NO.
SUPREME COURT OF THE UNITED STATES

JAMES KERNS	)
	)
Petitioner	)
	)
- VS. -	)
	)
UNITED STATES OF AMERICA	)
	)
Respondent.	)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

/s Michael Losavio
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QUESTION PRESENTED FOR REVIEW

Question I. If Count 3 charging a violation of 18 U.S.C. § 924 is without legal, constitutional foundation as it alleges a crime of violence in Count 2, interstate domestic violence in relation to Count 1, kidnapping, which was not a crime of violence pursuant to *United States v. Davis*, 588 U.S. ___ (2019), how can that be a proper relational predicate "crime of violence" as to sustain a conviction for Count 3?

And Count 2 references the "crime of violence" as defined by 18 USC 16, whose *residual clause* was found unconstitutionally vague in *Sessions v. Dimaya*, 584 U.S. ___ (2018).

Shouldn't Kerns' conviction for Count 3 be reversed, vacated and dismissed with prejudice?

Question II – Was the plea taken erroneously and Kerns' sentence flawed where the elements of the offense of kidnapping were not established therein or there was confusion as to those elements, especially given the ill-defined ***"otherwise"*** residual provision of the kidnapping statute. Is that plea constitutionally infirm as the residual "otherwise" clause is unconstitutionally vague and a conviction under it error?

Shouldn't Kerns judgment based on this infirm plea to an unconstitutionally vague element be reversed and vacated?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE COURT
WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

James Kerns, Appellant, Petitioner

United States of America, Appellee, Respondent

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OPINIONS AND ORDERS BELOW

The opinion below of the United States Court of Appeals for the Sixth Circuit was rendered in *United States v. James Kerns,* Case number 20-1563; that opinion affirmed the judgment of the United States District Court for the Western District of Michigan in case number 1-19-CR- 32 where the original sentence committed Kerns to the custody of the Bureau of Prisons to a total term of 192 months imprisonment.

JURISDICTION

i. The opinion of the United States Court of Appeals for the Sixth Circuit was entered on 12 August 2021; pursuant to Rule 13.1 of the rules of this Court, the Petition is timely filed.

ii. No petition for a rehearing was filed in this matter; no extension of time within

which to file a petition for a writ of certiorari has been made.

iii. This is not a cross-Petition pursuant to Rule 12.5.

iv. The statutory provision conferring jurisdiction upon this Court to review upon a writ of certiorari the judgment or order in question is 28 U.S.C. §1254.

Constitutional Provisions And Other Authorities Involved In This Case

Fourteenth Amendment to the Constitution of the United States

Fifth Amendment to the Constitution of the United States

Kidnapping, 18 U.S. Code § 1201.

> **(a)**Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or ***otherwise*** any person, except in the case of a minor by the parent thereof, when—
> **(1)**… the offender travels in interstate or foreign commerce … in committing or in furtherance of the commission of the offense…(emphasis added)

Interstate domestic violence, 18 U.S. Code § 2261:

> A person who travels in interstate or foreign commerce…with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

STATEMENT OF THE CASE

Jurisdiction in the First Instance

Subject matter jurisdiction vested in the U.S. District Court for the Western District of Michigan pursuant to 18 U.S.C. §3231; Kerns was indicted for offenses against the laws of the United States and was convicted upon a plea of guilty within that district.

Appellate jurisdiction vested in the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1291 and 28 U.S.C. §1294.

Presentation of Issues in the Courts Below and Facts

James Kerns is a young man with a history of mental illness that first presented in childhood. It continued into early adulthood, leading to in-patient treatment while in the U.S. Air Force and ultimately leading to his discharge. He began working back home in Kentucky and had a relationship that led his travel from Kentucky to his domestic partner's family's home in Michigan and to the instant charges of kidnapping, interstate domestic violence and brandishing a firearm in the commission of a felony.

Kerns' changed his plea to guilty of Counts 1 and 3 without a plea agreement.

During the plea colloquy the magistrate judge told Kerns what the government would need to prove if he went to trial, including:

> THE COURT: All right. If you decided to go to trial on Counts 1 and 3 rather than pleading guilty there are certain things the government would have to prove. Those would include the fact that you kidnapped A.C., held her for ransom, and traveled in interstate commerce, that is, you traveled from Kentucky to Michigan in the commission of that crime….
>
> …Do you understand what the government would have to prove to convict you on Counts 1 and 3 if you went to trial?
>
> THE DEFENDANT: Yes.

The plea proffer of the prosecution details the events leading to the charges against Mr. Kerns, though they conflict with the magistrate judge's statement to Kerns,

Thereafter, despite a plea for leniency and consideration of his mental illness, the District Court sentenced Kerns to 108 months imprisonment on Count I, the top of the guidelines range as calculated, in addition to the consecution 84 months for brandishing a firearm.

He appealed this conviction. The Court of Appeals affirmed, as to all issues raised.

But in a concurring opinion Judge Readler noted that

> …the statute's deployment of the term "otherwise" does raise a fair question as to what conduct Congress in fact criminalized. The Supreme Court answered that question many years ago, at least in part. *See Gooch v. United States*, 297 U.S. 124 (1936). But its manner of doing so may well have failed the test of time. For the decision employed now-disfavored a textual interpretive methods, and in the process dramatically expanded the reach of federal criminal jurisdiction, leaving separation-of-powers and federalism concerns in its wake. Opinion, p 11.

This Petition follows.

REASONS FOR GRANTING THE WRIT

Question I. – If Count 3 charging a violation of 18 U.S.C. § 924 is without legal, constitutional foundation as it alleges a crime of violence in Count 2, interstate domestic violence in relation to Count 1, kidnapping, which was not a crime of violence pursuant to *United States v. Davis*, 588 U.S. ___ (2019), how can that be a proper relational predicate "crime of violence" as to sustain a conviction for Count 3?

And Count 2 references the "crime of violence" as defined by 18 USC 16, whose *residual clause* was found unconstitutionally vague in *Sessions v. Dimaya*, 584 U.S. ___ (2018).

Shouldn't Kerns' conviction for Count 3 be reversed, vacated and dismissed with prejudice?

Count 3 punishes Kerns for brandishing a firearm in furtherance of the crime of violence as charged in Count 2, interstate domestic violence (18 U.S.C. § 924(c) (1)(a)(ii); 18 USC 2261). Via Superseding Information, this was an amendment to the charges, changing the predicate crime of violence referenced in the § 924 (c) brandishing charge from kidnapping (Count 1) interstate domestic violence (Count 2). This reflected the holding in *United States v. Davis*, 588 U.S. ___ (2019) that the residual clause for qualifying an offense as a "crime of violence" was unconstitutionally vague and could not be used to establish that predicate under §924(c)(1)(a)(ii).

Yet this doesn't remedy the fundamental problem that Count 2 itself, interstate domestic violence, is not automatically a "crime of violence" as required by 924 (c)(3) It doesn't automatically support a conviction under 18 USC §924(c)(1)(a)(ii). This is because the 18 USC §2261 element of "crime of violence" is undefined within the statute and thus defaults to the definition of 18 USC §16, "Crime of violence defined."

But 18 USC §16 suffers from the same infirmity as the Armed Career Criminal Act and 924 (c): it includes a residual clause that is unconstitutionally vague and illegal, as so held in

Sessions v. Dimaya, 584 U.S. ___ (2018)

The predicate Count 2 alleged that Kerns':

> …traveled in interstate commerce, from Kentucky to Michigan, with the intent to kill, injure, harass, and intimidate A.C., his intimate partner, and as a result of such travel, committed and attempted to commit a crime of violence against A.C. through use of a dangerous weapon.

But there was no crime of violence to support Count 2, which means Count 3 must fail.

In the alternative, Kerns' plea colloquy was erroneous and inadequate to sustain a valid plea per *Boykin v. Alabama*. The failure to establish that Kerns understood that to which he was pleading, and that to which he was pleading did establish a crime as supported by the government's proffer, requires a reversal and remand in this matter.

As the elements required to establish Count 3 were not established, Kerns' conviction and sentence on Count 3 must be reversed and vacated and dismissed.

Question II –Was the plea taken erroneously and Kerns' sentence flawed where the elements of the offense of kidnapping were not established therein or there was confusion as to those elements, especially given the ill-defined "otherwise" residual provision of the kidnapping statute. Is that plea constitutionally infirm as the residual "otherwise" clause is unconstitutionally vague and a conviction under it error?

Shouldn't Kerns judgment based on this infirm plea to an unconstitutionally vague element be reversed and vacated?

Mr. Kerns plea was taken erroneously due to insufficiency as to the facts and Kerns' understanding of that to which he was pleading.

The plea colloquy with Kerns demonstrated insufficiency and a lack of clarity as to

i) what Kerns thought he was pleading to and

ii) what the prosecution said he did and

iii) the requirements of the kidnapping statute

such as to assure a valid, constitutional plea to Count 1, Kidnapping, in accordance with Fed. R. Crim. Proc. 11 and as to the constitutionality of that conviction due the overly vague "otherwise" residual clause as applied here. *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Brady v. United States*, 397 U.S. 742 (1970); See *United States v. Davis*, 588 U.S. ___ (2019), *Sessions v. Dimaya*, 584 U.S. ___ (2018), as to unconstitutionally vague residual language.

Count 1 of the Superseding Information alleged Kerns':

> ..unlawfully seized, confined, kidnapped, abducted, or carried away A.C. and held her for ransom, reward or otherwise, after traveling in interstate commerce, from Kentucky to Michigan, in furtherance of the commission of the offense.

During the plea colloquy the magistrate judge told Kerns what the government would need to prove if he went to trial, to wit:

> THE COURT: All right. If you decided to go to trial on Counts 1 and 3 rather than pleading guilty there are certain things the government would have to prove. Those would include the fact that you kidnapped A.C., held her for ***ransom,*** and

traveled in interstate commerce, that is, you traveled from Kentucky to Michigan in the commission of that crime…. (emphasis added)

…Do you understand what the government would have to prove to convict you on Counts 1 and 3 if you went to trial?

THE DEFENDANT: Yes.[1]

Here the record does not disclose that Kerns knowingly and voluntarily entered a valid guilty plea as he was not told the correct elements of the offense to which he must admit nor did he admit to all the necessary elements of his intention/mental state/motivation:

1) That Kerns pled to kidnapping for ransom, where ransom was *never* a factor here in this case and there was no evidence anywhere of that, demonstrates this.
2) That the proffer of facts by the prosecution does not establish abduction for ransom, nor any other included motivation, demonstrates this.
3) That the residual motivation clause of the kidnapping statute – "otherwise"- is implicated here demonstrates this as both a sufficiency or constitutional infirmity as the "otherwise" fact/motivation was never mentioned and may itself be insufficiently defined due to vagueness.

The proffer to which Kerns agreed was lacking in all legal elements of the offense.

Kerns' Charge and Conviction Are Constitutionally Infirm

The kidnapping (Count 1) was not a crime of violence, as agreed by the parties, reflecting *United States v. Davis*, 588 U.S. ___ (2019) where the Supreme Court held that the residual clause for qualifying an offense as a "crime of violence" was unconstitutionally vague and could not be used to establish that predicate under §924(c)(1)(a)(ii).) This is part of an ongoing review

1 There was never an issue with "ransom" in this matter other than it appears in the statute, the Information copied the statute, and the magistrate judge erroneously repeated the inapplicable language from the Information.

of constitutionally vague, infirm statutes that include a residual clause that is unconstitutionally vague and illegal, such as 18 USC §16, as so held in *Sessions v. Dimaya*, 584 U.S. ___ (2018), the Armed Career Criminal Act (*Johnson* v. *United States*, 576 U. S. 591 (2015)) and 924 (c).

As Justice Gorsuch noted in *United States v Davis*, "In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them. Vague laws transgress both of those constitutional requirements." Id, at 1

The Fifth Amendment and Fourteenth Amendment to the US Constitution assure due process of law. That due process requires proper notice to a citizen of what is prohibited and proper limits to police power as to what can be enforced.

As the Supreme Court noted in *Davis* :

> 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 the laws they are expected to abide. See *Kolender* v. *Lawson*, 461 U.S. 352, 357–358, and n. 7 (1983); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89–91 (1921); *United States* v. *Reese*, 92 U.S. 214, 221 (1876).

Yet here we have a related case with an internal "residual" clause that equally violates the Constitution due to vagueness.

Count 1 alleged violation of 18 U.S. Code § 1201.Kidnapping, which makes it a crime where three (3) elements are met:

> **(a)**Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or ***otherwise*** any person, except in the case of a minor by the parent thereof, when—
> **(1)**… the offender travels in interstate or foreign commerce … in committing or in furtherance of the commission of the offense…(emphasis added)

But there is no statutory guidance as to what it means to "…holds for …***or otherwise*** any

person," (emphasis added)

Count 1 of the Superseding Information alleged Kerns':

> ..unlawfully seized, confined, kidnapped, abducted, or carried away A.C. and held her for ransom, reward or ***otherwise,*** after traveling in interstate commerce, from Kentucky to Michigan, in furtherance of the commission of the offense. (emphasis added)

"Otherwise" is constitutionally vague and insufficient in and of itself. But in 1936 the Supreme Court attempted to save this through an interpretation that related to a showing of "benefit" to the defendant: "[I]t is sufficient for the government to show that the defendant acted for *any* reason which would in *any* way be of benefit." *Gooch v. United States,* 297 U.S. 124, 128, 56 S.Ct. 395, 397, 80 L.Ed. 522 (1936) [2] That issue of "any way be of benefit" is still simply too vague and open to interpretation without any limits on prosecutorial discretion.

What was the "benefit" Kerns sought, under the vague notion that defendant's reason must be of some benefit? There is no benefit to Kerns in his actions, only a manifestation of his mental illness. The proffer by the prosecution at the plea colloquy made no reference to this factor or reason for this element of the statute, a crucial omission. The plea colloquy focused on this all being for *ransom,* which it certainly was not.

> THE COURT: All right. If you decided to go to trial on Counts 1 and 3 rather than pleading guilty there are certain things the government would have to prove. Those would include the fact that you kidnapped A.C., held her for ***ransom,*** and traveled in interstate commerce, that is, you traveled from Kentucky to Michigan in the commission of that crime.… (emphasis added)
>
> THE DEFENDANT: Yes.

None of the evidentiary documents mention ransom, and the essential prosecution's proffer never mentions ransom; that proffer never mentions ransom nor reward nor "otherwise"

2 See also *Chatwin v. United States,* 326 U.S. 455, 459, 66 S.Ct. 233, 235, 90 L.Ed. 198 (1946)

benefit to Kerns, and the proffer fails to establish a factual basis for the federal kidnapping charge.

The proffer by the prosecution did not establish all the elements of kidnapping as it did not detail any impermissible motive, even under the reasoning of *Gooch v. United States*; that proffer only states:

> We'd be able to prove that beginning in or about January or February of 2018, the Defendant got in a romantic relationship with a young woman by the name of Alissa Colby, who is from South Boardman, Michigan. They relocated to Louisville, Kentucky. Stayed there until approximately June of 2018. They were engaged in intimate relations during that time.
>
> The relationship was violent, and as a result, Ms. Colby eventually was able to get the Defendant to return her home supposedly just for a short visit. .And he agreed to do that. He returned her to South Boardman. And then he himself went back to Louisville to work.
>
> When she got to South Boardman, she told him that they were breaking up. She didn't want to see him again. They communicated back and forth by text and cell phone and things of that nature.
>
> In July, specifically July 23rd, the Defendant drove unbeknownst to Ms. Colby back up from Louisville to the Kalkaska County area, and by now he had this Hi-Point firearm that he had bought down in Louisville, and contacted her once he got near her house and asked her to talk to him. She thought he was still in Louisville. And then during their talk he said, well, can we video conference? Can I least see you by video one more time? And he convinced her to go out on the deck of her family's home so that they could get better reception. And he was out there with the gun and a ski mask and grabbed her off the porch. She says that he threatened to kill her and her family if he didn't do what she said -- she didn't do what he said, and then forced her into a car that he had nearby. So they drove way from her family's home. She saw a deputy sheriff in a speed trap by the side of the road as they were driving away. She grabbed the wheel and the deputy noticed that and started chasing the car, and a short time later pulled the Defendant over and this case unravelled and that's what brings us here.
>
> So that's what we could prove. We believe that that establishes all of the elements of the offense.

This fails to set out the requisite "otherwise" benefit to Kerns. Kerns' was not a valid plea

nor is this sufficient to prove a crime of federal kidnapping, as well as implicate an unconstitutional prosecution that is too vague to withstand scrutiny.

The District Court did not comply with its obligations under Rule 11 by verifying that Mr. Kerns admitted to the required elements of the offense.

And that plea was constitutionally infirm due to the vagueness of the "otherwise" element of kidnapping.

As such, Kerns' judgment and sentence should be vacated and reversed and this matter remanded so that his plea of guilty be set aside and dismissed.

CONCLUSION

The judgment and sentence were erroneous and this Petition for Writ of Certiorari should be granted and Mr. Kerns given the relief he has argued for herein.

Respectfully submitted,

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Counsel of Record for
Petitioner James Kerns

Certification of Word Count and Petition Length

The undersigned certifies that this Petition for a Writ of Certiorari does not exceed 5000 words nor 17 pages in length, not counting the appendix materials, and is in compliance with the length rules of Supreme Court Rule 33.

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Counsel of Record for Petitioner
pursuant to the Criminal Justice Act

Certificate of Service

A copy of the foregoing Petition for a Writ of Certiorari has been served this day by U.S. Postal Mail or via a private expedited service on Hon. Brian Fletcher, Solicitor General of the United States, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001.

This 18th day of August, 2021

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Opinion Affirming of the United States Court of Appeals for the Sixth Circuit... A 1-17… United States v. James Kerns,

Judgment of the U.S. District Court for the Western District of Michigan……B 1-7… United States v. James Kerns,

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> A person who travels in interstate or foreign commerce…with the intent to kill, injure, harass, or intimidate a spouse, intimate partner, or dating partner, and who, in the course of or as a result of such travel or presence, commits or attempts to commit a crime of violence against that spouse, intimate partner, or dating partner, shall be punished as provided in subsection (b).

File Name: 21a0181p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	⎫	
	⎬	No. 20-1563
v.	⎪	
JAMES MICHAEL KERNS, *Defendant-Appellant*.	⎭	

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids.
No. 1:19-cr-00032-1—Janet T. Neff, District Judge.

Decided and Filed: August 12, 2021

Before: SUTTON, Chief Judge; COLE and READLER, Circuit Judges.

COUNSEL

ON BRIEF: Michael M. Losavio, Louisville, Kentucky, for Appellant. Timothy VerHey, Kathryn Dalzell, UNITED STATES ATTORNEY'S OFFICE, Grand Rapids, Michigan, for Appellee.

COLE, J., delivered the opinion of the court in which SUTTON, C.J., and READLER, J., joined. READLER, J. (pp. 11–17), delivered a separate concurring opinion.

OPINION

COLE, Circuit Judge. James Michael Kerns pleaded guilty to one count of kidnapping and one count of possession of a firearm in furtherance of a crime of violence. The district court imposed a 192-month sentence. On appeal, Kerns challenges his guilty plea and sentence. For the reasons that follow, we affirm.

I.

On July 24, 2018, a sheriff's deputy observed a vehicle swerving in traffic and initiated a stop. Kerns was operating the vehicle. When the car came to a halt, the passenger, Kerns's prior romantic partner Alissa Colby, exited and yelled that Kerns had kidnapped her at gunpoint. Kerns was immediately arrested. He admitted to driving from Kentucky to Colby's Michigan residence and threatening to kill Colby and her family if she did not leave with him. Colby later explained that she had jerked the wheel of the car to get the attention of the deputy.

Kerns was indicted on three counts: kidnapping (18 U.S.C. § 1201(a)(1)), interstate domestic violence (§ 2261(a)(1)), and possession of a firearm in furtherance of a crime of violence (§ 924(c)(1)(a)(ii)). Kerns requested and obtained a competency and sanity evaluation, which found he suffered from major depressive disorder and borderline personality disorder. He was nonetheless found to have the capacity for criminal responsibility and to be competent to stand trial.

On February 12, 2020, Kerns pleaded guilty before a magistrate judge to kidnapping and possession of a firearm in furtherance of a crime of violence without the benefit of a plea agreement. Kerns confirmed that he understood the nature of the charges and the maximum prison time he could face, that his decision to plead guilty was voluntary, and that he was waiving certain constitutional rights. Both parties agreed that there was a sufficient factual basis to support Kerns's plea. Having found that Kerns's plea was knowing and intelligently made, the magistrate judge recommended that the district judge accept the plea. On February 28, the district judge adopted the magistrate judge's report and recommendation and accepted Kerns's guilty plea.

The district court sentenced Kerns on May 27. At sentencing, Kerns confirmed he had reviewed the presentence-investigation report and had no objection to its findings. The court explained that the recommended sentencing range for the kidnapping count was 87 to 108 months' imprisonment and that the firearm count under § 924(c) carried a mandatory minimum sentence of 84 months' imprisonment, to be served consecutively. Kerns's counsel asked for lenience in sentencing based on his substantial mental-health history. The court ultimately

sentenced Kerns to 108 months' imprisonment on the kidnapping count, the top of the Guidelines range, in addition to a consecutive mandatory minimum sentence of 84 months' imprisonment on the firearm count. The court recommended mental-health treatment in light of the issues raised by Kerns's counsel.

The court also indicated that Kerns and his counsel had reviewed and signed an order noting additional sentencing conditions prior to sentencing. This signed order noted, among other things, that Kerns "must pay a below advisory guideline fine of $1,000.00 on Counts One and Three, for a total of $2,000.00." (Order, R. 79, PageID 293.) The court summarized this order from the bench, noting that "[t]he additional conditions include a fine of $1,000 on which interest is waived." (Sent'g Hr'g Tr., R. 86, PageID 338.)

Neither party raised any objections to Kerns's sentence. This appeal timely followed.

II.

A. Sentencing Inconsistency

Kerns first contends that an inconsistency exists between the court's oral reference to a fine of $1,000 and its imposition of a total fine of $2,000. Kerns asserts "that when an oral sentence conflicts with the written sentence, the oral sentence controls." *United States v. Schultz*, 855 F.2d 1217, 1225 (6th Cir. 1988). But there was no genuine ambiguity as to the total fine Kerns would be required to pay. Prior to sentencing, Kerns and his counsel reviewed and signed additional sentencing conditions that provided he would pay a fine of $1,000 per count for a total of $2,000. When considered in context, the court's failure to specify that the $1,000 fine applied to each count could not have reasonably misled Kerns.

B. Procedural and Substantive Reasonableness

Next, Kerns purports to challenge both the procedural and substantive reasonableness of his sentence, but his arguments implicate only substantive reasonableness. Procedural reasonableness challenges, unlike substantive ones, focus on whether the district court "fail[ed] to calculate (or improperly calculate[ed]) the Guidelines range, treat[ed] the Guidelines as mandatory, fail[ed] to consider the § 3553(a) factors, select[ed] a sentence based on clearly

erroneous facts, or fail[ed] to adequately explain the chosen sentence." *Gall v. United States*, 552 U.S. 38, 51 (2007); *United States v. McBride*, 434 F.3d 470, 476 n.3 (6th Cir. 2006). Kerns does not identify any procedural error in the district court's sentencing decision. Nor could he. The court calculated Kerns's sentencing range correctly, consulted the 15 U.S.C. § 3553(a) factors in ordering a 192-month sentence, and carefully explained its reasoning. To succeed in challenging his sentence, Kerns's arguments must thus go to his sentence's substantive reasonableness.

The district court's sentencing decision is reviewed for abuse of discretion. *United States v. Lanning*, 633 F.3d 469, 473 (6th Cir. 2011). A sentence is assessed for substantive reasonableness by asking whether it is "proportionate to the seriousness of the circumstances of the offense and offender, and sufficient but not greater than necessary, to comply with the purposes of § 3553(a)." *United States v. Solano-Rosales*, 781 F.3d 345, 356 (6th Cir. 2015) (quoting *United States v. Vowell*, 516 F.3d 503, 512 (6th Cir. 2008)). Our review is "highly deferential" though not "without limit." *United States v. Boucher*, 937 F.3d 702, 707–08 (6th Cir. 2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018)).

Kerns argues that the district court failed to give sufficient weight to his mental-health history in weighing the § 3553(a) factors, and consequently his sentence was greater than necessary. First, Kerns's sentence fell within his Guidelines range and therefore is presumptively reasonable. *Boucher*, 937 F.3d at 707. Second, the court considered Kerns's significant mental-health issues but concluded that the seriousness of his offense, which was supported by a victim-impact statement, deterrence, and the need to protect the public favored a sentence at the top of the Guidelines range. At the same time, the court rejected the government's request for an above-the-Guidelines sentence as "greater than necessary to comply with the statute[.]" (Sent'g Hr'g Tr., R. 86, PageID 337.) A district court does not commit reversible error when it simply assigns more weight to certain § 3553(a) factors than others and arrives at a presumptively reasonable sentence. *United States v. Robinson*, 892 F.3d 209, 214 (6th Cir. 2018) ("[A] district court does not commit reversible error simply by 'attach[ing] great weight' to a few factors." (quoting *Gall*, 552 U.S. at 57)). Kerns's sentence was not substantively unreasonable.

C. VALIDITY OF THE GUILTY PLEA

Kerns also challenges the validity of his guilty plea. First, he argues that his guilty plea to the kidnapping charge was invalid because the court improperly advised him of its elements. He also argues that the district court failed to determine a factual basis for his plea to both the kidnapping and firearm charges.

Because Kerns did not object contemporaneously to these purported errors, we apply plain-error review. *United States v. Lalonde*, 509 F.3d 750, 757 (6th Cir. 2007). To prevail, Kerns must show that the district court committed an "(1) error, (2) that is plain, and (3) that affects substantial rights," and if those elements exist, we may grant relief for the error "if (4) the error seriously affects the fairness, integrity, or reputation of judicial proceedings." *Id.* at 757–58. An error affects a defendant's substantial rights if there is a "a reasonable probability that, but for the error, he would not have entered the plea." *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004).

1. Violation of Rule 11(b)(1)(G)

Kerns's argument that he was improperly advised of the elements of the kidnapping offense implicates Federal Rule of Criminal Procedure 11(b)(1)(G). Under that rule, district courts "must inform the defendant of, and determine that the defendant understands . . . the nature of each charge to which the defendant is pleading" before accepting the defendant's guilty plea. Fed. R. Crim. P. 11(b)(1)(G). The "district court must be satisfied, after discussion with the defendant in open court, that the defendant understands the elements of the offense." *Lalonde*, 509 F.3d at 760 (quoting *United States v. McCreary-Redd*, 475 F.3d 722, 723 (6th Cir. 2007)). "Where a defendant is represented by competent counsel, the court usually may rely on that counsel's assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005). And "[t]he Supreme Court has suggested that providing the defendant with a copy of the indictment prior to his plea of guilty creates a presumption that the defendant was informed of the nature of the charge against him." *Lalonde*, 509 F.3d at 760 (citing *Bousley v. United States*, 523 U.S. 614, 618 (1998)).

Upon carefully reviewing the record, we conclude that the district court properly determined that Kerns understood the elements of kidnapping. The federal kidnapping statute provides, in relevant part, that a person is guilty of kidnapping where he "unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person" while traveling in interstate commerce. 18 U.S.C. § 1201(a). Kerns's superseding felony information—which the district court, through the magistrate judge, read verbatim during the plea hearing—parroted these elements, noting that Kerns "unlawfully seized, confined, kidnapped, abducted, or carried away [Colby] and held her for ransom, reward or otherwise, after traveling in interstate commerce[.]" (Supers. Felony Info., R. 53, PageID 139.) Kerns's sole objection is to the fact that later in the plea hearing, the judge commented that if he were to go to trial, the government would have to prove that he "kidnapped [Colby], held her for ransom, and traveled in interstate commerce." (Plea Hr'g Tr., R. 66, PageID 196.) Kerns claims that this caused him to misunderstand the full nature of his charge because the court's comment omitted the statutory language specifying that a defendant can be convicted of kidnapping that is motivated by "ransom *or reward or otherwise*." § 1201(a) (emphasis added).

We are not persuaded. The record reveals that the court fully apprised Kerns of the elements of kidnapping as described in the superseding felony information and that Kerns consulted with his lawyer about the nature of his charges. And the court fully described the elements of § 1201(a) in another portion of the plea hearing. Further, Kerns confirmed at his plea hearing multiple times that he had read the superseding felony information, discussed it with his attorney, and understood the nature of his charges, including the kidnapping charge. We, therefore, cannot conclude that the district court's failure to restate the full language of § 1201(a) caused Kerns to misunderstand the essential elements of the kidnapping offense to which he pleaded guilty. Much less did this omission "seriously affect[] the fairness, integrity, or reputation of [his] judicial proceedings." *See Lalonde*, 509 F.3d at 759–61 (citation omitted) (an "omission alone" of an element of an offense did not demonstrate the defendant lacked awareness of the charges against him). Moreover, Kerns has not presented any plausible argument that, but for the court's alleged failure to inform him of the motive element in one portion of his plea hearing, he would have not entered the plea. *See United States v. Hobbs*, 953 F.3d 853, 857–58 (6th Cir. 2020). In fact, omitting the "otherwise" language from § 1201(a)

suggested to Kerns that the government had a more onerous burden that it did in reality, and yet he pleaded guilty nonetheless. He thus fails to show that the error affected his substantial rights.

2. Violation of Rule 11(b)(3)

Under Federal Rule of Criminal Procedure 11(b)(3), district courts "must determine that there is a factual basis for the plea" before entering judgment. The "purpose of this rule is to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Lalonde*, 509 F.3d at 762 (internal citations and quotations omitted). Kerns argues that Rule 11(b)(3) was not satisfied with respect to both his kidnapping and firearm charges. We disagree.

Kerns claims that the district court did not establish facts showing that Kerns's kidnapping was motivated by "ransom or reward or otherwise." We have held that the federal kidnapping statute's "otherwise" clause is satisfied where the government "show[s] that the defendant acted for *any* reason which would in *any* way be of benefit" to the defendant. *United States v. Small*, 988 F.3d 241, 250 (6th Cir. 2021). Here, during Kerns's plea hearing, the government detailed at length the evidence it would produce were the case to go to trial, including evidence suggesting that Kerns's actions were motivated by his emotional ties to the victim. And Kerns agreed that the evidence described was sufficient to support a conviction. Based on these representations, the district court did not plainly err in concluding that his actions provided a sufficient factual basis to support the kidnapping charge. *Lalonde*, 509 F.3d at 762 (noting "even a summary of the charges in the indictment and an admission by the defendant" may be "sufficient to establish a factual basis" (internal quotations omitted)).

Kerns also claims the district court did not confirm there was a factual basis for his guilty plea to possession of a firearm in furtherance of a crime of violence under 18 U.S.C. § 924(c)(1)(A)(ii). Section 924(c)(1)(A)(i) provides that any person who possesses a firearm in furtherance of a crime of violence is subject to a mandatory-minimum sentence of 60 months' imprisonment. But if the firearm is "brandished," the mandatory-minimum sentence increases to 84 months' imprisonment. § 924(c)(1)(A)(ii). Kerns contends that the facts

proffered by the government show only that "he *possessed* a firearm in relation to a crime of violence, not that he *brandished* a firearm." (Appellant Br. at 43.)

This argument contradicts the record. At Kerns's plea hearing, the government noted that it would be able to prove Kerns brandished a firearm because "he had it out and pointed it at [the victim] when he grabbed her off the porch." (Plea Hr'g Tr., R. 66, PageID 205.) Kerns expressly agreed to that factual representation. Therefore, the court correctly determined a factual basis for Kerns's guilty plea to § 924(c)(1)(A)(ii).

Finally, Kerns suggests that his firearm conviction lacks a factual basis because the government failed to set forth facts establishing that he possessed a firearm in furtherance of a "crime of violence." This claim is belied by the record as well. At the plea hearing the court informed Kerns—as did the superseding felony information—that the "crime of violence" furthered by his possession of a firearm was interstate domestic violence under 18 U.S.C. § 2261(a), a charge that the government promised to dismiss in exchange for his plea. Moreover, Kerns confirmed his understanding that the "crime of violence" for purposes of the § 924(c)(1)(A) count was interstate domestic violence. And he agreed that the government's description of the evidence that it would present at trial would be sufficient to support a conviction on that count.

Kerns contends that § 2261(a) does not "automatically" establish a factual basis for the "crime of violence" element of § 924(c)(1)(A) because § 2261(a) has its own "crime of violence" element. (Appellant Br. at 48–49.) True enough. We have summarized the elements of a § 2261(a)(1) claim as follows:

> [T]he Government must show that the defendant: (1) traveled in interstate commerce (2) with the intent to kill, injure, harass, or intimidate (3) a spouse or intimate partner (4) and that, in the course of or as a result of such travel (5) the defendant committed or attempted to commit a crime of violence against that spouse or intimate partner.

United States v. Utrera, 259 F. App'x 724, 731 (6th Cir. 2008). But Kerns fails to explain why this embedded "crime of violence" element affects the nature of his guilty plea. Nor does he identify any authority suggesting that the court was required to inform him of the specific "crime of violence" the government believes he committed or attempted to commit under § 2261(a)(1).

In any event, as the government points out in its briefing, Kerns's conduct could constitute felonious assault under Michigan Law, *see* Mich. Comp. Laws § 750.82(1). The elements of felonious assault in Michigan are: "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v. Avant*, 597 N.W.2d 864, 869 (Mich. Ct. App. 1999). The facts established at the plea hearing—that Kerns threatened Colby at gunpoint and forced her into a nearby car—would support a conviction under this statute and, thus, be a "crime of violence" under § 2261(a). Even if we concluded that the court should have informed Kerns that felonious assault could serve as a "crime of violence" for purposes of § 2261(a), Kerns has not pointed to any record evidence suggesting that he would have not entered his guilty plea to § 924(c)(1)(A) had he been supplied with this information. *See Dominguez Benitez*, 542 U.S. at 76.

While the government devotes much briefing to the issue of whether § 2261(a) can as a matter of law serve as a predicate "crime of violence" for Kerns's violation of § 924(c)(1)(A), Kerns fails to articulate an argument on this issue. We therefore decline to address it. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quotations omitted)).

D. VAGUENESS

Kerns argues that the term "or otherwise" in the federal kidnapping statute, 18 U.S.C. § 1201, is unconstitutionally vague. "The void-for-vagueness doctrine requires that [a] statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Farah*, 766 F.3d 599, 614 (6th Cir. 2014) (quotations omitted).

Kerns's argument lacks merit. Section 1201 criminalizes kidnapping committed in interstate commerce where the victim is held "for ransom or reward or otherwise." 18 U.S.C. § 1201(a). The Supreme Court has explained that "or otherwise" encompasses any benefit which a captor might attempt to obtain for himself. *Gooch v. United States*, 297 U.S. 124, 128 (1936); *see also United States v. Healy*, 376 U.S. 75, 82 (1964) (explaining that § 1201

was concerned not with the "ultimate purpose sought to be furthered by a kidnaping" but with the "undesirability of the act of kidnaping itself"); *Small*, 988 F.3d at 250. Given the expansive reach of the term "otherwise," we conclude that Kerns was given sufficient notice that his conduct—which included driving from Kentucky to Michigan to seize Colby against her will at gunpoint—was prohibited under § 1201. Indeed, we have rejected Kerns's exact argument once before. *See Daulton v. United States*, 474 F.2d 1248, 1248–49 (6th Cir. 1973) (per curiam) ("The obvious purpose of Sec. 1201 is too plain to warrant the assertion that any person of ordinary intelligence would fail to understand what conduct it forbids.").

Finally, Kerns appears to challenge his firearm conviction on the grounds that its predicate crime of violence (Kerns's since-dropped Count 2 for § 2261 interstate domestic violence, *see supra*) itself contains a "crime of violence" element that is unconstitutionally vague. Kerns is correct that the Supreme Court has invalidated one of the statutory definitions of "crime of violence" as unconstitutionally vague, namely 18 U.S.C. § 16(b)'s "residual clause" definition of the term. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223, 1234 (2018). But Kerns fails to explain how the unconstitutional vagueness of § 16(b)'s residual clause affects the validity of his sentence. His predicate act of assaulting Colby with a firearm falls comfortably within the still-valid definition of crime of violence in § 16(a), that is, "an offense that has as an element the use, attempted use, or threatened use of physical force" against another. 18 U.S.C. § 16(a).

III.

For the foregoing reasons, we affirm the district court's conviction and sentence.

CONCURRENCE

CHAD A. READLER, Circuit Judge, concurring. James Kerns was charged with violating the federal kidnapping statute. That statute, once again, prohibits one, while traveling in interstate or foreign commerce, from "kidnap[ping] . . . and "hold[ing] for ransom or reward or otherwise any person . . . ." 18 U.S.C § 1201(a)(1). Characterizing the statute's use of the term "otherwise" as "simply too vague and open to interpretation," Kerns contends that the statute is void for vagueness. *See* Appellant's Br. at 39. Especially as Kerns raises this argument for the first time on appeal, which dramatically lowers his chances of success, I agree that the argument fails. *Puckett v. United States*, 556 U.S. 129, 135 (2009). But the statute's deployment of the term "otherwise" does raise a fair question as to what conduct Congress in fact criminalized. The Supreme Court answered that question many years ago, at least in part. *See Gooch v. United States*, 297 U.S. 124 (1936). But its manner of doing so may well have failed the test of time. For the decision employed now-disfavored atextual interpretive methods, and in the process dramatically expanded the reach of federal criminal jurisdiction, leaving separation-of-powers and federalism concerns in its wake.

A bit of history helps frame today's issue. At common law, kidnapping entailed an obscure form of false imprisonment—abducting and sending one into another country to avoid the initial country's jurisdiction. *See* 4 William Blackstone, *Commentaries* *219; *see also* Model Penal Code § 212.1 cmt. 210 (1980) (describing common-law kidnapping as a "relatively unknown and inconsequential offense"). Originally, kidnapping was a misdemeanor offense. But as states began to enact kidnapping statutes, many states made it a felony to engage in false imprisonment when the perpetrator had a particularly nefarious motive, such as holding the victim for ransom or using the victim as a hostage. 2 Wharton's Criminal Law § 207 (15th ed. 2020).

The federal government, on the other hand, went many years without enacting a federal kidnapping statute. That changed in 1932 with the passage of what was then-called the "Federal

Kidnaping Act." *See* Pub. L. No. 72-189, 47 Stat. 326 (1932). (Congress amended Title 18 in 1994 so that the statute is now called the "Federal Kidnapping Act," the name I will use here. *See* Pub. L. No. 103-322, § 330021, 108 Stat. 1796, 2150 (1994)). The Act was seemingly inspired by the well-published abduction for ransom and murder of aviator Charles Lindbergh's infant son. *See* Robert C. Finley, *Lindbergh Law*, 28 Geo. L.J. 908, 910 (1940). Enactment of the so-called "Lindbergh Law" followed extensive debates in Congress over the risks of federalizing kidnapping law. *See id.* at 910–12. As enacted, the law prohibited the kidnapping and holding of a person for "ransom or reward" while transporting that person in interstate or foreign commerce. *See* 47 Stat. 326. Two years later, amidst a flurry of legislative enactments pursued by President Franklin Roosevelt's Justice Department, *see* Homer Cummings, *Progress Toward a Modern Administration of Criminal Justice in United States*, 22 A.B.A. J. 345, 346 (1936), Congress amended the Act. *See* Pub. L. No. 73-232, 48 Stat. 781 (1934). At the time, observers believed Congress's most significant handiwork was redrafting the law to allow for the imposition of the death penalty for certain kidnapping offenses. *See* Horace L. Bomar, Jr., *The Lindbergh Law*, 1 Law & Contemp. Probs. 435, 440 (1934) (discussing the "major" amendments to the Act); *see also* Hugh A. Fisher & Matthew F. McGuire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U. L. Q. Rev. 646, 655 (1935) (similar); *cf. United States v. Jackson*, 390 U.S. 570, 587 & n.31 (1968) (describing the 1934 legislative debate and noting that—save for a provision allowing for imposition of the death penalty—the statute left the 1932 law "substantially unchanged"). Yet history arguably would prove otherwise.

While perhaps unknown to the Seventy-Third Congress, let alone an ordinary English speaker in 1934, a cosmetic change to the Act—adding the phrase "or otherwise" to the clause containing "ransom or reward"—would prove consequential. Indeed, the Supreme Court would soon seize upon that term to vastly expand the Act's scope. That opportunity came in the case of Arthur Gooch, an Oklahoman convicted under the Federal Kidnapping Act and sentenced to death. *See Gooch*, 297 U.S. at 124 –25. Two years earlier, Gooch and a compatriot were in the midst of a month-long crime spree when two officers encountered them in Texas. *Id.* at 125. To avoid arrest, the pair disarmed the officers, forced them into a car, and proceeded to drive several hours into southern Oklahoma. *Id.* But upon arriving in the Sooner state, Gooch, in an act of mercy, released the two officers largely unharmed. *Id.*

Challenging his conviction, Gooch argued that the Act's use of the phrase "or otherwise" should be interpreted to imply some sort of pecuniary benefit, making his motive for the kidnapping—to prevent his arrest—insufficient to violate the Act. *Id.* A unanimous Supreme Court disagreed. Two considerations informed that conclusion. One was Congress's purported purpose in amending the Act, which the Supreme Court described as "enlarg[ing] the earlier" statute's reach. *Id.* at 126. Another was the statute's legislative history, which in significant part parroted the Department of Justice's views that federal jurisdiction should generally extend to kidnappings done "not only for reward, but for any other reason." *Id.* at 127–28 & n.1 (quoting S. Rep. 73-534 (1934) and H.R. Rep. 73-1457 (1934)). Embracing this purpose-based approach, *Gooch* concluded that "[h]olding an officer to prevent the captor's arrest" is an act done to "benefit . . . the transgressor," meaning Gooch's conduct fell "within the broad term, 'otherwise.'" *Id.* at 128.

Judged by modern interpretative orthodoxy, *Gooch*'s sins were many. Chief among them, the Supreme Court elevated purpose and legislative history over reliance on the statute's text. The Supreme Court charted that perilous course first by promoting the views of the Justice Department (documented in a House and Senate report) to the status of law. *See id*. at 128 n.1 (describing a Senate report that consisted almost entirely of a memorandum from the Department of Justice). *Gooch* in turn utilized that legislative history to divine a grand purpose to the 1934 amendments, *id.* at 126, even though legislation, we now rightly acknowledge, is the "art of compromise," with "no statute yet known pursu[ing] its stated purpose at all costs." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up). *Gooch* then elevated the statute's supposed purpose at the expense of the contemporary, ordinary meaning of the phrase "or otherwise." *See Gooch*, 297 U.S. at 128. In 1934 (as today), the phrase was well understood in a "restrictive sense" to "refer[] to such matters as are kindred to the classes before mentioned." *See* 6 *Judicial and Statutory Definitions of Words and Phrases* 5105 (1904); *see also Walker v. Jack*, 88 F. 576, 581 (6th Cir. 1898) (Taft, J.) (interpreting "or otherwise" to mean "in a manner similar" to the preceding language in the statute). That understanding, moreover, aligned with the familiar canon of statutory construction that general terms that follow specific ones are limited to "matters similar to those specified." *United States v. Aguilar*, 515 U.S. 593, 615 (1995) (Scalia, J., concurring in part and dissenting in part) (discussing the

ejusdem generis canon); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012) (observing that when a list of specific words is followed by the catchall phrase "other," *ejusdem generis* "implies the addition of similar after the word other"). Employing this canon, the use of the phrase "or otherwise" following "ransom or reward" customarily would indicate that the Act criminalizes kidnapping done with a motive akin to a ransom or reward—that is, a pecuniary motive. Yet *Gooch* read "or otherwise" to mean "any other reason," rendering the listed motives of ransom or reward entirely superfluous, violating yet another settled rule of statutory interpretation. *See Corley v. United States*, 556 U.S. 303, 314 (2009) (recognizing the "basic interpretive canon[]" that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (citation omitted)).

Over time, *Gooch*'s disregard for the Act's text has led the lower courts to find a "wide variety of purposes" to be encompassed by the "or otherwise" phrase. 3 Wayne R. LaFave, *Substantive Criminal Law* § 18.2(a) (3d ed. 2020) (surveying circuit case law); *see, e.g.*, *United States v. Vickers*, 578 F.2d 1057, 1058 (5th Cir. 1978) (per curiam) (holding that a defendant who drove his estranged wife against her will to "discuss their marital affairs" violated the Federal Kidnapping Act); *United States v. Cavallaro*, 553 F.2d 300, 302 (2d Cir. 1977) (holding that a defendant who forced a woman into his car and tried to extract information from her satisfied the Federal Kidnapping Act's motive clause); *Brooks v. United States*, 199 F.2d 336, 336 (4th Cir. 1952) (holding that members of the Ku Klux Klan who seized a couple to tell them to "stop living together and making liquor" and to instead "attend church" violated the Federal Kidnapping Act). We too have been swept up in that interpretive tidal wave, extending the Act to encompass kidnappings done for the purpose of assaulting another individual, *see United States v. Sensmeier*, 2 F. App'x 473, 476 (6th Cir. 2001); *see also United States v. Ingram*, 846 F. App'x 374, 382 (6th Cir. 2021), or to execute a robbery more effectively, *United States v. Small*, 988 F.3d 241, 250 (6th Cir. 2021), among other reasons. Despite the limiting fashion in which its text would otherwise be understood today, federal courts functionally amended the Act to have "little or no realistic analysis of the motives involved." Finley, *supra*, at 914.

Allowing federal courts to expand Congress's work in such sweeping fashion pays little heed to the principle of the separation of powers, a founding cornerstone of our system of government. *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("[T]he central judgment of the Framers of the Constitution [is] that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty."). After all, as every middle school American history student understands, the legislative branch, not the judiciary, is tasked with writing the laws that govern us. *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) ("Congress alone has the . . . constitutional authority to revise statutes . . . . Until it exercises that power, the people may rely on the original meaning of the written law."); *Henson*, 137 S. Ct. at 1725 ("[W]hile it is of course our job to apply faithfully the law Congress has written, it is never our job to rewrite a constitutionally valid statutory text ....").

Gooch similarly disregarded federalism principles, another bedrock of our federal system. *See Gregory v. Ashcroft*, 501 U.S. 452, 457–59 (1991) (recognizing the "system of dual sovereignty between the States and the Federal Government" as critical to check "abuses of government power" and to secure the "promise of liberty"). *Gooch*'s dubious interpretive methods functionally created a federal false imprisonment statute. By all accounts, the only remaining distinction between the Federal Kidnapping Act and the broadest state laws criminalizing kidnapping is the federal jurisdictional hook. And that "hook," it bears noting, has "substantially expanded" in recent years and, as merely a basis for jurisdiction, can be satisfied without "any proof" the defendant knew his crime implicated interstate commerce. *See* LaFave, *supra* § 18.2(a); *see also United States v. Burnette*, 170 F.3d 567, 571 (6th Cir. 1999) (recognizing that after amendments to the Federal Kidnapping Act in 1972, "knowledge of interstate transportation" is no longer "an element of the offense" and "interstate transportation now serves merely as a jurisdictional basis for federal prosecution of kidnapping"); *see generally Rehaif v. United States*, 139 S. Ct. 2191, 2196 (2019) (noting that jurisdictional elements are not subject to the presumption in favor of scienter). The result is expanding federal criminalization, here and elsewhere, which, more often than not, leaves state and local law enforcement at the behest of their federal counterparts. *See* Stephen F. Smith, *Federalization's Folly*, 56 San Diego L. Rev. 31, 55–64 (2019) (discussing how the federalization of criminal law "interferes with the

effective functioning of the state [criminal legal] system"); *see also* Brief of Senator Orrin Hatch as Amicus Curiae in Support of Petitioner at 28, Gamble v. United States, 139 S. Ct. 1960 (2018) (No. 17-646), 2018 WL 4358114 (observing that the "expansion of federal criminal law has come at the expense of states' traditionally exclusive jurisdictions," eroding states' ability to "punish behavior falling within [overlapping] areas of interest").

For better or worse, the expansion of federal criminal jurisdiction has many fathers. Congress, to be sure, has driven much of that evolution. *See, e.g.*, John G. Malcolm, *Criminal Justice Reform at the Crossroads*, 20 Tex. Rev. L. & Pol. 249, 278–81 (2016); Robert Alt, *You Might Be Committing a Federal Crime*, Heritage Found. (Dec. 17, 2010), https://perma.cc/WT9S-8WPT; Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, in *In the Name of Justice* 43–45 (Timothy Lynch ed., 2009). But those of us in the federal judiciary should be careful about casting too many stones in Congress's direction. After all, at least some of the blame lies at the doorstep of the glass house we occupy. In cases like *Gooch*, we have "perform[ed] Congress's" job by "defin[ing] a crime and ordain[ing] its punishment.'" *United States v. Bond*, 572 U.S. 844, 867 (2014) (Scalia, J., concurring in judgment) (quoting *United States v. Wiltberger*, 5 Wheat. 76, 95 (1820)). Doing so threatens individual liberty, a virtue that "is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J, concurring). Arthur Gooch understood these concerns better than most: he died at the gallows three months after his conviction was affirmed, suffering the ignominious fate of being the first person executed under the statute (and the only one for where the crime did not result in someone's death). *See* Leslie Tara Jones, Arthur Gooch: The Political, Economic, and Social Influences that Led Him to the Gallows (2010) (M.A. dissertation, University of Central Oklahoma), https://perma.cc/B4RL-VP7X.

Despite the many flaws in our modern kidnapping jurisprudence, however, vagueness seemingly is not one of them. Back to today's case, where Kerns argues that the term "otherwise" is too vague to allow him to enter a knowing and voluntary guilty plea. *See* Appellant's Br. at 41. Yet *Gooch* effectively forecloses such an argument. A law violates the "constitutional requirement of definiteness" where it fails to provide a "person of ordinary

intelligence fair notice" of what conduct is forbidden by the statute. *See United States v. Harriss*, 347 U.S. 612, 617 (1954). *Gooch*, however, concluded that it was "obvious" what Congress's amendment to the Federal Kidnapping Act criminalized: *any* act of kidnapping, so long as that act provided some sort of "benefit to the transgressor." 297 U.S. at 128; *see also Wainwright v. Stone*, 414 U.S. 21, 22 (1973) (observing that the "judgment of federal courts as to the vagueness" of a statute "must be made in light" of prior judicial constructions of the statute). In other words, after *Gooch*, there was no doubt as to the import of the "or otherwise" phrase in the Act. *Gooch* merely obviated the Act's motive element—something the government typically need not prove as part of a criminal offense, *see* 1 Wayne R. LaFave, *Substantive Criminal Law* § 5.3(a) (3d ed. 2020)—leaving in its place a federal criminal law largely indistinguishable from any state false imprisonment law. The mere fact that a law that is "marked by . . . reasonable breadth, rather than meticulous specificity," does not make it unconstitutionally vague. *Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972) (citations omitted). Accordingly, we (and other circuits too) have rejected challenges similar to Kerns's, albeit sometimes on somewhat imprecise grounds. *See Daulton v. United States*, 474 F.2d 1248, 1249 (6th Cir. 1973) (per curiam) (rejecting a vagueness challenge on standing grounds and noting in dicta the purpose of § 1201 is "too plain to warrant the assertion that any person of ordinary intelligence would fail to understand what conduct it forbids"); *see also United States v. Walker*, 137 F.3d 1217, 1219 (10th Cir. 1998) (noting that at least five circuits have rejected vagueness challenges to the "or otherwise" portion of § 1201).

True, a law can also be considered unconstitutionally vague where its definitiveness is so insufficient that it "encourage[s] arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see also Johnson v. United States*, 576 U.S. 591, 595 (2015). That said, whether the Federal Kidnapping Act "invite[s] the exercise of arbitrary power" by "allowing prosecutors and courts to make . . . up" when the law is enforced is left largely unexplored by Kerns. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1223–24 (2018) (Gorsuch, J., concurring). It is thus best left for another day to resolve whether the Act's "otherwise" clause raises such constitutional concerns and, more broadly, whether *Gooch*'s errors can be corrected.

Accordingly, I concur in full in the majority opinion.

UNITED STATES DISTRICT COURT

Western District of Michigan

UNITED STATES OF AMERICA

-vs-

JAMES MICHAEL KERNS

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:19-cr-32

USM Number: 22484-040

Helen Nieuwenhuis
Defendant's Attorney

THE DEFENDANT:

§ pleaded guilty to Counts One and Three the Superseding Felony Information.

1 pleaded nolo contendere to Count(s) _____ , which was accepted by the court.

2 was found guilty on Count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Offense Ended**	**Count**
18 U.S.C. § 1201(a)(1) Kidnapping	July 23, 2018	One
18 U.S.C. § 924(c)(1)(A)(ii) Possession of a Firearm in Furtherance of a Crime of Violence	July 23, 2018	Three

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

D The Indictment and Count Two of the Superseding Felony Information are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of material changes in economic circumstances.

Date of Imposition of Sentence: May 27, 2020

DATED: May 27, 2020

/s/ Janet T. Neff
JANET T. NEFF
UNITED STATES DISTRICT JUDGE

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **ONE HUNDRED EIGHT (108) MONTHS** as to Count One and **EIGHTY-FOUR (84) MONTHS** as to Count Three, to run consecutively.

D The court makes the following recommendations to the Bureau of Prisons:

that the defendant continue to receive intensive mental health treatment at either FMC Lexington in Lexington, Kentucky or FMC Butner in Butner North Carolina; and

that the defendant receive educational and vocational programming.

E The defendant is remanded to the custody of the United States Marshal.

§ The defendant shall surrender to the United States Marshal for this district:
at _____ on _____
as notified by the United States Marshal.

§ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
before 2:00 P.M. on _____
as notified by the United States Marshal.
as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **FIVE (5) YEARS** as to Count One and **FIVE (5) YEARS** as to Count Three, to run concurrently.

MANDATORY CONDITIONS

A. You must not commit another federal, state, or local crime.

B. You must not unlawfully possess a controlled substance.

C. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

C. ☒ You must cooperate in the collection of DNA as directed by the probation officer.

D. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

E. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

F. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

§ You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

§ After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

§ You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the Court or the probation officer.

§ You must answer truthfully the questions asked by your probation officer.

§ You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

§ You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

§ You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

§ You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

§ If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

§ You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

§ You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

§ If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

§ You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

A. You must participate in a program of testing and treatment for substance abuse, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer, and must pay at least a portion of the cost according to your ability, as determined by the probation officer.

B. You must participate in a program of mental health treatment, as directed by the probation officer, and follow the rules and regulations of that program until such time as you are released from the program by the probation officer, and must pay at least a portion of the cost according to your ability, as determined by the probation officer.

C. If you are unemployed after the first 60 days of supervision, or for 60 days after termination or layoff from employment, you must perform at least 20 hours of community service work per week, as directed by the probation officer until gainfully employed full-time.

D. You will be monitored by a form of location monitoring technology at the discretion of the probation officer for a period of **12 months**. During that time, you must abide by all technology requirements, the location monitoring program rules, and pay all or part of the costs of participation in the location monitoring program as directed by the U.S. Probation Office.

A form of location monitoring technology will be utilized to monitor the following restriction on your movement in the community as well as other court-imposed conditions of release:

(X) Home Detention: You are restricted to your residence at all times except for employment; education; religious services; medical, substance abuse or mental health treatment; attorney visits; court appearances; court-ordered obligations; or other activities as preapproved by the U.S. Probation Officer.

E. You must not have contact with the victim(s) in this case. This includes any physical, visual, written, electronic or telephonic contact with such persons. Additionally, you must not directly cause or encourage anyone else to have such contact with the victim(s).

F. You must provide the probation officer with all usernames, email addresses, passwords, social media accounts, and any other forms of internet identification, and must not create additional accounts, unless approved in advance by the probation officer.

G. You must participate in the Computer/Internet Monitoring Program and must comply with the rules of the program as directed by the U.S. Probation Office. You must pay the cost of computer monitoring as directed by the probation officer, and advise anyone in your household that any computer(s) in the household may be subject to computer monitoring.

H. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition.

The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

B. You must reside in a residence approved in advance by the probation officer.

C. You must not possess any replicas of handguns, pellet guns, air soft guns, or items in the likeness of firearms.

D. You must not work in any type of employment without the prior approval of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the following pages.

Assessment	Fine	Restitution
$200.00 ($100.00 per count)	**$2,000.00** ($1,000.00 per count)	**-0-**

C. The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such a determination.

D. The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

§ Restitution amount ordered pursuant to plea agreement.

§ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

1. The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine.

(2) the interest requirement is waived for the restitution.

(3) the interest requirement for the fine is modified as follows: _____

(4) the interest requirement for the restitution is modified as follows: _____

a. Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payment of **$200.00** due immediately, balance due

(1) not later than _____, or

b. in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with C, D, or F below); or

C ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after the date of this judgment; or

D ☐ Payment in equal _____ installments of $_____ over a period of _____, to commence _____ after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Any balance due upon incarceration must be paid in minimum quarterly installments of $25.00 based on IFRP participation, or minimum monthly installments of $20.00 based on UNICOR earnings, during the period of incarceration, to commence 60 days after the date of this judgment. Any balance due upon commencement of supervision must be paid, during the term of supervision, in minimum monthly installments of $100.00, to commence 60 days after release from imprisonment. You must apply all monies received from income tax refunds, lottery winnings, judgments, and or any other anticipated or unexpected financial gains to any outstanding court-ordered financial obligations.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court, 399 Federal Building, 110 Michigan N.W., Grand Rapids, MI 49503, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

  Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):

2. The defendant shall forfeit the defendant's interest in the following property to the United States: Hipoint C9 9mm firearm bearing serial number P883796 and associated ammunition.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.