96-1181

To Be Argued By:
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

AHMED AMER

Defendant-Appellant,

On Appeal from the United States District Court
for the Eastern District of New York

U.S.D.C. New York No. CV-95-693 (CBA)

BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	
UNITED STATES OF AMERICA, Appellee, vs. AHMED AMER, Defendant-Appellant.	Docket No. 95-693

BRIEF FOR DEFENDANT-APPELLANT AHMED AMER

QUESTIONS PRESENTED

1. Is 18 U.S.C. Section 1204, the International Parental Kidnapping Statute, unconstitutionally overbroad because it unduly restricts the free exercise of religion under the First Amendment to the United States Constitution and other fundamental rights.

2. Is 18 U.S.C. Section 1204, the International Parental Kidnapping Statute, unconstitutionally vague on its face and as applied to Mr. Amer because it fails to give reasonable notice of what is prohibited and fails to provide minimal guidelines for its enforcement by law enforcement.

3. Is the condition of supervised release imposed by the district court--return of the Amer children to their mother in the United States--in violation of law and/or an improper application of the Sentencing Guidelines.

4. Does the condition of supervised release imposed by the district court--return of the Amer children to their mother in the United States--threaten violation of the Double Jeopardy Clause of the United States Constitution.

5. Is the upward adjustment under United States Sentencing Guideline Section 2J1.2(b)(2) for "substantial interference with the administration of justice" imposed by the district court in violation of law and/or an improper application of the Sentencing Guidelines.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	)	
UNITED STATES OF AMERICA,	)	
Appellee,	)	Docket No. 95-693
vs.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
AHMED AMER,	)	EASTERN DISTRICT OF NEW YORK
Defendant-Appellant.	)	**BRIEF FOR DEFENDANT-APPELLANT AHMED AMER**

STATEMENT PURSUANT TO RULE 28(a)(2)

This is an appeal from a final decision of the United States District Court authorized by 28 U.S.C. Section 1291. As this is a criminal case, the appeal is of right pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure. The Defendant-Appellant was sentenced on March 6, 1996 and the Judgment of Conviction was entered on March 14, 1996. Notice of Appeal was timely filed within ten (10) days of the date of entry of Judgment.

PRELIMINARY STATEMENT

Defendant Ahmed Amer appeals under the Criminal Justice Act, 18 U.S.C. Section 3006A, from a judgment of conviction entered on March 14, 1996. The four-day trial was commenced before The Honorable Carol B. Amon, United States District Judge for the Eastern District of New York, between October 16-19, 1995. The jury returned its verdict on October 19, 1995.

The Indictment charged Ahmed Amer with one count alleging that between January 27, 1995 and August 4, 1995, Defendant Amer removed and retained his and his wife, Mona Amer's three children, who had

been in the United States, outside the United States (in Egypt) with the intent to obstruct the lawful exercise of parental rights, in violation of 18 United States Code ("U.S.C.") Section 1204(a) (International Parental Kidnapping).[1] (DK 4).[2]

On October 13, 1995, Mr. Amer filed a motion to dismiss the indictment on the ground that 18 U.S.C. Section 1204 is unconstitutionally vague, which was denied. (DK 32.)[3] After the government's case, Mr. Amer made an oral motion for judgment of acquittal under Fed. R. Crim. Proc. 29 (DK 38) based on the following grounds: (1) that prejudice from the Court's admission of unsubstantiated testimony that Mr. Amer had attempted to kill his wife deprived Mr. Amer of the right to a fair trial; (2) 18 U.S.C. Section 1204 is unconstitutionally vague and overbroad; and (3) the government failed to prove Mr. Amer's intent as required under the statute. After oral argument, the Court denied the motion. (ER 7:T:173-189.)[4]

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[1]A copy of the relevant statute is included in an Addendum attached hereto.

[2]"(DK #)" refers to the number of the relevant document listed in the Criminal Docket which is Number 1 in the Appendix filed concurrently herewith. Mr. Amer is proceeding under Second Circuit Local Rule 30 and filing a limited Appendix with five (5) copies of the relevant reporter's transcript for the court's review.

[3]The District Court denied the motion to dismiss during proceedings that have not been transcribed for this appeal.

[4]"ER [#]" refers to the relevant number of the Excerpts of Record containing the relevant excerpts of transcripts of the trial proceedings and the sentencing hearing. "(T:#)" refers to the relevant pages of the Reporter's Transcript of the trial.

After the defendant's case, Mr. Amer renewed his motion for judgment of acquittal made after the government's case, then made a motion for a mistrial based on the prosecutor's unduly prejudicial cross-examination of Mr. Amer. The Court denied the motions. (ER 1:T:388.) Mr. Amer objected to a portion of the Court's charge to the jury instructing that the jury could consider the defendant's substantial interest in the result in appraising his credibility as a witness. (A 2; T:462, 466.) After trial Mr. Amer was found guilty on the one count. (T:467-468.) Mr. Amer then made a motion to set aside the verdict as being contrary to the weight of the evidence, which the Court denied. (T:469-470.)

On January 18, 1996 defense counsel filed a Sentencing Memorandum on behalf of Mr. Amer on the following grounds: (1) the Sentencing Guideline applied by the Probation Department as analogous in lieu of an applicable guideline in its initial sentencing recommendation, United States Sentencing Guideline ("U.S.S.G.") Section 2A4.1, related only to the general Kidnapping statute (18 U.S.C. § 1201), and was not analogous to the offense of International Parental Kidnapping; (2) other, more analogous guidelines required a sentencing range of from zero (0) to six (6) months imprisonment (see U.S.S.G. §§ 2J1.5, 2B1.1); and (3) that making it a condition of Mr. Amer's supervised release that he return the children to Mrs. Amer in the United States would be unlawful. (DK 48.)[5]

[5]The sealed Presentence Report dated November 29, 1995, and the Addendum thereto submitted March 5, 1996 are included in Volume II of the Appendix and filed Under Seal.

The government replied by letter submitted January 31, 1996. (DK 51) The government opposed Mr. Amer's arguments regarding sentencing on the following grounds: (1) the Sentencing Commission added 18 U.S.C. Section 1204 to the statutory index to the 1995 Guidelines Manual, which became effective November 1, 1995, listing Section 2J1.2 --"Obstruction of Justice"-- as the offense guideline applicable to a violation of 18 U.S.C. Section 1204; (2) the two (2) adjustments available under U.S.S.G. Section 2J1.2, providing for eight (8) and three (3) level enhancements to the base level of twelve (12), should be applied to Mr. Amer because he threatened the children and substantially interfered with the administration of justice; and (3) the Court should upwardly depart because of Mr. Amer's extended retention of the children in Egypt, the fact he "abducted" the children, and that he inflicted "extreme psychological injury" on Mrs. Amer and the children.

The government also made the following arguments in favor of making it a condition of supervised release that Mr. Amer return the children to Mrs. Amer in the United States: (1) restoring Mrs. Amer's parental rights is analogous to an order of restitution under 18 U.S.C. Section 3556; and (2) the condition would be a proper exercise of the Court's discretion under 18 U.S.C. Section 2583(d).

In a Reply filed February 26, 1996 (DK 54), Mr. Amer responded to the government's letter with the following arguments: (1) application of the amendment to the Sentencing Guidelines made effective November 1, 1995 violates the Ex Post Facto clause of the United States Constitution because the last date of the offense alleged in the indictment is August 4, 1995. See U.S.S.G., Statutory

Index, App. A; and (2) no adjustments upward under U.S.S.G. Section 2J1.2 were warranted because (a) there was insufficient evidence that Mr. Amer threatened his children and any alleged threat to Mrs. Amer was unrelated to the desired goal of the offense stated in the guideline, that is to obstruct justice, and (b) the offense did not result in "substantial interference with the administration of justice." Mr. Amer explained there was no evidence that any judicial or investigative process of any kind was thwarted by his conduct (Mrs. Amer was not awarded custody by a United States court until after the children were in Egypt). Moreover, an Egyptian Court had granted Mr. Amer custody of his children, and ordered Mrs. Amer, an Egyptian citizen, to return to Egypt. It was also pointed out that under Egyptian law Mrs. Amer no longer had any parental rights to the oldest son Mahmoud at the time he went to Egypt because he was ten (10) years old.[6]

[6] See Defendant's Exhibits B and C to Defendant's Sentencing Memorandum in Reply, DK 54.

In sentencing Mr. Amer, the Court applied U.S.S.G. Section 2J1.2, which has a base offense level of twelve (12), then adjusted upward by three (3), concluding that Mr. Amer had substantially interfered with the administration of justice, resulting in a sentencing range of 18-24 months. The Court declined to adjust upward based on the other reasons provided by the Government or the Probation Department. In all other respects, the Court specifically relied on the factual findings of the Presentence Report. (A 2:6; A 5-6.)[7] The Court then sentenced Mr. Amer to the maximum allowed within the guideline range, 24 months. The Court also sentenced Mr. Amer to a one (1) year term of supervised release, and ordered as a condition thereof that Mr. Amer return the children to Mrs. Amer in the United States. (ER 3:3/6/96 ST:2-33; A 2 [Judgment].)[8] Mr. Amer is currently serving his sentence. The Notice of Appeal was filed on March 19, 1996. (A 4, Notice of Appeal.)

This appeal is brought on the following grounds:

1. 18 U.S.C. Section 1204 is unconstitutionally vague and overbroad;

2. The District Court imposed a sentence on Mr. Amer that is in violation of law. See 18 U.S.C. Section 3742; and

3. The District Court incorrectly applied the Sentencing Guidelines in sentencing Mr. Amer. Id.

STATEMENT OF FACTS

[7]"A (#)" refers to the relevant numbered document included kin the Appendix filed concurrently herewith.

[8]([date] ST:[#]) refers to the relevant transcript of the sentencing hearing which extended over three dates (12/28/95, 2/26/96, and 3/6/96), and the relevant pages therein.

II. THE GOVERNMENT'S CASE

The government's case against Ahmed Amer for commission of International Parental Kidnapping began with the testimony of his wife, MONA AMER. Mrs. Amer testified on direct examination that she was born in Egypt, she and Mr. Amer were married in Egypt in 1980 and they have three children, eleven and five year old boys and a six year old girl. The eldest boy, Amachmud (Mahmoud), was born in Egypt on November 23, 1984. (T:69-71; GEx.2A [birth certificate].)[9] Mr. Amer came to the United States in 1985. He was joined by Mrs. Amer and their son in 1987. Their other two children Maha and Omar were born in the United States in 1989 and 1991, respectively. (T:72-76.)

[9] "(GEx.#)" refers to the relevant Government Exhibit.

Mr. and Mrs. Amer informally separated in April 1994. Mrs. Amer claimed that Mr. Amer had assaulted her and once waited for her with a knife.[10] After the separation, the children lived with Mrs. Amer in the family home where Mr. Amer visited them regularly.[11] Mr. Amer told his wife that he wanted to take her and their children to live in Egypt. (T:77-81.) She overheard him book four one-way tickets to Egypt, which she testified he said was a mistake. Mrs. Amer told her husband she was not going with him to Egypt and that he would be going alone. She testified that sometime later Mr. Amer said he would kill her if she did not come to Egypt. (T:81-84.)[12] Mrs. Amer testified that after she found their marriage license and the children's passports and birth certificates missing from the home, her husband refused to return them. (T:84-86.)

On January 27, 1995 Mr. Amer went to the family home and ate dinner with his wife and children. At about 8:30 or 9:00 p.m. Mrs. Amer went to the supermarket leaving the children with their father. When she returned home at about 11:00 p.m. they were gone. She first learned that Mr. Amer had taken the children to Egypt when a friend

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[10]She did not see a doctor after any of these alleged incidents. (T:124.) Mr. Amer testified that on the occasion in question he was fixing his car with a knife, but his wife did not see it. (T:329-330.)

[11]Mr. Amer testified that he continued to reside in the family home until he left for Egypt with the children. (T:245-246, 251-252, 302-303.)

[12]Mr. Amer's counsel argued strenuously against admission of any testimony regarding alleged prior domestic violence and Mona Amer's unsubstantiated statement that Mr. Amer had threatened to kill her as unduly prejudicial. (T:14-15, 46-66.) The Court allowed the testimony, but instructed the jury during Mona Amer's testimony that it should not consider it on the issue of Mr. Amer's character, but only for the purposes of understanding the Amers' relationship and the issue of knowledge and intent. (T:80-81.)

of his called at about 9:00 a.m. on the next day. Mrs. Amer had not agreed to her husband taking the children to Egypt. She has not seen her children, who remain in Egypt, since the night they left. (T:86-92.)

On cross-examination Mrs. Amer testified that she, Mr. Amer and their children are Muslim, that it was important to them that the children be raised Muslim, and that under Islamic law a wife must do what her husband says as long as he treats her right. As of January, 1995, the children had not, however, been able to attend Muslim schools in New York. The Amers took their children to Egypt in 1992 where they both have large families. The eldest son, Mahmoud, spent three (3) or four (4) months in Egypt at that time. (ER 7:T:101-105, 119.) In 1994 Mrs. Amer obtained a permanent United States resident card. Mr. Amer had already been granted United States citizenship.[13] (ER 7:T:102-103.) After she and her husband separated, she received welfare. Mrs. Amer continued to receive welfare after the children went to Egypt. (ER 7:T:120-133.)

[13]Mr. Amer has dual Egyptian and United States citizenship. (A 5.)

The government then presented ROBIN EVANS, a reservation supervisor with Egypt Air, who testified that Ahmed Amer and his three (3) children traveled to Egypt from New York on the night of January 27, 1995. Evans testified also that Mr. Amer returned to the United States on June 1, 1995. (T:140-150; G.Exs. 4A, B, C and D, 5A and B.)

The government next presented GERARD COCUZZO, a special agent with the FBI who testified as to the results of his investigation. Cocuzzo determined that Ahmed Amer had become an American citizen in 1991. After he found that Mr. Amer was working as a cook in New Jersey in July 1995, Cocuzzo arrested him pursuant to a warrant on July 12. Cocuzzo testified that Mr. Amer admitted he had taken his children to Egypt. (T:158-162.)

III. THE DEFENDANT'S CASE

AHMED AMER testified for the defense that he was born and raised in Egypt. He came to the United States in 1985 to seek employment, a plan agreed to by his wife Mona who remained in Egypt with their then six (6) month old son Mahmoud. He is a devout, practicing Muslim. (ER 7:T:230-233.) Pursuant to the Koran and the Muslim religion, which permits a man to take multiple wives, Mr. Amer took a second wife named Barbara in 1987 with whom he had a daughter in Pennsylvania.[14] He went to New York when he brought Mona Amer and their son to the United States in December, 1987. Mr. Amer and his second wife (Barbara) were divorced in 1990. (ER 7:T:235-236, 313.)

[14]After six months he told her he had another wife. On cross-examination he stated that she already knew. (T:315-316.)

Mr. Amer and his wife Mona had two more children, one in 1989 and the other in 1991. Under Egyptian law, a child's citizenship is determined by the citizenship of the father. Mr. Amer applied to become an American citizen in 1992. At that time he inaccurately indicated in his application that his wife was Barbara Amer.[15] Under Muslim law, children must learn to read and write Arabic or they are not considered Muslim. Religious instruction is the father's responsibility. (ER 7:T:237-239.)

[15]On cross-examination he explained that he responded "none" to the question asking for names of previous spouses and listed only his daughter with his wife Barbara in response to a question asking for a list of his children, because he thought only the names of American, as opposed to Egyptian, wives and children were important for the application. (T:307-310.)

Mr. Amer denied abusing his wife. (T:239, 243-244.)[16] They had a disagreement about her receiving welfare and he told her his children would not be on welfare. In April, 1994 he left the family home one or two nights a week, or less, but he and Mona Amer continued to live together from April, 1994 until January, 1995. (T:245-246, 251-252.)[17] They went to a travel agency together to obtain four airplane tickets to Egypt; Mr. Amer already had one unused ticket. Mr. Amer told his wife that he had registered their oldest son Mahmoud in school in Egypt and she agreed they would go together to put Mahmoud in school.[18] Mrs. Amer agreed to go to Egypt then come back to the United States because she had to apply for citizenship in 1995. (ER 7:T:248-249.)

Mr. Amer kept the children's passports along with his other papers in a Samsonite bag in the family home. On the evening of January 25, 1995, Mrs. Amer left the family home where Mr. Amer was still living at about 6:00 p.m. to go to work. Mr. Amer kissed his wife goodbye and he and the children left for Egypt that night to be there in time for the holy month of Ramadan. He understood that his wife would join them in Egypt in a month. (T:251-255, 332.) Upon arrival in Egypt they went to the home of Mr. Amer's family, which is about ten minutes from the home of Mona Amer's family. The

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[16]He testified that after one fight his wife called the police and he went to court. The next day she dropped the charges. He returned to court in June, 1994 and was informed the order of protection would expire in December, 1994. (T:247.)

[17]On cross-examination Mr. Amer denied that his wife had asked him to leave. (T:302.)

[18]This was the basis for their leaving Mahmoud in Egypt on an extended holiday in 1992. (T:249.)

children visited with Mona Amer's mother the first week they were there. Mr. Amer enrolled his children in school. During the next 30 days Mona Amer called her children only once. (ER 7:T:256-257.)

After Ramadan, which began on January 30 that year, Mona Amer's mother told Mr. Amer that Mona would not be coming to Egypt until she had obtained her United States citizenship. He tried to get her to come, to no avail. Three months after their arrival he obtained from the Egyptian courts an order compelling his wife to return to the conjugal home. That order was sent to Mrs. Amer by the Egyptian government. Pursuant to Egyptian law, the court waited three months for Mrs. Amer to return to her native land and her family. When she did not, they formally awarded Mr. Amer custody of all three children. (ER 7:T:258-266; D.Exs. B and C [Egyptian court orders].)[19] With respect to the oldest son Mahmoud, who was ten years old, the custody order also relied on the law of Egypt, which provides that a mother loses any rights to her male child when he reaches the age of ten years. (D.Ex.C.)

On cross-examination the government questioned Mr. Amer about his delay in telling each wife that he was married to another woman. They also questioned him about his overbalances on a number of credit cards. (T:314-329.)[20]

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[19]"(D.Ex.[letter])" refers to the relevant, identified exhibit submitted by the defendant at trial. The Court instructed the jury that it was admitting the Egyptian court orders on the question of what weight, if any, they had on the issue of Mr. Amer's intent, and not for the truth of the statements in them. (T:266.)

[20]The defense objected to this line of questioning. (T:278-295, 368.)

On redirect examination Mr. Amer testified that Mona Amer could petition for divorce in Egypt if she returned and that family support laws in Egypt are tougher on the father than such laws in the United States. (T:343-347.)

The defense also called ANWAR FARID, the owner of a travel agency, who testified that Mr. Amer came to his office three (3) or four (4) times to discuss travel to Egypt. Mr. Farid said that Mr. Amer changed a reservation many times because his wife apparently was not leaving. On one occasion, Mr. Amer came with a woman who canceled her current reservation stating she would make it after she became a citizen.[21] Mr. Amer told Mr. Farid to change the reservation for his wife, who would not be leaving, and that he would leave with the "child." (T:377-384.)

ARGUMENT

I.

THE INTERNATIONAL PARENTAL KIDNAPPING STATUTE IS UNCONSTITUTIONALLY OVERBROAD AND VAGUE

Mr. Amer, in both a pre-trial motion to dismiss and in motions for judgment of acquittal, argued the unconstitutionality of 18 U.S.C. Section 1204 to the District Court. (DK 32, 38; ER 7:T:173-189) The Court clearly erred in finding the International Parental Kidnapping statute constitutional on its face and as applied to Mr. Amer. The statute unduly interferes with the First Amendment right to freedom of religion and other fundamental rights, and is unconstitutional for vagueness. A de novo standard of review governs this Court's determination of the statute's

[21]He did not know if the woman was Mr. Amer's wife. (T:386.)

constitutionality, which is a pure question of law. See United States v. Murphy, 979 F.2d 287, 289 (2d Cir. 1992).

A. THE STATUTE IS OVERBROAD

Mr. Amer has standing to challenge the overbreadth of a statute, such as 18 U.S.C. Section 1204, that is constitutionally deficient on its face. See Grayned v. City of Rockford, 408 U.S. 104, 114-115 (1972). The Supreme Court in Grayned discussed the applicable standard:

> A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.

Id.[22]

[22]The appellant in Grayned was allowed to raise the overbreadth of an ordinance that the court found was not unconstitutional as applied to him.

A statute is particularly vulnerable where, as here, it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Id. at 115. 18 U.S.C. Section 1204 does exactly that because it punishes parents who are following the dictates of religious laws in returning a child to the land of their birth, in violation of the First Amendment to the Constitution.[23] The statute also burdens children's fundamental rights, punishing parents who make decisions that are aimed at protecting a child's religious and other fundamental freedoms. The government's interest in achieving the statute's goals are outweighed by the severity of the burden imposed on religion. See, e.g., 42 U.S.C. § 2000bb, et seq. (Religious Freedom Restoration Act restoring requirement of compelling state interest and balancing test where government action burdens religious freedom).

18 U.S.C. Section 1204 provides, in pertinent part,

> (a) Whoever removes a child from the United States or retains a child (who had been in the United States) outside the United States with intent to obstruct the lawful exercise of parental rights shall be fined under this title or imprisoned not more than 3 years, or both...
>
> (b) As used in this section--
>
> ...(2) the term "parental rights"...means the right to physical custody of the child--
>
> (A) whether joint or sole...; and

[23]The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

(B) whether arising by operation of law, court order, or legally binding agreement of the parties...."

(See Addendum.) The statute was passed in order "...to deter the removal of children from the United States to foreign countries in order to obstruct parental rights...."[24]

The statute itself and its Legislative History establish that it is based on the international treaty known as the Hague Convention on the Civil Aspects of International Parental Child Abduction" ("Hague Convention" or "Convention") and incorporates definitions contained in that document.[25] Indeed, the statute incorporates the Hague Convention in Section (d). 18 U.S.C. § 1204(d). Yet, the District Court here interpreted the criminal statute, unlike the civil treaty, to focus solely on the interruption of "parental rights" and failed to consider other, compelling fundamental interests that are the basis of decisions in international custody disputes under the Convention. As recognized by the international treaty, the children's best interests and "fundamental rights", including religious rights, can override any claim that they were wrongly taken.

[24]H.R. Rep. No. 103-390, 103rd Congress, 1st Session, *reprinted in* 1994 U.S. Code Cong. & Admin. News 2419, 2420. (See Addendum.)

[25]Ibid. at 2420-2422; 18 U.S.C. § 1204(d).

The goals of the "Hague Convention" treaty (included in the Addendum), expressed by the signatories to that Convention, include the "prompt return of children wrongfully removed," under certain defined circumstances. (Hague Convention, Ch. I, Art. 1(a).)[26] A removal or retention is initially considered wrongful where,

> it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention...."

(Id. at Ch. I, Art. 3(a).) However, the Convention recognizes the existence of principles and interests, especially the best interests of the children, which dissipate the "wrongfulness" and justify retention of the child in the new country.

A signatory state may refuse to return children based on the best interests of the children, the reasons underlying any custody decision in the requested state, as well as the fundamental principles of the requested State. (Convention, Ch. III.) On the other hand, 18 U.S.C. Section 1204, as interpreted by the District Court, looks only to whether the criminal defendant intended to remove the child from the other parent's legal custody. The provisions of the Hague Convention are apparently irrelevant. The motivating reason for the removal is apparently irrelevant except for narrow circumstances serving as affirmative defenses which are not congruent with the Convention's provisions.[27]

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[26]It was undisputed at trial that Egypt is not a signatory to the Hague Convention. (T:180-187.)

[27]This is exactly the interpretation of the statute given by the government in this case. (T:222-223.) The government, in opposing introduction of the Egyptian custody orders, argued, in pertinent part,

> [A]ll that the government needs to prove is that when he took the kids away, he did it to get them away from her physical possession and control. It need not prove that he had some other reasons or that he had no other reasons for doing it...."

(T:222-223.)

The Hague Convention is carefully circumscribed. Children are not to be returned (thereby excusing their "wrongful" taking) if "there is a grave risk that his or her return would expose the child to psychological or physical harm or otherwise place the child in an intolerable situation." Further, a sufficiently mature child may refuse return. Return will not take place "if this would not be permitted by the fundamental principles of the requested state (here Egypt) relating to the protection of human rights and fundamental freedoms."[28]

None of these defenses is embodied in the criminal statute. Yet Section 1204(d) states the criminal act does not detract from the Convention. Seemingly then, these defenses to the return of the child embodied in the Convention must be defenses to the crime enacted. Nevertheless, the Court's reading of the statute makes clear that removals which states are justified in sustaining under the clear provisions of the Convention, are crimes. A parent's recognition of the fundamental right and freedom of a teenaged Egyptian to be raised Muslim in his native land is not a defense. The potential claim that a child's being returned to a Welfare mother who has made no provision for his or his siblings' education in Arabic or the Muslim religion is no defense. As interpreted here, the statute does not "detract" from the Convention, it abolishes it.

[28] See Addendum, Hague Convention, Ch. III, Articles 12, 13, 17 and 20.

This attempt by Congress to criminalize behavior previously regulated by an international treaty must necessarily fail. It is laudable that Congress sought to create an additional deterrent to parental kidnapping. Yet it cannot create an artificially narrow definition of the proscribed behavior which ignores the international and domestic complexities plaguing this area, as well as the compulsion of religious principles and laws often driving a parent's decision. The facts of this case exemplify how application of the criminal statute can burden the free exercise of religion. Indeed, under the Hague Convention, the best interests of the children, including their religious upbringing and respect for Islamic law, would in all likelihood have resulted in a denial of a petition by Mona Amer for their return.[29]

[29]Under these circumstances the state court's award of custody to Mrs. Amer directly conflicts with the Hague Convention and the latter, as an international treaty, would prevail. See Nielsen v. Johnson, 279 U.S. 47 (1929).

There was uncontroverted evidence at trial that the Amers are Muslim, that in order to be considered Muslim, the children had to learn to read and write Arabic, and that the children had not been enrolled in Muslim schools in Brooklyn, New York where they lived. There was also evidence that the oldest boy, Mahmoud, remained in Egypt on an extended holiday with an eye toward going to school there, and that the children were enrolled in schools in Egypt within 30 days of their arrival. Mr. Amer was awarded custody of the two younger children by an Egyptian court because Mrs. Amer, an Egyptian citizen, had disobeyed Islamic law and refused to return to the conjugal home in Egypt. (DK 54:D.Exs. B and C.) There was further evidence that the oldest child, Mahmoud, was ten (10) years old at the time he returned to Egypt with his father and that under Islamic law, his mother no longer had any rights to him whatsoever. (DK 54:D.Ex. C.) Indeed, letters from Mahmoud expressing his desire to stay in Egypt were submitted at sentencing. (DK 54, Ex. A.)

At the time of their father's sentencing, the children had been in Egypt for well over a year, living with Mr. Amer's extended family and near to Mrs. Amer's mother and family. There was also evidence that if returned to the United States, the children would be on welfare with their mother. Mr. Amer can hardly support his family sitting in prison and could face deportation to Egypt because of his alleged false statements on his application for citizenship. Thus, the children's best chance for decent support, as well as their only chance to continue seeing their father, lies in their staying in Egypt. On the other hand, their mother can freely travel to Egypt to see them. There would be firm ground for Egypt to refuse to return

the children under the principles of the Hague Convention. The Court's interpretation ignores all of these elements relevant to a decision under the Convention.

The record demonstrates that Mr. Amer's actions were dictated by and sanctioned by adherence to his duties under the Muslim religion and protection of his children's welfare. Yet, the Court construed the statute, unlike the Hague Convention, to deny the free exercise of the Muslim religion and protection of the children's fundamental rights as a defense. The statute criminalizing actions like those undertaken by Mr. Amer, sweeping into its ambit the adherence to overriding religious and other fundamental principles motivating and even compelling those actions, is plainly unconstitutional.

B. THE STATUTE IS VOID FOR VAGUENESS

The Supreme Court has repeatedly struck down statutes that were unconstitutionally vague because of the difficulty of determining what they prohibit. See, Papachristou v. City of Jacksonville, 405 U.S. 156 (1982); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). The Court has also condemned statutes which fail to provide "an ascertainable standard of conduct." Bagget v. Bullit, 377 U.S. 360, 372 (1964). This Court has described the two-part void-for-vagueness test articulated by the Supreme Court:

> [T]he court must first determine whether the statute "give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and then consider whether the law "provide[s] explicit standards for those who apply [it]."

United States v. Schneiderman, 968 F.2d 1564, 1568 (2d Cir.), cert. denied, 507 U.S. 921 (1993), quoting, Grayned v. City of Rockford,

408 U.S. 104, 108 (1972). (Other citations omitted.) The Supreme Court has also elevated this concern, noting recently:

> that the more important aspect of the vagueness doctrine is not "actual notice, but the other principal element of the doctrine--the requirements that a legislature establish minimal guidelines to govern law enforcement" ... Where the legislature fails to provide such minimal guidelines, a criminal statute may permit a standardless sweep [that] allows policemen, prosecutors and juries to pursue their own personal predilections.

Koldender v. Lawson, 461 U.S. 352, 357-358 (1983), citing Smith v. Goguen, 415 U.S. 566, 574-575 (1974). Such a result offends equal protection because it permits discriminatory enforcement. As Grayned warned:

> A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. at 109 (citation omitted).

With respect to 18 U.S.C. Section 1204's prohibition of the "retention" of children outside the United States, no standard of conduct is defined. Nor is this deficiency cured by the Legislative History. (See Addendum.) There is no way for a reasonable person to tell from the statute whether any particular length of retention is necessary to constitute a violation, or whether continued retention could subject him to an additional prosecution. Indeed, this latter ambiguity was the subject of some debate at the sentencing hearing which exemplifies the ad hoc nature of prosecutorial decisions invited by the statute. The District Court asked the Assistant United States Attorney ("AUSA") representing the government whether Mr. Amer could be re-indicted under 18 U.S.C. Section 1204 for continuing to retain the children in Egypt. The AUSA

responded "I think we could. I think that it would be a different indictment and we would have different elements of proof...." (ER 2:2/28/96 ST:92-93.)

The statute fails to define when the first retention ends and a new one begins subjecting the defendant to an additional prosecution. Under the government's theory, it could arbitrarily charge a defendant with a new crime under the statute whenever it wished until the children are returned, conceivably subjecting a defendant to a different charge for every day of the children's continued retention, handily converting a three year penalty into a life sentence for even a brief foreign retention. Mr. Amer submits that the statute completely fails to give notice of the possibility of such unlimited charges, and in any event that repeated prosecution for continued retention of the children would violate the Double Jeopardy Clause of the United States Constitution. See United States Constitution, Amendment V.

The statute is also exceptionally inclusive in regards to its subject matter. The plain meaning of the statute embraces not only the sixty million United States citizens and permanent residents, but it includes in its encompassing sweep children who have "been in the United States." This would include children not only as students and tourists, but also those who have touched down for incidental periods of time, such as for airplane refueling, traveling in United States airspace or within three miles of the coast line. The statute's fleeting subject matter requirements provide a vast universe of potential targets. The opportunities for abuse on a multitude of grounds are apparent.

Finally, the statute by its terms contemplates transactions occurring across international borders. The statute provides no mechanism for construing the term "lawful exercise of parental rights." See United States v. Turkette, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language.") Subsection (b)'s attempt to clarify and delimit the overbreadth and vagueness of subsection (a) only reinforces this deficiency because it defines parental rights as "arising by operation of law, court order or legally binding agreement of the parties." Far from clarifying and delineating the prohibited conduct, these definitions mirror the same deficiencies noted in subparagraph (a).

The statute, by its terms, would apply to all international travelers who are, by its terms, shouldered with the unreasonable responsibility of being familiar with federal law, the law of the several states, the law of their own country, the law of any country they may pass through in transit, the impact of international treaties, positive law promulgated by the United Nations and Resulting Customary International Law emerging from mores between countries. This is an impossible position for any defendant. The ambit of prosecutorial discretion is limited only by outer space. A statute which on its face imports authority from this collage of contradictory sources fails to give the ordinary person notice of what is or is not prohibited.

As discussed above, the statute also states in sub-section (d) that it does not "detract" from the Hague Convention. 18 U.S.C. § 1204(d). The Hague Convention uses a different set of criteria from § 1204 to determine if the taking of a child was "wrongful," and

excuses the conduct upon a plethora of grounds, as discussed above, which are inconsistent with § 1204(c)'s limited affirmative defenses. The Legislative History does little to cure this fatal deficiency. In the House Report, Congress states, "These "parental rights" are to be determined by reference to State law, in accordance with the Hague Convention on the Civil Aspects of International Child Abduction." H.R. Rep. No. 103-390, 103rd Congress, 1st Session, *reprinted in* 1994 U.S. Code Cong. & Admin. News 2419, 2422. (See Addendum.) There is no explanation of the principles of the Hague Convention, the rules enunciated therein, or even the meaning of "in accordance with." The result is a criminal statute impermissibly confused and unclear.

The International Parental Kidnapping Act should thus be struck down because "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

II.

THE DISTRICT COURT VIOLATED LAW AND INCORRECTLY APPLIED THE SENTENCING GUIDELINES IN SENTENCING MR. AMER

18 U.S.C. Section 3742 permits a defendant to appeal a sentence that,

> (1) was imposed in violation of law...[and]
>
> (2) was imposed as a result of an incorrect application of the sentencing guidelines...."

The sentence of Mr. Amer should be reversed on both grounds. A de novo standard of review governs this Court's review of the District

Court's application and interpretation of the sentencing guidelines, which raises questions of law. See United States v. Lovell, 16 F.3d 494, 495-496 (2d Cir. 1994). Except in one instance discussed infra, the District Court's underlying findings of fact are not in issue in this appeal, so the clearly erroneous standard does not apply. Id.

/ / /

/ / /

A. The Court Cannot Legally Order As a Condition Of Supervised Release That Mr. Amer Return The Children

1. The Condition is Not Mandatory

Compelling Mr. Amer to return his children to the United States by making it a condition of his supervised release is not permitted under the law. 18 U.S.C. Section 3583(d) sets forth mandatory conditions of a period of supervised release. (See Addendum.) That section provides, in pertinent part,

> The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision....

Id. Keeping the children in Egypt would not constitute "another...crime," the commission of which would violate the conditions of supervised release mandated by 18 U.S.C. Section 3583(d). Mr. Amer has already been convicted for taking the children to, and keeping them in Egypt. See 18 U.S.C. § 1204(a). The Indictment charged that Mr. Amer "did knowingly and intentionally remove and retain children who had been in the United States...outside the United States...." (DK 4.) To characterize Mr. Amer's continued retention of the children as "another crime" invites an application of Section 1204 that violates the Double Jeopardy Clause, and serves only to strengthen Appellant's argument that the statute is void for vagueness.

2. The Condition is Illegal

18 U.S.C. Section 3583(d) also permits a court to impose other conditions which meet certain criteria:

> First, they must be reasonably related to the factors set forth in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). These factors are: consideration of "the

> nature and circumstance of the offense and the history and characteristics of the defendant; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant;" and "to provide the defendant with needed [training], medical care, or other correctional treatment in the most effective manner." Second, the conditions must involve no greater deprivation of liberty than is reasonably necessary for the latter three purposes. And third, the conditions must be consistent with pertinent policy statements of the Sentencing Commission....

United States v. Eyler, 67 F.3d 1386, 1393 (9th Cir. 1995) (citation omitted). The District Court's conclusions to the contrary (ER 9:3/6/96 ST:13-17), conditioning Mr. Amer's supervised release on bringing the children back does not meet any of these criteria and is thus illegal. See United States v. Abrar, 58 F.3d 43, 46 (2d Cir. 1995.)

At the outset, the condition does not provide Mr. Amer with correctional "treatment" of any kind, nor will it afford needed protection to the public. The fact that the condition may bear some relation to the underlying offense is undercut by its clear punitive nature in contravention of sentencing policies specified by the Sentencing Commission. Although a District Court has the authority to impose probation conditions that are punitive in nature, "[t]he provision of just punishment is not a criterion for supervised release conditions. *Compare* 18 U.S.C. § 3563(b) *with* 18 U.S.C. § 3583(d)(1)." United States v. Eyler, 67 F.3d at 1393, n.8.[30]

[30]The Ninth Circuit in Eyler explained that discretionary conditions under the probation and supervised release statutes, by their terms, must be reasonably related to certain purposes of sentencing contained in 18 U.S.C. § 3553. The probation statute, however, allows discretionary conditions related to § 3553(a)(2)(A), whereas the supervised release statute does not. Section 3553(a)(2)(A) provides, in pertinent part,

> ...The court, in determining the particular sentence to be imposed, shall consider [...] the need for the sentence

imposed [..] to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense...."

To call this a condition "of" supervised release is a misnomer. The second Mr. Amer's term of supervised release begins, he will be in violation of the condition if he has not already returned the children. The condition constitutes an ad hoc court order the violation of which will subject Mr. Amer to increased punishment for his underlying offense of retaining the children in Egypt.

The condition also involves a greater deprivation of liberty than is reasonably necessary "to afford adequate deterrence to [the] criminal conduct." 18 U.S.C. § 3553(a)(2)(B).[31] Congress and the Sentencing Commission have clearly expressed their position that a lengthier retention of the children does not warrant increased punishment. The punishment scheme envisioned by Congress as an adequate deterrent for violations of Section 1204, including a fine only and/or zero (0) to three (3) years imprisonment, is applicable both to the taking and the retention of children outside the United States. See 18 U.S.C. § 1204; see also H.R. Rep. No. 103-390, 103rd Congress, 1st Session, *reprinted in* 1994 U.S. Code Cong. & Admin. News 2419, 2421. (See Addendum.) The scheme does not include enhanced penalties related to the length of retention, although it could have.[32] Rather, the statutory scheme shows Congress and the Sentencing

[31]The District Court disagreed, concluding that no deprivation of liberty resulted from the condition, only from its violation. (ER 9:3/6/96 ST:16-17.) As discussed infra, the condition not only affects the liberty of Mr. Amer, it affects the liberty interests of the three innocent Amer children who could be forced to return to the United States against their will if Mr. Amer complies with the condition. The condition also may be impossible for Mr. Amer to accomplish from his prison cell, rendering him in violation and in prison for an extra year through no fault of his own.

[32]This was in fact the basis for the District Court's decision not to adjust the sentence upward under the guideline on the basis of length of retention. (ER 9:3/6/96 ST:12.)

Commissions deliberately chose not to make increased penalties for lengthier retention of the children part of the sentencing options for Section 1204 violations.

In setting forth the punishment scheme for the crime of "Kidnapping" under 18 U.S.C. Section 1201, Congress and the Sentencing Commission created a scheme whereby kidnappers violating 18 USC Section 1201 who detain their victims for lengthier periods can be punished more severely. See U.S.S.G. § 2A4.1. (See Addendum.) Congress also expressly stated that the Kidnapping Statute (18 U.S.C. § 1201), does not apply to parental kidnapping of a minor. See 18 U.S.C. § 1201A. Then, in accordance with this prohibition, the Sentencing Commission did not make the guideline for general Kidnapping applicable to International Parental Kidnapping, choosing instead the "Obstruction of Justice" guideline found in USSG § 2J1.2. See U.S.S.G., Statutory Index, App. A. (See Addendum.) That guideline does not include enhancements for increased retention of the children.

The condition imposed by the District Court is further not included in, and is inconsistent with the 25 conditions of supervised release recommended by the Sentencing Commission in U.S.S.G. Section 5B1.4. (See Addendum.) Although district courts are not limited in their discretion to the 25 conditions set forth therein, this Court recently was reluctant to broaden them, striking down a condition imposed by a district court that was not included. See United States v. Abrar, 58 F.3d at 47. In doing so, this Court admonished that 18 U.S.C. Section 3583(d) does not provide a district court with

"untrammelled discretion" in imposing non-mandatory conditions of supervised release. Id.[33]

In fact, none of the 25 conditions listed in Section 5B1.4, contrary to the condition here, involve acts which will drastically affect the liberty and other direct interests of persons other than the defendant. Although phrased as a condition requiring acts by Mr. Amer, the condition imposed by the District Court directly affects the lives and liberty interests of the Amer children. It places them in the untenable position of being forced, possibly against their wills and contrary to their religious, psychological and physical well-being, to return to their mother in the United States. Mr. Amer is being compelled by the District Court to ignore what has been determined by an Egyptian Court to be in the best interests of his own children in order to avoid further imprisonment.

[33]This Court in Abrar reversed the lower court's imposition of a condition requiring a defendant to pay off unrelated debts.

In making its decision, the District Court did not consider the best interests of the children, and was not required to do so under the sentencing scheme. Indeed, protecting the best interests of the children, the controlling principle in domestic, custody disputes and the Hague Convention, can often be at odds with the statutory mission of the sentencing Commission--"the development of guidelines that will further the basic purposes of criminal punishment: Deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G., Ch. 1, Pt. A. (See Addendum.)

This is particularly disturbing in light of Congress' express reliance on the Hague Convention in drafting the International Parental Kidnapping Statute, and the Convention's overriding consideration of the best interests of the children. It would appear that under the District Court's approach, restoration of the non-offending parent's "parental rights" is the overriding concern, even if that parent would not be entitled to a return of the children under the Hague Convention. Under such circumstances, Mr. Amer submits, the principles of the Hague Convention treaty should control. This complies with Congress' express statement in 18 U.S.C. Section 1204(d) that "This section does not detract from The Hague Convention on the Civil Aspects of International Parental Child Abduction...."

As discussed above, concerns such as the physical and psychological welfare of the child, the child's maturity and (if it is appropriate) his views, whether the child is settled in his new environment, the "social background of the child," and the reasons for any decision relating to custody given in the signatory state,

are bases for refusing to return the child under the Hague Convention. The signatory state may also refuse to return the child if "this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." A decision under the Convention, considering the circumstances of the Amer children's quality of life and religious needs, as well as their grim prospects in the United States, in all likelihood would result in Egypt's refusal of a petition by Mrs. Amer for a return of the children, finding it to be in their best interests to remain in Egypt.[34]

[34]It is likely that Egypt, as well as other non-signatory countries, informally comply with the Convention on a case-by-case basis.

The condition also may be impossible for Mr. Amer to accomplish.[35] He cannot travel to Egypt while he is incarcerated. Arrangements for travel visas and escorts for the children could be prohibitively expensive. Such arrangements would also be complicated by the Egyptian court's decision that Mona Amer is obligated to return to Egypt to be with the children, the Egyptian award of custody to Mr. Amer, as well as any determination that the children would be better off in Egypt. The District Court's decision was, in essence, a child custody decision more appropriately made by the state court (or Egyptian court) with civil jurisdiction over the Amers' domestic dispute. Neither the Congress, in its role as drafter of criminal laws, nor the court in sentencing, should be in the business of deciding international domestic disputes and resolving custody battles.[36]

3. The Condition Threatens Double Jeopardy

Further imprisonment for failing to return the children would impermissibly violate the Double Jeopardy Clause of the United States

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[35]The District Court made a specific finding that it was within Mr. Amer's power to return the children without specifying what facts supported that conclusion, referring only to the "testimony at trial" and the "arguments" at sentencing. (ER 9:3/6/96 ST:20.) Mr. Amer submits this finding was clearly erroneous. There was no information available to the Court concerning the position of the Egyptian authorities on this issue. Defense counsel had repeatedly attempted, but was unable to obtain help from the Egyptian embassy. The Court also concluded that Mr. Amer was unable to afford a fine, which is clearly inconsistent with his being able to afford the cost of arranging his three children's return. (ER 9:3/6/96 ST:19-34.)

[36]Indeed, if this were a civil matter, it is questionable whether the District Court would have jurisdiction to decide such clear State-law questions relating to custody. See 28 U.S.C. §§ 1331 (Federal question jurisdiction) and 1332 (diversity jurisdiction). The doctrine of abstention would also apply. See, e.g., Colorado River Water Cons. Dist. v. United States, 424 U.S. 800, 814-815 (1976).

Constitution. The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." United States Const. Amend. V. As the Supreme Court has explained, the clause "applies both to successive punishments and to successive prosecutions for the same criminal offense." United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 2855 (1993). The Double Jeopardy Clause prohibits the condition imposed by the District Court because it exposes Mr. Amer to increased punishment for the same offense for which he was indicted, convicted and sentenced--keeping the children in Egypt. Any failure by Amer to comply with the condition would not constitute new behavior. The Court cannot punish through the back door what the Congress cannot punish through the front. Mr. Amer cannot be re-indicted for continuing to keep his children in Egypt without violating double jeopardy.

As noted by Supreme Court Justice Brennan in Ashe v. Swenson,

> [T]he Double Jeopardy Clause requires the prosecution...to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction. This "same transaction" test of "same offence" not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience....

Ashe v. Swenson, 397 U.S. 436, 453-454 (1970). The prosecution here was obligated to, and did, charge Mr. Amer with all of the offenses that grew out of the transaction underlying his indictment--his taking the children to Egypt where they remain.

The civil concept of res judicata, or "merger and bar" is further embodied in the Fifth Amendment's guaranty against double jeopardy and would equally bar further punishment for keeping the children in Egypt. See Ashe, 397 U.S. at 443 (applying the Federal rule of collateral estoppel to criminal cases). As noted by the Second Circuit Court of Appeals in the Burka case, 'New York adheres to a transactional analysis of res judicata, "barring a later claim arising out of the same factual grouping as an earlier litigated claim...."' Burka v. New York City Transit Authority, 32 F.3d 654, 657 (2d Cir. 1994) (citation omitted). The earlier claim, the charge of taking and retaining the children to Egypt, comprises factually any claim that the children remain there.

The fact that the additional punishment is for violating a condition of supervised release, as opposed to committing a new crime should not be dispositive under the facts of this case. This Circuit has found that a person can be imprisoned for acts that violate a condition of supervised release and also prosecuted for the same acts without creating a double jeopardy problem. See United States v. Meeks, 25 F.3d 1117, 1122-1123 (2d Cir. 1994). To apply that principle here would, however, exalt form over substance. The crime of which Mr. Amer was convicted, taking and retaining the children in Egypt, is complete. He received the maximum sentence under the guidelines (24 months) as interpreted by the District Court. If he does nothing further, he will receive another year in prison for that very same offense, not a new one. This additional punishment for the same offense violates the Double Jeopardy Clause.

B. The Sentence Should Not Have Been Adjusted Upward

The Court erroneously adjusted the base offense level of twelve (12) provided by USSG § 2J1.2(a) upward by three (3) levels in accordance with subsection (2), which provides,

> If the offense resulted in substantial interference with the administration of justice, increase by 3 levels.

In imposing the adjustment, the District Court concluded that because the Obstruction of Justice guideline is not "directly analogous," it was "important to determine what administration of justice means in the context of this particular circumstance...." The Court then concluded that there is a substantial interference with the administration of justice when a defendant interferes with "parental rights" and ignores the legal process by taking the children without first going to court. (ER 9:3/6/96 ST:9.) This application of the phrase "substantial interference with the administration of justice" misinterprets 18 U.S.C. Section 1204, ignores the guideline chosen by the Sentencing Commission for violations of that statute, and condemns anyone who is convicted under the statute to an upward adjustment in all cases. The guideline itself, in Application Note No. 1, defines "substantial interference with the administration of justice" as including,

> a premature or improper termination of a felony investigation; an indictment, verdict, or any judicial determination based upon perjury, false testimony, or other false evidence; or the unnecessary expenditure of substantial governmental or court resources.

None of these scenarios applies here. There is no evidence that any judicial or investigative process of any kind was thwarted by Mr. Amer's conduct. The Amers were married and not legally separated at the time Mr. Amer took the children to Egypt, and Mrs. Amer spoke with the children and knew there whereabouts shortly after their arrival

in Egypt. (A 5, PSI at p.3, ¶3.) Indeed, the Probation Department stated in the Presentence Report that "The probation officer has no information suggesting that the defendant impeded or obstructed justice." (A 5, PSI at p.4, ¶7.)

Moreover, if interference with parental rights were the equivalent of "substantial interference with the administration of justice," an enhancement under U.S.S.G. § 2J1.2(b)(2) would be required in all cases of conviction under 18 U.S.C. Section 1204. Under the District Court's interpretation, a parent who takes the children in violation of the other parent's sole court-awarded custody and hides them, causing the government to mount an expensive investigation to locate the children, would receive the same sentence as Mr. Amer. Such a result removes sentencing discretion from the court and vitiates Congress' expressed intent that lesser sentences could be appropriate under the statute. Mr. Amer has been punished three times by the District Court for the same conduct, first in the base sentence of imprisonment, second in the unwarranted enhancement, and third in the illegal condition of supervised release. His sentence should be vacated. **III.**

CONCLUSION

For the reasons stated above, the conviction of Ahmed Amer should be reversed and the Indictment under 18 U.S.C. Section 1204 dismissed as violating the United States Constitution. Alternatively, Mr. Amer's sentence should be vacated and the matter should be remanded to the District Court for re-sentencing, without an upward adjustment under U.S.S.G. § 2J1.2(b)(2) and without imposition of a condition

of supervised release compelling the return of the Amer children to their mother.

DATED: May ___, 1996 Respectfully submitted,

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STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action. My business address is: Union Bank Plaza, 24th Floor, 445 South Figueroa Street, Los Angeles, California, 90071.

On February 7, 2010, I served the foregoing document described as on the interested parties in this action by placing [] the original [x] a true copy thereof enclosed in a sealed envelope addressed as follows:

Timothy Macht, Esq.
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The Honorable Carol B. Amon
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

[x] I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[x] I declare under penalty of perjury under the laws of the State of California and the United States of America that the above is true and correct.

[x] I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on May 9, 1996, at Los Angeles, California.

_____
Tina Walling

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