No.

In the Supreme Court of the United States

GLENDON SCOTT CRAWFORD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err in its determination that Petitioner was not entrapped and that the government did not engage in outrageous conduct?
2. Did the Second Circuit err in holding that the statutes applied to his conduct?
3. Should the government have been permitted to introduce highly prejudicial evidence regarding Petitioner's alleged ties to the Ku Klux Klan and other organizations?
4. Should the jury have been charged with the defense of renunciation?
5. Did the Second Circuit err in not dismissing Counts One and Two of the Indictment?
6. Did the Circuit Court err in not dismissing Count One of the Indictment as being unconstitutionally vague?
7. Did the District Court err in applying the terrorism enhancement?
8. Was Petitioner denied a fair trial when the district court allowed the government to introduce incomplete and misleading evidence despite the rule of completeness?

PARTIES TO THE PROCEEDING

All parties to petitioner's Second Circuit proceedings are named in the caption of the case before this Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Other Authority:

PETITION FOR WRIT OF CERTIORARI

Petitioner Glendon Scott Crawford respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2017 WL 4994459.

JURISDICTION

The judgment of the Court of Appeals, which had jurisdiction pursuant to 28 U.S.C. § 1291, was entered on November 1, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the Constitution provides, in relevant part, that "Congress shall make no law…abridging the freedom of speech…or the right of the people peaceably to assemble."

The Fifth Amendment of the Constitution provides, in relevant part, that "No person shall…be deprived of life, liberty, or property, without due process of law."

The Sixth Amendment of the Constitution provides, in relevant part, that "the accused shall enjoy the right to a…public trial by an impartial jury."

The Fourteenth Amendment of the Constitution provides, in relevant part, that "No state shall … enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law …"

STATEMENT OF FACTS

Petitioner conceived an idea that an industrial grade x-ray machine could be converted into a "ray gun" and said "ray gun" could be used by our armed forces to combat terrorism. Petitioner approached the United States Federal Government, the Israeli Consulate, and local Jewish organizations about placing the concept into the hands of People that could make it a reality. Beginning in April 2012, the Federal Bureau of Investigations began to investigate Petitioner as a suspected terrorist. The investigation ran till June 2013, during which time federal agents, working undercover, provided Petitioner with materials and encouragement to construct the x-ray device. Repeatedly during the investigation, Petitioner indicated to undercover agents that he no longer had an interest in the project and that he was done with it. Agents responded by further encouraging Petitioner to assist in the construction.

In June 2013, Petitioner was arrested and thereafter indicted on charges of Attempt to Produce or Use a Radiological Dispersal Device, in violation of 18 U.S.C § 2332h(a) & (c)(1), Conspiracy to Use a Weapon of Mass Destruction, in violation of 18 U.S.C. § 2332a(a)(2)(C), and Distribution of information Relating to Weapons of Mass Destruction, in violation of section 18 U.S.C 2332a and 18 U.S.C § 842(p)(2)(A). Prior to trial, Petitioner moved for, among other things, dismissal of Counts One and Two of the Indictment based upon the legal insufficiency of those counts, and specifically, the invalidity of the construction given by the indictment to the statutes on which those counts of the indictment were founded and the facial insufficiency of the indictment. Petitioner also moved to dismiss Count One of the Indictment on the grounds that it was impermissibly vague. The District Court denied the motions.

During the trial, the District Court permitted the Government to make repeated references to the Ku Klux Klan and the Petitioner's involvement in that organization. The District Court

specifically denied Petitioner's pre-trial motion to preclude such references. Additionally, during the trial, Government moved into evidence several recordings of interactions of Petitioner with federal agents. After they were admitted, the Government was allowed to pick and choose those portions that would be played for the jury and was allowed to pick and choose those portions that they wished to transcribe. That is, the Government played only select clips of different recordings and Petitioner was not allowed to play the entire portions to put the clips into context.

Petitioner was ultimately convicted on all three counts. At sentencing, the District Court assessed a twelve-level "terrorism" enhancement. Petitioner objected to such enhancement, but the objection was overruled.

REASONS THAT THIS PETITION SHOULD BE GRANTED

I. THE SECOND CIRCUIT ERRED IN ITS DETERMINATION THAT PETITIONER WAS NOT ENTRAPPED AND THAT THE GOVERNMENT DID NOT ENGAGE IN OUTRAGEOUS CONDUCT

It is respectfully submitted that the United States Court of Appeals for the Second Circuit (herein after "lower court") erred in determining that Petitioner was not entrapped and that he was not subject to outrageous government conduct. Specifically, the lower court relied upon two cases to defeat Petitioner's claim of entrapment. That is, the lower court cited to *United States v. Al Kassar,* 660 F.3d 108 (2d Cir. 2011) and *United States v. Comitie,* 727 F.3d 194 (2d Cir. 2013) in support of the decision. Petitioner respectfully submits that the reliance of these cases was misplaced and that the District Court and the Court of Appeals erred in failing to review whether the Government, in the first instance, sustained their burden of proving beyond a reasonable doubt that Petitioner was predisposed to commit the charged crimes.

Petitioner respectfully submits that the lower court did not follow this Court's consistent adherence to the view, first enunciated in *Sorrells v. United States,* 287 U.S. 435 (1932) that a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct. See *Mathews v. Untied States,* 485 U.S. 58 (1988). This Court has repeatedly determined that in their zeal to enforce the law, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute. *Sorrells, supra,* 287 U.S., at 442, 53 S.Ct., at 212. Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the defendant

was disposed to commit the criminal act prior to first being approached by Government agents. *Jacobson v. United States,* 503 U.S. 540 (1992).

Predisposition focuses upon whether the defendant was an "unwary innocent" or, instead, an "unwary criminal" who readily availed himself of the opportunity to perpetrate the crime. *Sherman v. United States*, 356 U.S. 369 (1958). At the trial the factual issue was whether the Government had convinced an otherwise unwilling person to commit a criminal act or whether Petitioner was already predisposed to commit the act. The issue of entrapment went to the jury on the first two counts, and a conviction resulted.

As this Court is aware, the defense of entrapment is designed to protect innocent persons from being convicted for crimes that government agents have unfairly tricked or persuaded them into committing. The controlling question is whether Petitioner is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of their own design. Just as in the case of *Jacobson v. United States*, 503 U.S. 540 (1992), Petitioner's ready response to the solicitations cannot be enough to establish beyond a reasonable doubt that he was predisposed to commit the crimes as charged in Counts One and Two of the Indictment. It is respectfully submitted that rational jurors could not say beyond a reasonable doubt that petitioner possessed the requisite predisposition prior to the Government's investigation and that it existed independent of the Government's many and varied approaches to petitioner. Id. Thus, Petitioner is seeking reversal of these two counts.

In this case, Petitioner had an idea of how an x-ray machine could be modified. There is nothing criminal about this idea. Petitioner had many ideas that may be viewed as objectionable, but there is nothing criminal about having political beliefs that do not jive with mainstream beliefs. The Government put thousands of hours into ensuring that there would be criminal conduct. They

had dozens of employees working on their behalf to produce what they want to describe as a criminal minded individual. But, the reality is that Petitioner had no criminal history, lived a completely law abiding life with his wife and three children, worked at General Electric and otherwise had no predisposition to commit criminal conduct. Petitioner's original intent is demonstrated in his *lack of* action prior to government involvement. Petitioner talked to people about his idea, but there was never any action. When he was turned away from Congressman Chris Gibson, another two years passed before he tried to approach the Israeli Consulate and other Jewish Organizations.

Petitioner further contends that the lower court erred in determining that there was no outrageous government conduct. Petitioner repeatedly stressed his desire to distance himself from all of the government employees and repeatedly told the undercover agents that he did not want to be involved. The government embellished specifications, they played on his sympathies and his patriotism, and they induced him to engage in conduct that he never would have engaged in without such encouragement.

II. LOWER COURT ERRED IN HOLDING THAT THE STATUTES APPLIED TO HIS CONDUCT

Petitioner respectfully submits that the lower court erred in holding that the statutes for each count of his Indictment do not apply to his conduct.

Count One

Petitioner was convicted under Count One for violating 18 U.S.C. § 2332h, which makes it "unlawful for any person to knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use . . . any weapon that is designed or intended to ***release*** radiation or radioactivity at a level dangerous to human life." (emphasis added). This statute was enacted by Congress in 2004. *See* Pub.L. 108-458, Title VI, §

6905, Dec. 17, 2004, 118 Stat. 3772. In its findings, Congress noted that the law was intended to address the concern that "[a]tomic weapons or weapons designed to ***release*** radiation ('***dirty bombs***') could be used by terrorists to inflict enormous loss of life and damage to property and the environment." 108 H.R. 5118(2)(a)(2) (emphasis added).

The statement of Congress that "atomic weapons or weapons designed to release radiation" was synonymous with the term "dirty bomb" makes clear what was prohibited by statute. According to the United States Nuclear Regulatory Commission, dirty bombs "combine conventional explosives, such as dynamite, with radioactive material." https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/fs-dirty-bombs.html. "Release" in this context thus, means the singular explosive event that spreads radioactive material. Obviously, Petitioner's device, a high-powered x-ray machine, has no such conventional explosive and does not "release" radiation as intended by Congress.

The lower court upheld the District Court's ruling and determined that it was not erroneous. Petitioner contends that this was error. The lower court relied on *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), and held that there is an "assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross*, 175. Petitioner contends that the lower court failed to consider this Court's recognition that when "literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

"Unquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results *** or would thwart the obvious purpose of the statute.'" Commissioner of Internal Revenue v. Brown 85 S.Ct. 1162, 1166 (1965), quoting Helvering v. Hammel, 311 U.S. 504, 510-511(1941). A plain reading of this statute, excluding the issue of the

meaning of release in the statute, would prohibit any devices that give off radiation at a deadly level. This would preclude industrial x-ray and gamma-ray devices which provide a multitude of beneficial uses on a daily basis, but require a great deal of safety precautions because of their inherent deadly radiation. Congress clearly did not intend to ban such devices and, as such, a narrower reading, assisted by an examination of Congressional intent is required. The law intended to attack the "release" of radiation at a level dangerous to human life.

The lower court failed to appreciate the significance of the word "release" in 18 U.S.C. § 2332h. Specifically, 18 U.S.C. § 2332h was designed to attack weapons that served no legitimate private use. Release in that statute is intended to describe a singular explosive dispersal of radiological materials over an area, as a dirty bomb is designed to accomplish. This is reflected in Congress' legislative intent. This is also reflected in the fact that Congress later passed the more encompassing statute at 18 U.S.C. § 2332i, which, in relevant part, prohibits "whoever knowingly and unlawfully possesses radioactive material or makes or possesses a device with intent to cause death or serious bodily injury." 18 U.S.C. § 2332i (a) (1) (i). "Device" is defined as "any radioactive material ***dispersal*** or ***radiation-emitting*** device that may, owing to its radiological properties, cause death, serious bodily injury or substantial damage to property or the environment." 18 U.S.C. § 2332i(e)(2)(B) (emphasis added).

The lower court described the statutory language of releasing compared to emitting radiation as a "distinction without difference." This holding ignores this Court's continuous assumption, "that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). See also *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 742 (2014); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988). Given this well-established principle of statutory construction, the fact that Congress felt it necessary in 2015

to pass a statute (18 U.S.C. § 2332i) criminalizing the possession of radiation dispersal and emission devices demonstrates their belief that such conduct did not fall under the purview of the existing statute, 18 U.S.C. § 2332h. Petitioner submits that releasing and emitting radiation are distinct acts. Congress intended release to be a singular explosive spread of radiation while Congress intended emitting to be a large more encompassing form of distributing radiation, including via the continuous process used by X-ray machines.

Thus, Petitioner is requesting that this Court reverse the lower court and dismiss Count One.

Counts Two and Three

Petitioner was convicted on Count Two of the indictment under 18 U.S.C. § 2332a(a)(2), which makes it a crime for a person who "without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction … against any person or property within the United States." 18 U.S.C. § 2332a(a)(2). As relevant here, 18 U.S.C. § 2332a(c)(2) provides that the term weapon of mass destruction' includes any weapon that is designed to release radiation or radioactivity at a level dangerous to human life. 18 U.S.C. § 2332a(c)(2)(D). Count Two charged that from about the summer of 2012 to June 18, 2013, Petitioner and others conspired to "use a weapon of mass destruction, specifically, a modified industrial grade x-ray system designed to release radiation at a level dangerous to human life" against persons and property in the United States. Appendix, 103.

Petitioner respectfully submits that he was not charged with possessing a "weapon of mass destruction" as that term is defined in 18 U.S.C. § 2332a(c)(2)(A); 18 U.S.C. § 2332a(c)(2)(B); or 18 U.S.C. § 2332a(c)(2)(C). Thus, the only conceivable way in which this device could be classified as a "weapon of mass destruction" would be under 18 U.S.C. § 2332a(c)(2)(D).

However, that section is also inapplicable. §18 U.S.C. §2332a(c)(2)(D) is limited in scope as to what types of weapons it prohibits. Other than the exclusion of the phrase "or intended," the language of 18 U.S.C. §2332a(2)(D) and 18 U.S.C. § 2332a(c)(2)(D) mirrors that of 18 U.S.C. §2332(h). As previously stated, Congress has expressly identified a weapon that "releases radiation or radioactivity" as a "dirty bomb." There is no indication or reason that the exact same wording, "weapon that is "designed (or intended) to release radiation or radioactivity", would have a more encompassing meaning in § 2332a than in § 2332h. Thus, 18 U.S.C. §2332a(c)(2)(D) only applies to weapons that use an explosive force to "release" radioactivity into the environment. As stated previously, an x-ray emitting device would not fall under such a statute.

Petitioner was also convicted on Count Three under 18 U.S.C. § 842(p)(2)(A), which makes it unlawful for any person "to teach or demonstrate the making or use of … a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of a … weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence." 18 U.S.C. § 842(p)(2)(A). Count Three charged that from April 2012 through June 18, 2013, Petitioner "did knowingly teach and demonstrate the making and use of a weapon of mass destruction." Appendix, 103.

Petitioner contends that the lower court erred in determining that there was no error and that these charges must be dismissed.

III. THE GOVERNMENT SHOULD NOT HAVE BEEN PERMITTED TO INTRODUCE HIGHLY PREJUDICIAL EVIDENCE REGARDING PETITIONER'S ALLEGED TIES TO THE KU KLUX KLAN AND OTHER ORGANIZATIONS

Prior to trial, defense counsel moved to preclude evidence regarding "association with the Ku Klux Klan and opinions of government officials including President Obama, Governor Cuomo,

and Hillary Clinton, as well as to institutions such as the Federal Reserve Bank." Appendix, 122-123. This motion was denied, and throughout the Government's case at trial, repeated references were made to Petitioner's alleged involvement with the Ku Klux Klan and other similar organizations. They were also permitted to introduce extensive evidence of the Petitioner's alleged "racist" and "anti-Government" views for the sole purpose of inflaming and prejudicing the jury against him.

Petitioner respectfully submits that the cumulative effect of the above-referenced testimony and evidence was not only highly prejudicial to his right to a fair trial, but also violated his First Amendment rights by impermissibly using constitutionally-protected expressive and associative conduct as evidence of criminal liability. *See* Dawson v. Delaware, 503 U.S. 159 (1992). In Dawson, this Court held that "the First and Fourteenth Amendments prohibit the introduction in a capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence has no relevance to the issues being decided in the proceeding." Dawson, 503 U.S. at 160. See also." Street v. New York, 394 U.S. 576 (1969). The Court noted that the First Amendment not only "prevents the State from criminalizing certain conduct in the first instance," but also prevents the Government, in the context of a criminal prosecution "from employing evidence of a defendant's abstract beliefs . . . when those beliefs have no bearing on the issue being tried." Id. at 168. As noted in defense counsel's motion here, Rule 404(a)(1) of the Federal Rules of Evidence provides that "evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Appendix 122.

In United States v. Padilla, 869 F.2d 372 (8th Cir. 1989) the Eighth Circuit held that evidence regarding the defendants' alleged dealings with the Klan "was not relevant to any issue

at trial. The unnecessary association of the Ku Klux Klan, an infamous organization, with the defendants created a real danger of prejudicing the jury against the defense, with no countervailing probative value for the issues before the jury. The reference to the Ku Klux Klan should have been suppressed under Fed.R.Evid. 403." Padilla, 869 F.2d 372 at 380. The reasoning and holding of Padilla and Dawson apply with equal force to the circumstances of this case. Thus, for the foregoing reasons, Petitioner is requesting that this Court reverse the lower court's decision.

IV. THE JURY SHOULD HAVE BEEN CHARGED WITH THE DEFENSE OF RENUNICIATION

At the time of the jury charge conference, defense counsel requested that the jury be charged with renunciation. The District court denied said request and held that "the Second Circuit has essentially adopted the predominant national view that renunciation is not itself a defense." Appendix, 1030. The Second Circuit upheld the District Court's refusal to instruct the jury with renunciation and held that that "they need not decide whether renunciation is not a defense because Crawford never renounced and ended his plot". 2017 WL 4994459, at page 6. Petitioner claims that renunciation is a valid defense and that said defense should have been charged to the jury.

"As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). As it pertains specifically to renunciation as a defense "affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators have generally been regarded as sufficient to establish withdrawal or abandonment." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 464–465 (1978).

On June 29, 2012, Petitioner, Undercover #1, and the CHS met in a hotel room in Schenectady paid for by the Government. Appendix, 515; 523. At that meeting, Petitioner told the other participants: "I won't be able to help you with this one." Appendix, 526. On October 1, 2012, Undercover #1 sent a "vague text message" to Petitioner regarding the machine. Appendix, 665-666. In response to this message, Petitioner told the Undercover that he had "too many balls in the air to be involved with it." Appendix, 667. He referred to the project as "a dead end," and told the Undercover that he was "wasting resources on it." Id. In sum, he reiterated, "I can't be involved with it now." Id. He went on to say, "Do what you got to do but I can't be involved with it anymore." Id. In response to Petitioner's repeated statements to the effect that he no longer wanted to be involved, the Undercover told him to "relax." Id.

Defense counsel objected to the District Court's refusal to charge and argued that the northern portion was renunciated in telephone calls and action by Petitioner. Appendix, 1031. He further argued that the southern portion was renunciated when Petitioner declared that this was out of his league. Id. Petitioner repeatedly distanced himself from any involvement and when the x-ray machine was actually present for the first time, he told everyone around that it was out of his league and he could not assist them any further.

While denying the Petitioner request for the instruction to the jury the District Court pointed out the Petitioner still had the opportunity to argue such a defense to the jury. However, it is well-settled that "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488–489 (1978). Petitioner respectfully submits that there was ample support in the record to charge this defense and that it was error to deny this charge. For these reasons, Petitioner is seeking reversal.

V. THE SECOND CIRCUIT ERRED IN REFUSING TO DISMISS COUNT ONE OF THE INDICTMENT

Count One of the indictment alleged a violation of 18 U.S.C. § 2332h, which, as relevant here makes it unlawful for any person to "knowingly produce, construct, otherwise acquire, transfer directly or indirectly, receive, possess, import, export, or use, or possess and threaten to use: . . . any device or other object that is capable of and designed or intended to endanger human life through the release of radiation or radioactivity." 18 U.S.C. § 2332h(a)(1)(b). Count One recited the statutory language of 18 U.S.C. § 2332h, though, the specific allegations contained therein were that Petitioner "did knowingly attempt to produce, construct, acquire, transfer, receive, possess, and use a device capable of and designed and intended to endanger human life through the release of radiation and radioactivity, ***specifically*** an industrial grade x–ray system that the defendant ***planned to modify*** so that it could be activated from a remote location." Appendix, 108.

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that "[t]he indictment . . . must be a plain, concise, and definite written statement of the *essential facts* constituting the offense charged." (emphasis added). Petitioner submits the above-quoted language failed to allege that Petitioner "attempted to 'produce, construct, acquire, transfer, receive, possess' and 'use' a device," as required by the statute, and that "'*planning* to modify' does not equal "attempt to produce . . . and use' a device capable and designed to release radiation". Appendix, 110-111. Thus, the Indictment failed to satisfy the statutory pleading requirements and failed to allege conduct that constitutes the crime charged.

Additionally, it is respectfully submitted that Count One is duplicitous in that it charges numerous variations of the crime. That is, the way that the indictment is crafted opens the possibility that jury members could have conflicting interpretations about what constitutes the

material elements of the crime. Thus, there to no way to ensure that they arrived at a unanimous verdict based upon the same conduct. There is simply no way to determine on this record whether the jury in this case decided that Petitioner "produced," "constructed," "acquired," "transferred," "received," "possessed," "imported," "exported," "used," or "possessed and threatened to use" this device, or any of the countless combinations thereof. Neither the indictment nor the Government's proof at trial was sufficiently specific to eliminate the possibility that the jury, having been inaccurately apprised of the factual elements they were required to find, may not have rendered a unanimous verdict on this Count.

VI. THE CIRCUIT COURT ERRED IN NOT DISMISSING COUNT ONE OF THE INDICTMENT AS UNCONSTITUTIONALLY VAGUE

Petitioner challenges the constitutionality of Count One of the Indictment on the ground that 18 U.S.C. § 2332h is void for vagueness on its face and as applied in his case because it does not define the word "use." It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357, (1983).

It has long been held "[t]hat the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Lanzetta v. State of N.J.*, 306 U.S. 451, 453 (1939) (internal quotation marks and citations omitted). "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). See generally, *City of Chicago v. Morales,* 527 U.S. 41, 56-64 (1999). "As generally

stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (citations omitted). "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process." *Johnson v. United States*, 135 S. Ct. 2551, 2556-2557 (2015) (internal quotation marks and citations omitted).

"A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Petitioner respectfully submits that, due to the failure to define "use" of a radiological dispersion device, "people of ordinary intelligence" are necessarily left unaware of the specific conduct which the statute prohibits. "Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process." *Smith v. Goguen*, 415 U.S. 566, 576 (1974). A statute such as this, which "is so indefinite that 'it encourages arbitrary and erratic arrests and convictions,' is void for vagueness." *Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (quoting *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)).

"This level of uncertainty is fatal where criminal liability is imposed." *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 451 (1983). As the Supreme Court recently reiterated, "[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend." *Burrage v. United States*, 134 S.Ct. 881, 892 (2014) (citing *United*

States v. L. Cohen Grocery Co., 255 U. S. 81, 89–90 (1921)). Petitioner therefore submits that his conviction on this count must be reversed.

VII. THE DISTRICT COURT ERRED IN ITS TERRORISM ENHANCEMENT

Petitioner submits the District Court erred in applying the "terrorism enhancement" to the Petitioner's sentencing guidelines.

Section 3A1.4, the so-called "terrorism enhancement," provides:

> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.
> (b) In each such case, the defendant's criminal history ... shall be Category VI.

U.S.S.G. § 3A1.4.

"Federal crime of terrorism" is defined as follows:

> an offense that—
>
> (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
>
> (B) is a violation of [any one of many statutes, including 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2332i (relating to acts of nuclear terrorism),

18 U.S.C.A. § 2332b.

The conventional meaning of "calculated" is "devised with forethought." II *Oxford English Dictionary* 777 (2d ed.1999). *United States v. Stewart*, 590 F.3d 93, 137 (2d Cir. 2009). Therefore, if a defendant's purpose in committing an offense is to "influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," the first requirement of section 2332b(g)(5)(A) is satisfied. However, where, as here, "'there is no evidence that the defendant sought to influence or affect the conduct of the government,' the enhancement

is inapplicable." United States v. Siddiqui, 699 F.3d 690, 709 (2d Cir. 2012) (quoting Stewart, 590 F.3d at 137). Indeed, he did not seek to influence anyone or anything.

VIII. THE PETITIONER WAS DENIED A FAIR TRAIL WHEN THE DISTRICT COURT ALLOWED THE GOVERNMENT TO INTRODUCE IMCOMPLETE AND MISLEADING EVIDENCE DESPITE THE RULE OF COMPLETENESS

During the Petitioner's trial, the Government moved into evidence several recordings of the Petitioner with undercover federal agents. Thereafter, the Government, as an "aid solely for the jury", provided transcripts for only portions of the conversations. Appendix, 425; 441-442. The Government also proceeded to play only "clips" of the different meetings. The Petitioner objected on the grounds that the transcripts and played recordings were not complete. The District Court overruled the objection. In addition, the District did not permit Petitioner to play the entire recording of the conversations giving rise to the Government's particular selections.

Petitioner respectfully submits that the Government's introduction of select portions of the conversations violated the rule of completeness, and that the District Court erred in allowing their introduction without mandating that the tapes be played in their entirety upon request of Petitioner's counsel. The common-law rule of completeness doctrine, which underlies Federal Rule of Evidence 106, was designed to prevent exactly the type of prejudice of that occurred in this case. The Federal Rules of Evidence have partially codified the doctrine of completeness in Rule 106 as follows:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.
>
> Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–172 (1988).

The Government's introduction of incriminating segments of Petitioner's recorded conversations lacking in further context was fundamentally unfair to Petitioner, particularly

considering Petitioner's multiple statements of his intention to withdraw from the conspiracy, and other exculpatory statements left out of the Government's excerpts. As a result, the District Court failed to ensure that the jury in Petitioner's case received a full and fair picture of the evidence.

CONCLUSION

Based upon the foregoing arguments, it is respectfully requested that the lower court's decision be reversed.

Respectfully submitted,

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