ORIGINAL

20-6034

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER THIEME -- Petitioner

v.

UNITED STATES OF AMERICA -- Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CHRISTOPHER THIEME
Reg. No. 69451-050
FCI FORT DIX
Federal Correctional Institution
Post Office Box 2000
Joint Base MDL, New Jersey 08640
PETITIONER PRO SE -- ** PRESENTLY CONFINED **

** QUESTIONS PRESENTED FOR REVIEW **

This petition contains several claims of which most are novel and have never been brought before this court or decided in courts below. These specific claims--one seeking to invalidate a federal criminal statute, two challenges to the constitutionality of a federal sentencing guidelines enhancement provision, have not been heard in the 30-35 years since the guidelines and 18 U.S.C. 1958(a) was enacted. Further claims seek to ask whether novel challenges to whether the AEDPA statute of limitations violates the suspension clause for first-time 2255 filers and whether the common law "doctrine of equitable estoppel" would reset the AEDPA clock--specific questions that the Supreme Court has not determined. All of these questions raised below remain unanswered.

1. When faced with a plea agreement that contained unconstitutional provisions, does the doctrine of "equitable estoppel" or "material mutual mistake" apply to "reset the clock" and provide habeas relief from a Petitioner's unlawful conviction and sentence? Would "equitable estoppel" be one of the "equitable modifications" (other than tolling) hinted at but never enumerated in the Third Circuit decisions in Miller v. New Jersey State Department of Corrections, 144 F.3d 616, 618 (3rd Cir. 1998) and Robinson v. Johnson, 313 F.3d 128, 135-137 (3rd Cir. 2002)?
2. Does the AEDPA statute of limitations under 28 U.S.C. 2255(f) essentially deny an inmate's right to equal access to the courts, equal protection of law, and/or violate the Suspension Clause when it forecloses a merits adjudication against a first-time 2255 petitioner?
3. In the face of competing holdings in the First and Sixth Circuit, and a 2020 District of Idaho decision calling the statute "ambiguous" and "badly written", is 18 U.S.C. 1958(a) facially invalid for being "void-for-vagueness" and "overbroad"?
4. In the context of a statute invalidity examination, does the dictum in Bousley v.United States, 523 U.S. 614, 623 (1998) that "actual innocence" does not mean "legal insufficiency" CONFLICT with the Third Circuit's decision in United States v. James, 928 F.3d 247 (2019) holding "legal innocence counts as innocence" and CONFLICT with this Court's "Blackledge-Menna doctrine" and its holding in Class v. United States, 200 L.Ed.2d 37 (2018) that an underlying constitutional infirmity in a

statute "implicates the very power of the [Government] to prosecute" a defendant?

5. Does the use of a four-point USSG 2A1.5(b)(1) sentencing enhancement to a defendant's sentence for an 18 U.S.C. 1958(a) conviction constitute "impermissible double counting" if this sentencing enhancement duplicates verbatim the "critical element" of the offense of conviction?
6. Does this same four-point USSG 2A1.5(b)(1) sentencing enhancement when applied to the calculation of a guidelines offense level for other counts through "grouping" in a multi-count conviction become a double jeopardy multiple punishment? And further, did Congress intend that grouping under USSG 3D1.2 and 3D1.3 be used as an "end-run" around a statutory maximum sentence through its application to other counts?
7. Can a sentencing court order restitution that does not meet the four specific reasons for imposing restitution provided by 18 U.S.C. 3663A?
8. Would the failure of defense counsel to recognize or object to the aforesaid errors before, during, and after sentencing render deficient and prejudicial performance to render his assistance constitutionally ineffective? Further, would his misadvice that prevented the Petitioner from taking an appeal he would have otherwise pursued render his assistance ineffective?
9. Do never-before-argued "novel" claims of constitutional injury provide an equitable basis to "reset the clock", "in the interests of justice", for first-time AEDPA-limited 2255 motions?
10. Would the Supreme Court of the United States hear and adjudicate the merits of the Petitioner's habeas claims, raised in this action pursuant to 28 U.S.C. 2255, in its original jurisdiction?

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Certiorari Petition (ii)
DATE: 09/16/2020 06:36 PM

** LIST OF PARTIES **

All parties to this action appear in the caption set forth above.

1.) Christopher Thieme, Petitioner (pro se).

2.) United States of America, Respondent.

** RELATED CASES **

For the underlying criminal conviction:

* United States v. Thieme, Docket No. 2:16-CR-00294-SDW, United States Distrtict Court for the District of New Jersey. Sentencing hearing held December 19, 2016. Judgment and Commitment Order, as amended, dated December 22, 2016.

For the 2255 motion:

* Thieme v. United States, Docket No. 2:19-CV-15507-SDW, United States District Court for the District of New Jersey. Judgment (memorandum opinion and order) entered March 24, 2020.

* Thieme v. United States, No. 20-1839, United States Court of Appeals for the Third Circuit. Judgment (order) entered July 29, 2020.

TRULINCS 69451050 - THIEME, CHRISTOPHER - Unit: FTD-Q-B

FROM: 69451050 THIEME, CHRISTOPHER
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FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Petition (iv.2)
DATE: 09/22/2020 10:29 PM

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CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Petition (1)
DATE: 09/16/2020 06:34 PM

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 **

This case derived in the federal courts.

The opinion of the United States Court of Appeals appears at APPENDIX A to the petition and is unpublished.

The opinion of the United States District Court appears at APPENDIX B to the petitioner and is unpublished. However, the opinion can be found at Thieme v. United States, 2020 U.S. Dist. LEXIS 50443, or 2020 WL 1441654 (D.NJ March 24, 2020).

** JURISDICTION **

The date on which the United States Court of Appeals for the Third Circuit decided my case was July 29, 2020. No petition for rehearing was sought. This Petition was timely filed within ninety days of that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

** CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED **

The pertinent constitutional and statutory provisions involved are too lengthy to be set forth verbatim in this petition, but are set forth in Appendix D, pages D-1 to D-18. However, they include:

* The Vesting Clauses of Article I, II, and III of the United States Constitution (page D-1)
* The "Suspension Clause" of Article I, Section 9, Clause 2 of the United States Constitution (page D-1)
* Amendment V of the United States Constitution (page D-1)
* Amendment VI of the United States Constitution (page D-1)
* Amendment VIII of the United States Constitution (page D-1)
* Amendment XIV of the United States Constitution (page D-1)
* 18 U.S.C. 1958 (page D-2)
* 18 U.S.C. 3663A (pages D-3 to D-5)

* 28 U.S.C. 2255 (pages D-6 to D-7)

* United States Sentencing Guidelines, USSG 2E1.4 (page D-8)

* United States Sentencing Guidelines, USSG 2A1.5 (page D-9)

* United States Sentencing Guidelines, USSG 3D1.2 (pages D-10 to D-16)

* United States Sentencing Guidelines, USSG 3D1.3 (pages D-16 to D-18)

** STATEMENT OF THE CASE **

I. COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE NOW BEFORE THIS COURT.

On June 21, 2016, in a cause then pending in the United States District Court for the District of New Jersey entitled "United States v. Thieme", Docket No. 2:16-CR-00294-SDW, Petitioner was convicted on the information by entry of a plea agreement on two counts--count one: "Attempted Kidnapping", in violation of 18 U.S.C. 1201(d); and count two: "Use of Interstate Commerce Facilities in the Commission of a Murder for Hire" (Racketeering), in violation of 18 U.S.C. 1958(a).

On December 19, 2016, the District Court entered judgment and sentenced the Petitioner to a total of 210 months--210 months on count one and 120 months on count two to run concurrently to each other. This was to be followed by 3-years of supervised release and the Petitioner was ordered to pay $1,033.50 in restitution. [See Appendix C, pages C1-C7]. No direct appeal was taken. The Petitioner was serving this sentence when the motion under Section 2255 was filed in the District Court.

On June 11, 2019, the Petitioner filed a motion to the District Court for a Writ of Audita Querela which was subsequently converted into a motion under 28 U.S.C. 2255 to vacate and set aside the judgment in the underlying criminal case. This was entitled "Thieme v. United States", Docket No. 2:19-CV-15507-SDW. No answer to the motion was required by the District Court or filed by the Government. The Petitioner filed a Brief and other motions and supporting papers in support of his 2255 motion. No hearing was held.

On March 24, 2020, the District Court entered a memorandum opinion and order denying the motion under 28 U.S.C. 2255. The District Court denied a Certificate of Appealability. [See Appendix B, pages B1-B11].

On April 2, 2020, Petitioner duly and timely filed a Notice of Appeal to the United States Court of Appeals for the Third Circuit and subsequently filed an Application for a Certificate of Appealability and other papers.

On July 29, 2020, the Court of Appeals issued an Order denying the Petitioner's application for a Certificate of Appealability. [See Appendix A, pages A1-A2]. Petitioner brings this matter before this Court through this Petition for a Writ of Certiorari.

II. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the United States District Court for the District of New Jersey on two counts as indicated above. A Section 2255 motion was appropriately filed before this Court and duly appealed to the United States Court of Appeals for the Third Circuit.

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS -- Petitioner (3 - 3.1)
DATE: 08/29/2020 05:12 PM

** REASONS FOR GRANTING WRIT **

In 25 years of habeas jurisprudence, it appears to a layman that the courts are more concerned with finding any and every procedural obstacle to deny access to relief instead of directing their focus to scrutinizing and correcting constitutional injury. This reflects badly on the judiciary--even more especially when a first-time 2255 petitioner appears with novel issues of constitutional magnitude, never before argued in front of this Court or heard on the merits in any lower court, never raised by any attorney, and he only finds locked doors barring him and his cause entry. The claims argued in this petition and argued below directly affect and impact the convictions and sentences of several hundred, and potentially several thousand federal inmates and defendants down the road. While Petitioner recognizes the need for the finality of conviction and sentence, he asserts that justice and the interests of justice should have a role here, too. See United States v. Black, 2019 U.S.Dist. LEXIS 7589 (W.D.Pa 2019) (that finality should take a back seat when significant constitutional errors need correction). Because these issues are a sojourn into an undiscovered country, this Court should grant review in order to promote the development of the law.

I. THE DISTRICT COURT AND COURT OF APPEALS ERRED IN DENYING A CERTIFICATE OF APPEALABILITY BECAUSE THE PETITIONER RAISED SEVERAL NOVEL, NEVER-BEFORE-RAISED CONSTITUTIONAL INJURIES AND PROCEDURAL CLAIMS THAT ARE INHERENTLY "DEBATABLE" BY "JURISTS OF REASON"

As stated above, several of the claims raised herewith are novel issues. No other court has been asked to decide these questions proposed in this petition. These questions are important, raise concerns about the fundamental nature of the sentencing guidelines, and to date remain unresolved. He believes that the decision by the District Court and Court of Appeals below to not adjudicate these claims on the merits were egregious error and an exemplar of what is wrong with the habeas process.

Before the District Court, the Petitioner raised several substantial issues. He raised a due process and separation of powers facial validity challenge to a vague and overbroad federal criminal statute. He raised a double jeopardy and due process as-applied challenge against a guidelines sentencing enhancement from two different angles--first, that it impermissibly double counted an offense element as a sentencing enhancement and second, that through "grouping" in a multicount conviction, it created a multiple

punishment. He challenged that the sentencing court exceeded its statutory authority by imposing restitution for reasons not provided for in the specifically-tailored reasons defined by statute. He claimed that the failure of defense counsel to recognize and object to these errors was ineffective assistance. He claimed that "equitable estoppel" and "material mutual mistake" could reset the clock imposed by the AEDPA limitations of 28 USC 2255(f). On four of these six issues, no court has had the chance to hear the claims. The Petitioner is the FIRST litigant to raise these questions before any court in the 33-year history of the Sentencing Guidelines era and 36 years after 18 U.S.C. 1958(a) was enacted. Indeed, this would be the first time these questions reached the Supreme Court.

In Slack v. McDaniel, 529 U.S. 473 (2000), this Court held that "when the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a Certificate of Appealability should issue when the prisoner shows, at least, that jurists of reason would find it debat--able whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural rule." Ibid. at 484, Cf. Miller-El v. Cockrell, 537 U.S. 322 (2003) ("A Petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further".)

The Third Circuit did not deny that the Petitioner's claims are of substantial constitutional injury. Instead, they argue that "jurists of reason" would not find the claims "debatable" but are silent as to why they reach this conclusion.

Indeed, as for procedure, District Judge Wigenton entirely IGNORED the Petitioner's claims that "equitable estoppel" and "material mutual mistake" should reset the AEDPA clock. She did not hear his claims on the merits. Her strict, inflexible application of the AEDPA time bar poses an "unreasonable burden" to a first-time 2255 petitioner's due process and equal protection rights, his equal access to the courts, and his access to relief protected by the Suspension Clause. Petitioner asserts that this kind of "unreasonable burden" is such an obstacle that Justice Sotomayor characterized 20 years ago as a "suspension" of the writ. The Third Circuit also gave no explanation why these novel claims, not raised previously in the 2255 context before the Third Circuit or elsewhere in other jurisdictions, were not sufficiently "debatable".

To the contrary, based on their novelty, the Petitioner asserts he satisfied the criteria for a Certificate of Appealability under 28 U.S.C. 2253(c). The Third Circuit, in two of their previous decisions, in Miller v. New Jersey State Department of Corrections 145 F.3d 616, 618 (3rd Cir. 1998) and Robinson v. Johnson,

313 F.3d 128, 135-137(3rd. Cir. 2001), hinted at other "equitable modifications" that would apply, in addition to "equitable tolling", to reset the AEDPA clock. Since the Third Circuit never enumerated what those other "modifications" were, the Petitioner properly invited the Third Circuit to review his presented arguments against those two decisions.

Further, the courts should review an actual innocence/legal innocence claim against a statute that the District of Idaho recently criticized as "badly written" and "ambiguous". Petitioner asked for the scrutiny of a validity review. The Third Circuit punted.

Instead, the Third Circuit made claims that (a) the petitioner wasn't diligent in pursuing his rights--which is not true; (b) that the reasons for tolling weren't sufficient--which they never explained "why not"; (c) that actual innocence is not "legal insufficiency"--which Petitioner asserts is a statement that conflicts with its own decision in a 2019 case and runs into conflict with this Court's "Blackledge-Menna doctrine" and its recent decision in Class v. United States, 200 L.Ed.2d 37 (2018).

Petitioner asserts that the District Court and the Court of Appeals below abused its discretion, applied the law and legal standards in unreasonable or incorrect ways, and ignored the Petitioner's valid, substantial constitutional claims. Cf. Winthrop-Redin v. United States, 767 F.3d 1210, 1215 (11th Cir. 2014) ("a district court abuses its discretion if it applies an incorrect legal standard, applies the law in an unreasonable or incorrect way, follow improper procedure in making a determination, or clearly errs in making its factual findings").

Petitioner respectfully asks that this court answer these tough questions that "could go either way". See United States v. Giancola, 754 F.2d 898, 902 (11th Cir. 1985) (substantial defined as "a close question or one that very well could be decided the other way"); United States v. Miller, 753 F.2d 19, at 23 (3rd Cir. 1985) (substantial question is "significant question at issue...which is novel, which has not yet been decided by controlling precedent, or which is fairly doubtful"; also question is "important to" or "so integral to the merits of the conviction in which a defendant is imprisoned that a contrary appellate holding is likely to require reversal of conviction"); and United States v. Quinn, 416 F.Supp.2d 133 (D.D.C. 2006) (presented issue on appeal "that was novel and could result in a contrary ruling to one made by (lower) court").

The Third Circuit held in Miller, supra, that "judges do not knowingly leave substantial errors uncorrected". Unfortunately, the habeas jurisprudence and the case at bar negate that ideal. For that reason, this Court should grant review.

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Petition (3.2)
DATE: 08/29/2020 09:07 PM

II. THE DISTRICT COURT AND COURT OF APPEALS ERRED IN BLATANTLY IGNORING THE PETITIONER'S ASSERTION THAT THE DOCTRINES OF "EQUITABLE ESTOPPEL" AND "MATERIAL MUTUAL MISTAKE" SHOULD "RESET THE CLOCK" OR OTHERWISE OVERCOME THE AEDPA'S 2255 LIMITATIONS PERIOD.

As stated above, District Judge Wigenton IGNORED the Petitioner's argument that the "Doctrine of Equitable Estoppel" should be evoked to overcome procedural obstacles and let his 2255 action be heard. Instead, she snidely belittled the argument and glibly mischaracterized it as the petitioner being "unhappy with his plea agreement".

The Third Circuit was asked to review the question of whether "equitable estoppel" and the similar "mutual material mistake" principles enshrined in common law and contract law applied. The petitioner stated that the Third Circuit had indicated in two previous cases that various "equitable modifications" could be invoked to overcome limitations periods in habeas relief and there were several tools available in addition to "equitable tolling". See Robinson v. Johnson, 313 F.3d 128, 135-137 (3rd Cir. 2002) (AEDPA limitations period subject to "other non-jurisdictional equitable considerations"--not just "tolling"); and Miller v. New Jersey State Department of Corrections, 145 F.3d 616, 618 (3rd Cir. 1998); cf. Holland v. Florida, 560 U.S. 631, 645 (2010) (explaining AEDPA statute of limitations is not jurisdictional and "DOES NOT set forth an inflexible rule requiring dismissal whenever its 'clock has run'"); citing Day v. McDonough, 547 U.S. 198, 205 (2006). The courts have never enumerated what those tools or modifications were. The Petitioner believes that the "Doctrine of Equitable Estoppel" is one of them, that it can be used to compel review of unlawful or unconstitutional provisions in a plea agreement, compel "reformation" pursuant to contract law, and that courts have the authority to invoke it through its "inherent equitable powers" in Article III of the United States Constitution. See United States v. Doe, 806 F.3d 732, 751 (3rd Cir. 2015) (regarding inherent equitable powers, that the court has a great reservoir of equitable power to do justice in a particular case); also Cox v. Horn, 757 F.3d 113, 122 (3rd Cir. 2014); also In Re Machne Israel, Inc., 48 Fed.Appx. 859, 863 (3rd Cir. 2002) (equitable action for relief may be employed to prevent manifest injustice).

Petitioner premised his argument on the long-standing holding that a plea agreement is a contract. Puckett v. United States, 556 U.S. 129, 142 (2009); citing Mabry v. Johnson, 467 U.S. 504, 508 (1984);

Santobello v. New York, 404 U.S. 257, 263 (1971). When a contract is broken or otherwise the result of a misrepresentation, a party injured by the breach will generally be entitled to some remedy. 26 R. Lord, Williston on Contracts, 68.1 (4th Ed. 2003). Reformation is an appropriate equitable remedy. See Restatement (Second) of Contracts, Sections 152, 155, 158 (2003). A contract with an illegal provision cannot be enforced concerning said illegal provision. Petitioner would say an unconstitutional provision renders and an illegal conviction and sentence. Petitioner has been delayed in bringing action via this 2255 action merely because of the plea agreement's waiver-of-appeal-rights provision. Various attorneys have advised him he couldn't get around it (he later learned on his own that this was incorrect) and that he didn't have a claim because his plea agreement was proper (which he also later learned on his own was incorrect). The essence of equitable estoppel is that a statute of limitations does not run against a petitioner who is unaware of his cause of action. Majid v. Fielitz, 700 F.Supp. 704, 706 (S.D.N.Y. 1986); quoting Dillman v. Combustion Sig'g, Inc. 784 F.2d 57, 60 (2nd Cir. 1986), aff'd 891 F.2d 277 (2nd Cir. 1989). The very nature of "material mutual mistake" is that because it is a mistake, there does not have to be foreknowledge of the error or its nature, it could have even been negligently overlooked.

However, with the plea agreement being a contract, the courts have held that parties may not stipulate to an unlawful sentence in a plea agreement. See United States v. Peppers, 899 F.3d 211, 225 (3rd Cir. 2018), citing United States v. Symington, 781 F.3d 1308, 1313 (11th Cir. 2015) (court has no power to impose an unlawful sentence even if stipulated to by parties in a plea agreement). By accepting the contractual plea agreement, Petitioner changed his position to his detriment--by taking on an obligation of several years in prison. It is reasonable to assume that a prosecutor would not draft an unconstitutional plea agreement or the court or the Petitioner's own counsel would not endorse the propriety of an illegal provision. Perhaps they did not know (i.e. the negligence of material mutual mistake). Because his own counsel, the prosecution, the probation office, and the court signed off on the plea agreement, the petitioner was under the impression that the contractual terms were proper and legal. To invoke equitable estoppel, reliance must be reasonable. Vadino v. A. Valey Engineers, 903 F.3d 253, 263 (3rd Cir. 1990); see also Heckler v. Community Health Services of Crawford City, Inc., 467 U.S. 51, 59 (1984) (that a "plaintiff's reliance on a government's agency's conduct must be reasonable in that (plaintiff) did not know nor should it have known that its adversary's conduct was misleading"). Here, in the case at bar, the Petitioner reasonably relied on the errors in his plea agreement being "proper" much to his detriment. Buttry v. General Signal Corp., 68 F.3d 1488, 1493 (2nd Cir. 1995); citing Heckler, supra; also Sinacole v. iGate Capital, 287 Fed.Appx. 993, 995 (3rd Cir.

2008); In Re RFE Indus., Inc., 283 F.3d 159, 164 (3rd Cir. 2002). Equitable estoppel rises when a party, by his conduct, either intentionally or unintentionally, leads another in reliance upon conduct to change position to his detriment. As a result, the person whose conduct has created the situation is estopped from asserting his rights against the party so misled. See Bechtel v. Robinson, 886 F.2d 644, 650 (3rd Cir. 1989).

However, mistakes can be made and are often made. Between the doctrines of equitable estoppel and material mutual mistake, such errors can and should be corrected when discovered. Because contracts are typically actions in equity, relief is not automatically barred by a statute of limitations but reviewed under the equitable doctrine of LACHES. While a statutory limitations period can be considered in the calculus, the doctrine of laches relies on one main question--whether it is too late to recover from an injury. See Tower v. Allstate Insurance Co. 1994 U.S.Dist. LEXIS 20539 (D.Del 1994). "Law and Equity merged long ago in the federal courts which allows a party to bring both types of claims in the same action and 'it is now clear that a single claim or cause of action includes all remedies, legal and equitable'." 18 Charles Alan Wright and Arthur R. Miller, Federal Practice & Procedure, 4410 (3rd Ed. 2017), citing Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 964 n.3 (3rd Cir. 1991).

Whether intentionally or unintentionally (or inadvertently), the Government drafted a plea agreement with a provision concerning the calculation of a Petitioner's sentencing guidelines range that runs afoul of his constitutional rights. Under the principles of contract law, the Government may be equitably estopped from asserting a statute of limitations as a defense where a defendant was delayed or obstructed from bringing a lawsuit to remedy such injuries. Cf. Cerbone v. International Ladies Garment Workers Union, 708 F.2d 45, 50 (2nd Cir. 1985); also Keaby v. Carey, 706 F.2d 377, 382 (2nd Cir. 1983); also Abbas v. Dixon, 480 F.3d 636, 642 (2nd Cir. 2007) (that doctrine of equitable estoppel requires a petition who was induced by misrepresentation to have refrained from filing a timely action). There is no prejudice to the government by correcting this error and enforcing the Constitution.

District Judge Wigenton IGNORED the Petitioner's attempts to invoke the doctrine of equitable estoppel to overcome the AEDPA statute of limitations period under 28 U.S.C. 2255(f). She did not even give it "short shrift". At a minimum, she glibly and condescendingly mischaracterized the Petitioner's argument as "he was dissatisfied with his plea agreement" and his concerns received no further attention.

This Court is in a position to remedy this error and provide relief. Further, the Petitioner thus respectfully asks this Court to review this question in light of clarifying whether the doctrine of "equitable estoppel" and its counterpart "material mutual mistake" can compel reformation and resentencing, and whether it is one of the "equitable modifications" or tools suggested as actionable in habeas relief in Robinson v. Johnson, 313 F.3d 128 (3rd Cir. 2002) and Miller v. New Jersey State Department of Corrections, 145 F.3d 616 (3rd Cir. 1998).

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: Petition (3.3)
DATE: 08/29/2020 05:52 PM

III. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DENYING THIS FIRST-TIME PETITIONER'S ACCESS TO 2255 RELIEF BECAUSE THE AEDPA LIMITATIONS VIOLATE THE SUSPENSION CLAUSE AND HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW
(Suspension Clause, Due Process, Equal Protection of Law, Equal Access to Courts, and Eighth Amendment claims)

Petitioner asserts that the District Court and Court of Appeals both erred through their strict adherence to the AEDPA limitation and foreclosed consideration of his first 2255 petition's merits. The result is an absolute denial of much-needed constitutional scrutiny of his conviction and sentence. A Certificate of Appealability should have been issued as the Petitioner made the requisite substantial showings of the denial of a constitutional right and that the issues were sufficiently "debatable" amongst reasonable jurists.

The AEDPA limitations period which was strictly enforced against the Petitioner raises serious constitutional questions and possibly renders the habeas remedy for first-time 2255 petitioners (especially those with novel, never-before-heard issues) ineffective and inadequate. See Triestman v. United States, 124 F.3d 361, 373-380 (2nd Cir. 1997). The Supreme Court remarked that "denial of a first federal habeas petition is a particularly serious matter for that dismissal denies the petitioner the protection of the Great Writ entirely, risking injury to an important interest in human liberty". Lonchar v. Thomas, 517 U.S. 314, 116 S.Ct. 1293, 1299 (1996) (disapproving of dismissals of delayed first habeas petitions).

Petitioner raises to this Court's attention two cases which seem to have been ignored by two decades of habeas litigation which go to the heart of the very question of the Suspension Clause, AEDPA, and first-time 2255 motions--including one by a current sitting associate justice of this Court:--Rosa v. Senkowski, 1997 U.S.Dist LEXIS 1177 (S.D.N.Y. 1997) ("Rosa I") and Rodriguez v. Artuz, 990 F.Supp. 275 (S.D.N.Y. 1998). In Rosa I, Judge Sweet gave a lengthy, reasoned explanation on how the AEDPA's limitations period violates due process and the Suspension Clause. In Rodriguez, Associate Justice Sotomayor, when a district judge, indicated the dispositive question was when AEDPA's limitations strictly enforced posed an "unreasonable burden" because it left a petitioner without an opportunity to be heard on the merits. Rodriguez, supra, at 280, 282.

When courts otherwise would be required to "answer the difficult question of what the Suspension

Clause 'protects', there is a reason to avoid the restrictive construction of AEDPA, especially when there is no clear intent from Congress that it intended restrictive interpretation and there is no alternative forum for federal review". See INS v. St. Cyr, 533 U.S. 289, 301 n.13, 314 (2001); cf. Swain v. Pressley, 430 U.S. 372, 381 (1977) ("a restriction or modification of the Writ of Habeas Corpus constitutes suspension if it leaves Habeas Corpus inadequate or ineffective to test the legality of a person's detention"); cf. Triestman, supra, at 378-379, and n.21 (where inability of petitioner to even raise actual innocence claim raises serious questions under the Due Process Clause and Eighth Amendment, leads to Suspension Clause claim). While several courts cite the Supreme Court's decision in Felker v. Turpin, 518 U.S. 651 (1996) on the Suspension Clause, it did not address first-time 2255 petitions--only 2254 and second and successive petitions.

There is a stark issue of whether 2255(f)(3) renders access to the courts nugatory because the high court rarely identifies a "retroactively applicable" case until the window for relief has closed. There is an equal protection of law argument to be made because the Petitioner has been denied relief that other prisoners seem to get in direct review or AEDPA-timely habeas review. If I had argued a sentencing guidelines miscalculation error on direct appeal that was considered after June 2018, I would get the full benefit of the Supreme Court's decision in Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018), immediately after that case was decided. If I had filed a timely 2255 motion, I might get it reviewed under Rosales-Mireles. However, despite having a similar sentencing guidelines calculation error, and the holding that over-sentencing errors bring the judiciary and the justice system into disrepute, I cannot get heard on an AEDPA-untimely 2255 petition for that same relief? There is no equity in that. "Equal protection of the laws requires equal operation of the laws upon all persons in like circumstances". Maxwell v. Bugbee, 250 U.S. 525 (1919); also Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947) (that "so long as law applies to all alike, requirements of equal protection are met"), Louisville Gas & Electric Co. v. Coleman, 277 U.S. 32 (1928) ("Equal protection means rights of all persons must rest upon same rule under similar circumstances, and applies to exercise of all powers of state which can affect individuals"). Once a sufficient reason for delay is advanced (and the Petitioner argued several reasons he asserts should suffice), equal protection of law and equal access to the courts prevents the Government from imposing more rigorous standards on petitioner's seeking belated appeals than those seeking timely appeals.

The rules that 2255(f) gave birth to pose nearly insurmountable "byzantine" obstacles to 2255 relief. They are creating a situation where one prisoner is told "sorry, you're late, the constitution doesn't have effect here, you fail on procedure, go do you time" and another is told "welcome in, here's relief". However,

the divide between direct review and collateral review is shrinking--and this was what Judge Wigenton ignored when denying the Petitioner access to Rosales-Mireles relief because she stated its stance on the plain error rule, Fed.R.Crim.P. 52, was a solely direct review posture--is a specious assertion. The First Circuit has recognized several times that the "plain error" standard on direct review is essentially similar, indistinguishable, and even interchangeable with the "miscarriage of justice" standard in collateral review. See United States v. Velez-Luciano, 814 F.3d 553, 565 n.15 (1st Cir. 2016); also United States v. Cabrera--Rivera, 893 F.3d 14, 30 (1st Cir. 2018); United States v. Garay-Sierra, 885 F.3d 7, 12 (1st Cir. 2018). The inability to obtain benefits from cases like Rosales-Mireles, Garza v. Idaho, or Davis v. United States, creates classes of petitioners with differing levels of access--even if it creates a "class of one"--and that should not stand in a country where all persons are equal before the law. This is especially salient when district courts and appellate courts can hold a case is "retroactively applicable" at any time when the interests of justices require it. See Butterworth v. United States, 775 F.2d 459, 464 (1st Cir. 2015); Weigan v. United States, 380 F.3d 890, 892 (6th Cir. 2004;) United States v. Lopez, 248 F.3d 427, 431 (5th Cir. 2010); United States v. Swinton, 333 F.3d 481, 487-491 (3rd Cir. 2003). This creates an uneven playing field.

In Harris v. Nelson, the Supreme Court remarked that "the very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris v. Nelson, 294 U.S. 286, 290-292 (1969). The AEDPA limitations and the byzantine morass of judge-made rules around it works against that fundamental principle. The focus of today's judges no longer is the finding and correcting constitutional injury but quickly finding a way to procedurally bar someone from relief without any consideration of their claims. This is plain wrong. This operates against the rational that led the Supreme Court to state the need to correct a miscalculated sentence in cases like Rosales-Mireles v. United States, 138 S.Ct. 1897 (2018), because the failure of justice to provide the seemingly obvious relief from constitutional injury casts a shadow of shame against the call to "ensure the fairness and integrity, and prevent the erosion of public confidence in our judicial system". Ibid, at 1908.

But today, it seems AEDPA worked its purpose: giving judges a tool to clear overwhelmed dockets at the expense of, and despite, the merits. However, when it comes to a first-time 2255 petitioner, the "abuse of the writ" doctrine that undergirded the need for AEDPA reforms seems to be a flimsy veneer that doesn't make sense. A first-time filer cannot be held to have "abused" the writ. It seems that the

AEDPA has let the courts forget that:

> [The] "overriding responsibility of (the) court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist...we must be deaf to all suggestion that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts...were not early able to enforce what the Constitution demands".

-- Chessman v. Teets, 354 U.S. 156, 165 (1957). Petitioner further asserts that perhaps 28 U.S.C. 2255(f) may be unconstitutional because such a short statute of limitations is deliberately "designed to defeat the remedy" and violates due process. See Edward v. Kearzey, 96 U.S. 595, 603 (1878). The various litigation post-AEDPA in which relief was denied because of the limitations period and the resulting procedural tangle runs afoul of many of this Court's rulings that lower courts were obliged to hear habeas petitions even when filed many years after a prisoner's conviction became "final". See Chessman, supra, (seven years after conviction); Uveges v. Pennsylvania, 335 U.S. 437, 438-439 (1949) (seven years after conviction); Palmer v. Ashe, 342 U.S. 134, 137 (1951) (eighteen years after); Herman v. Claudy, 350 U.S. 116, 123 (1957) (seven years after). AEPDA's time limitations become a denial of justice seeming only to defeat the remedy for this unassisted, untrained first-time petitioner with novel, never-before-raised issues that happened coalesce too late to meet an arbitrary deadline set by a Congress long ago that put on the facade of being "tough on crime" to win votes and didn't care about the painful, damaging, long-term consequences to the "interests of justice". This is a perfect example of the "unreasonable burden" that impedes on due process and clearly violates the Suspension Clause.

FROM: 69451050 THIEME, CHRISTOPHER
TO:
SUBJECT: SCOTUS - Petition (3.4 - 3.5)
DATE: 09/22/2020 10:23 PM

IV. THAT THE COURT OF APPEALS ERRED BECAUSE THEIR APPLICATION OF BOUSLEY v. UNITED STATES, 523 U.S. 641 (1998) THAT "ACTUAL INNOCENCE" DOES NOT MEAN "LEGAL INSUFFICIENCY" CONFLICTS WITH THEIR DECISION IN UNITED STATES v. JAMES, 928 F.3d 247 3rd Cir. 2019) THAT "LEGAL INNOCENCE COUNTS AS INNOCENCE" AND CONFLICTS WITH THIS COURT'S "BLACKLEDGE-MENNA DOCTRINE" AND ITS DECISION IN CLASS V. UNITED STATES, 200 L.Ed.2d 37 (2018)

If a statute is constitutionally invalid, the Government has no right to prosecute a defendant for committing it. Indeed, as this Court has held, "virtually all rights of criminal defendants" are "merely...right[s] not to be convicted" of an offense. See Flanagan v. United States, 465 U.S. 259, 267 (1984). However, the Third Circuit recently held that "legal innocence counts as innocence" in United States v. James, 928 F.3d 247 (3rd Cir. 2019). But, in the case at bar, the Third Circuit's application in the order denying access to 2255 relief through a Certificate of Appealability mentioned the statement in Bousley v. United States, 523 U.S. 641 (1998) that "actually innocence" does not mean "legal insufficiency". Petitioner asserts that this claim in Bousley runs into a head-to-head conflict with James and with this Court's "Blackledge-Menna Doctrine". It also conflicts with this Court's recent decision in Class v. United States, 583 U.S. ___, 138 S.Ct. 798, 200 L.Ed.2d 37 (2018).

If the criteria for habeas relief under Section 2255 is that someone is held in violation of their rights under the Constitution, a claim of "legal innocence" should be potent to open the doors. Indeed, someone arrested and held under an invalid statute has been a victim of a trespass against his person. Elkison v. Deliesseline, 8 F.Cas 493 (D.SC 1823) (regarding eligibility for habeas corpus versus "de homine replegiando" relief). To claim that the requisite standard of innocence doesn't include "legal innocence", does not include a claim that the Government potentially did not have the power to prosecute or arrest in the first place seems to mock the principles of one's "basic liberty interest" and substantive due process.

This is a question that must be resolved between James, Bousley, Class, and the Blackledge-Menna doctrine, for consistency's sake and for the proper development of the law.

V. THAT THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DECIDING THAT THE PETITIONER HAS NOT BEEN DILIGENT IN PURSUING HIS RIGHTS

Petitioner counters by stating that he could be nothing less than "reasonably" diligent in pursuing his rights before filing this 2255 action. As stated throughout, the constitutional injuries herein pose entirely novel claims--never before raised nor argued; never before considered by any court. In Reed v. Ross, 468 U.S. 1 (1984), this Court held "that a claim is so novel that its legal basis was not reasonably available to counsel" can constitute cause for a procedural default and meet the "cause and prejudice" test. Ibid. at 16.

Novel claims never come fully formed, ab initio. They never materialize out of thin air in an instant or twinkling of an eye. Inchoate questions asked in 2016 that his defense counsel quickly disregarded never arrive as clear, learned, polished briefs. Indeed, a defense attorney or a criminal defendant might not be aware of what they really have in an argument--they might not be "sufficiently aware of a question's latent existence". Reed, supra, at 15. It took time to investigate and develop the research to the point where the argument for the novel claims raised in the District Court and to the Court of Appeals were clear and cogent. Even before Judge Wigenton, and the Third Circuit panel, their "novelty" was ignored--as the Supreme Court observed in Reed v. Ross that it is entirely likely that "a court will fail to appreciate the (novel) claim and reject it out of hand", Reed, supra, at 15.

Indeed, the Petitioner's facial challenge against the 18 U.S.C. 1958(a) could not be possible without various courts deciding Gordon in 2017 and Danforth in 2020 together--both subsequent to his 2016 sentencing. Petitioner's double jeopardy and due process challenges to the USSG 2A1.5(b)(1) four-level sentencing enhancement have never been argued before and required piecing together thoughts from dozens of cases, some not available at the time of his December 2016 sentencing. Petitioner never found a single other case in which "equitable estoppel", "material mutual mistake" and errors in plea agreements were discussed together in a 2255 motion context.

These novel claims required substantial research and substantial research requires diligence. The reading of several hundreds of federal court decisions in an institutional "electronic law library" that was updated sporadically (the Bureau of Prisons abandoned physical "book" law libraries several years ago), where BOP hiring freezes and staff shortages often required the frequent closure of law libraries so that an "education/library" officer could be "augmented" to serve as a custody officer in a housing

unit, in institutions that locked-down frequently due to violence or drug overdoses often for weeks at a time. These cases don't get read all-together in one-night. It involved piecing together pieces of these hundreds of cases to put together a cogent argument. This takes time--and in many cases takes years. In Reed v. Ross--one of a multitude of examples--a 1969 conviction finally obtained the begged-for examination of a constitutional error in 1984.

In the interim, between the Petitioner's sentencing in late December 2016 and his filing in mid-June 2019, he attempted to reach out to his former defense attorney only to be ignored. He reached out to over 130 different attorneys, law professors, law school clinics, as well as civil rights and appellate advocacy organizations, by mail, email, and through third parties. He was frequently told (incorrectly) "you don't have a claim", others told him (incorrectly) "you can't get around your plea agreement waiver". Mercenary lawyers wanting huge sums in retainers told him "too bad"--that without money he'd be without help. Law professors at Duke, Ohio State, Georgetown, Rutgers, and several other schools told him "interesting issues, but far too complex for second-year law students to take on in a clinic or seminar given the academic-term's time constraints and that usually our litigation focuses on simpler issues" or that they "could not take on cases given the rigors of their teaching schedule". Advocacy organizations often responded months later with form letters saying essentially: "We lack the resources to take everyone's case. Good luck".

Unfortunately, it is too easy for lawyers on the outside to ignore someone on the inside imploring for help or for some advice. It is too easy for the entire broken system to say, "You're on your own, good luck". More often than not the claims never get filed because they never get properly researched by unskilled, often illiterate inmates who can't navigate a law library--much less one that is now on computers and not in physical books. Even for an educated inmate it takes time to learn the skills, learn how to hone the argument, format and present. All in a hostile place designed to thwart attempts at regaining liberty. But when a cogent filing is presented, to flippantly dismiss it as lacking sufficient "diligence" is disingenuous and often insulting.

That this petitioner, amongst many others, could not hire an attorney simply due to his poverty, and that assistance was impossible to find, might pose an equal protection, equal access claim--it exposes a great weakness and brokenness in the criminal justice system. If someone is suffering a constitutional issue, most often justice is out of reach just because of a question of money.

Nevertheless: How much diligence is required? In Holland v. Florida, this court said

"(d)iligence required for equitable tolling is reasonable" diligence--and "not maximum, extreme, or exceptional diligence". Holland v. Florida, 560 U.S. 631, 653 (2010). A petitioner must show first that he is pursuing his rights diligently and that some extraordinary circumstance stood in his way". Holland, supra, at 649; quoting Pace v. Diguglielmo, 544 U.S. 408, 418 (2005). Reasonable diligence tends to be recognized through a "subjective test considered in light of the circumstances of the case". Ross v. Varano, 772 F.3d 784, 799 (3rd Cir. 2013); Schleuter v. Varner, 384 F.3d 69, 74 (3rd Cir. 2004) ("Due diligence doesn't require maximum feasible diligence, but it does require diligence in the circumstances"). The Third Circuit also held that "(e)quitable tolling can be triggered only when 'the principles of equity would make rigid application of a limitations period unfair, such as when a (prisoner) faces extraordinary circumstances that prevent him from filing a timely habeas petition AND the prisoner has exercised reasonable diligence in attempting to investigate and bring his claims.'" LaCava v. Kyler, 398 F.3d 271, 275-276 (3rd Cir. 2005); also Holland, supra, at 653-654. Petitioner asserts that he passed the standard of "reasonable diligence" and the circumstances above--especially the novelty of the claims--should be sufficient to establish "cause" and overcome "procedural default".

Petitioner asserts that the District Court and the Court of Appeals erred by failing to regard the novelty of the constitutional errors raised as sufficient cause to overcome procedural default and warrant equitable tolling. They fell back to their default position of the need for finality--but finality has never provided "sufficient reason for federal courts to compromise their protection of constitutional right" in habeas jurisprudence. Reed, supra, at 15.

FROM: 69451050 THIEME, CHRISTOPHER
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SUBJECT: SCOTUS - Petition (3.6 a)
DATE: 08/29/2020 09:07 PM

VI. THE DISTRICT COURT AND COURT OF APPEALS BELOW ERRED BY DECLINING TO ADJUDICATE THE MERITS OF THE PETITIONER'S 2255 MOTION

In declining the Petitioner's Certificate of Appealability, the Third Circuit did not refute that the Petitioner had substantial merits for his seeking 2255 relief. Indeed, the absence of any criticism is telling. The Petitioner raised several novel claims of substantial denials of constitutional rights. Here below, the Petitioner reiterates his challenges to the validity of the 18 U.S.C. 1958(a) statute as void--for-vagueness and overbroad. He states two distinct double jeopardy and due process challenges to the application of a four-point sentencing enhancement under 2A1.5(b)(1). These have never been heard by any other court in the 30+ years they have been in effect. He challenges his restitution order and the court's exceeding its authority under statute. He raises an ineffectiveness claim. However, none of these were adjudicated below as his petition was improperly barred by procedural reasons and was denied a remedy to his constitutional errors. We are in an era where the AEDPA has denied access to the courts for issues of considerable constitutional error:

> "That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery, but it is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom".

-- Elkison v. Deliesseline, 8 F.Cas. 493 (D.SC 1823).

A. PETITION HAS RAISED A SUBSTANTIAL SHOWING OF THE DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE THAT AN OFFENSE OF CONVICTION, 18 U.S.C. 1958, IS VOID-FOR-VAGUENESS AND OVERBROAD (Due Process and Separation of Powers claim)

Petitioner asserts that 18 U.S.C. 1958 is unconstitutionally invalid because it is void for vagueness and overbroad. In a recent court deceision, it was described as "ambiguous" and "badly written" The previous two courts to hear issues regarding its ambiguity, the First and Sixth Circuits, issued two different interpretations of the statute. Petitioner asks for an examination of the statute's validity and requests that the court invalidate the statute and vacate Count Two of his conviction. This claim is that the invalidity of 1958(a) implicates the Due Process Clause of the Fifth Amendment and the Vesting Clauses of Articles I, II, and III of the Constitution. This is an actual innocence/legal innocence claim. See United States v. James, 928 F.3d 247 (3rd Cir. 2019) ("legal innocence counts as innocence").

In United States v. Danforth, Docket No. 2:18-CR-00398-BLW, 2020 U.S.Dist LEXIS 26216 (D.Idaho

2020), Judge Winmill lamented that the 1958(a) statute is ambiguous regarding its "unit of prosecution" and noted there is a disagreement in how to interpret the statute amongst two circuits. Judge Winmill also noted that the Ninth Circuit has never interpreted the 1958(a) language and that "authority is sparse". In United States v. Gordon, 875 F.3d 26, 35 (1st Cir. 2017) and United States v. Wynn, 987 F.3d 354, 359 (6th Cir. 1993),the two courts concluded that "separate phone calls" which relate to one plan to murder one victim is one crime. However, the Sixth Circuit reached a "contrary result", eight years after deciding Wynn, in United States v. Ng, 26 Fed.Appx. 452, 462 (6th Cir. 2001), which affirmed a multiplicitous interpretation of the statute, holding: "the plain language of the statute makes clear that the evil it intended to proscribe was the interstate travel and use of facilities in interstate commerce with the intent that a murder for hire be committed". Ibid.; Cf. United States v. Steward, 420 F.3d 1007, 1012 (9th Cir. 2015) ("prosecution is multiplicitous when the government charges a defendant two or more times for what is essentially a single crime"). In Danforth, Judge Winmill noted that legislative intent provides comfort to both sides' interpretations as they are "able to find statements supporting their positions". This vagueness in the statute allows law enforcement and prosecutors too much opportunity for arbitrary enforcement. See Kolender v. Lawson, 461 U.S. 352, 357 (1987) (perhaps the most important part of vagueness doctrine is the request "that a legislature establish guidelines to govern law enforcement" to "not encourage arbitrary and discriminatory enforcement"), quoting Smith v. Goguen, 415 U.S. 566, 574 (1974); City of Chicago v. Morales, 527 U.S. 41, 56 (1999) (a statute should not "authorize" or "encourage" arbitrary and discriminatory enforcement"); see also United States v. Davis, 204 L.Ed.2d 757, at 765, 139 S.Ct. 2319 (2019) ("Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of laws they are expected to abide").

Indeed, the Petitioner points the court's attention several cases where defendants were charged with the multiplicity theory of the unit of prosecution:

* In Danforth, supra, she was charged with 5 counts of 1958(a) for four phone calls and one mailing, pleaded guilty to 2, sentenced to 1 count under a "rule of lenity" decision.
* In United States v. Bloom, Docket No. 05-CR-178-AVC, D.Conn, Bloom received 240 months, 2 counts of 1958(a), for one victim, one plot.
* In United States v. Mandell, 2014 U.S.Dist LEXIS 155253 (N.D.Ill. 2014), Docket No. 12-CR-842, two counts, one victim, one plot.
* In United States v. Barrett, 2015 U.S.Dist LEXIS 29249 (E.D.Ky 2015), 2 counts--one facility, one travel.
* In Johnson v. United States, 2016 U.S.Dist LEXIS 100687 (W.D.Tenn 2016), Docket No. 13-2219-STA-tmp

two counts, 1958(a) conspiracy, 1958(a) travelling.

* In Finley v. Payne, 2018 U.S.Dist. LEXIS 208275 (E.D.Mo. 2018), Docket No. 4:97-CR-455-SNL. 3 counts of 1958(a) for using mails in one plot, one victim.

* In United States v. Schueller, 136 F.Supp.3d 1074 (D.Minn. 2015), 3 counts of "using mails", one plot, one victim.

These are just a few examples of a 30-year history of how the 18 U.S.C. 1958(a) statute has been variously employed on both interpretations.

While the Petitioner's conviction conforms with the Gordon interpretation, this may be only due to his early acceptance of a plea agreement. Had this led to indictment or trial, he could have faced upwards of 9 counts for 7 phone calls and 2 face-to-face meetings where a plot was discussed. There are likely many other inmates beyond those cited above--potentially hundreds facing conviction or already convicted and sentenced--with their information or indictments based on alternative interpretations of the 1958(a) statute. This shows that the law has fatal flaws and this ambiguity should be met with a determination of the statute's validity.

Petitioner asserts that that he possesses standing to exercise the potent right to mount a facial challenge to the 18 U.S.C. 1958(a) statute. When uncertain language of a statute promotes the arbitrary and discriminatory enforcement, a person clearly within statutory bounds may be permitted to challenge its validity and constitutionality. See Gooding v. Wilson, 405 U.S. 518, 521 (1972); citing Coates v. City of Cincinnati, 402 U.S. 611, 619-620 (1971) (White, J. dissenting) ("Although a statute may be neither vague, overbroad, nor otherwise invalid against a particular defendant, he is permitted to raise its vagueness, or unconstitutional overbreadth as applied to others"). An otherwise valid statute may become invalid by change in the conditions to which it is applied. Nashville, Chattanooga and St. Louis Railway v. Walters, 294 U.S. 405, 415 (1935); Abie State Bank v. Bryan, 282 U.S. 765, 772 (1931).

Petitioner asserts that the amibiguity allows prosecutors and federal law enforcement to arbitrarily charge and thus cannot survive an overbreadth challenge. This court has held "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law". Connally v. General Constr. Co. 269 U.S. 385, 391 (1926). If the 1958(a) statute cannot pass a validity examination, as Petitioner asserts it cannot, "the court had no power to enter the conviction or impose the sentence" on that count. See United States v. Broce, 488 U.S. 563, 569 (1989), citing Blackledge v. Perry, 417 U.S. 21, 30 (1974); Menna v. New York, 423 U.S. 61 (1975); also Haynes v. United States, 390 U.S. 85 (1968). This constitutional infirmity would implicate the "very power of the

(Government) to prosecute" the Petitioner; see Blackledge, ibid.; also Class v. United States, 583 U.S. __, 138 S.Ct. 798, 801-802 (2018). An invalid statute is a fundamental defect of law that results in a miscarriage of justice that is "inconsistent with the rudimentary demands of fair procedure". United States v. DeLuca, 889 F.2d 503, 506 (3rd Cir. 1989); citing United States v. Addonizio, 442 U.S. 178, 185 (1979); which quoted Hill v. United States, 368 U.S. 424, 428 (1962).

As Justice Gorsuch recently wrote in United States v. Davis, "In our Constitutional order, a vague law is no law at all...When Congress passes a vague law, the role of the Court under our Constitution is not to fashion a new clearer law to take its place but to treat the law as a nullity and invite Congress to try again." Davis, supra, at 764. The Petitioner argues: so, too, here.

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SUBJECT: SCOTUS - Petition (3.6 b)
DATE: 08/29/2020 09:06 PM

B. PETITIONER HAS RAISED A SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE OF "IMPERMISSIBLY DOUBLE COUNTED" SENTENCING ENHANCEMENT
(Double Jeopardy and Due Process claim)

Petitioner asserts to this court that the application of a four-point enhancement under United States Sentencing Guidelines provision 2A1.5(b)(1) has subjected him to an unconstitutional injury in two distinct ways that requires the intervention of this court to correct.

First, 2A1.5(b)(1) duplicates verbatim the "critical element" of the offense of conviction--18 U.S.C. 1958(a)--in an error that the courts have prohibited as "impermissible double counting". Second, this error takes on the dynamic of a "multiple punishment" because of the effects of "grouping" the Petitioner's two convicted offenses under the higher of the calculated offense levels, pursuant to USSG 3D1.2 and 3D1.3. These are two ways the Petitioner's sentence violates the Double Jeopardy Clause. Further, Petitioner argues that this resulting sentencing guidelines miscalculation is an error that constitutes a violation of the Due Process Clause.

The commentary to USSG 1B1.3 states clearly that "conduct which is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guidelines range". An element of the offense of conviction CANNOT be used as a sentencing enhancement. However, the "critical element" of 1958(a) is that there is an offer "as consideration for the receipt of, promise or agreement to pay anything of pecuniary value" for committing a murder. See United States v. Ritter, 989 F.2d 318, 321 (9th Cir. 1993) (describing this clause as the "critical element"); also United States v. Chong, 419 F.3d 1076, 1079, 1081-82 (9th Cir. 2005) (where it is the "critical element" and "constructed strictly"); cf. United States v. Frampton, 382 F.3d 213, 217 (2nd Cir. 2004) (that this element "proscribes a very limited category of behavior"); United States v. Wicklund, 114 F.3d 151, 154 (2nd Cir. 1997) (that this conduct proscribed is the very core of conduct Congress intended to prohibit).

By cross-reference, the sentences for 1958(a) convictions are typically calculated using the "underlying criminal conduct" under USSG 2A1.5. A defendant begins at a base offense level of 33 and is typically assessed a four-point enhancement under 2A1.5(b)(1) "if the offense involved the offer of anything of pecuniary value for undertaking the murder". For 35 years since the enactment of 18 U.S.C. 1958, and 30 since the implementation of the 2A1.5, this duplication of the 1958(a) offense element as a sentencing

enhancement has gone unnoticed. Indeed, USSG 2A1.5 was not originally meant for 1958(a) convictions. It was originally meant to be applied in convictions under Section 351(d), 371, 373, 1117, or 1751(d) of Title 18 for which 2A1.5(b)(1) is conduct beyond the elements of the offense. See United States v. Blum, 534 F.3d 608, 612 (7th Cir. 2008) (that enhancing a sentence only allowed when it is an "additional or separate aspect of a defendant's conduct"--i.e. not an offense element). None of those statutes use this specific language regarding consideration. Therefore, because the "critical element" of 18 U.S.C. 1958(a) is being punished again as a sentencing enhancement, this is "impermissible double counting". See United States v. McCullah, 76 F.3d 1087, at 1111-1112 (10th Cir. 1996) (Petitioner is "essentially condemned twice for the same culpable act"). See e.g. Jones v. United States, 527 U.S. 373, 398 (1999) ("finding aggravating factor(s) based on matters already taken into account by the offense of conviction"); United States v. Reevey, 364 F.3d 151, 158 (4th Cir. 2004) ("when a provision of a sentencing guideline is applied to increase punishment on the basis of a consideration that has been accounted for by the application of another guideline provision or by application of a statute"); United States v. Beith, 407 F.3d 881, 889 (7th Cir. 2005) ("use of an enhancement based on conduct that encompasses an element of the offense is 'impermissible double counting' if the offense itself necessarily involves the same conduct as the enhancement"); United States v. Senn, 129 F.3d 886, 897 (7th Cir. 1997) (same); United States v. Haynes, 582 F.3d 686, 710 (7th Cir. 2009) (it is "impermissible double counting when the same underlying facts that establish an element of the base offense are used to justify an upward enhancement"); United States v. Lallemand, 989 F.2d 936, 939 (7th Cir. 1993) (same).

Petitioner can only argue this first issue by comparable applications of case law regarding "impermissible double counting" in other statutes where an element of the statute was duplicated as a sentencing enhancement or how in death penalty cases, aggravating factors cannot be used at sentencing if they duplicate an offense element. There has not been a single case concerning this error in 1958(a) convictions like that suffered by the Petitioner. No one else has noticed it, raised it, and no court has decided it.

For example, in United States v. Sinclair, 74 F.3d 753 (7th Cir. 1995) the defendant challenged enhancement for "abuse of trust" in his 18 U.S.C. 215(a)(1) conviction. Because "Abuse of trust" is an element of Section 215(a)(2) and not (a)(1), Sinclair lost. However, the court noted that "when an aggravating factor is a necessary element of the crime, a court may not employ enhancement for the same factor. Ibid. at 763. Also, the court "determined that it can assume an offense level before

enhancements accounts for every element of the crime". Ibid. Relying on this holding in Sinclair, ibid., Petitioner asserts that the base offense level of 33 in USSG 2A1.5 should encompass the conduct necessary for conviction in 1958(a) cases--including the "critical" consideration element complained of here. However, it is salient to note, though, that the sentencing guideline directly connected to 18 U.S.C. 1958(a)--namely, 2E1.4--begins at a base offense level of 32 and provides for no enhancements. Comparatively, in the Third Circuit, this principle was applied in United States v. Knobloch, 131 F.3d 366, 373 (3rd Cir. 1997) (where the court sentences defendant for both 924(c) and the underlying drug trafficking offense, court may not impose enhancements for possession of firearm to the drug trafficking offense). See also United States v. Rodgers, 981 F.2d 497, 500 (11th Cir. 1993).

Petitioner also challenges the additional impact that USSG 2A1.5(b)(1) has when applied through "grouping" under USSG 3D1.2 and 3D1.3 to his sentence calculation for count one of his convicted offenses--"attempted kidnapping", 18 U.S.C. 1201(d). Note that Section 1201 does not contain an element of consideration as found in Section 1958(a) (i.e. for "receipt of, promise or agreement to pay anything of pecuniary value"). Further, the appropriate sentencing guideline applied to 1201(d) conviction, namely USSG 2A4.1, does not contain any enhancement for this conduct. Considering the Third Circuit's holding in Knobloch, supra, the principle should be apposite here. A element of conviction on one offense should not be used to enhance another count.

Where Petitioner received his injury on his sentence for count one is that 1201(d) provides a sentence of "up to 20 years" for conviction. In the case at bar, the 1958(a) element duplicated as an enhancement through grouping is "triple counted" for a "multiple punishment" when applied to the wider range provided by 1201(d). The two grouped counts are controlled by the adjusted offense level from 1958(a) with enhancement which resulted in a final calculation for the "group" of offense level 34, criminal history category 2. (Note: 2A1.5's base offense level, 33, plus 4 levels for (b)(1) equals 37 for 1958(a) conviction is higher than the base offense level of 32 under 2A4.1 for the 1201(d) conviction, therefore 37 controls the "group". Defendant received a three-level reduction to 34 under 3E1.1 "acceptance of responsibility" by pleading guilty).

This is a double jeopardy multiple punishment. Ironically, "grouping" was supposed to "prevent double punishment for essentially the same conduct". See USSG, Chapter 3, Part D, introduction commentary ("rationale for grouping is to prevent the imposition of multiple punishment for substantially identical offense conduct"); cf. United States v. Seligsohn, 981 F.2d 1418, 1425 (3rd Cir. 1992). The guidelines were written to treat "multicount convictions with an eye towards eliminating unfair treatment that might

flow from count manipulation" and "in order to minimize the possibility than an arbitrary casting of a single transaction into several counts will produce a longer sentence". See USSG 1A4(a) policy statement. Further, the Sentencing Commission concedes that errors will pop up as the guidelines are used stating "these rules may produce occasional anomalies". See USSG 1A4(e). This is such an anomaly.

If not for this error, Petitioner asserts he could likely have been sentenced at a calculated guidelines offense level no greater than level 30, criminal history category 2, for a calculated range of 108 to 135 months--that would mean he was over-sentenced by a factor of 75-102 months. This is the kind of guidelines calculation error that should compel relief under Rosales-Mireles v. United States, 585 US __, 138 S.Ct. 1897, 201 L.Ed.2d 397 (2018).

The two errors sustained by the Petitioner from the application and impact of 2A1.5(b)(1) are non-frivolous showings of a double jeopardy injury. See United States v. Liotard, 817 F.2d 1074, 1077 (3rd Cir. 1987); United States v. Garcia, 919 F.2d 881, 886 (3rd Cir. 1990). The Double Jeopardy clause protects a defendants from receiving "multiple punishments for the same offense imposed in the same proceeding. Jones v. Thomas, 491 U.S. 376 (1989).

Further, Petitioner does not believe Congressional Intent was to allow prosecutors to manipulate "grouping" to obtain an "end-run" around the 10-year statutory maximum in 18 U.S.C. 1958(a) (for convictions not involving bodily injury or death). Petitioner argues that this sentencing guidelines provision should be ruled unconstitutional "as applied" to defendants convicted of 18 U.S.C. 1958(a). Accordingly, this is an error that requires drastic correction to the petitioner's sentence.

FROM: 69451050 THIEME, CHRISTOPHER
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DATE: 08/29/2020 06:24 PM

C. PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE THAT SENTENCING COURT'S RESTITUTION ORDER IS BEYOND ITS AUTHORITY UNDER 18 U.S.C. 3663A (Due Process and Excessive Fines claim)

In the case at bar, the court is limited in what it can grant restitution for under 18 U.S.C. 3663A. See United States v. Hicks, 997 F.3d 594, 600 (9th Cir. 1993) (that federal courts may only order restitution pursuant to statutory authority). Section 3663A is very clear and enumerates only FOUR instances where restitution is mandated. See United States v. Amato, 540 F.3d 153, 159, 161 (2nd Cir. 2000) (statute limited the court's discretion to impose restitution only for specific kinds of harm, to "direct harm" and not indirect harm or "consequential damages"). Restitution was not mandated by the Petitioner's plea agreement. The court imposed it through its discretion (or abuse of discretion).

The Petitioner is ordered to pay $1,033.50 in restitution to the victim as reimbursement for lost income for a time the victim CHOSE to take off work following the Petitioner's arrest. The reason stated in the pre-sentence report to justify this amount was a week taken off to "be with my supportive family". Petitioner asserts that the court erred by ordering restitution for this reason.

18 U.S.C. 3663A mandates restitution in four narrow situation: (b)(1) for loss or destruction of a victim's property; (b)(2) for costs related to bodily injury (i.e. medical, psychological, or professional services, phyiscal therapy, lost income due to injury); (b)(3) for funeral and related expenses; (b)(4) for costs incurred during participation in the investigation or prosecution of the offense or attending proceedings related to the offense. None of these apply to the case at bar. The victim did not lose or have damage to property. As the crime never happened and Petitioner was arrested in the early mere preparation and conspiracy phase, there were no bodily injuries or death. Any time off to be "with supportive family" is not compensible under (b)(2) because the statute unambiguously limits and ties such recovery for harm or costs to bodily injury. See United States v. Reichow, 416 F.3d 802, 805-806 (8th Cir. 2005); also United States v. Manna, 201 Fed.Appx. 146 (4th Cir. 2006); and United States v. Follet, 269 F.3d 996, 1001 (9th Cir. 2001) (when "the solicitation never proceeded beyond the point of a discussion between the defendant and undercover agent...in the absence of bodily injury, restitution cannot be ordered pursuant to 18 U.S.C. 3663A(b)(2)(A)."). Further, the Petitioner entered a plea agreement to the Information. No grand jury or trial was necessary. The victim never appeared at

arraignment, plea colloquy, or sentencing hearing. There were no participation costs. Expenses other than those enumerated in Section 3663A are simply not compensible here. See United States v. Maynard, 743 F.3d 374. 379 (2nd Cir. 2014). The district court lacked the authority to enter the restitution order.

Because this issue has a direct impact on the validity of a component of the sentence, and on how the Bureau of Prisons can execute (or prolong) the sentence against the Petitioner through sanctions, it should be actionable for review here. While it does not immediately lengthen the time the Petitioner is serving, willful noncompliance with fines could result in a disciplinary sanction where loss of good conduct time credit can be imposed. His future supervised release could be violated and revoked, and the Petitioner returned to custody, by noncompliance with this obligation. Petitioner is forced by BOP agency policy to pay an unlawful restitution order.

D. PETITIONER HAS MADE A SUBSTANTIAL SHOWING OF DENIAL OF CONSTITUTIONAL RIGHT ON ISSUE OF DEFICIENT AND PREJUDICIAL PERFORMANCE OF DEFENSE COUNSEL
(Ineffective Assistance of Counsel claim)

Petitioner asserts that his defense counsel's failure to recognzie or object to these issues before, during, and after sentencing constitute ineffective assistance of counsel. Petitioner asserts these failing satisfy both prongs of the Strickland test and show (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defendant. See Strickland v. Washington, 466 U.S. 669, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, counsel dismissed and ignored the Petitioner's inchoate questions on these issues before and after accepting the plea agreement. These questions and the Petitioner's desire for answers or to challenge these issues should have triggered a "duty to consult" because the Petitioner demonstrated an interested in challenging or potentially appealing these questions. Petitioner was denied an opportunity to meaningfully challenge the conditions of his sentence that he asserts are unconstitutional. Petitioner was further denied the opportunity to appeal because of his counsel's lack of motivation, dismissal of the his questions, and his mis-advice. See Garza v. Idaho, 203 L.Ed.2d 77 (2019), extending the precedent and rights conveyed by Roe v. Flores-Ortega, 528 U.S. 470 (2000) to those who signed plea agreement waivers precluding appeals.

While no one has raised these specific claims before the courts previously, Petitioner asserts that while these specific questions are novel, "double counting" is not a new or novel concept, and should have been known by defense counsel. Defense counsel should have been knowledgeable enough to identify the potential for a "double counting" challenge when inchoate questions were raised. This Court described

such ignorance as the quintessential example of unreasonable performance. See Hinton v. Alabama, 134 S.Ct. 1081 (2014) (an attorney's ignorance on a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland). "When the law is established, a lawyer's ignorance of it can amount to deficient performance". Griffith v. United States, 871 F.3d 1321, 1329 (11th Cir. 2017) (ineffective assistance claim based on failure to object to drug quantity at sentencing); Mack v. United States, 782 Fed.Appx. 789 (11th Cir. 2019) (ineffective assistance claim where lawyer failed to object to weapons enhancement); also Smith v. Singletary, 170 F.3d 1051, 1054 (ignorance of well-defined legal principles is nearly inexcusable).

It is entirely and reasonably probable that the Petitioner woudl have received a lower sentence except that he was prejudiced by counsel's failure to recognize and object to the above issues. In Molina-Martinez v. United States, 136 S.Ct. 1338, 1346-47 (2017), the Supreme Court held that application of an incorrect higher guidelines range will be sufficient to show a reasonable probability of a different result. "Absent unusual circumstances", the court held, a defendant who proves he was sentenced under an incorrect higher guidelines range "will not be required to show more" to establish prejudice. Ibid, at 1347. That the Petitioner was told by counsel that his plea agreement was proper, that counsel dismissed his questions about his double jeopardy concerns of his sentence, ignored his further requests for answers, counsel thus failed him and forced him to forfeit those challenges before the sentencing court and on an appeal he would have otherwise taken. Cf. Jae Lee v. United States, 198 L.Ed.2d 476 (2017) (where counsel's advice that claims had poor prospects led to forfeit of appeal is ineffective assistance); White v. Johnson, 180 F.3d 648, 652 (5th Cir. 1999) (counsel's duty to consult requires more than simply notice that an appeal is unavailable or unavailing; and if counsel ignored questions or concerns that would indicate an interest in the potential challenging of a sentence provision that should have triggered counsel's duty to consult regarding the filing of an appeal). Counsel essentially ignored and abandoned his client immediately after sentencing--attempts to reach him via letters, emails, and via third parties on these questions were ignored. See Davis v. United States, 464 F.2d 1009 (6th Cir. 1972) (counsel's abandonment of client after sentencing is deficient performance).

Although the Petitioner's challenge to the validity of 18 U.S.C. 1958(a) is a novel claim that has not been previously litigated, the Petitioner asserts that counsel rendered ineffective assistance in letting the Petitioner enter a plea of guilty to an unconstitutional statute. One of the first questions that any attorney should ask is whether the statute seeking to criminalize his client's conduct is constitutionally

valid and whether the Government even possessed the power to prosecute. However, ineffective assistance of counsel implicates the voluntariness of the Petitioner's plea. See United States v. Gardner, 417 F.3d 541 (6th Cir. 2005); United States v. Keller, 902 F.2d 1391 (9th Cir. 1990); and Taylor v. United States, 2020 U.S.Dist LEXIS 34341 (S.D.Ind. 2020) (where counsel let defendant plead guilty to a statute when his conduct did not meet the definition and elements, received significant sentence).

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VII. THE QUESTIONS RAISED IN THIS CASE ARE IMPORTANT AND UNRESOLVED.

The issues presented herein have not been decided by this court nor has the court otherwise spoken plainly on these issues. The substantive constitutional claims are novel, never before raised, argued, or decided by this Court or lower courts. The procedural claims open new ground on what constitutes equitable bases for access to habeas relief.

The importance of these questions cannot be understated. If the Petitioner prevails on his constitutional claims regarding his conviction and sentence, regarding the validity of 18 U.S.C. 1958(a) or the application of USSG 2A1.5(b)(1), it will directly impact the convictions and sentences of several hundred federal inmates. Convictions could be vacated. Prison time decreased in resentencing. His questions about "grouping" pursuant to USSG 3D1.2 and 3D1.3 and the analysis of his claims may indirectly open the doors for fairer sentences and resentencing to potentially thousands of federal inmates who suffer comparable injuries. The questions regarding equitable reasons and the application of the Suspension Clause to the AEDPA restrictions on first-time 2255 petitions could drastically tear open much needed access to 2255 relief would change the landscape of AEDPA-era 2255 and other habeas litigation. His other two claims, regarding the legality of the court's restitution and claim of ineffective defense counsel are relatively routine by comparison, but nonetheless important because of their impact on sentencing.

The Court of Appeals and the District Court erred below because the Petitioner articulated several grounds to remove the obstacles to entry and to have his motions adjudicated on the merits of his claims. He argued:

* 1. That the doctrines of equitable estoppel and material mutual mistake provided a need to reform or resentence because the plea agreement contained unconstitutional provisions. Further, as a result, that the courts did not have the power to enter an illegal conviction to impose an illegal sentence.
* 2. He articulated in filings below that the errors constituted a "miscarriage of justice".
* 3. He articulated a reason for not filing within the year because of the complex novel nature of the issues not being easy to figure out until a considerable research effort and the failure of his ability

to get legal advice on whether his claims were viable or arguable while he was tirelessly engaging in research and investigation of his claims. He has been denied access to proper legal advice and frustrated in his efforts to acquire needed knowledge because of his indigency, which raises questions of equal protection and equity.

* 4. He raised an actual innocence by legal innocence claim, questioning the very power of the Government to be able to prosecute, arrest, and imprison him based on a constitutionally invalid statute.

Any one of these should have sufficed to overcome "procedural default". The Petitioner respectfully asks this Court to review the procedural questions raised by this action and the failure to obtain entry to 2255 relief in the District of New Jersey and in the Third Circuit below. The effects of these questions could create a Fifth-Amendment-sized hole in the wall of the AEDPA.

These questions are of such importance and to date remain unresolved that the Petitioner respectfully asks this Court to consider adjudicating the merits of the constitutional claims raised in his 2255 motion in its original jurisdiction if it may.

These questions raise a significant opportunity to the court that could promote a "watershed moment" in the development of the law.

** CONCLUSION **

For the reasons set forth above, the Petitioner respectfully requests this court to grant this Petition for a Writ of Certiorari.

** DECLARATION PURSUANT TO 28 U.S.C. 1746 **

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 26, 2020.

Respectfully submitted,

CHRISTOPHER THIEME
PETITIONER PRO SE