARK, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:23-cv-10027-JEM

ORDER:

Fred Davis Clark, Jr. moves for a certificate of appealability. To obtain a COA, Clark must show that reasonable jurists would find debatable both (1) the merits of an underlying claim, and (2) the procedural issues that he seeks to raise. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Clark's

motion for a certificate of appealability is DENIED because he failed to make the requisite showing.

UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

December 17, 2025

Claudia T. Pastorius
Claudia Pastorius PA
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MELBOURNE, FL 32901

Appeal Number: 25-10955-E
Case Style: Fred Clark, Jr. v. USA
District Court Docket No: 4:23-cv-10027-JEM
Secondary Case Number: 4:13-cr-10034-JEM-1

The enclosed order has been ENTERED.

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

Clerk's Office Phone Numbers

General Information:	404-335-6100	Attorney Admissions:	404-335-6122
Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

MOT-2 Notice of Court Action

In the

United States Court of Appeals

For the Eleventh Circuit

No. 25-10955

FRED DAVIS CLARK, JR.,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:23-cv-10027-JEM

Before BRANCH and LUCK, Circuit Judges.

BY THE COURT:

Fred Davis Clark, Jr., is a former federal prisoner seeking a certificate of appealability to appeal the district court's denial of his 28 U.S.C. § 2255 motion. He now moves this Court to reconsider its October 28, 2025, order denying a certificate of appealability. After careful review, Clark's motion for reconsideration is

DENIED, as he has offered no new evidence or arguments of merit to warrant relief.