No. 23-6552

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE VINCENT PISCIOTTA,
-- 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, OR FOR A WRIT OF AUDITA QUERELA, OR FOR A WRIT DE HOMINE REPLEGIANDO, UNDER 28 U.S.C. § 1651

On the Petition:

VINCENT PISCIOTTA
Reg. No. 23174-045
FCI FORT DIX
Federal Correctional Institution
Post Office Box 2000
Joint Base MDL, NJ 08640

PETITIONER PRO SE

** PRESENTLY CONFINED **

QUESTIONS PRESENTED FOR REVIEW

1.) Can a conviction for "using fire to commit a federal felony", under 18 U.S.C. § 844(h)(1), be predicated upon the conspiracy conduct element of a "conspiracy to commit arson", under 18 U.S.C. § 371, when it is legally impossible and absurd because "fire" cannot be "used" in an agreement (unless co-conspirators used smoke signals, or lanterns in a belfry)?

2.) Can a conviction for "using fire to commit a federal felony", under 18 U.S.C. § 844(h)(1), be predicated upon "arson" conduct in which fire was used, or upon the conspiracy's "overt act" (the same arson conduct) without posing an "obvious double jeopardy issue"?

3.) Will the Supreme Court resolve a "Circuit Split" between the 8th Circuit (which allows such an § 844(h)(1) conviction) and the 1st, 5th, and 7th Circuits (which does not allow such a conviction) on these very questions?

4.) In the alternative, if the Court does not provide habeas relief, would it consider relief via a Writ of Audita Querela or Writ De Homine Replegiando under the All Writs Act?

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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 a Writ De Homine Replegiando under 28 U.S.C. § 1651(a), directing the vacatur of his conviction on count four in United States v. Pisciotta, et al., Case No. 4:10-CR-0174-02-DGK in the United States District Court for the Western District of Missouri, Western Division, at Kansas City; and for remand to the District Court for resentencing.

PARTIES TO THIS ACTION

1.) PETITIONER, appearing here pro se, VINCENT PISCIOTTA, Reg. No. 23174-045, 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 an aggregate 240-month (20-year) sentence of imprisonment to be followed by three-years of supervised release. At present calculation, he has a "projected release date" of December 9, 2029. He was convicted and sentenced in the United States District Court for the Western District of Missouri after trial by jury in 2012 on three of four counts charged in the indictment. He was sentenced in 2013 to 60 months (5 years) on count one: "conspiracy to commit arson", in violation of 18 U.S.C. §§ 371, 844(i); 120 months (10 years) on count two: "arson", in violation of 18 U.S.C. § 844(i); and 120 months (10 years) count four: "using fire to commit a federal felony", in violation of 18 U.S.C. § 844(h)(1). The court set the sentences for counts one and two to run concurrently, and count four to run consecutively.

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 before this Court 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.

JURISDICTIONAL STATEMENT

5.) 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

6.) The Fifth Amendment to the United States Constitution, specifically its Due Process and Double Jeopardy Clauses, in pertinent part, reads:

> "...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ... nor be deprived of life, liberty, or property, without due process of law; ...."

7.) Section 371 of Title 18 of the United States Code, relevant to the Petitioner's conviction on count one, "conspiracy to commit arson", in pertinent part, reads:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both."

8.) Section 844(i) of Title 18 of the United States Code, relevant to the Petitioner's convictions on count one, "conspiracy to commit arson", and count

two, "arson", in pertinent part, reads:

> "(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or an any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; ...."

9.) Section 844(h) of Title 18 of the United States Code, relevant to the Petitioner's conviction on count four, "using fire to commit a federal felony", in pertinent part, reads:

> "(h) Whoever -- (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, ... shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years."

RELATED PROCEEDINGS AND DECISIONS

Underlying Criminal Conviction and Sentence

10.) United States v. Pisciotta, et al., Case No. 4:10-CR-0174-02-DGK, United States District Court for the Western District of Missouri, Western Division. Before District Judge KAYS. Convicted by jury verdict, October 31, 2012. Sentenced September 9, 2013 (judgment and commitment order).

Direct Appeal

11.) Conviction affirmed sub.nom. United States v. Anderson, 783 F.3d 727 (8th Cir. 2015), Case Nos. 13-3130 (for co-Defendant Anderson), 13-3131 (Pisciotta), 13-3132 (for co-Defendant Sorrentino); United States Court of Appeals for the Eighth Circuit, opinion dated April 16, 2015, before Circuit Judges BYE, COLLOTON, and GRUENDER.

12.) Petition for rehearing, en banc, denied for Anderson; order June 9, 2015.

13.) Pisciotta v. United States, Case No. 15-77, Supreme Court of the United States. Certiorari denied by order, October 3, 2015. 136 S.Ct. 199 (2015).

Motion under 28 U.S.C. § 2255

13.) Pisciotta v. United States, Case No. 4;15-CV-01030-DGK, United States

District Court for the Western District of Missouri, Western Division. Before District Judge KAYS. Motion denied by order dated September 12, 2016. Certificate of Appealability denied. 2016 U.S. Dist. LEXIS 123433, 2016 WL 4745186 (W.D.Mo. 2016).

14.) Pisciotta v. United States, Case No. 16-3977, United States Court of Appeals for the Eighth Circuit. Before Circuit Judges WOLLMAN, ARNOLD, KELLY. Appeal dismissed. Certificate of Appealability denied by Order dated March 1, 2017. 2017 U.S. App. LEXIS 23781, 2017 WL 5157748 (8th Cir. 2017).

15.) Petition for rehearing, en banc, denied by order April 11, 2017.

16.) Pisciotta v. United States, Case No. 16-9515, Supreme Court of the United States. Certiorari denied by order October 2, 2017. 138 S.Ct. 149 (2017).

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

17.) Pisciotta v. Harmon, Case No. 3:17-CV-2797-L-BK, United States District Court for the Northern District of Texas, Dallas Division. Before Magistrate Judge TOLLIVER and District Judge LINDSAY. Petition denied by opinion and order, 2018 U.S. Dist. LEXIS 59443, 2018 WL 1718055 (N.D.Tx. April 8, 2018) per recommendation 2018 U.S. Dist. LEXIS 59941, 2018 WL 1721933 (N.D.Tx. Jan. 31, 2018).

18.) Pisciotta v. Harmon, Case No. 18-10489, United States Court of Appeals for the Fifth Circuit. Before Circuit Judges BENAVIDES, HIGGINSON, ENGELHARDT. Affirmed by opinion, January 24, 2019. 748 Fed. Appx. 634 (5th Cir. 2019).

19.) Pisciotta v. Harmon, Case No. 18-9453, Supreme Court of the United States. Certiorari denied by order October 7, 2019. 140 S.Ct. 91 (2019).

Second Petition under 28 U.S.C. §§ 2241, 2255(e) and 1651(a)

20.) Pisciotta v. Ortiz, Case No. 1:21-CV-15852-RMB. United States District Court for the District of New Jersey. Before District Judge BUMB. Petition for Writs of Habeas Corpus and De Homine Replegiando denied by opinion and order October 26, 2021. 2021 U.S.Dist. LEXIS 206134, 2021 WL 4975063 (D.NJ. Oct. 26,

2021).

21.) Pisciotta v. Warden Fort Dix FCI, Case No. 21-3114, United States Court of Appeals for the Third Circuit. Before Circuit Judges McKEE, GREENWAY JR., PORTER. Affirmed by order March 1, 2022. 2022 U.S. App. LEXIS 5349, 2022 WL _____ (3rd Cir. 2022).

UNAVAILABILITY OF RELIEF IN OTHER COURTS

Petitioner has diligently sought to argue these issues in the courts for the past 8 years, on direct appeal, and three times on collateral review, to no avail. He had the unfortunate lack of luck to find himself convicted in the 8th Circuit where the precedent followed in the Circuit does not consider that the circumstances of his conviction on "conspiracy to commit arson", "arson", and "use of fire in a federal felony" (tied to the conduct of the other two counts) is an "obvious double jeopardy violation". No matter what he files in the 8th Circuit, and the District Courts below it, will be met with the same result.

He sought collateral review in the districts where he was confined in the custody of the Bureau of Prisons. However, this court well knows that the law of habeas corpus has been drastically cabined and narrowed, it has become procedurally "byzantine" as this court has lamented, and relief has become farther and farther from a federal prisoner's reach. The "saving clause" has become a nullity, and no matter grave an injury of constitutional magnitude, courts are not willing to move relief closer to a prisoner's grasp. One could say habeas is dead, and the Constitution suffers unheard.

Even when the Petitioner has filed for review in the Supreme Court, his luck was absent - his petition fell to conference during the court's October "long conference" where the odds of being selected is about 0.6% - 12 out of 2,000 petitions that piled up over the summer.

The result is the Petitioner asks for relief by extraordinary writ, to

finally get the review this grave constitutional injury deserves - an adjudication on the merits, and one that conclusively resolves the Circuit split between the 8th Circuit (which disadvantages the Petitioner's asserted claims) and the 1st, 5th, and 7th Circuits (where he would have gotten relief if wrongfully convicted therein).

UNSUITABILITY OF ANY OTHER FORM OF RELIEF

Petitioner respectfully asks the Supreme Court to exercise its prerogative to grant an extraordinary writ so as to correctively administer the inferior courts and in 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). 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 for the reasons stated in the previous section. The failure of justice in the courts below to provide seemingly obvious relief from a readily apparent constitutional injury 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).

As Petitioner has served over 3 years past what he should have been sentenced to absent the constitutional injuries, a drastic remedy is necessary here to prevent such irreparable harm and the continuation of this miscarriage of justice, and thus constitutes an "exception circumstance warrant[ing] the exercise of this Court's discretionary power". Rule 20.1. Absent relief, his access to the protections this Constitution should guarantee him would remain trampled by the very inaction of the courts designed by our Founders to protect them.

STATEMENT OF THE CASE

At 12:44am on the night of October 20, 2008, the "Hereford House", a popular restaurant in downtown Kansas City went up in flames. The structure sustained substantial damage. Authorities quickly concluded that arson was involved. After nearly three years of investigation, three persons were arrested, the Petitioner, Vincent Pisciotta, along with Hereford House owner, Rodney Anderson, and Mark Sorrentino.

After a trial by jury, all three co-defendants were convicted. Pisciotta was convicted of three counts of the four-count indictment: of (count one) conspiracy to commit arson, in violation of 18 U.S.C. § 371 and § 844(i); (count two) arson, in violation of 18 U.S.C. § 844(i); and (count four) "using fire to commit a federal felony", in violation of 18 U.S.C. § 844(h)(1). Pisciotta was acquitted on count three, for "mail fraud", in violation of 18 U.S.C. § 1341. Co-defendant Mark Sorrentino was convicted of the same three out of four counts as Pisciotta. Anderson was convicted on all four counts, including the count three "mail fraud".

According to the Court of Appeals: "In an interrogatory, the jury specified that Anderson's predicate felony for the use-of-fire offense included mail fraud and conspiracy to commit arson and mail fraud.... The jury found that Pisciotta and Sorrentino's predicate felony for the use-of-fire offense was conspiracy to commit arson." United States v. Anderson, 783 F.3d 727, 737 (8th Cir. 2015). This jury finding is the subject of a long quest for justice, and the source of a constitutional injury that continues to keep Petitioner Pisciotta in prison much longer than the law or Constitution should allow.

Petitioner challenges the constitutionality of 18 U.S.C. § 844(h)(1), the "using fire to commit a federal felony", as-applied to the circumstances of his conviction. He challenges that they violate his rights under the due process and

double jeopardy clauses of the Constitution's Fifth Amendment. First, premising a "use-of-fire" offense on a predicate felony of "conspiracy to commit /arson", reliant on the conspiracy's "agreement" element, would be legally impossible or utterly absurd. Petitioner and his accused co-conspirators did not "make an agreement" using fire -- they did not brand their agreement on a contract after heating the brand in fire, they did not burn it in the side of a barn, they did not send smoke signals across the Mississippi River, and they did not communicate by hanging lanterns in a belfry. Premising a count four conviction on such "agreement" conduct, that they "used fire" in the agreement, is legally impossible. Conviction on this basis would be a due process violation. Secondly, premising conviction on the "use of fire" offense on the arson conduct -- either the substantive arson, or on the "overt act" required to prove a conspiracy, would be an "obvious double jeopardy violation" as several courts have stated.

If not for this unconstitutional count four conviction, the Petitioner would have recieved an aggregate sentence of 10 years. He has been in custody for nearly 12 years. Had he been sentenced to a 10-year term of imprisonment, with all due good conduct time credits, he would have served 8.5 years -- and been released nearly three-and-a-half (3.5) years ago. That he challenges the constitutionality of his conviction, and has not received redress for his injury, means he is threatened with more prison time than necessary, than allowed by law. Petitioner thus calls on this court to correct this grave injury.

LEGAL ARGUMENT

I. PETITIONER'S CONVICTION ON COUNT FOUR FOR "USING FIRE TO COMMIT A FEDERAL FELONY", UNDER 18 U.S.C. § 844(h)(1), SHOULD BE VACATED

A.) If Petitioner's count four conviction is premised on "conspiracy to commit arson" conduct, it is illogical and a legal impossibility

Petitioner argues that his conviction on count four, for "using fire to commit a federal felony", in violation of 18 U.S.C. § 844(h)(1) is unconstitutional on due process and double jeopardy grounds: first, because if it is premised on his convicted conduct for "conspiracy to commit arson" -- namely, the act of conspiring -- it would be absurdly illogical and a legal impossibility; and, second, that if premised on his overt act or substantive "arson" conduct, it would violate double jeopardy. For these reasons, the Petitioner's conviction on count four is unconstitutional, in violation of his Fifth Amendment rights, and should be vacated.

Petitioner's conviction on count one was for "conspiracy to commit arson", in violation of 18 U.S.C. § 371. To be convicted under § 371, the Government must establish two elements: first, an agreement to commit a crime; and second, an overt act by one or more of the agreeing parties in furtherance of effecting or bringing about that crime, the object of the conspiracy agreement. United States v. Falcone, 311 U.S. 205 (1940) (gist of offense of criminal conspiracy is agreement among conspirators to commit offense attended by act of one or more conspirators to effect object of conspiracy); Pinkerton v. United States, 328 U.S. 640 (1946); United States v. Fontenot, 483 F.2d 315 (5th Cir. 1973).

This poses a legal impossibility -- that it would be impossible to "use fire" to form such an agreement under § 371 unless the three conspirators "communicated across the Mississippi River by smoke signals or by hanging a lantern in a belfry". See United States v. Colvin, 353 F.3d 569, 576 (7th Cir.

2003) (en banc); citing United States v. Corona, 108 F.3d 565, 573 (5th Cir. 1997). In Colvin, supra, the Seventh Circuit ruled that a conviction for a civil rights conspiracy under 18 U.S.C. § 241 could not serve as the predicate for an § 844(h) conviction because it is a conspiratorial agreement and that fire could not be used for form that agreement. Further, the three conspirators in the case at bar did not memorialize their agreement by branding it on a contract with a red-hot iron heated in a fire. Therefore, it would be logically absurd and legally impossible to form an agreement "using fire" and this cannot support a conviction under 18 U.S.C. § 844(h)(1) based on the agreement element of the 18 U.S.C. § 371 conspiracy in count one.

The count four conviction creates an tautological absurdity, albeit simplified, that the Petitioner stands convicted essentially of:

> "using fire (arson) after defendants having agreed to use fire (conspiracy to commit arson), in which fire was used to use fire (the § 844(h)(1) using fire to commit a federal felony)."

Statutory interpretations which would produce "absurd results" are to be avoided. See Arizona State Board of Charter Schools v. U.S. Dept. of Education, 464 F.3d 1003, 1008 (9th Cir. 2006). The "absurdity of such a result, with its attendant likelihood of unfair punishment ... is sufficient by itself to foreclose that construction". Chatwin v. United States, 326 U.S. 455, 464 (1946). This application of § 844(h) "compels an odd result" and unfortunately Congressional intent regarding the ambit of the statute is unclear. See Green v. Bock Laundry Machine Co., 490 U.S. 504, 509 (1989); Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892).

B. If Petitioner's count four conviction is premised on the overt act or substantive "arson" conduct, it constitutes double jeopardy

If the overt act of the completed arson satisfies the element of the Petitioner's count one 18 U.S.C. § 371 conviction, and is thus the same conduct as

the substantive act of the completed arson that undergirds the Petitioner's count two 18 U.S.C. § 844(i) "arson" conviction, then the conviction on count four, under 18 U.S.C § 844(h)(1) becomes a double jeopardy violation that effects both an unconstitutional conviction on count four and the ensuing multiple punishment that doubled the petitioner's sentence.

When we compare the text of § 844(h)(1) with § 844(i), we notice that they involve the same critical action element. In § 844(h)(1), the pertinent text reads "(h) Whoever -- (1) uses fire or an explosive to commit ...". In § 844(i), the pertinent text reads "(i) Whoever maliciously damages or destroyes, or attempts to damage or destroy, by means of fire or any explosive ...". Whether the text is "uses fire" or "by means of fire", they are interchangeable. The operative verbal action is both the same because § 844(i) could just as easily read "Whoever uses fire or an explosive to damasge or destroy, or attempts to damage or destroy maliciously..." to the same effect.

The Supreme Court defined "use" or "uses" as "variously defined as 'to convert to one's service', 'to employ', 'to avail oneself of" and 'to carry out a purpose or action by means of'". Bailey v. United States, 516 U.S. 137, 145 (1995); quoting Smith v. United States, 508 U.S. 223, 228-29 (1993) (citations and internal quotations omitted). Any of these "various definitions" can be substituted into § 844(h)(1) or § 844(i) to the same effect -- they are the same operative verbal element.

In the relevant model jury instruction, applicable to both of these statutes, the text reads "to use fire to commit a crime means to use it in such a way that it was an integral part of the commission of the crime and not something incidental or independent or that merely happened to facilitate or assist the commission of the crime". See Instruction 30-10, Second Element - Use of Fire or Explosive in § 30.02 Use of Fire to Commit a Felony (18 U.S.C. § 844(h)), Leonard

B. Sand, Modern Federal Jury Instructions (Matthew Bender). The absence of this critical element -- the "use of fire" -- would mean a conviction cannot be achieved. By contrast, one could damage or destroy a building with a wrecking ball or bulldozer or with a sledgehammer to the same "malicious" effect - but here, both § 844(h)(1) and § 844(i) rest solely (and necessarily) on the "use of fire". Under the Blockberger test, they are the same element.

This becomes all-the-more important because the Petitioner was the only one of the three co-Defendants to be accused of setting the fire - of "using fire". For the others, they were not involved in the "overt act" -- which means Pisciotta's involvement "overt act" conduct means conviction on both § 844(h)(1) and § 844(i) violates double jeopardy.

The Double Jeopardy Clause of the Fifth Amendment prohibits both being twice convicted of the same conduct and prohibits multiple punishments for the same conduct. See North Carolina v. Pearce, 395 U.S. 711, 716-17 (1969). Here, both count two and count four hinge on the "use of fire" conduct which means the Petitioner is twice convicted for the same conduct. Then, § 844(h) requires a consecutive sentence -- for the same conduct -- a "multiple punishment". In United States v. Coronal, 108 F.3d 565 (5th Cir. 1997), cited above, the Fifth Circuit described the accumulative effect of the three charges (conspiracy to commit arson, arson, and using fire to commit a federal felony) as a "prosecutor's sleight of hand" and criticized this multiplicity. Ibid. at 576. The 7th Circuit agreed, concluding that these three counts amount to a multiple conviction for the same offense conduct within the meaning of the Double Jeopardy Clause because they would be proved by identical evidence. See United States v. Chaney, 559 F.2d 1094, 1095-96 (7th Cir. 1977); citing Brown v. Ohio, 432 U.S. 161 (1977).

In Corona, the court saw "no indication from Congress that every arson should be subject to the [sentencing] enhancement set out in § 844(h)(1)". It noted that an § 844(i) arson conviction along with § 844(h)(1) was an "obvious

double jeopardy violation". The Fifth Circuit further stated,

> "We accordingly applied the statutory construction rule in Blockburger and concluded that 'once the jury had found the defendants guilty of arson and conspiracy to commit arson, it has found them guilty of using fire as part of that conspiracy,' at least when the overt act of the conspiracy was setting a fire. No other findings were necessary to establish the use-of-fire offense. We held that 'the government may choose to dismiss any of the three counts,' but it could not seek convictions and sentences under all three. We expressly held that there could be 'multiple punishments' for any combination of two of the three counts: (1) use of fire to commit conspiracy to commit arson under § 844(h)(1), and conspiracy to commit arson under 18 U.S.C. § 371; or (2) arson under § 844(i), and conspiracy to commit arson under § 371; or (3) arson under § 844(i), and use of fire to commit conspiracy to commit arson. In each of these combinations, one offense contained an element that the other did not. But when the third offense was added to the mix, that was no longer the case."

-- United States v. Severns, 559 F.3d 274 (5th Cir. 2009) (citations omitted); citing Coronal; supra. Thus, in the Fifth Circuit, applying the Blockburger analysis, the combination of convictions on these three counts are squarely a double jeopardy violation for clearly obvious reasons. However, Petitioner's conviction in the Eighth Circuit has been allowed to stand.

The Petitioner's convictions on these three counts, and the resulting sentences should not be allowed under the Fifth Amendment and under any application of the principles of Blockburger v. United States, 289 U.S. 299 (1932) (the double jeopardy question is whether conviction under each statutory provision requires proof of additional facts which the others do not). In Petitioner's conviction, the facts alleged at trial were simply that there was an agreement to commit arson and an arson was committed. These same facts established a conviction on the count one (the conspiracy) and count two (the arson) and later used to undergird the count four "use of fire" conviction. There is an exact overlap of the same actus reus elements. Cf. United States v. Davis, 793 F.2d 246, 248 (10th Cir. 1988), cert.denied 479 U.S. 931 (1989) (where a potentially duplicative count "must contain elements not in sum of elements of other

offenses).

Certainly, we can note that Congress obviously viewed the use of fire or explosives to effect some felonies as something that should be punished more severely than those effected by other means. However, there is already a heavy penalty for arson under 18 U.S.C. § 844(i) based precisely on the idea that fire is abnormally dangerous. However, to rely on § 844(h) to punish further, to enhance with an additional conviction and additional consecutive punishment would be to accumulate two layers of distinctly heavy punishment. There is no indication that Congress intended to supplement arson conduct with an § 844(h) enhancement. This is something that the 1st, 5th and 7th Circuits have contemplated and rejected as an obvious "double jeopardy" problem. See Chaney, supra; Colvin, supra, Coronal, supra, Severns, supra; also United States v. Konopka, 409 F.3d 837, 840 (7th Cir. 2005); United States v. Gardner, 211 F.3d 1049, 1056-57 (7th Cir. 2000); United States v. Patel, 370 F.3d 108, 115 (1st Cir. 2004).

For these reasons, the Petitioner's conviction on count four should be vacated.

C. Congressional intent on 18 U.S.C. § 844(h) is unclear and there is a long-unresolved split both between Circuits and within Circuits on this question

Congressional intent is quite unclear as to whether § 844(h)(1) applies to all underlying felonies, when there are obvious double jeopardy and due process implications by applying it to arson or conspiracy to commit arson as a predicate felony. The Fifth Circuit noted that the legislative history of § 844(h)(1) "at least suggests that arson to defraud an insurance company comes within the intended ambit of the 'use of fire' enhancement". Severns, supra, at 284. And further observed "In explaining the rationale for the enhancement, it is stated that 'fire is used extensively not only for the criminal purposes of extortion, terrorism, and revenge, but to conceal other crimes such as homicide, and for

fraud against insurnace companies'". Ibid. at 284 and n.35, citing H.R. Rep. No. 97-678, as reprinted in U.S.C.C.A.N. 2631, 2632 (legislative history to the Anti-Arson Act of 1982, Pub. L. 97-298). However, in this statement, the obvious is not stated or asked: can the "use of fire" be used in arson (where fire is "used") or in a conspiracy to commit arson (where the defendants agree to "use" fire, and an overt act "uses" fire). Likewise, it would be absurd to "use fire" to conceal an arson or even a conspiracy to commit arson. The 5th Circuit noted in Severns, that, "on the other hand, it can be argued somewhat persuasively that Congress did not intend to authorize the enhancements in § 844(h) in addition to the minimum sentences set forth for conviction under § 844(i). This would mean that neither arson nor conspiracy to commit arson could serve as predicate offenses". Severns, supra, at 284.

In applying the implications of this legislative history, recall that the Petitioner stands convicted of the accusation that he set the fire (of "using fire") -- that is, the substantive arson and the overt act of the conspiracy. His co-defendant Anderson was not at the scene, and evidence elicited did not fully establish Sorrentino at the scene. Sorrentino's use-of-fire offense was tied to being in a conspiracy where he may not have been involved in the accused overt act. Anderson was convicted of "using fire" in association with the conspiracy and the mail fraud afterwards (as cited in the Statement of the Case above).

The result of unclear Congressional Intent has an inconsistent interpretation of double jeopardy and due process principles between the 8th Circuit and its sister circuits (the 1st, 5th, and 7th). The 7th Circuit does not permit this combination of convicted counts citing an "obvious double jeopardy violation". The 5th generally does not, although there are conflicting opinions within the circuit. See United States v. Riggio, 70 F.3d 336 (5th Cir. 1995). The 8th Circuit, however, stands apart, opposing the analysis of the 5th and 7th relying on the logic of United States v. Ihmoud, 454 F.3d 887 (8th Cir. 2006) where Ihmoud's § 844(h) conviction was part of a conviction for "conspiracy to

commit arson, arson, mail fraud, and using fire to commit another felony --namely, mail fraud". Anderson, supra, at 739. Ihmoud should not have been the basis for denying the Petitioner relief. And because of the split between the circuits, and the problems caused by unclear Congressional intent, it requires the intevention of this Court to resolve. The Petitioner's liberty interest is at stake - and he has already been held in federal custody for at least 3 years longer than he should have because of this unresolved question.

D. If the application of the 18 U.S.C. § 844(h)(1) statute to the Petitioner is unconstitutional as-applied then he is legally innocent and the Menna-Blackledge doctrine should apply

This case poses a novel question as to whether the Petitioner is legally innocent of his conviction on count four, in violation of 18 U.S.C. § 844(h)(1) because of the due process and double jeopardy implications raised hereinabove. If the Court agrees with the Petitioner's claims above, his conviction on count four should be vacated and he should be remanded for resentencing. Because he would have faced a 10-year total sentence (and achieved release with good conduct time in 8.5 years), and that he has served about 11.5 years so far on his sentence, correcting this error would entail his immediate release from incarceration and the restoration of his liberty interest.

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..." holding someone liable for violating a law when they should not have been convicted or sentenced on it, "cannot be shrugged as a minor detail". See Dretke v. Haley, 541 U.S. 386, 399-400 (2004) (Kennedy, J. dissenting). Legal innocence is not a technicality. It essential in a nation placing primacy on the "rule of law" under a system of supreme "constitutional rights".

Virtually all rights of a criminal defendant in our constitutional order

are "merely 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 (D.C.Cir. 1995). Here, the Petitioner has a claim that he should be legally innocent on count four because of an "obvious double jeopardy issue" -- his conviction should not have been entered in the first place. However, he stands convicted only because he was tried in a court under the Eighth Circuit, which disagrees with other courts that readily recognized the error and precluded this kind of constitutional injury.

Petitioner asserts that the Government should not have had the right or power to charge the defendant on count four -- or as the Fifth Circuit said in Severns, supra, that it could not seek conviction and sentence on all three charges. The Supreme Court developed the "Menna-Blackledge doctrine" and held that an unconstitutional statute (in this case unconstitutional "as-applied") should deny the Government its power to prosecute and obtain such 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 hiss factual guilt is established"). This doctrine precludes the Government from "haling a defendant into court on a charge" when there is a constitutional violation that should

preclude such prosecution. Menna, ibid. 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). Therefore, this court should intervene and "yield to the imperative of correcting a fundamentally unjust incarceration". Engle v. Isaac, 456 U.S. 107, 135 (1982); Dretke, supra, at 399-400.

II. 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 is empowered to issue a writ of habeas corpus because the Petitioner is being held in the custody of the United States despite the constitutional injury complained of above. See Engle v. Isaac, supra. 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 argues that the court should not have had the power to enter a conviction or impose sentence on count four -- a challenge to its very jurisdictional power -- due to its application being a violation of the due process and double jeopardy clauses of the Fifth Amendment. 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. This court recognizes the need to correct violations of the constitution and statutes that wrongfully imprison American citizens. This court recognizes the need to intervene to 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 this high court, as in 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 would provide the Court to shed light on when such habeas relief can be called upon -- what was hinted at, but unelaborated in Felker. In the alternative, it can allow the court to expand understanding and development of the law in its empowerment to grant other potent, but ancient writs, such as audita querela or de homine replegiando under the All Writs Act in aid of its jurisdiction under Rule 20, as hinted at in United States v. Morgan, 346 U.S. 502, 506 (1954) (discussing the court's prerogative in a coram nobis context).

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 disocvered 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 was entered; that is (3) not redressable by some other means. Muirhead v. AG of the United States, 262 Fed. 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 unconstitutionality of the application of § 844(h)(1), recognized by other Circuits, but not by the Eighth Circuit where he was convicted, is that valid legal objection. The failure to get relief -- in the Eighth Circuit under direct appeal or 2255, and because the habeas process is essentially unavailable under the savings clause, means that reliance on an ancient Writ of Audita Querela would be properly placed.

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 "as-applied" unconstitutionality of 18 U.S.C. § 844(h)(1), relief via a Writ De Homine Replegiando is properly situated.

CONCLUSION

The Supreme Court should intervene to provide relief by granting an 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'". United States v. Black, 2019 U.S. Dist. LEXIS 7589 at *18 (W.D.Pa. Jan. 16, 2019) (granting a writ of audita querela); citing Bousley v. United States, 523 U.S. 614, 621 (1998). Without relief, a constitutional injury will be allowed to persist -- and an American citizen will do roughly twice the amount of time in federal prison as the laws and Constitution should allow. Petitioner asks this Court to consider a 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 is still greater to suppose that he can be altogether precluded from his constitutional remedy to recover his freedom."

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

PRAYER FOR RELIEF

For the reasons set forth hereinabove, Petitioner respectfully 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,

Vincent Pisciotta

VINCENT PISCIOTTA
PETITIONER PRO SE

DATED: DECEMBER 11, 2023