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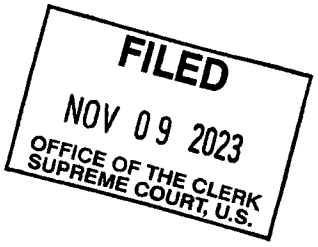

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE CHRISTOPHER THIEME,

-- Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS
UNDER THE JUDICIARY ACT OF 1789
AND/OR 28 U.S.C. § 2241 and 28 U.S.C. § 1651(a)
OR FOR A WRIT OF AUDITA QUERELA
OR FOR A WRIT DE HOMINE REPLEGIANDO
UNDER THE ALL WRITS ACT
28 U.S.C. § 1651(a)

On the Petition:

CHRISTOPHER THIEME
Reg. No. 69451-050
FCI FORT DIX
Federal Correctional Institution
Post Office Box 2000
Joint Base MDL, NJ 08640

PETITIONER PRO SE

QUESTIONS PRESENTED FOR REVIEW

1.) Does the application of a four-level sentencing enhancement under United States Sentencing Guideline § 2A1.5(b)(1) to the sentence calculation of a defendant convicted of 18 U.S.C. § 1958(a) constitute "impermissible double counting" in violation of the 5th Amendment's Due Process and Double Jeopardy Clauses?

2.) Does its further application through "grouping" of multicount convictions at the higher offense level of convicted counts, per U.S. Sentencing Guideline §§ 3D1.2 and 3D1.3, impacting a count for which the sentencing enhancement does not apply, resulting in a longer sentence, constitute a double jeopardy "multiple punishment" through essentially "triple counting" or "cumulative counting"?

3.) Should 18 U.S.C. § 1201(d) be invalidated as "void for vagueness" and overbreadth because it relies on the word "attempt" which Congress has never defined because it has not enacted a federal attempt liability statute?

4.) Did the courts violate the Separation of Powers doctrine by adopting the Model Penal Code definition of "attempt" in the absence of both a federal attempt liability statute and any authorization from Congress to use the Model Penal Code definition?

5.) Is the Petitioner innocent of attempted kidnapping under 18 U.S.C. § 1201(d) due to "legal innocence"?

6.) Should the Court issue a Writ of Habeas Corpus under the Judiciary Act of 1789, and/or 28 U.S.C. § 2241 and § 1651(a); or a Writ of Audita Querela or Writ De Homine Replegiando?

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RELIEF SOUGHT

Petitioner prays for the issuance of a Writ of Habeas Corpus under either the Judiciary Act of 1789 and/or 28 U.S.C. § 2241 and 28 U.S.C. § 1651(a); or for the issuance of a Writ of Audita Querela or Writ De Homine Replegiando under 28 U.S.C. § 1651(a), directing the vacatur of his sentence on both counts one and two of the Information in United States v. Thieme, Case No. 2:16-CR-00294-SDW, in the United States District Court for the District of New Jersey at Newark, New Jersey (as explained further below); and/or directing the vacatur of his conviction on count one (as further discussed below), and for remand to the District Court for resentencing.

PARTIES TO THIS ACTION

1.) PETITIONER appearing here pro se, CHRISTOPHER THIEME, Reg. No. 69451-050, is a federal prisoner in the custody of the Federal Bureau of Prisons at Federal Correctional Institution Fort Dix ("FCI Fort Dix") located in southern New Jersey. Petitioner is currently serving a total 210-month sentence of imprisonment to be followed by three-years of supervised release. At present calculation, he has a "projected release date" of December 2, 2029. He was convicted in 2016 and sentenced in the United States District Court for the District of New Jersey on a two-count Information -- count one: attempted kidnapping, in violation of 18 U.S.C. § 1201(d) and count two: racketeering - use of interstate commerce facilities in the commission of a murder for hire, in violation of 18 U.S.C. § 1958(a), for which the court imposed a sentence of 210 months on count one, and 120 months on count two, both set to run concurrently.

2.) The RESPONDENT, if required to appear and answer, would be RACHEL

THOMPSON, the current WARDEN of FCI Fort Dix and an officer in the Federal Bureau of Prisons. Within the meaning of 28 U.S.C. § 2242, THOMPSON is the federal officer or employee who has custody of the incarcerated petitioner. She has been served a copy of this Petition, in accordance with Rule 29.4(a), at FCI Fort Dix, 5756 Hartford & Pointville Road, Joint Base MDL, NJ 08640.

3.) The Respondent will likely be represented by ELIZABETH PRELOGAR, Solicitor General of the United States, who has been served with a copy of this Petition, in accordance with Rule 29.4(a), at Room 5616, U.S. Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC, 20530-0001.

4.) A proof of service certification is attached herewith.

RELATED PROCEEDINGS AND DECISIONS

Underlying Criminal Conviction and Sentence

5.) United States v. Thieme, Case No. 2:16-CR-00294-SDW, United States District Court, District of New Jersey. Sentenced December 19, 2016; amended judgment and commitment order December 22, 2016.

First Motion under 28 U.S.C. § 2255

6.) Thieme v. United States, Case No. 2:19-CV-15507-SDW, United States District Court, District of New Jersey. Decision: Motion denied, 2020 U.S. Dist. LEXIS 50443, 2020 WL 1441654 (D.NJ March 24, 2020).

7.) Thieme v. United States, Case No. 20-1839, United States Court of Appeals for the Third Circuit. Decision: Certificate of Appealability denied, 2020 U.S. App. LEXIS 36121, 2020 WL 6707326 (3rd Cir. July 29, 2020).

8.) Thieme v. United States, 141 S.Ct. 863, 208 L.Ed.2d 431 (2020).

Certiorari denied, Supreme Court of the United States.

Second Motion under 28 U.S.C. § 2255

9.) In Re Thieme, Case No. 21-2268, United States Court of Appeals for the Third Circuit. Motion to Authorize a Second or Successive 2255 Motion denied, August 3, 2021 (ECF No. 3).

Declaratory Judgment Action

10.) Filed a civil action under the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202 against Attorney General Merrick Garland, the U.S. Department of Justice, and the U.S. Sentencing Commission.

11.) Thieme v. Garland, et al. Case No. 1:21-CV-1750-APM, United States District Court, District of Columbia. Decision: Dismissed for jurisdiction, 2021 U.S. Dist. LEXIS 144511, 2021 WL 3363408 (D.DC August 3, 2021).

12.) Thieme v. Garland, et al., Case No. 21-5211, United States Court of Appeals for the District of Columbia Circuit. Decision: District Court affirmed. 2022 U.S. App. LEXIS 5100, 2022 WL 566455 (D.C. Cir. February 24, 2022).

Petition under 28 U.S.C. §§ 2241 and 2255(e)

13.) Thieme v. Knight, Case No. 1:22-CV-3439-CPO, United States District Court, District of New Jersey. Decision: Denied/Dismissed, 2022 U.S. Dist. LEXIS 137421, 2022 WL 3040927 (D.NJ July 28, 2022).

14.) Thieme v. Warden Fort Dix FCI, Case No. 22-2498, United States Court of Appeals for the Third Circuit. Decision: District Court affirmed. 2022 U.S. App. LEXIS 36724, 2022 WL 18673316 (3rd Cir. December 8, 2022).

Compassionate Release Motion under 18 U.S.C. § 3582(c)(1)(A)

15.) United States v. Thieme, Case No. 2:16-CR-00294-SDW, United States District Court, District of New Jersey. Still pending since February 2022. No action by judge after 20 months. Motion included claim in Section I of

this Petition, see Legal Argument below.

JURISDICTIONAL STATEMENT

This court has jurisdiction to issue the requested Writ under Section 14 of the Judiciary Act of 1789 (Act Sept. 24, 1789, 1 Stat. 73, 81-82), 28 U.S.C. § 2241 et seq., 28 U.S.C. § 1651(a), and Supreme Court Rule 20.

CONTROLLING PROVISIONS AND STATUTES

Petitioner has compiled the relevant constitutional provisions, statutes, and other requisite materials for the Court's perusal in the Appendix, pursuant to Supreme Court Rule 14.1(f) and 14.1(i)(v).

UNAVAILABILITY OF RELIEF IN OTHER COURTS

1. Petitioner has been up and down the federal judiciary three times, trying to be heard on the merits of his arguments and has not once received a full examination and adjudication of these claims ont he merits.

2. These claims have been placed before three district court judges (Wigenton and O'Hearn in New Jersey, Mehta in Washington DC); and 9-12 Circuit Court Judges (Jordan, Krause, Matey, Hardiman, Restrepo and Bibas, and possibly 3 more in In Re Thieme in 2021 on the Third Circuit; and Wilkins, Rao, and Jackson on the DC Circuit) previously on a petition for a writ of certiorari for the discretion of this Court). None have heard the issues on the merits. They remain unexamined.

3. Petitioner has tried to get these issues heard for 5 years, the result of an attorney who did not care when the Petitioner was convicted, and has been silent and unresponsive immediately after his sentencing, after having to research entirely novel issues never before brought before the federal

courts in the decades that these statutes or sentencing provisions have been in effect. There has never been an in-depth judicial examination, no lawyer, defendant, or prisoner had previously discovered or argued them.

4. Petitioner's experience is only one more tragic story about how the habeas corpus mechanism is broken.

5. Petitioner argues that the claims raised in Sections I and II of this petition rise to the level where habeas relief is necessary, as he is "in custody in violation of the Constitution or laws... of the United States". See 28 U.S.C. § 2241(c)(3).

6. The fact remains -- years ago, Petitioner discovered errors of constitutional magnitude, violating the Fifth Amendment due process and double jeopardy clauses, and diligently prepared such novel claims and asserted to the court that the conviction and sentence were impermissible under the Constitution, that my liberty interest was negatively impacted. Not one single judge has decided to find out if I am correct in my complaints.

7. Further, because every previous judge to have responded to my filings dismissed or denied them without a merits adjudication, the Government has never had to answer for these constitutional injuries.

8. In my first 2255 motion, District Judge Wigenton flippantly characterized my issues (without giving them a hearing on the merits) as "that Petitioner agreed to a plea agreement that he now dislikes is no extraordinary circumstance". She then stated I was time-barred from relief -- despite my arguing that the novelty of the issues, with Supreme Court precedent behind "novelty" should have been cause and prejudice to navigate around such a time bar. See Thieme v. United States, 2020 U.S. Dist. LEXIS 50443 at *12 (D.NJ Mar. 24, 2020).

9. Every attempt since to be heard on the merits of my issues has been batted aside with procedural excuses and judge-made doctrines -- never even

acknowledging that their might be a constitutional injury to examine.

10. If no court below will deign to hear the Petitioner's complaints, much less acknowledge that he has asserted grave constitutional injuries needing examination and that he faces irreparable harm and continued denial of his rights precisely because he has not been heard, then the very inaction of the courts below establish that no other court can grant relief.

11. I ask the Supreme Court to exercise its prerogative to grant a writ so as to correctively administer the inferior courts and its general supervisory control over the federal court system to hear this petition and grant a full adjudication on the merits in aid of its appellate jurisdiction. See Rule 20.1 and e.g. Connor v. Coleman, 440 U.S. 612, 624 (1979) (when lower federal court refuses to give effect to, or misconstrues the mandate of the Supreme Court, its actions may be controlled by the Court).

12. Per 28 U.S.C. § 2242 and Rule 20.4(a), Petitioner asserts that he has not reapplied for relief to a district court because it would be an act of futility. The failure of justice in the courts below to provide seemingly obvious relief from a readily apparent constitutional issue casts a shadow of shame against calls to "ensure the fairness, integrity, and prevent the erosion of public confidence in our judicial system". Rosales-Mireles v. United States, 138 S.Ct. 1897, 1907 (2018).

13. Petitioner should have been released (as he argues hereinbelow) in September 2022, or would be released in August 2024 absent the errors complained of here. Without relief, Petitioner faces the irreparable harm of being required to serve more time in prison than the law allows or the Constitution should permit.

14. A drastic remedy is necessary here to prevent such irreparable harm and this miscarriage of justice and thus constitutes an "exceptional circumstance warrant[ing] the exercise of the Court's discretionary power". Rule 20.1.

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

This Court has previous characterized habeas jurisdiction below as lamentably "byzantine" and that its complexity compromises the ability of habeas corpus to correct miscarriages of justice below. In this case, the Petitioner has repeatedly asked to be heard -- and only needed to be heard once. He has been denied that one request for a hearing on the merits. Petitioner asserts that an exercise of the Supreme Court's rare but potent power is necessary to cut through the obstacles, hear these constitutional injuries, and grant adequate relief that has been too long denied.

No other form of relief will be sufficient to protect the rights of the Petitioner.

Section 14 of the Judiciary Act of 1789 enables the courts to grant habeas writs to "inquir[e] into the cause of [a federal prisoner's] confinement". It includes the power to question whether a court lacked jurisdiction over the defendant or his offense. The Petitioner's first claim raises a grave due process and double jeopardy clause violation. His second claim asks the court to invalidate a vague statute and is such a jurisdictional claim. The Great Writ is, no less than "the instrument by which due process could be insisted upon". Hamdi v. Rumsfeld, 542 U.S. 507, 555 (2004) (Scalia, J. dissenting); cf. Ex Parte Watkins, 28 U.S. (3 Pet.) 193, 202-203 (1830); also Ex Parte Lange, 85 U.S. 163 (1874) (granting relief to convicted person after finding double jeopardy clause violation). "There is no more sacred duty" than to discharge a prisoner held without authority "to maintain unimpaired those securities for the personal rights of the individual". Lange, supra, at 178.

The Court recognized the need to correct violations of the Cnostitution and Laws that improperly imprison Americans. The Court recognized the need to intervene and grant habeas relief as "law and justice require". See 28 U.S.C. §§

2241, 2243; Wright v. West, 505 U.S. 277, 285 (1992). As a last resort, a Petitioner can call on the high court, as is the case here, to issue justice when other courts have failed to hear him. See Felker v. Turpin, 518 U.S. 651 (1996).

This case provides the Court an opportunity to shed light on when such habeas relief can be called upon, what was hinted at but unelaborated in Felker. In the alternative, it would allow the court to expand understanding and development of the law in its empowerment to grant other potent writs, such as audita querela and de homine replegiando under the All Writs Act in aid of its jurisdiction, as hinted at in United States v. Morgan, 346 U.S. 502, 506 (1954) (discussing the court's prerogative in a coram nobis context).

Nevertheless, this is the Petitioner's last opportunity to be heard. If unheard and no aid is coming, then his Constitutional rights will continue to be trampled by the miscarriage of justice. He will do more time than the law allows and that should offend the Constitution.

STATEMENT OF THE CASE

In January 2016, Petitioner was arrested for soliciting the services of another individual to kidnap and murder "Victim 1". This other individual became an informant for the FBI and later introduced the Petitioner to another individual who was an undercover FBI agent. In the course of this solicitation, Petitioner had a few phone and email conversations, and met with the two men to discuss and plan possible various scenarios for carrying out the kidnapping and murder of Victim 1, and then to liquidiate assets and property belonging to the Victim afterwards. The Petitioner showed the two men several sites speculating that these were sites where the crime could occur. These discussions ended with a verbal agreement that the act would happen at a later time. The Petitioner was not at the "threshold of the crime"--Victim 1 was not in jeopardy at the time of this inchoate planning and agreement. The Petitioner was arrested minutes later.

Petitioner pleaded guilty under a plea agreement to two counts: count one, "attempted kidnapping", 18 U.S.C. § 1201(d) and count two "racketeering murder for hire", 18 U.S.C. § 1958(a). At sentencing, the plea agreement and pre-sentence report called for the court to impose a 4-level enhancement under USSG § 2A1.5(b)(1) for the "promise and agreement to pay something of pecuniary value for the commission of the murder". Every murder-for-hire defendant receives this enhancement. No one has previously fully challenged the legality of its application.

In his first claim, the Petitioner challenges the constitutionality of the application of this enhancement. Petitioner later noticed that this enhancement duplicates verbatim conduct that is already a critical element of the § 1958(a) offense. This would be "impermissible double counting", a due process and double jeopardy injury. The result was that his sentence guidelines offense level was miscalculated -- and caused the Petitioner to be oversentenced by a factor of 75-102 months. Absent this error, he would have faced a guidelines offense level range of 108-135 months and would either be already released from custody or approaching release in the next 9 months (as of the date of this filing).

Further, through "grouping" the two counts under the higher of the two calculated offense levels, the added impact was not felt on his § 1958(a) count but on his "attempted kidnapping" §1201(d) count through a "triple counting", a potential "multiple punishment" where the Petitioner gets most of the prison sentence imposed against him.

In his second claim, the Petitioner challenges that the §1201(d) statute is vague simply because Congress has never defined "attempt" liability. Unfortunately, the law of "attempt" is unclear and there are uncomfortable ambiguities that some solicitations can be attempt, others not; some preparatory conduct can be, other conduct is not. There is no "clear line in the sand" or

"hard and fast rule" - and this broadens the ambit of attempt liability in ways that are dangerously overbroad and violative of due process. Because the limits of "attempt" have shifted considerably, and the clarity of what is or is not "attempt" shifts from case to case and court to court, there is a lack of fair warning or fair notice. The Courts have overstepped their bounds, under the separation of powers doctrine, by employing a "model penal code" definition of attempt that is not sanctioned by Congressional directive and has essentially created a "non-statutory crime" in the absence of Congressional action. This would mean that the Petitioner may be legally innocent due to the vagueness of §1201(d).

Petitioner noticed these two errors too late. His attorney ignored his questions, and abandoned him right after sentencing, and provided ineffective assistance. By the time these two novel issues were figured out, time for a remedy under 28 U.S.C. § 2255 expired. Courts do not treat novel issues well. However, over the last 5 years since their discovery and the time needed to develop them, he has sought review diligently at all levels. However, he has been denied even one examination of his claims -- no court has deigned to provide a merits adjudication. That they remain unexamined cause these constitutional injuries to be allowed to persist and will result in the irreparable harm of requiring the Petitioner to serve more time in prison than the law allows.

ARGUMENT

I. Application of a 4-level enhancement under USSG § 2A1.5(b)(1) to the Petitioner's sentence calculation constituted "impermissible double counting" of an offense element and must be corrected.

A. USSG § 2A1.5(b)(1) impermissibly duplicates the critical element of 18 U.S.C. § 1958(a)

The actus reus proscribed in 18 U.S.C. § 1958(a) is the "receipt of, promise or agreement to pay something of pecuniary value" to commit a murder. This has been described as the criminal statute's "critical element". However, when a 1958(a) defendant is sentenced, his punishment is enhanced with a four-level enhancement based on conduct for the "offer or agreement to pay something of pecuniary value". The sentencing guidelines are clear that a sentencing enhancement cannot duplicate an element of the offense of conviction. This is called "impermissible double counting" and it is an unconstitutional injury violative of the Due Process and Double Jeopardy provisions of the Fifth Amendment. The Petitioner asserts that this four-level enhancement provision, USSG § 2A1.5(b)(1), subjects him to an ongoing unconstitutional injury in two distinct ways and requires the intervention of this court to correct before he faces the tragic and irreparable harm of being drastically oversentenced for his convicted conduct and serving longer than the law would otherwise permit.

First, USSG § 2A1.5(b)(1) duplicates nearly verbatim the critical element of the offense of conviction which is an error courts have prohibited as "impermissible double counting". It is a double jeopardy issue because an offense element duplicated as a sentencing enhancement effectively punishes this Petitioner twice for the same conduct. It is a due process injury because the duplication results in a sentencing guidelines calculation error impacting his liberty interest especially with the courts' heavy reliance on the guidelines to determine a defendant's sentence exposure. Next, this error has a "multiple punishment" aspect because of how

"grouping" on the Petitioner's two convicted counts in which the offense with the higher sentencing guidelines calculated offense level controls sentence exposure for all convicted counts, pursuant to USSG §§ 3D1.2 and 3D1.3. By grouping, impermissible double counting creates a cumulative counting that is essentially "triple counting"--an element of one offense impermissibly double counted as a sentencing enhancement has its maximum effect in how the other offense's conduct (which lacks that element) is punished. This error created by this "grouping" dilemma creates a similar double jeopardy and due process injury.

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". Therefore, an element of the offense of conviction CANNOT be used as a sentencing enhancement. The guidelines in this statement expresses an unmistakable, clear, and explicit prohibition where double counting cannot be allowed. Cf. United States v. Johnstone, 107 F.3d 200, 212 (3rd Cir. 1997) (that double counting is impermissible if Guidelines explicitly prohibit application); also United States v. Wong, 3 F.3d 667, 671 (3rd Cir. 1993) (noting an adjustment that clearly applies to conduct of an offense must be imposed unless the Guidelines exclude its applicability).

First, we must consider that the "actus reus" or the "critical element" of 18 U.S.C. § 1958(a) gets duplicated to the detriment of 1958(a) defendants by identifying this element from the statute. In its pertinent part, 18 U.S.C. § 1958(a) states "Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce with the intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as

consideration for the promise or agreement to pay something of pecuniary value, or conspires to do so..." Several courts have identified the consideration element (i.e. "recipt of...promise or agreement to pay something of pecuniary value") within the statute text to be its critical element. See United States v. Ritter, 989 F.2d 318, 321 (9th Cir. 1993); United States v. Chong, 419 F.3d 1076, 1079, 1081-82 (9th Cir. 2005) (both, where it is a "critical element" and "construed 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 what Congress intended to prohibit). If a defendant charged with 1958(a) did not perform this "critical" consideration element conduct, the conviction could not be accepted by the court for failure to establish the offense elements.

By cross-reference, the sentences for 1958(a) convictions are typically calculated using the "underlying criminal conduct" under USSG § 2A1.5. Cf. e.g., United States v. Vasco, 564 F.3d 12 (1st Cir. 2004); United States v. Lisyanskv, 806 F.3d 706 (2nd Cir. 2015). Almost every 1958(a) defendant begins thus at a "base offense level" of 33 and is typically assessed the four-level enhancement under § 2A1.5(b)(1) "if the offense involved the offer of anything of pecuniary value for undertaking the murder". This is where the "impermissible double counting" originates and persists. However, for 35 years since the enactment of 1958(a) (first codified as "1952A") and 30 years since the implementation of USSG 2A1.5, the duplication of this 1958(a) offense element as a sentencing enhancement has gone unnoticed. No court has fully examined the issue and no lawyer has really presented the argument this way. Conceivably, over three decades, hundreds if not thousands of federal prisoners have been effected by this injury and likely served more prison time than necessary.

Indeed, the provisions of USSG § 2A1.5 were not originally meant to be tied to 1958(a) convictions. For 2A1.5's entire history--up to the present incarnation of the guidelines--the guidelines have tied its use expressly to convictions under 18 U.S.C. § 351(d) (for assassinations or kidnappings of congressional, cabinet, or supreme court members); 18 U.S.C. § 371 (for conspiracies to commit offense or defraud the United States); 18 U.S.C. § 373 (for solicitations to commit a crime of violence); 18 U.S.C. § 1117 (for conspiracies to murder); 18 U.S.C. § 1751(d) (for assassinations or kidnappings of the president or presidential staff). The "consideration" conduct to be enhanced by USSG 2A1.5(b)(1) is not an element of any of those five offenses and is conduct that goes beyond their respective offense elements. See, e.g., United States v. Blum, 534 F.3d 608, 612 (7th Cir. 2008) (holding that enhancements are meant to punish conduct beyond the elements of an offense). Because none of these five enumerated statutes--§§ 351(d), 371, 373, 1117, or 1751(d)--tied to USSG §2A1.5 or the 2A1.5(b)(1) enhancement mention "pecuniary value" consideration in their statute texts. Applying an adjustment based on 2A1.5(b)(1) is harmless to those convictions. However, for defendants convicted of 18 U.S.C. § 1958(a), which has the nearly verbatim "pecuniary value" consideration element that is its core "critical element", the application of 2A1.5(b)(1) punishes this element conduct again. This renders the use of 2A1.5(b)(1) when applied to 1958(a) defendants unconstitutional as "impermissible double counting". See United States v. McCullah, 76 F.3d 1087, 1111-12 (10th Cir. 1996) (that Petitioner is "essentially condemned twice for the same culpable act"). See Jones v. United States, 527 U.S. 373, 398 (1999) ("finding aggravating factors based on matters already taken into account by the offense of conviction" is impermissible double counting); United States v. Reevey, 364 F.3d 151, 158 (4th Cir. 2004) (it is impermissible double counting "when a provision of a sentencing guideline is applied to increase

punishment on the basis that has been accounted for by the application of another guideline or by application of a statute"): United States v. Reith, 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).

As stated above, over three decades, no court has given great examination to the application of USSG § 2A1.5(b)(1) to 1958(a) defendants. Because no court has broached the specific questions raised in the case at bar with any penetrating depth. Petitioner can only argue this first aspect of "Impermissible double counting" by analogue in comparable applications of the case law as applied to other criminal statutes. For instance, in the long line of death penalty cases, an aggravating factor cannot be based on or duplicate an convicted offense's element or conduct that establishes that element. Further, in non-capital offenses, the same is true with provisions of the sentencing guidelines.

In United States v. Sinclair, 74 F.3d 753 (7th Cir. 1995), the defendant challenged his enhancement for "abuse of trust" in his 18 U.S.C. § 215(a)(1) conviction. "Abuse of trust" is an element of 18 U.S.C. § 215(a)(2). The court noted that had Sinclair been convicted of the 215(a)(2) offense, the "abuse of trust" enhancement could not have applied. However, because he was convicted of 215(a)(1), which lacked the element, it was permissible. Nevertheless, the 7th Circuit in Sinclair held 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. Further, in Sinclair, the court "determined that it can assume an offense level before enhancements accounts for every element of the crime". Ibid. The Third Circuit applied this principle 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 firearms to the drug trafficking offense); also United States v. Rodgers, 981 F.2d 497, 500 (11th Cir. 1993) (same).

Only one court, to date, has considered the permissibility of applying USSG § 2A1.5(b)(1) in 18 U.S.C. § 1958(a) convictions. In United States v. Caguana, 884 F.3d 681, 691-692 (7th Cir. 2018), the Court of Appeals held that the application was not double counting. But this case is troublesome and should not control the court's examination here--in an over-20-page decision dealing expansively with other unrelated issues, the discussion of 2A1.5(b)(1)'s permissibility spans approximately one paragraph that seems a "throw-away" appended to the decision. It lacks an in-depth examination of the case law concerning the 1958(a) statute's construction, or 2A1.5's intent (unlike the argument above) and does not even cite one case decision in support of its holding. The 7th Circuit in Caguana relied exclusively on the idea that double counting was allowed where no guideline provision prohibited it. This was in error. The court neglected to note that USSG § 1B1.3 and its commentary is that specific prohibition (that elements of the offense of conviction cannot be used as an enhancement in determining the applicable guidelines range).

It is salient to note that the guideline provision directly tied to 18 U.S.C. § 1958(a) is USSG § 2E1.4 and that this guideline begins at a base offense level of 32 and directs the court to apply the level appropriate to the "underlying criminal conduct". We presume that USSG § 2E1.4's base offense level of 32 includes consideration of all element-related conduct. Also noteworthy is

that the text of USSG § 2E1.4 lacks any enhancements. If the U.S. Sentencing Commission had desired to enhance 1958(a) defendants for anything, it is arguable that it would have likely mentioned so within the 2E1.4 text. Or mentioned § 1958(a) in the 2A1.5 text or application notes. Perhaps, considering this, it is arguable that the long-used cross-reference to USSG § 2A1.5 is superfluous and only offers prosecutors a chance to up the base offense level to 33 with no stated reason (or oversight) for the past 30 years. However, because USSG § 2A1.5 is tied only to five other statutes by the Commission -i.e., §§ 351(d), 371, 373, 1117, and 1751(d)- this guideline goes out of its way to mention an enhancement under § 2A1.5(b)(1) for the "pecuniary value" consideration that these five statutes demonstrably lack. While absence of evidence is not evidence of absence, we must consider that the failureto specifically mention the cross-reference from 2E1.4 to 2A1.5 that it was either not intended by the Commission or that the guideline was negligently written. Nevertheless, prosecutors have identified this shortcoming and have exploited it effectively against 1958(a) defendants because no one has noticed this issue since its implementation in 1990.

However, this is only the "tip of the iceberg", and Petitioner here asserts that "grouping" may be where such double counting exacts greater harms.

B. Where USSG § 2A1.5(b)(1) effects a "multiple punishment" through "grouping"

Petitioner challenges a second, additional impact of this impermissible double counting of USSG § 2A1.5(b)(1) which is experienced when the enhancement's effect is augmented by "grouping" using USSG §§ 3D1.2 and 3D1.3.

Petitioner is convicted of two offenses. Count one was "attempted kidnapping" in violation of 18 U.S.C. § 1201(d) for which he faced a sentence of "up to 20 years". Count two was the 1958(a) conviction for which he could only be sentenced to a statutory maximum of up to "10 years". In Chapter 55 of Title 18,

Section 1201 does not contain any "pecuniary value" consideration element similar to that found in § 1958(a) in Chapter 95 (i.e. consideration as "receipt of...promise or agreement to pay something of pecuniary value). Further, the appropriate sentencing guideline applied to 1201(d) convictions, videlicet USSG § 2A4.1, does not contain any enhancement for this "pecuniary value" consideration conduct. Perhaps the Sentencing Commission did not intend to make such provision, or likewise may have neglected to write it in. Then again, as no one has raised a comprehensive challenge to these two applications, it may have never been brought to their attention to require such consideration or action. However, considering the Third Circuit holding in Knobloch, supra, where a conviction for both 18 U.S.C. § 924(c) firearms possession and its predicate drug trafficking offense means a court cannot enhance the drug trafficking offense's sentence for its associated guidelines firearms enhancement, the same principle should apply here. Since 2A1.5(b)(1) conduct is explicitly a 1958(a) offense element, the enhancement should not have augmented either the 1958(a) count's sentence or been carried over to augment the Petitioner's sentence on his 1201(d) count. Moreover--this should be true as both counts of the Petitioner's conviction spring from a common scheme and course of conduct.

However, it is the sentence imposed for the 1201(d) count conviction where the Petitioner gets most of the time calculated into his sentence. This is because count one, "attempted kidnapping", can be punished with a range of "up to 20 years". Comparatively, the Petitioner's conduct in his 1958(a) conviction on count two where no one died and no one was injured by the plot exposed him only to a range of "up to 10 years". This 10 year was intended to be a statutory maximum by Congress. However, due to the effects of "grouping" under §§ 3D1.2 and 3D1.3, this element of the 1958(a) statute is not only duplicated as the sentencing enhancement through USSG § 2A1.5(b)(1) to the 1958(a) count, but becomes

essentially "triple counted" (or "cumulatively counted") creating a "multiple punishment" when applied to the larger sentence exposure provided by § 1201(d). The element of one count should not logically be used to effect punishment on another count where it not an element.

Pursuant to the "grouping" provisions of the guidelines, the sentence for the two counts of the Petitioner's conviction are to be controlled by the offense which garners the higher calculated offense level. On count one, the court applied USSG § 2A4.1 which starts with a base offense level of 33 with no applicable enhancements. On count two, the court applied USSG § 2A1.5 (through the cross-reference from § 2E1.4) which began with a base offense level of 33 to which the four-level § 2A1.5(b)(1) enhancement was applied. This resulted in a final offense level of 37 on count two. Because 37 is higher than 33, count two's offense level controlled the grouped sentencing guidelines range for both counts. This 37 was lowered to 34 when the court applied the three-level reduction for "acceptance of responsibility" (for taking a plea agreement) under USSG § 3E1.1. The Petitioner's criminal history determined in the pre sentencing report placed him in Category 2. Because of this, at offense level 34 and criminal history category 2, he faced a sentencing guidelines range of 168-210 months.

However, if not for this error, Petitioner asserts that he should have been sentenced in December 2016 at a calculated guidelines offense level of no greater than offense level 30, criminal history category 2. Since both count one and count two had base offense levels of 33, and the four-level USSG § 2A1.5(b)(1) enhancement should not have been applied due to prohibited impermissible double counting violating USSG § 1B1.3's commentary, neither count one's 33 or count two's 33 would have been greater than the other. An offense level of 33 would have thus covered the grouping of both convicted counts under one offense level. After applying the three-level § 3E1.1 reduction, the final offense level would have

been 30. On the sentencing chart, the intersection of offense level 30 and criminal history category 2 recommends a sentence of between 108 and 135 months. This range would have been commensurate with the statutory maximum of 10 years (120 months) provided for in § 1958(a). This would mean that the Petitioner was potentially oversentenced by a factor of 72 to 102 months. This is the kind of guidelines calculation error that should compel relief under Rosales-Mireles v. United States, 585 U.S., 138 S.Ct. 1897 (2018). As of the date of this filing, with a correct guidelines calculation sentence in the 108-135 month range, the Petitioner would have been released from custody as early as September 2022 (at 108 months) or in July 2023 (with 120 months) and approaching release in August 2024 (with 135 months).

This "grouping error" is a double jeopardy multiple punishment. See generally North Carolina v. Pearce, 395 U.S. 711, 718-19 (1969) (that the Double Jeopardy Clause protects "against multiple punishments for the same offense"). Ironically, "grouping" was supposed to "prevent double punishment for essentially the same conduct". USSG, Ch. 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 that an arbitrary casting of a single transaction into single 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. While it has likely popped up multiple times in the last 30 years, and while it has impacted hundreds, if not thousands, of federal prisoners, it has gone unnoticed and

unaddressed. Thus, this is a novel claim and this is the first time a court has had a chance to deeply examine and correct it.

The two aspects of this error persist through the Petitioner's ongoing sentence. The application and multifaceted impacts of the USSG § 2A1.5(b)(1) enhancement 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 Fifth Amendment's Double Jeopardy Clause protects a defendant from receiving multiple punishments for the same offense imposed in the same proceeding. Moreover, Petitioner does not believe that Congressional Intent was to allow prosecutors to manipulate "grouping" to obtain or effect an "end run" around the 10-year statutory maximum in 18 U.S.C. § 1958(a) for the Petitioner's conduct. Through count manipulation and through this unscrutinized sentencing enhancement, the Government obtained a longer sentence against this Petitioner than what he would have otherwise received due to the violations of the Petitioner's due process and double jeopardy clause rights. This impermissible double counting and guidelines calculation error caused by application of USSG § 2A1.5(b)(1) must be corrected. Therefore, the Petitioner urges this Court to vacate his sentencence and remand for resentencing under the "sentencing package doctrine" to correct it.

II. Petitioner's conviction for "attempted kidnapping" under 18 U.S.C. § 1201(d) should be vacated as the statute is constitutionally invalid

A. Because Congress did not enact a federal attempt liability statute defining the ambit of criminal attempt, 18 U.S.C. § 1201(d) is void-for-vagueness and overbroad; and the court's adoption of the Model Penal Code definitions without Congressional authorization violates the Separation of Powers doctrine

The Petitioner stands convicted on one count of "attempted kidnapping" in violation of 18 U.S.C. § 1201(d) if he "attempts" to perform an act enumerated in subsection § 1201(a) -- that is, in attempting to "seize, confine, inveigle, decoy, kidnap, abduct, or carry away and hold for ransom or reward or otherwise" any person. However, the statute does not define the word "attempt". Congress has not passed a federal attempt liability statute despite many calls to do so. The use of "attempt" in federal case law is troublesome because of the lack of a precise definition and the resulting ambiguity on the bounds of that liability ensnares inchoate conduct that should not suffice to establish a conviction. Because of this, Petitioner asserts that 18 U.S.C. § 1201(d) is unconstitutional and should be invalidated as "void-for-vagueness" and "overbroad" violative of his due process rights under the Fifth Amendment. Further, because Congress never authorized the courts to adopt and employ definitions from the Model Penal Code, the court's use of these concepts violates the Separation of Powers doctrine embodied in the Vesting Clauses of Article I, II, and III.

A statute can be invalidated as "void-for-vagueness" and implicates a criminal defendant's Fifth Amendment due process rights. Void-for-vagueness doctrine is concerned with a defendant's right to fair notice and adequate warning that his conduct runs afoul of the law. Gentile v. State Bar of Nevada, 501 U.S. 103, 107-08 (1991). A statute is unconstitutionally vague if "it fails to give ordinary people fair notice of the conduct it punishes"

or "so standardless that it invites arbitrary enforcement". Johnson v. United States, 576 U.S. 591, 595 (2015); United States v. Williams, 553 U.S. 285, 304 (2008); also Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982). When a vagueness is contested, the court can declare the statute "on its face" (or facially) or by its application (or "as-applied"). A facial challenge establishes that no set of circumstances exist under which the statute would be valid. United States v. Mitchell, 652 F.3d 387, 405 (3rd Cir. 2014); citing United States v. Salermo, 481 U.S. 739, 745 (1987). By contrast, "an as-applied attack does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right". United States v. Marcavage, 609 F.3d 264, 273 (3rd Cir. 2010); Heffner v. Murphy, 745 F.3d 56, 65 (3rd Cir. 2014). A statute is void-for-vagueness if it (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) authorizes or even encourages arbitrary and discriminatory enforcement". United States v. Stevens, 533 F.3d 218, 249 (3rd Cir. 2008); quoting Hill v. Colorado, 530 U.S. 703, 732 (2000); also United States v. Fullmer, 584 F.3d 132. 152 (3rd Cir. 2009). The dispositive question for whether the statute is unconstitutionally vague is not the inherent "lawfulness" of certain conduct but the fair warning. See Omaechevarria v. Idaho, 246 U.S. 343, 348 (1918). In considering 18 U.S.C. §1201(d) we have no direction or definition from Congress of when inchoate conduct crosses a "point of no return" and "attempt" begins. Because this is absent from the statute, the statute does not provide the requisite "fair warning" and is unconstitutionally vague.

Due process bars courts from applying constructions of a criminal statute when the elements of that statute are not defined. Cf. Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964) ("fair warning is lacking...when a statute is expanded by

judicial construction").

In the American constitutional order, Congress writes and enact laws, not the Courts. Writing for the Supreme Court long ago, Chief Justice John Marshall wrote: "The plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime and ordain its punishment." United States v. Wiltberger, 5 Wheat 76, 95, 5 L.Ed. 37 (1820). "It is commonplace that the federal courts are courts of limited jurisdiction, and that there are no common law crimes against the United States. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offense." United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812). "It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under a statute unless clearly within its terms". Todd v. United States, 158 U.S. 278, 282 (1895) (emphasis added); Keeble v. United States, 412 U.S. 205, 215 (1973) (Stewart, J. dissenting); also Liparota v. United States, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute").

The federal criminal code does not contain a general provision for the crime of attempt. Federal criminal law is purely statutory; there is no federal common law of crimes. Levy v. Parker, 478 F.2d 772, 796 (3rd Cir. 1973); United States v. Berrigan, 482 F.2d 171, 186 (3rd Cir. 1973) ("the interstices of federal criminal law cannot be filled by resort to common law precedents"); cf. Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (that common law principles about aiding and abetting cannot be considered). Courts have taken a

liking to the definition of "attempt" developed by the Model Penal Code in the early 1960s. However, and most importantly, Congress has never enacted its provisions into law or authorized its use to delineate the law of attempt. Cf. e.g., United States v. Davis, 139 S.Ct. 2319, 2325 (2019) ("only the peoples' representatives in Congress may enact federal criminal law"); citing Hudson, supra; United States v Bass, 404 U.S. 336, 344 (1971) ("While a court should interpret...these principles are not substitutes for Congressional lawmaking"); cf. Gun Owners of America, Inc. v. Garland, 992 F.3d 446 (6th Cir. 2021) ("What the Supreme Court has previously said about a federal court's ability to create a crime is equally relevant to a federal agency's ability to do so. Because criminal punishment usually represents the condemnation of the community, legislatures, not agencies should define criminal activity") which cited Bass, supra, at 348 (on courts).

Indeed, the drafters and proponents of the Model Penal Code "felt the necessity for a statute" -- but that recommendation has remained unheeded by Congress. Berrigan, supra, at 186; ibid ("The National Commission on Reform of Criminal Laws, also recognizing the apparent void in the existing federal criminal code, has proposed a general attempt statute, applicable to every federal offense" closely resembling the Model Penal Code). Several bills proposed such an attempt liability statute. Even the Nixon administration advocated adding specific "attempt" provisions to federal drug laws. See United States v. Everett, 700 F.2d 900, 905 (3rd Cir. 1983) (noting that the Senate passed a bill but used the word "endeavor" for "attempt"). But, as the Third Circuit noted in Berrigan, "Nevertheless, the brute fact remains that present federal criminal statutes do not contain this provision. And for this court to uphold these convictions in the absence of such statutory authority would be to impose criminal liability upon mere intent, where the will is to be taken for the deed, or as expressed in the Latin

formula appearing in the Year Books, Voluntas reputabitur pro facto". Berrigan, supra, at 186; ibid at 190 and n.7 ("Congress has not yet enacted a law that provides that intent plus act plus conduct constitutes the offense of attempt irrespective of legal impossibility. Until such time as such legislative changes in the law take place, this court will not fashion a new non-statutory law of criminal attempt").

By employing the Model Penal Code definition which was never enacted by Congress, the Courts overstep their authority in ways that "violate the constitutional principle of separation of powers in a manner that trenches particularly harshly on individual liberty". Whalen v. United States, 495 U.S. 684, 690 (1980). "If Congress desires to go farther...it must speak more clearly than it has". United States v. Skilling, 561 U.S. 358, 410 (2010); citing McNally v. United States, 483 U.S. 350, 360 (1987).

The question, in the absence of a federal statute providing a clear, precise definition, is what "attempt" really means. There are too many posited formulations and the inconsistencies and ambiguities presented violate due process. We must consider how a statute is constructed with an analysis based in how "words should be 'interpreted as taking their ordinary, contemporary, common meaning... at the time Congress enacted the statute". Wisconsin Cent. Ltd v. US, 138 S.Ct. 2067, 2074 (2018); quoting Perrin v. United States, 444 U.S. 37, 42 (1979); also Util. Air Regulatory Group v. EPA, 573 U.S. 302, 320 (2014) ("Courts must bear in mind the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000). The original iteration of the federal kidnapping statute was passed without any provisions prohibiting an "attempted" kidnapping. So, the analysis of "attempt" must take into mind that when the Kidnapping statute was first passed, as the

Lindbergh Act, the concept of "attempt" was heavily reliant on common law understanding of the term. Morrisette v. United States, 342 U.S. 246, 263 (1952) ("generally, where Congress uses a common law term in a federal criminal statute without otherwise defining it, Congress is presumed to adopt the meaning given that term at common law"); also United States v. Nedley, 255 F.2d 350, 357 (3rd Cir. 1958). Historically, at common law, attempt had been limited to conduct close to the completion of the intended crime. See People v. Werblow, 241 N.Y. 55, 69, 148 N.E. 786, 789 (1925) (Cardozo, J.) (holding that, to constitute attempt, a suspect's conduct must "carry the project forward within dangerous proximity to the criminal end to be attained"); also Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N.E. 55, 56 (1901) (Holmes, J.) ("recognizing that "some preparations may amount to an attempt" when they come "very near to the accomplishment of the act"). The "dangerous proximity" test determined how close one was to the threshold of the crime. This is because the development of the law has stated that solicitations were not attempts, inchoate conduct was not an attempt, preparation was not an attempt, conspiracy was not an attempt. See, e.g., United States v. Delvecchio, 816 F.2d 859, 862 (2nd Cir. 1987) ("A substantial step is not established by proof that defendants had met with suppliers, agreed on terms, and provided beeper numbers. Such evidence, at most, established a "verbal agreement", which, "without more, is insufficient as a matter of law to support an attempted possession conviction").

However, 15 years after the Model Penal Code drafters wrote their definition, the courts began adopting it--despite (or in spite of) the lack of Congressional action to enact a federal attempt liability statute. This adoption which radically contrasted with previously used limitations of attempt, and applied the requirement that intent to commit the crime needed to be accompanied by a substantial step and thus ushered in a broader view of attempt. The ambit of criminal attempt liability expanded not by a change or clarification of statute, but by an edict of the court

without any express instruction by Congress. These competing definitions have created many pitfalls due to the vagueness of the term "attempt" and how the law is being executed against defendants. The courts essentially created a non-statutory crime.

While the Model Penal Code's attempt liability claims are simply stated, they do not provide bright lines for application. The identification of when a substantial step begins, like the identification of attempt itself, is necessarily a matter "of degree". United States v. Coplon, 185 F.2d 629, 633 (2nd Cir. 1950); quoting Commonwealth v. Peaslee, supra. They vary depending on "the particular facts of each case". United States v. Ivic, 700 F.2d at 66. The statement that a substantial step must be "something more than mere preparation, yet may be less than the last act necessary before the actual commission of the substantive crime" creates too wide an ambit, too broad a dragnet to provide sufficient fair notice. Cf. United States v. Manley, 632 F.2d 978, 987 (2nd Cir. 1980). In an age of positive law, the definitions should not shift from case to case because that leads to arbitrary and uneven justice that would run counter to the need for "fair warning" and offend fundamental fairness and equal protectionin ways that would undermine the desired universality of law. The quandaries caused by the failure of Congress to state a precise definition left courts to overstep their vested powers to redefine "attempt" law which courts have since lamented as a "perplexing problem", a "subtle concept" and in similar language that any ordinary citizen should find concerning and alarmingly inconclusive. United States v. Stallworth, 543 F.2d 1038, 1039, 1040 (2nd Cir. 1976), "So not all solicitations qualify, but some do". Martinez v. Attorney General, 906 F.3d 281, 286 (3rd Cir. 2018). These problems have been called "much-mooted", "intricate and difficult", "one of the most interesting and difficult problems of the criminal law", reflecting "ambivalence as to how far the governing criteria should focus on the dangerousness

of the actor's conduct". See Berrigan, supra, at 187, and n.29-34. A type of vagueness that leads judges to note a shoulder-shrugging "some do, some don't" murkiness to the definition cannot conceivably satisfy a defendant's due process rights or constitute fair notice any more than justice hinged on the throw of a dice or drawing of lots.

"Common law crimes, especially those formulated in vague terms, are considered serious threats to liberty". A. Denning Freedom Under Law, 41-42 (1949). "He who accuses one of any offense must put his finger on some act of Congress denouncing that particular conduct as criminal. In Re King, 46 F. 905 (6th Cir. 1891). "A federal court has no common law jurisdiction of crimes and therefore no power to adjudge any act criminal not declared to be so by statutory enactment". United States v. Irwin, 26 F. Cas. 544 (D.Ohio 1851) (describing the lack of a clear statutory definition as "a defect of power to punish in the event of trial and conviction"). Comparatively, the lack of a clear definition should render a law unenforceable. See, e.g., Ashton v. Kentucky, 384 U.S. 195 (1966) (on common law inconsistencies in "criminal libel" definition, holding "elements of the crime were so indefinite and uncertain that it should not be enforced"); however cf. 18 U.S.C. §2113(a) (tying attempt to specific, clear elements of "by force and violence, or by intimidation, attempts to take").

Ambiguity concerning the ambit of a criminal statute should be resolved in favor of lenity. See Skilling, supra, at 410; citing Callanan v. United States, 364 U.S. 587, 596 (1969) and Rewis v. United States, 401 U.S. 808, 812 (1971). To satisfy due process "a penal statute must define the criminal offense (1) with suficient definiteness that ordinary people can understand what conduct is prohibited and (2) in a manner that does not encourage arbitrary and discriminate enforcement"; Skilling, 130 S.Ct. 2896, 2927-2928; citing Kolender v. Lawson, 461 U.S. 352, 357 (1983). In Berrigan, the Third Circuit stated that one of the

following teachings from analyzing the law of attempt is that "We must not generalize in the law of attempt". Berrigan, supra, at 187.

Where current "attempt" jurisprudence casts too wide a net is in the ambiguities of what solicitations are and are not a substantial step, what preparation crosses the line, what conspiratorial and planning conduct crosses the line. Because mere preparation is not an attempt, many solicitations are not, and where planning stops being inchoate and becomes attempt is not clear. While the desire of the Model Penal Code drafters was to broaden the ambit of attempt liability, there is a question "of degree" that this broadening captures too much conduct that falls short. That is why it is important that Congress draft, debate, and enact, because the application of the definitions for a non-statutory crime created by the Courts has become dangerous to the need to fairly warn.

The old principle of "Nulla poena, sine lege" -- that no punishment without a law authorizing it should hold here. There needs to be an explicit "fair warning" of the conduct prohibited. Attempt law at the federal level does not have such direction from Congress -- and it sorely needs it. But this lack of Congressional action was not an invitation for courts having overstepped its bounds by creating a non-statutory crime of attempt. If "attempt...consists of steps taken in furtherance of an indictable offense which a person attempting intends to carry out if he can. As we have seen there can be a long chain of such steps and it is necessary to have some test by which to decide that the particular link in the chain has been reached at which the crime of attempt has been achieved. That link will represent the actus reus of attempt". See J.W. Cecil Turner Kenny's Outlines of Criminal Law, 79 (16th ed. 1952). However, what "link" in the chain constitutes the threshold answer is a question only for Congress to answer.

In the meantime, the federal government and the courts have overstepped the metes and bounds of their powers as limited by the Vesting Clauses by usurping the

responsibility in the shadow of Congress's failures to act. Further, until that link is defined, the law of attempt is not sufficiently clear to satisfy due process. In these situations, "the rule of lenity has bearing if, after full examination of a particular statute, an inquiring court must guess at what Congress intended". United States v. Meade, 175 F.3d 215 (1st Cir. 1991). Therefore, 18 U.S.C. §1201(d) should be invalided as void-for-vagueness and overbreadth and this Court should issue a writ to effectuate a vacatur of the Petitioner's conviction on Count One of the Information.

B. The Petitioner's conviction should be vacated due to a claim of legal innocence because his conduct does not meet the elements of 18 U.S.C. §1201(d)

The text of 18 U.S.C. §1201(d) is remarkably short and operates chiefly by reference: "Whoever attempts to violate subsection (a)..." -- subsection (a) being the substantive offense of kidnapping. See §1201(d). The substantive crime is defined as "Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise" is guilty of kidnapping. See §1201(a). The elements of attempted kidnapping, based on the combined texts of both subsection (a) and (d) are that a person (1) attempts to (2) "unlawfully seize, confine, inveigle, decoy, kidnap, abduct, or carry away and hold a person; (3) for ransom, reward, or any other reason or purpose, (4) and do so in a way that touches upon interstate commerce to commit or further the kidnapping. See Hattaway v. United States, 399 F.2d 431 (5th Cir. 1968); United States v. McBryan, 553 F.2d 433 (5th Cir. 1977). In the previous section, the Petitioner asserts "attempt" is unconstitutionally vague and overbroad and that fatally undermines the validity of §1201(d). In this section, the Petitioner asserts that his conduct did not meet the operative elements required by subsections (a) and

(d).

Because §1201(a) employs seven specific verbal actions, the "attempt" must be tied to the actions of those verbs. This construction is necessarily disjunctive. A defendant must be accused of an (1) "attempt to seize"; (2) "attempt to confine"; (3) "attempt to inveigle"; (4) "attempt to decoy"; (5) "attempt to kidnap"; (6) "attempt to abduct"; and/or an (7) "attempt to carry away and hold" a person for ransom, reward, or otherwise. See United States v. McInnis, 601 F.2d 1319 (5th Cir. 1979) ("although comprehensive language was used to cover every possible variety of kidnapping, 18 U.S.C. §1201 does not make either all abductions or even every seduction of victims a federal crime"). There is a necessary element of an actual force, fraud, deception, or coercion, essential to the crime. United States v. Healy, 376 U.S. 75 (1964); also Gooch v. United States, 82 F.2d 534 (1936); cf. 18 U.S.C. §2113(a) (where attempted bank robbery inextricably ties attempt liability to clear element of "by force or violence, or by intimidation, attempts to take").

This implicates that the statute text was not satisfied with a mere "intent to commit with force or fraud". The nature of the "force or fraud" was inextricable from the conduct and implied that an attempt tied to an act of force or fraud must necessarily be at a threshold of the crime. Perhaps even an active engagement with the victim at the threshold of trying. See United States v. Macklin, 671 F.2d 60 (2nd Cir. 1982). Comparatively, the law does not state "or conspires or prepares to do so". Conspiracy conduct is covered by 18 U.S.C. §1201(c). By applying a model penal code definition of attempt the court overstepped by creating an non-statutory expansion of the law that punishes mere intent in a way Congress did not explicitly intend.

As explained in the "Statement of the Case" hereinabove, the Petitioner's conduct was essentially a "verbal agreement" and "planning" of the crime in discussions with a confidential informant and undercover federal agent. This was

merely preparatory conduct and conspiracy conduct remote from the threshold of the crime -- and remote from the specific verbal actions of 18 U.S.C. §1201(a). See Delvecchio, supra, (where conduct that a defendant met with suppliers, agreed on terms, and provided beeper numebrs could only establish a "verbal agreement" and was insufficient to support attempt liability).

Petitioner concedes that it is altogether possible his conduct rose to the level that would have supported a conviction for "conspiracy to kidnap" under 18 U.S.C. §1201(c) which requires "two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy". However, he could not be so charged because a defendant cannot engage in a "conspiracy" with either an undercover agent or confidential informant. See United States v. Lewis, 53 F.3d 29, 33 (4th Cir. 1995) ("because conspiracy is premised upon an agreement to commit an unlawful act, an undercover government agent or government informant cannot supply the necessary agreement to form a conspiracy"); United States v. Wright, 63 F.3d 1067, 1072 (11th Cir. 1995) (defendant cannot be convicted of conspiring with a confidential informant); also United States v. DeSimone, 119 F.3d 217, 223 (2nd Cir. 1997) (same); United States v. Vasquez, 113 F.3d 383, 387 (2nd Cir. 1997); United States v. Gonzalez, 967 F.Supp 326 (1997) (or with undercover agent); United States v. Garcia, 89 F.3d 362, 365 (7th Cir. 1996) (same); United States v. Hayes, 775 F.2d 1279, 1283 (4th Cir. 1985).

Because the concept of "attempt" is too murky and imprecise, and lacks the intent of Congress in the form of a federal attempt liabilty statute, 18 U.S.C. §1201(d) is impermissibly vague and violates the Petitioner's due process rights. Further, the Petitioner asserts he did not meet the elements of §1201(d) as it requires an attempt of the actions proscribed §1201(a). Because there is a failure to meet these elements, the Petitioner is legally innocent on Count One of the

Information filed against him. In the interests of justice, his conviction on this count should be vacated. As it presently stands, his convicted conduct, of planning, conspiring, agreeing, and driving around town in the process of planning--was far too removed and remote from any try of force or fraud. It essentially constituted nothing more than a form of "mere intent" that is an "attempt to attempt" -- an actus reus that no federal court has ever recognized as valid to sustain a conviction.

III. Other considerations this Court should consider

A. The passage of time should not bar relief

Various procedural excuses and protestation that finality is absolute should not been relied upon to deny this Petitioner corrective relief for his constitutional injuries. It should never be too late to correct an error of constitutional magnitude in a prisoner's conviction or sentence -- especially if the denial of relief leaves him in prison unheard. See Chessman v. Teets, 354 U.S. 156, 165 (1957) (seven years after conviction: "The overriding responsiblity of this 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 suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands".); Herman v. Claudy, 350 U.S. 116, 123 (1956) (eight years after conviction: "the sound premise upon which these holdings rested is that men incarcerated in flagrant violation of their constitutional rights have a remedy".); cf. Day v. McDonough, 547 U.S. 198, 215 (2006) (Scalia, J. dissenting) (where habeas petitions entertained 40 years, 36 years, 23 years after filing petitioners were sentenced).

If habeas litigation is more about navigating inconsistent procedural bars and never getting to examining constitutional injuries, we have lost our way and should be ashamed of the monster we allowed to be born. Today, thousands of federal prisoners languish while over 99.5% of habeas claims are denied or dismissed before anyone asks about the constitutional injury.

B. The novelty of Petitioner's claims should have resulted in their being heard sooner

Claims that are "novel" rarely come to the courts quickly. They do not pop up fully formed ready to be employed to rescue an imperiled prisoner. They take time. Often they go from an initial "gut feeling" that something is not correct.

It may not be expressable quickly in words. It often requires reading across varied and disparate areas of the law to "connect the dots". Extensive research is required. Extensive drafting and re-drafting to ensure a claim is articulated precisely so another person can say "yes, something is wrong here". Lawyers, typically don't want to engage in such an investigation because at the onset, they do not see guarantees that the path leads to a destination.

"As Supreme Court precedent shows, a remedy does not provide a prisoner with a 'meaningful opportunity' and is therefore constitutionally deficient if it does not allow a prisoner to present a collateral challenge at a meaningful time" .... "The timing of a remedy's availability can be the difference between constitutional deficiency and constitutional sufficiency". McCarthan v. Dir. Goodwill Industries Suncoast Inc., 851 F.3d 1077, 1135-36 (11th Cir. 2017). An issue's novelty and late-blooming should not be a bar to relief -- cause for relief has been found to exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel". Reed v. Ross, 468 U.S. 1, 16 (1984). "It is the nature of our legal system that legal concepts, including constitutional concepts, develop slowly". Reed, supra, at 15; also Engle v. Isaac, 456 U.S. 107, 135 ("principles of comity and finality must yield to the imperative of correcting a fundamentally unjust incarceration"). It is never acceptable "that finality, standing alone, provides sufficient reason for federal courts to compromise their protection of constitutional rights". Reed, supra, at 15. The claims raised herein are novel, but that they have been denied is very troublesome and disconcerting because they are "significant question(s)... which has not yet been decided by controlling precedent, or which is fairly doubtful" and "important to" or "so integral to the merits of the conviction in which the defendant is imprisoned that a contrary appellate holding is likely to require reversal of conviction". United States v. Miller, 753 F.2d 19, 23 (3rd Cir. 1985) There was sufficient cause and prejudice because the Petitioner points out that

he was oversentenced. See Molina-Martinez v. United States, 587 U.S. 189, 200 (2016) ("a defendant who shows a guidelines miscalculation has demonstrated a reasonable probability of a different outcome" - the definition of "prejudice"); also Strickland v. Washington, 466 U.S. 668, 689 (same); United States v. Olano, 507 U.S. 725, 732-35 (1993) (focusing on whether error affected the outcome and affected "substantial rights").

The denial of a hearing on the merits has meant that justice has been denied. "Judges do not knowingly leave substantial errors uncorrected". Miller, supra, at 23. By leaving the errors complained about hereinabove, there is the potential for a grave miscarriage of justice being allowed to persist. Khattak v. United States 273 F.3d 557, 563 (3rd Cir. 2001); also Herrera v. Collins, 506 U.S. 390, 404 (1993) (fundamental miscarriage of justice exception grounded in equitable discretion of habeas courts to ensure that federal constitutional issues do not result in wrongful incarceration); United States v. DeLuca, 899 F.2d 503, 506 (3rd Cir. 1989) ("habeas relief is generally available to protect against fundamental defect which inherently results in a complete miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure") citing United States v. Addonizio, 442 U.S. 178, 185 and Hill v. United States, 368 U.S. 424, 428 (1962). This Court has remarked that "the very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected. Harris v. Nelson, 394 U.S. 286, 290-292 (1969). However, with the denials of access to a "hearing on the merits" and to justice that this Petitioner has experienced, his experiences mirror those lamented in Phelps v. Alameida, 569 F.3d 1120, 1141 (9th Cir. 2009), cert. denied 558 U.S. 1137 (2010) in which Circuit Judge Reinhardt criticized that the case took 11 years to travel up and down the federal judiciary apparatus three separate times" and "no less than 12 federal judges and 9 supreme court justices" were asked to intervene, but

"in all this time, not a single federal judge has once examined the substances of Phelps' claims. Despite all the procedural hangups, "a critically important part has been overlooked. Over 11 years ago, a man came to federal court and told a federal judge that he was being unlawfully imprisoned in violation of the rights guaranteed to him by the Constitution of the United States. More than 11 years later, not a single federal judge has ever once been allowed to seek to discover whether that claim is true. Ibid. Let's not repeat such deprivations in the case at bar.

C. Petitioner has an actionable claim of "legal innocence" and this Court should apply the Menna-Blackledge doctrine

If the Court agrees with the Petitioner's assertions in Section II above, he would be legally innocence of 18 U.S.C. § 1201(d) and his conviction would be vacated. In 2004, Associate Justice Kennedy wrote: "The law must serve the cause of justice... Perhaps some would say that [Petitioner's] innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating and not violating a criminal statute cannot be shrugged as a minor detail". Dretke v. Haley, 541 U.S. 386, 399-400 (2004) (Kennedy, J. dissenting). Legal innocence is not a technicality. It is essential in a nation placing primacy on the "rule of law". Virtually all rights of a criminal defendant in our constitutional order are "merely rights not to be convicted". Flanagan v. United States, 465 U.S. 259, 267 (1984); also at 266 ("more than a right not to be convicted - it is the right not to be placed in jeopardy, that is not to be tried for the offense"). The Third Circuit held "In short, legal innocence counts as innocence". United States v. James, 928 F.3d 247, 253-254 (3rd Cir. 2019). "The weight of authority clearly supports treating a claim of legal innocence as an adequate assertion of innocence". Ibid. cf. United States v. Hamilton, 510 F.3d 1209, 1214 (10th Cir. 2007) ("mere assertion of a legal defense is insufficient, the defendant must present a credible claim

of legal innocence"); United States v. Cray, 47 F.3d 1203, 1209, 310 U.S.App.DC 329 (DC.Cir. 1995).

When a statute is unsalvagably "void-for-vagueness", the Government should not have had the right or power to charge a defendant. This Court developed the "Menna-Blackledge doctrine" and held that an unconstitutional statute denies the Government its power to prosecute and obtain a conviction. See Blackledge v. Perry, 417 U.S. 21, 30 (1974) (an unconstitutional statute "implicates the very power of the State to prosecute Defendant"); and Menna v. New York, 423 U.S. 61, 63 (1975) ("the state may not convict him" under unconstitutional statute, "no matter how validly his factual guilt is established"). This doctrine precludes the Government from "haling a defendant into court on a charge". Menna, ibid. Pleading guilty by a plea agreement does not bar a challenge to a statute's constitutionality. See Class v. United States, 138 S.Ct. 798, 803-806 (2018). This Court recently stated clearly: "a conviction under an unconstitutional law is not merely erroneous, but it is illegal and void and cannot be a legal cause of imprisonment". Montgomery v. Louisiana, 136 S.Ct. 718, 730 (2016). Thus, this Court should intervene and "yield to the imperative of correcting a fundamentally unjust incarceration". Engle v. Isaac, supra at 135; Dretke, supra, at 399-400.

D. If habeas relief is unavailable, this Court can issue a Writ of Audita Querela or Writ De Homine Replegiando through the All Writs Act

This Court, in United States v. Morgan, 346 U.S. 502, 506 (1954), hinted at the substantial power of this Court to grant ancient writs in order to fashion a remedy under the All Writs Act, 28 U.S.C. § 1651(a).

Audita Querela is an "ancient writ" that emerged during the reign of Edward III and has a long record of being employed "to challenge a judgment that, while justified at the time it was rendered, has been placed in question by subsequently discovered evidence or by a new legal defense". Gore v. United

States, 2009 U.S. Dist. LEXIS 15403 at *3 (D.NJ Feb. 20, 2009). It is available where a Petitioner raises: (1) a valid legal objection; (2) to a judgment that arises after the judgment is entered, (3) not redressable by osome other means. Muirhead v. AG of the United States, 262 F.Appx. 473, 474 (3rd Cir. 2008). It requires a legal defect in the underlying judgment. Muirhead, supra; United States v. Holder, 936 F.3d 1, 5 (1st Cir. 1991).

the Writ De Homine Replegiando is of even more ancient origins, older than habeas corpus, with roots in the 11th century shortly after the Norman Conquest. Its purpose was "for replevying the man" -- ensuring a release from prison because of an illegal detention under an unconstitutional statute. In US legal history, it was often associated with freeing "free Blacks" and escaped slaves under federal laws aiming to keep them in bondage. See, e.g. Elkinson v. Deliesseline, 8 F.Cas. 493 (Cir.Ct.SC 1823) ("with a view to try the question of the validity of the law under which he is held in confinement"); In Re Martin, 16 F.Cas. 881, 2 Paine 348 (Cir.Ct SDNY 1800) ("If the act of Congress is unconstitutional, we see no objection to issuing of a homine replegiando"); United States v. Scott, 27 F.Cas. 990 (D.Mass 1851) ("we must of necessity decide upon the constitutionality of an act of Congress"); cf. Prigg v. Pennsylvania, 16 Peters (41 U.S.) 539, 10 L.Ed. 1060 (1842). Because the Petitioner here asserts a challenge of legal innocence vis-a-vis the constitutionality of 18 U.S.C. § 1201(d), relief via a Writ De Homine Replegiando is properly situated.

CONCLUSION

The Supreme Court should intervene to provide relief by granting issuance of an extraordinary writ -- either habeas corpus, audita querela, or de homine replegiando. The issues complained of here are grave, and the risk of irreparable harm is unacceptable in our Constitutional order. "Interests in finality in sentencing must be at a lower ebb when one of a group of sanctions offends the Constitution. Collateral review 'does not encompass all claimed errors in conviction and sentencing, but it does encompass an error of constitutional magnitude'". See United States v. Black, 2019 U.S. Dist. LEXIS 7589 at *18 (W.D. Pa Jan. 16, 2019); citing Bousley v. United States, 523 U.S. 614, 621 (1998). The Petitioner's simple request to be heard once on the merits of his claims of constitutional injury have been delayed and denied for too long. I ask this Court to consider the question, posed by one of your members almost 9 years ago:

> "What reasonable person wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of its own devise that threaten to require individuals to linger longer in federal prison than the law demands?"

-- United States v. Sabillon-Umana, 772 F.3d 1328, 1334 (10th Cir. 2014). Or of an older sentiment, no less true:

> "That a party should have a right to his liberty, and no remedy to obtain it, is an obvious mockery, but it 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 (Cir.Ct.SC 1823)

PRAYER FOR RELIEF

For the reasons set forth hereinabove, Petitinoer prays that this Court will issue relief by granting a Writ of Habeas Corpus, or a Writ of Audita Querela, or a Writ de Homine Replegiando.

Respectfully submitted,

CHRISTOPHER THIEME
PETITIONER PRO SE

DATED: NOVEMBER 7, 2023