NO:

In the Supreme Court of the United States

KHALIL ABU RAYYAN,

***Petitioner*,**

v.

UNITED STATES of AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

FEDERAL DEFENDER OFFICE

Jessica Lefort
Todd Shanker
Counsel for Petitioner

613 Abbott St., 5th Floor
Detroit, Michigan 48226
Telephone No. (313) 967-5542
jessica_lefort@fd.org

QUESTIONS PRESENTED FOR REVIEW

(1) Several United States Courts of Appeals have suggested that the use of defendants' uncharged, unproven conduct in deciding their sentences may violate their Fifth and Sixth Amendment rights. This Court has ruled that the use of uncharged conduct is unconstitutional in determining defendants' minimum and maximum sentences, but not in imposing upward variances and determining final sentences. *Alleyne v. United States*, 570 U.S. ---, 133 S. Ct. 2151 (2013) (min.); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (max.).

> **Did the district court violate Khalil Abu Rayyan's Fifth and Sixth Amendment rights by imposing an upward variance of almost three times the top of his guidelines range based solely upon uncharged conduct not relevant to the offenses of conviction and not proved beyond a reasonable doubt?**

(2) United States Sentencing Guidelines § 3E1.1(b) allows for a reduction of one offense level, on the government's motion, for a defendant who has "timely notif[ied] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." In 2013, the Sentencing Commission amended § 3E1.1(b), limiting the government's discretion to withhold such motions only to cases where the defendant has failed to preserve government trial resources.

> **Did the district court err in failing to compel the government to file a § 3E1.1(b) motion for Khalil Abu Rayyan, where the government's proffered reasons for refusal related only to its own requests for a competency evaluation as well as its premature motion about a sentencing issue, affirmatively filed after having received notice of Rayyan's intent to plead guilty?**

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Khalil Abu Rayyan respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion affirming Rayyan's sentence is reported at *United States v. Rayyan*, 885 F.3d 436 (6th Cir. 2018), *reh'g denied* (Apr. 17, 2018) and is included as Appendix A, at A-1. The district court's unpublished opinion supporting Rayyan's sentence is available on Westlaw at *United States v. Abu-*

Rayyan, No. 16-CR-20098, 2017 WL 1279226 (E.D. Mich. Apr. 6, 2017) and is included as Appendix B, at A-10.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2018) and Part III of the Rules of the Supreme Court of the United States. The Court of Appeals affirmed Khalil Abu Rayyan's sentence on March 19, 2018. Rayyan petitioned for an *en banc* rehearing, which was denied on April 17, 2018. Therefore, this petition is timely filed pursuant to Supreme Court Rule 13.1.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . [and] to be informed of the nature and cause of the accusation.

U.S. Const. amend. VI.

STATUTORY PROVISIONS INVOLVED

Section 3553 of Title 18 states, in pertinent part:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . .

(5) any pertinent policy statement . . .

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2018).

Section 3742 of Title 18 states, in pertinent part:

§ 3742. Review of a sentence

* * *

Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

> **(C)** the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or
>
> **(4)** was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
>
> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

18 U.S.C. § 3742(e) (2018).

U.S. SENTENCING GUIDELINES PROVISIONS INVOLVED

United States Sentencing Guideline Section 3E1.1 states in pertinent part:

> **§ 3E1.1. Acceptance of Responsibility**
>
> **(a)** If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
>
> **(b)** If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the

government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

Commentary

Application Notes:

* * *

6. . . . [Text added by U.S.S.G. Amendment 775:] The government should not withhold such a [§ 3E1.1(b)] motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

U.S.S.G. § 3E1.1

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INTRODUCTION

When Khalil Abu Rayyan pled guilty in district court to one count of making a false statement to acquire a firearm in violation of 18 U.S.C. § 922(a)(6) and one count of possession of a firearm by a prohibited person in violation of 18 U.S.C. § 922(g)(3), he expected to serve the 15 to 21 months recommended by the United States Sentencing Guidelines. He did not expect the judge to acquiesce to prosecutors and triple his recommended guidelines sentence based on conduct for which he had never been charged. Nor did he expect the government to refuse to decrease his offense level for acceptance of responsibility under U.S.S.G. § 3E1.1(b), after he had entered a timely guilty plea. As a result, Rayyan is currently serving a 60 month prison sentence, which the Sixth Circuit affirmed.

This petition presents two questions: (1) whether a threefold upward variance from the top of a defendant's guidelines range based solely on uncharged, unproven conduct violates the defendant's Fifth and Sixth Amendment rights; and (2) whether, in light of Amendment 775 to U.S.S.G. § 3E1.1, the government should be required to file a § 3E1.1(b) motion to decrease offense level when its only cited basis against doing so is its affirmative litigation unrelated to trial.

The answer to both questions should be yes.

The first question regarding uncharged conduct remains undecided after a series of topically proximate decisions from this Court. In *Apprendi*, the Court found

that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. In *Cunningham v. California*, 549 U.S. 270 (2007), the Court found that a law which placed "sentence-elevating factfinding within the judge's province [violated] a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." *Id.* at 274. And in *Alleyne*, the Court found that "any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury." *Alleyne*, 133 S. Ct. at 2153.

These cases, together with *Booker*'s release of federal judges from the binding authority of the Sentencing Guidelines, marked a sea change in sentencing policy. *See United States v. Booker*, 543 U.S. 220 (2005). But crucial questions about constitutional sentencing remain unanswered, particularly about the use of uncharged and acquitted conduct in upward variances and final sentencing decisions.

Several Circuit Courts of Appeals has expressed serious discomfort with the Constitutional basis of allowing uncharged or acquitted conduct to influence sentencing. *See, e.g.*, *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014) (Gorsuch, J.) ("[I]t is far from certain whether the Constitution allows [a district court to] either decrease or increase defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury

or the defendant's consent."); *United States v. Faust*, 456 F.3d 1342, 1349 (11th Cir. 2006) (Barkett, J., specially concurring) ("[S]entencing enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment as well as the Due Process Clause of the Fifth Amendment."). However, several other Circuits have affirmed sentences based on uncharged or acquitted conduct with little hesitation, as the Sixth Circuit did in affirming Rayyan's elevated sentence. The Court has yet to ease this Constitutional anxiety.

When this Court denied certiorari in *Jones v. United States*, 547 U.S. ---, 135 S. Ct. 8 (2014), it declined to address the issue of sentencing based on uncharged or acquitted conduct; three Justices dissented, bemoaning this missed opportunity. *Id.* at 8-9 (Scalia, J. dissenting, joined by Thomas, J. and Ginsburg, J.) ("Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal. If so, their constitutional rights were violated.") (citation omitted). Since then, the use of uncharged conduct to enhance sentences has continued unchecked in most Circuits, in violation of the original intent of the Fifth and Sixth Amendments.

The Court should neutralize this Constitutional threat by ruling that judges may not hand down higher, harsher sentences on the basis of uncharged conduct. The immediate case—in which a first-time offender pleading guilty to minor gun crimes

had his guideline sentence tripled on the basis of uncharged, unproven, and completely unrelated terrorism allegations—presents an excellent opportunity.

The second question regarding the § 3E1.1 motion to reduce offense level was answered by a recent amendment to the Sentencing Guidelines but requires this Court's clarification. In 2013, the Sentencing Commission enacted U.S.S.G. Amendment 775 to address a circuit split in how much discretion courts were granting the government to withhold § 3E1.1(b) motions. U.S.S.G. § 3E1.1(b) allows for a one-offense-level reduction, on the government's motion, for any defendant who "timely notif[ies] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently." U.S.S.G. § 3E1.1(b).

Prior to Amendment 775, the Second and Fourth Circuits had held that the government was not allowed to withhold a § 3E1.1(b) motion for reasons unrelated to the conservation of trial resources. *United States v. Lee*, 653 F.3d 170, 173-174 (2d Cir. 2011); *United States v. Divens*, 650 F.3d 343, 348-50 (4th Cir. 2011); *see also United States v. Davis*, 714 F.3d 474, 477-78 (7th Cir. 2013) (Rovner, J. concurring) ("[I]nsisting that [a defendant] waive his right to appeal before he may receive the maximum credit under the Guidelines for accepting responsibility serves none of the interests identified in section 3E1.1 . . . the government's discretion with respect to

the extra reduction for acceptance of responsibility is not unlimited."). Other circuits disagreed, analogizing the government's discretion in withholding § 3E1.1(b) motions to its broad discretion in withholding § 5K1.1 motions for offense level reduction for substantial assistance to authorities. *See United States v. Smith*, 429 F.3d 620, 628 (6th Cir. 2005) (collecting cases from other circuits).

With Amendment 775, the Sentencing Commission came down firmly on the side of limited government discretion, citing with approval the *Lee* and *Divens* decisions, as well as Judge Rovner's concurrence in *Davis*. *See* United States Sentencing Commission Guidelines Manual, Supplement to Appendix C, 43 (November 1, 2013). The Commission issued Amendment 775 to clarify that the government must cite resources expended on trial preparation in order to withhold a § 3E1.1(b) motion, stating that it "could discern no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1 . . . the defendant's waiver of his or her right to appeal is an example of an interest not identified in § 3E1.1." *Id.* at 45. While waiver of appellate rights is the only example of an unidentified interest that the amended commentary cites, the Commission's nod to *Lee* implies that other non-trial-related interests will also not qualify the government to withhold a § 3E1.1(b) motion. *See Lee*, 653 F.3d at 172-73 (finding improper the government's withholding of a § 3E1.1(b) motion on account of defendant's contesting claims in a presentence report, requiring a *Fatico* hearing,

which government claimed required trial-like preparations, and where the judge ruled against defendant).

This position is plainly reflected in the amended Commentary to § 3E1.1, which explicitly curtails the government's right to withhold the motion: "The government should not withhold such a motion based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." U.S.S.G. § 3E1.1, comment. (n.6).

Since Amendment 775's enactment, defendants for whom the government declined to file § 3E1.1(b) motions for reasons other than the conservation of trial resources have challenged their sentences. Some Circuit Courts have found that the government did not meet its burden of proving that these defendants expended trial resources sufficient to allow the government to withhold a § 3E1.1(b) motion; those sentences have consequently been reversed and remanded. *See, e.g.*, *United States v. Barrow*, 606 F. App'x 335, 337 (9th Cir. 2015); *United States v. Castillo*, 779 F.3d 318, 322-23 (5th Cir. 2015). But other Circuits have affirmed sentences in which § 3E1.1(b) motions have been withheld with scant justification, finding that little to no trial expenditure nonetheless justified the withholding. In affirming Rayyan's sentence, the Sixth Circuit did just this: it accepted the government's claim that Rayyan did not sufficiently conserve trial resources on the basis that the government—not

Rayyan—filed motions for a competency evaluation, thereby delaying the trial, and filed a motion *in limine* relating to a sentencing issue, after being notified of Rayyan's intent to plead guilty and two weeks before the plea date. *Rayyan*, 855 F.3d at 443.

Accordingly, this Court should clarify whether the government has met its burden under Amendment 775 to withhold a § 3E1.1(b) motion when the trial has been delayed due to the government's own affirmative litigation—during which the defendant had very limited access to his attorney—and the government's filing of a motion *in limine* related to a sentencing issue, not a trial issue.

With this petition, this Court has the opportunity to clarify the constitutionality of the use of uncharged conduct in sentencing and also standard for determining when a defendant has conserved the government's trial resources and therefore is entitled to an offense level reduction based on acceptance of responsibility. It should be granted.

STATEMENT OF THE CASE

I. Conduct underlying the charges of conviction

1. On October 7, 2015, Detroit police officers pulled over Khalil Abu Rayyan and discovered a handgun and a small amount of marijuana in his car. Rayyan had bought the gun from a licensed dealer two days prior. He admitted to purchasing the firearm for protection; his job as a pizza delivery person for his father's pizzeria required him to travel to dangerous neighborhoods in Detroit. He was arrested for marijuana possession and for carrying a concealed weapon, and he was released the next day. No charges were immediately filed.

2. On November 15, 2015, Rayyan attempted to purchase another gun, stating on the ATF form that he was not an unlawful user of a controlled substance. Due to his state arrest, he was denied sale. The same day, Rayyan went with his cousin to a local firing range for a gun safety class and, afterward, they rented two assault rifles to practice firing for fun.

3. On November 17, 2015, Rayyan was issued formal state charges related to his October 7 arrest. He was released on bond by the state court in December 2015. Throughout this time, the FBI had been gathering information on Rayyan. Although the conduct which would form the basis for federal criminal jurisdiction had already occurred, Rayyan was not immediately detained on a federal gun charge.

II. The FBI's sting operation

4. The FBI began surveilling Rayyan in May 2015 after noticing that he had watched and shared several violent Islamic State ("ISIS") videos posted on Twitter. After Rayyan's release from state custody in December 2015, the FBI launched an online sting operation in which an undercover agent posed as two young Islamic women who represented themselves to Rayyan as potential wives.

5. The first informant, named "Ghaada," represented herself as a 23-year-old Pakistani-American living in Cleveland, Ohio, who was resistant to her parents' efforts to arrange a marriage for her. Within a couple of weeks of communicating, Rayyan and Ghaada were engaged. They exchanged photos and numerous expressions of undying love, and together discussed their wedding, their future children, and their dreams of a life together. Rayyan and his father then planned a trip to meet Ghaada and her father in Ohio to finalize the wedding details. But when the government heard of Rayyan's plan, it abruptly ended the "relationship."

6. While Rayyan was devastated over the sudden, unexplained loss of Ghaada, the government inserted another informant, named "Jannah Bride." She contacted Rayyan in the midst of the Ghaada "break up" and held herself out to be a depressed, suicidal, 19-year-old Sunni Muslim, who was prepared to engage in a martyrdom operation, but who also constantly held out the possibility of marriage to Rayyan. She claimed that her former husband or fiancé had been killed in an airstrike

in Syria while engaged in combat on behalf of ISIS; she also claimed to have had two cousins suddenly killed in Iraq by a Shia militia.

7. Through the guise of Jannah Bride, the FBI tried to sell Rayyan on the concept of an everlasting spiritual love and entrance into Jannah (heaven) via a martyrdom operation committed together. In response, Rayyan refused to agree and repeatedly tried to talk Jannah Bride out of such plans. For example, in late January 2016, Jannah Bride said that she wanted to be part of the "Sharia police," that she wanted to die for the sake of Allah, and that "jihad is [her] dream." Rayyan responded that Jannah was "young and confused," that she did not "know what [she] want[s]." Finally, he, rebuffed her, saying she needed to think about what she wanted, because he "cannot be in this game."

8. But at other times, Rayyan naively made false boasts about violent actions, in an effort to exhibit similar convictions to Jannah Bride, which he thought would further a relationship and, eventually, a marriage. For example, he intimated that he had been wrongly imprisoned for three months for a crime he did not commit. No such record exists. At another point he claimed he had a large capacity weapon and lots of bullets to commit an operation, but that his father took the gun away from him. Rayyan's father has averred that this never occurred. At another point, Rayyan claimed he had a large knife for beheading attackers. No such weapon were ever found on his person or in his home. When Rayyan told Jannah Bride about the

weapon he had purchased that had been seized by police, he called it a "long" and "powerful" firearm, when in reality it was a .22 caliber single-loading revolver.

9. By the end of January, Rayyan had become more depressed and despondent, and frequently confided in Jannah Bride that he was contemplating suicide. In an FBI-recorded phone call on February 2, 2016, Rayyan told Jannah Bride that he had bought a rope to hang himself. In response, she attempted to coerce Rayyan into martyrdom, by telling him that suicide is forbidden in Islam. She added:

> Like I told you before . . . when it's for the sake of Allah, when it's jihad, or when it's on our aqidah [creed] or for a cause, that's the only time Allah subhanahu wa ta'ala [God, may He be praised and exalted] will allow it. But not to put your life to waste, and just hang yourself like you say you want to do.

Rayyan repeatedly refused to agree to harm an innocent victim because of his pain, saying, "I would not like to hurt somebody else."

10. It was at this point, with Rayyan on the verge of suicide, that the FBI finally decided to end the covert operation and arrest him. On February 4, 2016, Rayyan was arrested on a federal complaint charging possession of a firearm by an unlawful user of a controlled substance.

III. Federal court proceedings

11. Rayyan first appeared in the United States District Court for the Eastern District of Michigan on the day of his arrest, February 4, 2016. At a detention

hearing in front of a federal magistrate judge on February 16, 2016, the government made an oral motion for a competency hearing, based on pre-arrest statements Rayyan had made about depression and hearing voices. However, after conducting a brief *voir dire* of Rayyan and hearing from defense counsel, the magistrate judge concluded there was no reasonable basis to question Rayyan's ability to understand the nature of the charges against him or assist in his defense. The magistrate judge also detained Rayyan.

12. Shortly after the hearing, an indictment issued that included no terror-related charges, but added a false-statement charge related to Rayyan's second attempt to purchase a gun. His two federal counts were as follows: possessing a firearm as an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3), and making a false statement about not being a marijuana user in order to acquire a firearm from a licensed dealer, in violation of 18 U.S.C. § 922(a)(6).

13. On March 16, 2016, the government moved a second time for a competency evaluation, this time before the district judge. Rayyan opposed the motion. On April 18, 2016, the district court held a hearing on the government's second motion for a competency evaluation, and the court granted the government's request. Rayyan was sent out of state to undergo approximately a month of 24-hour behavioral monitoring and psychological evaluation and, in the meantime, his dates to either plead guilty or go to trial were extended by stipulation several times, with

the final plea date being set to September 13 and the trial date to October 11. When Rayyan returned after a month of evaluation, he immediately began negotiating with the government for a plea bargain. The government psychologist eventually issued a report opining that Rayyan was competent and not dangerous. On August 2, 2016, the district court held a competency hearing and found Rayyan competent.

14. On September 1, 2016, twelve days prior to the previously stipulated plea cut-off date of September 13, counsel for Rayyan officially contacted the court and the government and gave notice of his intent to plead guilty.

15. After receiving notice of Rayyan's intent to plead guilty, and almost six weeks before trial was scheduled to begin, the government filed a motion *in limine* to preclude what it characterized as an "entrapment defense" at trial. The government's motion had nothing to do with trial: Rayyan could not have made an entrapment defense to his charged gun conduct, only to his uncharged conduct related to his statements to "Jannah Bride," which was exclusively a sentencing issue. Rayyan never responded to this motion, as he had already finalized his intent to plead guilty, and the court never ruled on it, for the same reason.

16. On September 13, 2016, as scheduled, Rayyan pleaded guilty as charged.

17. The pre-sentence report recommended a guidelines range of 15 to 21 months. It stated that it did not consider Rayyan's ISIS-related conduct to be relevant

to his underlying gun convictions. It specifically noted that "[t]his conduct was the subject matter of competency and detention hearings; however, it did not form the basis for the defendant's current convictions." Nowhere in the pre-sentence report's assessment of the § 3553(a) factors did it rely on this conduct to assist it in formulating its sentencing recommendation, saying that 15 to 21 months "would reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense."

18. The report also stated that the government intended to withhold moving for a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b). When Rayyan objected, the government justified its withholding of the motion on the basis that the procedural delay and the motion *in limine* expended the government's trial resources. Rayyan responded that these were products of the government's affirmative litigation, and that Rayyan should be entitled to the third offense level reduction for having timely entered a guilty plea. At sentencing, over the objection of Rayyan, the court accepted the government's basis for withholding the motion.

19. The sentencing spanned three hearings over three weeks in March and April 2017. From the recommended range of 15 to 21 months, the government requested an upward variance to 96 months, alleging that Rayyan was a dangerous terrorist in need of detention. Although the FBI's investigation of Rayyan had failed to produce sufficient evidence for a terrorism indictment or even for a true threat

charge, the government nonetheless introduced this evidence to support a five-fold increase in sentencing for Rayyan's minor gun convictions. The final day of sentencing, April 6, 2017, was limited to the court's oral recitation of its written opinion, filed the same day, sentencing Rayyan to 60 months incarceration. *Abu-Rayyan*, 2017 WL 1279226. The court's basis for this extraordinary three-fold upward variance was primarily the statements Rayyan made to the undercover agents and his dissemination of ISIS propaganda.

20. Rayyan timely appealed the judgment of the court. The Sixth Circuit heard oral argument in Rayyan's appeal on March 15, 2018. Four days later, on March 19, 2018, the Sixth Circuit issued its judgment and opinion affirming the district court's decision. *Rayyan*, 885 F.3d 436. Rayyan sought *en banc* review from the Sixth Circuit but was denied on April 17, 2018. *Id.* This petition arises from that denial.

REASONS FOR GRANTING THE WRIT

I. This Court must clarify that the Fifth and Sixth Amendments are violated when a court imposes a three-fold upwards variance in sentencing based on uncharged, unrelated, judicially-found facts, without which the sentence would have been substantively unreasonable.

The driving force behind the district court's drastic upward variance—from a guidelines sentencing range of 15 to 21 months to a sentence of 60 months—was uncharged and unproven conduct. Absent inclusion of this conduct, there is little doubt Rayyan's sentence would be deemed substantively unreasonable. This Court should reverse and remand for resentencing, clarifying that the use of uncharged conduct to enhance a defendant's sentence violates the Fifth and Sixth Amendments.

The district court made clear at sentencing that it was granting an upward variance of 39 months above the top of Rayyan's guidelines range based on his statements to undercover FBI agents posing as love interests, statements which never formed the basis of a criminal charge and were never factually connected to his offenses of conviction. As the district court plainly stated, and as the Sixth Circuit affirmed, these judicially found facts had a much greater impact on Rayyan's sentence than the guidelines range corresponding to his offenses of conviction. Without this unrelated, uncharged conduct, there would be no reasonable basis for an above-guidelines sentence. This Court should state once and for all that any fact that a court infers to constitute chargeable conduct and is used to increase a sentence,

without which the sentence would be substantively unreasonable, must be admitted by a defendant or found by a jury, or else the defendant's Fifth and Sixth Amendment rights will be violated.

A. Sentences based on uncharged or acquitted conduct violate the Fifth and Sixth Amendments, as recent decisions have stated.

The Sixth Amendment protects an individual's right to a jury trial "in all criminal prosecutions" as well as a defendant's fundamental right "to be informed of the nature and cause of the accusation" in order to defend against it. U.S. Const. amend. VI. The Fifth Amendment protects a defendant from a deprivation of liberty "without due process of law," which, in turn, requires notice and an opportunity to defend. U.S. Const. amend. V; *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Both amendments also require that, in order to sustain a conviction, each element of a crime be "proved to the jury beyond a reasonable doubt." *Alleyne*, 133 S. Ct. at 2156. Any fact used to increase the penalty to which a defendant is exposed is an element of the crime and therefore "must be found by a jury, not a judge." *Cunningham* 549 U.S. at 28; *Apprendi*, 530 U.S. at 483 n.10. This recent wave of cases has clarified the broad scope of the Fifth and Sixth Amendment, and many sentencing practices that have not been banned outright have nonetheless been cast into constitutional murk.

Piggybacking on this wave was the dissent from a denial of certiorari in *Jones v. United States*, 574 U.S. ---, 135 S. Ct. 8, 8-9 (2014) (Scalia, J. dissenting, joined by Thomas, J., and Ginsburg, J.), in which three Justices reproached the Court for

squandering a chance to further clarify the Fifth and Sixth Amendments' breadth. The Court left unanswered whether the near-unanimous use of uncharged or acquitted conduct to enhance sentences violates the Constitution. The dissenters rightly portrayed this as a badly missed opportunity:

> Petitioners present a strong case that, but for the judge's finding of fact, their sentences would have been 'substantively unreasonable' and therefore illegal. See *Rita v. United States*, 551 U.S. 338, 372 (2007) (Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment). If so, their constitutional rights were violated. The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, 'requires that each element of a crime' be either admitted by the defendant, or 'proved to the jury beyond a reasonable doubt.' *Alleyne v. United States*, 570 U.S. ---, ---, 133 S. Ct. 2151, 2156 (2013). Any fact that increases the penalty to which a defendant is exposed constitutes an element of the crime, *Apprendi v. New Jersey*, 530 U.S. 466, 483, n.10, 490 (2000), and 'must be found by a jury, not a judge,' *Cunningham v. California*, 549 U.S. 270, 281 (2007). We have held that a substantively unreasonable penalty is illegal and must be set aside. *Gall v. United States*, 552 U.S. 38, 51 (2007). It unavoidably follows that any act necessary to prevent a sentence from being substantively unreasonable – thereby exposing the defendant to the longer sentence – is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.

Id. (emphasis in original).

Indeed, many other jurists, before and after this dissent, have lamented the conflicts between sentencing based on uncharged or acquitted conduct and the protections of the Constitution. *See, e.g.*, *United States v. Watts*, 519 U.S. 148, 170 (1997) (Kennedy, J., dissenting) ("At the least it ought to be said that to increase a sentence based on conduct underlying a charge for which the defendant was acquitted

does raise concerns about undercutting the verdict of acquittal."); *id.*, (Stevens, J., dissenting) ("The notion that a charge that cannot be sustained by proof beyond a reasonable doubt may give rise to the same punishment as if it had been so provided is repugnant to [the Court's] jurisprudence."); *United States v. White*, 551 F.3d 381, 387 (6th Cir. 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct to punish is wrong as a matter of statutory and constitutional interpretation and violates both our common law heritage and common sense."); *United States v. Fisher*, 502 F.3d 293, 311 (3d Cir. 2007) (Rendell, J., concurring) ("A defendant's due process rights are implicated when facts found by a judge under a preponderance standard concerning a separate, uncharged crime result in a dramatic increase in the sentence actually imposed on the defendant for the crime of conviction, so as to suggest that the defendant is really being sentenced for the uncharged crime rather than the crime of conviction."); *United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., concurring) ("Because I believe the inclusion of 'acquitted conduct' to fashion a sentence is unconstitutional, I urge the Supreme Court to re-examine its continued use forthwith."); *United States v. Fitch*, 659 F.3d 788, 800 (9th Cir. 2011) (Goodwin, J., dissenting) (criticizing majority for affirming sentence significantly increased by uncharged murder because sentencing judge enhanced based on this conduct without clear and convincing evidence); *Sabillon-Umana*, 772 F.3d at 1331 (Gorsuch, J.) ("[I]t is far from certain whether the Constitution allows [a district court to] either decrease

or increase defendant's sentence (within the statutorily authorized range) based on facts the judge finds without the aid of a jury or the defendant's consent."); *Faust*, 456 F.3d at 1349 (Barkett, J., specially concurring) ("[S]entencing enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment as well as the Due Process Clause of the Fifth Amendment.").

The use of uncharged conduct in sentencing is plainly an issue that requires this Court's attention. Rayyan's is a more fitting case on which to resolve this issue than *Jones* was, because Rayyan's uncharged conduct is so fundamentally disconnected from his offenses of conviction. In *Jones*, the defendants were convicted of selling small amounts of crack-cocaine and their sentence was increased on the judicial finding that they conspired to sell larger amounts of crack-cocaine. *Jones*, 135 S.Ct. at 8. In this case, by contrast, the uncharged conduct—namely, Rayyan's untrue boasts regarding terrorist sympathies made to an undercover FBI agent posing as a potential bride—bears no relation to his charged conduct—the purchase and possession of a gun while being a marijuana user, in order to stay safe while delivering pizza—which occurred months before the alleged terrorist statements. Even if Rayyan's uncharged statements are allowed to be used at sentencing, the unreasonable inferential leap between the statements and a chargeable offense of true threat or material support of terrorism remains. Tripling a defendant's sentence

based on uncharged statements with an unproven nexus to any crime debases the Fifth and Sixth Amendments.

B. Sentences based on uncharged conduct are even more repugnant to the Constitution than sentences based on acquitted conduct.

While acquitted conduct has been the more common focus of these recent opinions, sentencing based on uncharged conduct is arguably even more repugnant to the Constitution.

i. Unlike acquitted conduct, uncharged conduct has never been found at any level of probability by a jury or admitted by the defendant.

Before an individual can be sentenced based on acquitted conduct, he or she has to have been tried on that conduct by a jury or has to have admitted it during a guilty plea. And before a trial or guilty plea can occur, an indictment has to have issued, so at a minimum, a grand jury of citizens has found probable cause that the conduct was criminal. Thus, at sentencing after an acquittal, the chance a defendant engaged in the conduct has been deemed by a jury to fall somewhere between probable cause and beyond a reasonable doubt.

Compare this with using uncharged conduct, which has never been tested on any standard by any constitutionally mandated body. No jury has found proof of the uncharged conduct beyond a reasonable doubt, no grand jury has found probable cause, and the defendant has not made any admission of the conduct's criminality. It follows that it would be even less appropriate for a judge to sentence a defendant on

the basis of this completely unvetted conduct, against which a defendant has had no opportunity, meaningful or otherwise, to defend. The idea that a defendant's alleged actions, untested by any type of jury at any level of burden and not admitted by the defendant, may nonetheless be cited to sentence the defendant as if he had committed the crime, is offensive to the Fifth and Sixth Amendments.

The constitutional concerns of sentencing based on uncharged conduct are even starker when one notes that the vast majority of sentencings occur after pleas of guilty. *See Lafler v. Cooper*, 566 U.S. 156, 170 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). In those cases, not only has the defendant had no opportunity to properly defend against the uncharged conduct, but any attempt to do so at sentencing could be viewed by the prosecutor or the court as failing to fully accept responsibility or as grounds for a possible obstruction of justice enhancement under U.S.S.G. § 3C1.1. *See United States v. Darden*, 552 F. App'x 574, 577-78 (6th Cir. 2014) (affirming the governments withholding of § 3E1.1 motion where defendant challenged sentencing enhancement based on uncharged drug quantity). This risk does not apply to acquitted conduct, which, by definition, the defendant has already challenged.

Thus, with the possibility of a reduced sentence in jeopardy, defendants may have reason to bite their tongues when the government brings up uncharged conduct at sentencing. Throughout criminal litigation, the government has many

opportunities to present conduct untested by any defense mechanism, in the form of charging documents, proffers, presentencing reports, and more. When defendants know that this unproven conduct can be used against them, they face a difficult question of whether to rebut it. Defendants' concerns that the court will misinterpret such rebuttals as frivolous or obstructive often leaves them between the rock of accepting an upward variance for conduct of which they may not be guilty, and the hard place of the potential consequences of challenging it. Requiring uncharged conduct to be proved by a jury or admitted by a defendant prior to sentencing is the only way to obviate this Cornelian dilemma.

ii. The absence of an indictment related to Rayyan's statements suggests a lack of probable cause that he committed any crime beyond his crimes of conviction.

Although it is not known why the government did not pursue charges related to Rayyan's statements to the undercover agents, there are only two logical reasons for failing to do so: either it could not obtain an indictment on the conduct, or it affirmatively declined to seek one yet used the information to advocate for an increased sentence. Either option undermines the district court's use of this conduct at sentencing.

The only reason for the government not to have charged a terrorism-related offense, based on Department of Justice policy, was if it reasonably believed it could not prove the elements of that offense beyond a reasonable doubt at trial. *See* United

States Attorney's Manual, 9-27.300. Were the government to have made a calculated decision not to charge a terrorism-related offense on that basis, the uncharged conduct analysis functions the same way as it would with acquitted conduct—the elements either were not or could not be proved beyond a reasonable doubt and thus should not be taken into consideration at sentencing, pursuant to a growing choir of judicial voices. In addition, were the government to have consciously decided not to bring terrorism charges knowing it would nevertheless offer the conduct at sentencing to advocate for an upward variance, that would border on unethical.

This pressing constitutional concern requires the Court's attention, even more so than it was required in *Jones*, 135 S.Ct. at 8-9. For the aforementioned reasons, sentences based on uncharged conduct are even more repugnant than those based on acquitted conduct. Consider the constitutional shakiness that the *Jones* dissenters identified in sentences based on acquitted conduct:

> In *Rita* . . . [we] left for another day the question whether the Sixth Amendment is violated when courts impose sentences that, but for a judge-found fact, would be reversed for substantive unreasonableness. 551 U.S., at 353 . . . ("Such a hypothetical case should be decided if and when it arises") . . . The present petition presents the nonhypothetical case the Court claimed to have been waiting for. And it is a particularly appealing case, because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury acquitted them of that offense.

Id. The petition before the Court today presents a case where not only did no jury convict defendant Rayyan of the terrorist conduct of which the sentencing judge

thought him guilty, but the government could not even find sufficient probable cause to indict him for it. This is truly the nonhypothetical case that the Court has been waiting for.

II. This Court must clarify that under U.S.S.G. Amendment 775, the government may only withhold § 3E1.1(b) motions from defendants who have expended government trial resources through their own affirmative litigation, and that the government may not withhold it on the basis of its own affirmatively filed motions unrelated to trial.

The Sixth Circuit erred in affirming the district court's blind allowance of the government to withhold moving for a third acceptance point under § 3E1.1(b). The government's proffered reasons were that the trial was delayed due to its own moving for competency evaluation and that it filed an affirmative motion anticipating a defense that could only have been raised during sentencing. As required by § 3E1.1, Rayyan timely notified the government and the Court of his intent to plead guilty almost two weeks prior to the final date allotted for a plea, and prior to the government's filing of its affirmative motion. Rayyan did in fact plead guilty on the plea cut-off date, which was almost a month before trial was scheduled to begin. As a result, the government's refusal to move for the third offense-level reduction had no relation to the conservation of trial resources, which § 3E1.1 identifies as the only legitimate reason for withholding such a motion from an otherwise qualified defendant. This Court should clarify that when the government fails to identify a

legitimate trial resource-conservation reason for withholding a § 3E1.1(b) motion, it must file the motion, or the court must compel it to do so.

A. Under Amendment 775 to § 3E1.1, the government may not withhold a § 3E1.1(b) motion for any reason unrelated to the conservation of trial resources.

Section 3E1.1(b) provides for one extra offense level reduction for acceptance of responsibility, on the government's motion, where the defendant "timely notif[ies] authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources effectively." U.S.S.G. § 3E1.1(b). Since the government is generally in the best position to determine whether the plea was sufficiently timely to avoid it preparing for trial, a level reduction under this subsection can only be accomplished on the government's motion. *Id.*, comment. (n.6). In 2013, the Guidelines' commentary was amended to resolve a circuit split over the government's freedom to withhold a motion for reasons unrelated to the conservation of trial resources. *See* U.S.S.C. G.M., Supp. To App'x C at 43-45. The government claimed, and the Sixth Circuit agreed, that its withholding of the § 3E1.1(b) motion from Rayyan fell within its limited discretion under the amended rule. This Court should rule that decision erroneous.

i. Amendment 775 aimed to address a circuit split over the government's discretion to withhold § 3E1.1 motions.

Prior to Amendment 775, a majority of circuits, including the Sixth, analogized the government's discretion in filing a § 3E1.1(b) motion with its discretion in filing a § 5K1.1 motion to reduce offense level for substantial assistance to authorities. U.S.S.G. § 5K1.1; *Smith*, 429 F.3d at 628 (collecting cases from other circuits). These courts held that a decision not to file either a § 3E1.1(b) motion or a § 5K1.1 motion was never error unless the defendant could show either a constitutionally impermissible basis (such as race or religion) or that the decision was arbitrary, in that it was not rationally related to a legitimate government purpose. *See, e.g.*, *United States v. Lapsins*, 570 F.3d 758, 769 (6th Cir. 2009).

In contrast, the Second and Fourth Circuits distinguished the § 3E1.1(b) motion from the § 5K1.1 motion, holding that the rules did not follow the same standard and that the government was not permitted to withhold a § 3E1.1(b) motion for reasons unrelated to the conservation of trial resources. *Lee*, 653 F.3d at 173-74; *Divens*, 650 F.3d at 348-50. The Second Circuit recognized this in the context of a defendant having challenged a sentencing enhancement; the Fourth in the context of the defendant's refusal to waive his appeal rights. Similarly, Seventh Circuit Judge Rovner filed a concurrence arguing that the government's discretion in this arena was really more limited than in the analogous arena of § 5K1.1 motions. *Davis*, 714 F.3d at 477-78 (Rovner, J., concurring).

In resolving the circuit split, the Sentencing Commission cited the *Lee* and *Divens* decisions, as well as Judge Rovner's concurrence in *Davis*, with approval. With Amendment 775, the Commission stated that it could "discern no congressional intent to allow decisions under § 3E1.1 to be based on interests not identified in § 3E1.1." U.S.S.C. G.M., Supp. To App'x C at 45. The Commission noted that a "defendant's waiver of his or her right to appeal is an example of an interest not identified in § 3E1.1(b)." *Id.* By citing the *Lee* decision, the Commission also implied that a defendant's request for an evidentiary hearing on a sentencing issue was an insufficient basis for withholding a § 3E1.1(b) motion. *Id.* In siding with the Second and Fourth Circuits, the Commission effectively rejected the lenient standard set by the Sixth and other circuits, which allowed the government almost unfettered discretion in withholding § 3E1.1(b) motions.

ii. The government must justify any withholding of a § 3E1.1. motion on the basis of trial resource conservation.

With the passage of Amendment 775, the government is now required to cite a legitimate trial resource conservation motive for every withholding of a § 3E1.1 motion. However, circuits remain split about what constitutes "trial resources" and when they are "conserved." In Rayyan's case, the Sixth Circuit affirmed the district court's permitting the government to withhold a § 3E1.1 motion, on the basis of a government-caused trial delay and the government's affirmatively filed motions

unrelated to trial. *Rayyan*, 885 F.3d at 443. This Court should clarify that such litigation falls outside the purview of trial resource conservation and does not justify withholding the motion.

Amendment 775 has spurred other circuits to impose a stricter standard of review for such withholdings and require lower courts to reconsider their decisions in light of the amendment. *See, e.g.*, *Barrow*, 606 F. App'x at 337 (9th Cir. 2015) (requiring remand for application of the amendment); *Castillo*, 779 F.3d at 322-23 (5th Cir. 2015) (applying Amendment 775's considerations when determining justification for government's withholding rather than prior standard of unconstitutional motive or arbitrariness). As a result, either Amendment 775 is vague and requires clarification, or it is being disobeyed by courts like the Sixth Circuit and requires an exercise of this Court's supervisory power.

B. The government's decision to withhold the motion was not based on the interests identified in § 3E1.1, violating Amendment 775.

The government's proffered reasons for withholding a motion under § 3E1.1 bore no relation to the government's preservation of trial resources. The government's repeated requests for a competency evaluation, the second of which was granted against Rayyan's opposition and which alone was the reason for the substantially prolonged pretrial proceedings, cannot in good faith form a basis for the government to claim an inability to conserve trial resources. The same holds true for the government's affirmative filing of a self-styled "motion *in limine*," six weeks ahead of

trial and after the government had been informed of Rayyan's intention to enter a timely guilty plea. The filing of this motion is an even more hollow ground for withholding the § 3E1.1 motion, because it sought to preclude an entrapment defense that Rayyan only could have offered at sentencing, not at trial for his two uncontested gun charges, and thus bore no relation to the conservation of trial resources.

i. By entering a timely guilty plea, Rayyan conserved trial resources and satisfied the requirement of § 3E1.1.

The government's first proffered reason for withholding the § 3E1.1 motion was that Rayyan delayed the trial and thereby expended the government's trial resources. But in fact, Rayyan entered a timely plea and did not cause any delay. Timely notification of intent to plead guilty entitles defendants to the third offense-level reduction under § 3E1.1(b): "the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar effectively." U.S.S.G. § 3E1.1, comment. (n.6). Rayyan satisfied this requirement by informing the government and the court of his intent to plead guilty almost two weeks prior to, and actually pleading guilty on, the stipulated date for the entry of a plea. *See Lapsins*, 570 F.3d at 769–70 ("[T]he government's decision to move for the reduction is usually based on whether the defendant pleaded guilty early enough to save the government the expense of preparing for trial."); *accord United States v.*

Caldwell, 614 F. App'x 325, 326-27 (6th Cir. 2015), *vacated on other grounds*, 136 S. Ct. 417 (2015) (affirming denial of third-point motion where defendant pled after date of final pretrial conference).

The delay of the trial date and plea cut-off date does not complicate Rayyan's eligibility for the § 3E1.1 motion, because the delay resulted exclusively from the government's affirmative litigation. The plea cut-off date was postponed only because of the government's renewed motion for a time-intensive competency evaluation and Rayyan's subsequent month-long evaluation out of state. Meanwhile, Rayyan did not file any pretrial motions that delayed trial or expended government resources. His timeliness and resource conservation entitle him to a § 3E1.1 motion.

ii. The government should not be allowed to withhold a § 3E1.1(b) motion based on its filing of an irrelevant motion after being notified of a defendant's intent to plead guilty.

The government's other proffered reason for withholding the § 3E1.1(b) motion was that it filed what it described as a motion *in limine* before Rayyan had the opportunity to enter his guilty plea. Despite being in constant plea negotiations with Rayyan after the completion of his competency evaluation, and after being notified of Rayyan's decision to plead guilty twelve days before the plea cut-off, the government filed a self-styled pretrial motion to preclude an entrapment defense relating to an issue only relevant at sentencing. Rayyan did not even respond to this motion, and the district court never ruled on it. The government should not be permitted to file

such frivolous motions and then use the filing of those motions as a basis to withhold a § 3E1.1 offense level reduction.

Courts have permitted the withholding of § 3E1.1(b) motions where a defendant moves for some relief that requires the government to litigate in a way that mimics preparing for trial. *See, e.g.*, *Collins*, 683 F.3d at 707 (where government undertook trial-like preparations to defend motion to suppress). But no court—other than the court below in this case—appears to have permitted the government to withhold based on its own affirmative filing of motions. To permit withholding in such circumstances would punish defendants for the government's mismanagement of its own resources. It was by no fault of Rayyan that the government squandered resources on this motion, and it is not the intent of § 3E1.1 that Rayyan should be deprived of a sentencing reduction due to the government's wasteful litigation tactics.

Further, the so-called motion *in limine* on which the government based its withholding was actually a pre-*sentencing* motion dressed up as a pretrial motion. The entrapment defense that the motion intended to preclude could only have been raised at sentencing, not at trial. Even if the government argues that it had been preparing the motion in good faith, not expecting Rayyan to plead guilty, its preparation of the motion was still in bad faith, because it was in fact a pre-sentencing motion in disguise.

As such, the government's withholding of the § 3E1.1(b) motion not only falls outside the intent of § 3E1.1, but it also reeks of bad faith. This Court should reverse the Sixth Circuit's affirmation of the ill-supported withholding and remand for resentencing, with the direction that the district court mandate the government to move for a third acceptance point.

CONCLUSION

The sentence that Khalil Abu Rayyan is currently serving is the result of serious, recurrent, and unconstitutional sentencing practices. The petition for a writ of certiorari should be granted.

Respectfully submitted,

By: /s/ Jessica Lefort
FEDERAL DEFENDER OFFICE

Jessica Lefort
Todd Shanker
Counsel for Petitioner Khalil Abu Rayan

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