No. ____

October Term, 2018

IN THE
Supreme Court of the United States

HARLEM SUAREZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. In *United States v. Lopez*, 514 U.S. 549 (1995), this Court held that Congress had the authority under the Commerce Clause to regulate three broad categories of activities including "activities that substantially affect interstate commerce." In *Taylor v. United States*, 136 S. Ct. 2074 (2016), this Court confirmed that the substantial-effect standard applies to Hobbs Act prosecutions, although this Court further held that when the activity in question is economic in nature, the substantial effect may be proven based on an aggregate effect. However, the Eleventh Circuit held, based on its precedent regarding Hobbs Act cases, that a prosecution for attempted use of a weapon of mass destruction, 18 U.S.C. § 2332a, only requires a de minimis effect on commerce even though the activity at issue was not economic in nature.

This Court must decide whether attempted use of a weapon of mass destruction, 18 U.S.C. § 2332a, only requires a de minimis effect on commerce even though the activity at issue is not economic in nature, or whether, as mandated by this Court in *Lopez*, the government must prove a substantial effect on commerce.

II. This Court has held that proportionality is a bedrock principle of the Eighth Amendment prohibition against cruel and unusual punishment. As such, this Court has instructed Courts reviewing an Eighth Amendment challenge to a specific sentence to conduct a specific proportionality analysis to determine whether the sentence imposed is grossly disproportionate and whether it violates the Eighth Amendment. The Court of appeals here failed to engage in that proper analysis and rejected Mr. Suarez's claim without comparing Mr. Suarez' sentence with sentences for similar offenses and offenders. Here, Mr. Suarez, a first-time offender, was sentenced to Life without the possibility of parole and that sentence is grossly disproportionate to sentences for similar offenses and it violates the Eighth Amendment.

INTERESTED PARTIES

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

Mr. Harlem Suarez, respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 17-11906 in that court on June 27, 2018, *United States v. Suarez,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on June 27, 2018. Mr. Suarez filed a timely petition for rehearing en banc which was denied August 24, 2018. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., art. I, § 8, cl. 3:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const., amend VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT OF THE CASE

A federal grand jury in the Southern District of Florida charged Mr. Harlem Suarez with one count of attempting to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2) (Count One); and one count of attempting to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339(a)(1) (Count Two). (DE 13). Following a jury trial, Mr. Suarez was convicted on both counts. (DE 151). Over defense objection, the district court sentenced Mr. Suarez to a Life term of imprisonment as to Count One and a concurrent Twenty-Year term of imprisonment as to Count Two. (DE 171).

STATEMENT OF FACTS

Mr. Harlem Suarez is a twenty-seven year-old native of Cuba. Presentence Report (PSR) at ¶ 61. Mr. Suarez and his family immigrated to the United States when Mr. Suarez was twelve years-old. PSR ¶¶ 65, 66. He and his family have legally resided in Key West, Florida since that time. *Id.* Mr. Suarez was living with his parents in an apartment in Key West when he was arrested on the underlying charges.

When Mr. Suarez was born, there were some complications and he was deprived of oxygen. Mr. Suarez was diagnosed with having just marginal intelligence. He dropped out of high school and he has not pursued any educational opportunities since. PSR ¶¶ 72, 73.

Mr. Suarez has a substance abuse problem concerning alcohol. PSR ¶ 70. He has also used other illicit drugs as well. PSR ¶ 71. However, despite these issues,

Mr. Suarez has never had any run-ins with the law prior to the underlying case. PSR ¶¶ 54-56.

TRIAL

Initial Complaint

Nigel Allen, a twenty-two year old student from Loxahatchee, Florida, testified on behalf of the government. (DE 195:39). Allen testified that in April 2015, he was living with his mother and working landscape when he got a friend request on his Facebook account from an individual named Almlak Benitez, whom he did not know. *Id.* at 41. Allen testified that he accepted the request and was able to view Almlak Benitez's Facebook profile including pages and photographs. *Id.* at 43. Allen testified that on Almlak Benitez' Facebook page he saw a picture of soldiers holding a flag with writing on it. *Id.* at 44. As a result, Allen unfriended Almlak Benitez. *Id.* at 45. Allen testified that he subsequently had an on-line chat with Almlak Benitez in which Almlak Benitez claimed to be Muslim and claimed to be an ISIS Muslim and spoke of the new caliphate. *Id.* at 46-49. When Allen asked, as part of the on-line chat, whether Almlak Benitez was trying to recruit him, Almlak Benitez responded: "you want to join us, you are the one who ask. I didn't tell you to." *Id.* at 50.

Allen testified that he kept a screen shot of the on-line chat with Almlak Benitez and filed a report with the Palm Beach Sheriff's Office. *Id.* at 52. As a result, Allen testified that he was later contacted by the F.B.I. *Id.* Allen testified that he was offered $2,000 by the F.B.I. to work in an undercover capacity, but he declined the offer. *Id.* at 53.

F.B.I. Investigation

F.B.I. agent Clinton Goodman testified on behalf of the government. (DE 195:60). Agent Goodman testified that in 2015 he received a complaint from a Nigel Allen claiming that an individual named Almlak Benitez had reached out to him on Facebook and had spoken to him about joining ISIS. *Id.* at 61-64. As a result, the agent investigated the Facebook account of Almlak Benitez. *Id.*

Agent Goodman testified that on Almlak Benitez's Facebook page was a black flag often associated with ISIS and Al-Shabaab and terrorists groups. (DE 195:68). There were also ISIS propaganda videos on the page as well as still photographs from the videos including photographs of individuals with firearms. *Id.* at 72-84.

Agent Goodman also testified that he received information from Facebook showing that Almlak Benitez sent a friend request to Nigel Allen on April 6, 2015, and April 7, 2015. *Id.* at 85, 86. The information from Facebook also contained the instant message chats testified to by Allen. *Id.* at 86, 87. The agent also testified that the information from Facebook showed that Almlak Benitez made numerous friend requests over a short period of time to individuals that he did not know and who purported to be outside the United States such as Turkey and Bangladesh and who purported to be Muslim and sympathetic to ISIS. *Id.* at 87-93.

Agent Goodman testified that Almlak Benitez engaged in an instant messaging conversation on Facebook with an individual named Mujahid on May 8, 2015. (DE 195:101). In the conversation, Almlak Benitez stated that he is "trying to recruit and meet every brother and me and another brother are trying to create

the USA ISIS troops," and that they "need weapons, bombs, tanks, grenades, guns, and missiles." *Id.* Almlak Benitez also suggested in the conversation that, "you can make it through the border, get help from the Mexican cartels to bring you from everywhere." *Id.* In another unrelated conversation on Facebook with another individual, Almlak Benitez wrote that "the brothers here in America want to fight with you. We want to make bombs here but we have to get in touch with the caliphate leaders." *Id.* at 102.

Agent Goodman testified that an investigation into the Facebook account of Almlak Benitez led to an IP address associated with Bernardo Suarez, father of Harlem Suarez, and a physical address that was the apartment in Key West shared by the Suarez family. (DE 195:102-108). In addition, the agent testified that based on the previously-created Facebook account by Harlem Suarez with the same email and phone number, the agent knew that Harlem Suarez had also created the Facebook account for Almlak Benitez. *Id.* at 108-121.

At that point, the FBI knew that Mr. Harlem Suarez was behind the postings and chats on the Almlak Benitez Facebook page. Yet, the agent testified that the FBI chose not to question Mr. Harlem Suarez at that point, but instead decided to "get a source in contact with him." (DE 195:122). By "source" the agent meant a confidential informant that is controlled and paid by the FBI to act in an undercover capacity. *Id.* at 124. The agent testified that he would create the fake identity for the source and that he monitored the interaction between the source and Mr. Suarez. *Id.* However, the agent did not just get one "source" to lure Mr.

Suarez but rather got numerous "sources" to make contact with Mr. Suarez. The agent created the online Facebook identities for the sources that appeared to be sympathetic to ISIS in order to entice Mr. Suarez into contacting the source. *Id.* at 126-128. At least two sources were able to make contact with Mr. Suarez and the agent selected one source, Mohammed, to interact with Mr. Suarez. Mohammed sent several friend requests to the Almlak Benitez Facebook account until one was accepted. *Id.* at 128-134. Almlak Benitez finally accepted Mohammed's friend request and Almlak Benitez stated in an online chat "good to meet you. My account was taken down more than four times already, but I still created it back." *Id.* at 134.

The source, at the direction of the agent, engaged Almlak Benitez and tried to get Almlak Benitez to provide him with a phone number to contact him. (DE 195:135-137). Having communications between the source and Almlak Benitez go through phone lines allows the agent to monitor all calls and text messages. *Id.* at 141-142. The source asked Almlak Benitez what his goal was several times until Almlak Benitez responded with a canned ISIS image in which ISIS "declares the caliphate." *Id.* at 137. The source and Almlak Benitez discussed firearms and Almlak Benitez informed the source that he was five hours away from the source's location in West Palm, Beach. *Id.* at 137-141. Almlak Benitez also informed the source that he is not very knowledgeable about the Muslim faith and needs help to "know much more of our religion." *Id.* at 143-144.

At one point, Almlak Benitez told the source that he tried to recruit others but found it hard. (DE 195:144). Almlak Benitez also stated that he was trying to make "timer bombs" but that he had not gotten the instructions yet. *Id.* at 145. The Source replied that he knew where they can get one. *Id.* at 146.

At the direction of the agent, the source eventually set up a meeting with Almlak Benitez for May 8, 2015. (DE 195:149). The agent created a detailed plan for the source to follow in the meeting including what topics needed to be brought up at the meeting, what to say and do during the meeting. *Id.* The agent also wanted to ensure that the meeting was secure and recorded. *Id.* at 150. The agent testified that the source met with Almlak Benitez, who turned out to be Mr. Harlem Suarez, on May 8, 2015, as planned. *Id.* at 152.

Mohammed Skaik

Mohammed Skaik, an alias for a confidential informant for the FBI, testified on behalf of the government. (DE 196:8). Skaik testified that an FBI agent approached him and recruited him to be a confidential informant in June of 2014. *Id.* at 10, 11, 16. Then in April of 2016, agent Goodman recruited him to work in this case by creating an on-line identity for "Mohammed Skaik." *Id.* at 16. Agent Goodman then instructed Skaik to send a friend request on Facebook to Almlak Benitez on April 15, 2015, which Skaik did with the following message: "hey, brother, can you add me please? I have something extremely important to communicate with you. As-salamu alykum." *Id.* at 17, 18. However, Almlak

Benitez did not respond. *Id.* at 19. Nine days later on April 24, 2015, Skaik tried again, with the following message:

> Hey, brother, As-salmu alaykum. It's good to see someone around here that lives nearby me. A word of advice: I've been down your alley and got my accounts taken down numerous times. I would be very careful not to post things onto my account relating to my location. Just an advice from a brother to another. I hope I get to know you.

Id. at 19, 20. Again, there was no response from Almlak Benitez. *Id.* at 20. Ten days later, Skaik again sent the exact same message to Almlak Benitez, but again there was no response from Almlak Benitez. *Id.* Eventually, Almlak Benitez responded and Skaik instructed him that they should communicate via telephone. *Id.* at 22, 25. Skaik asked Almlak Benitez what his goal is and Almlak Benitez responded with a news clip stating that "ISIS declares caliphate, calls on groups to pledge their allegiance." *Id.* at 24. Skaik told Benitez that he has everything he needs to be ready and Benitez responded that he is "just getting ready. Got two Glock 19, 22, but need the long one." *Id.* at 26. Skaik responded that he had an M-4 rifle. *Id.*

Through text messages, Skaik and Benitez realized they are about a five-hour drive away from each other. Benitez offered Skaik a bullet proof vest and Skaik promised to teach Benitez about Islam because Benitez acknowledged that he did not know much about Islam. *Id.* at 32-37. Benitez stated that he was attempting to recruit like-minded Muslims and he also told Skaik that he was trying to "make timers bomb," but that he had no instructions on how to do it *Id.* at

39, 40. Skaik responded that he knew "somewhere we can get one." *Id.* at 40. In response to a question of where he is from, Benitez actually responded as follows:

> We need to recruit to many, to many and keep calm, train and train, used lot of way of communications and not let any of our brothers to go gone, the strongest troops we will have, the best we will be. And be one step before our enemies. Cuba.

Id. at 43. Skaik then suggested that any further communication be done via telephone. *Id.* at 45.

During their first telephonic conversation, Skaik and Benitez had a general conversation about where they live and how they can meet half way in Homestead, Florida where Skaik said he had a friend. (DE 196:54-57). Skaik then brought up the topic of going overseas versus doing things here. *Id.* at 57. At First, Benitez thought Skaik was still talking about not having to drive all the way to Key West, presumably on the overseas highway that leads to Key West. *Id.* But Skaik quickly corrected him:

> No, no, no. I'm talking live over . . . overseas. I mean like go . . . like I was always thinking that I want to go to like uh . . you know Iraq or, or, or Syria, uh to join the Filaza, but uhm, you know ever since I met you I feel like you have a better idea than mine, you know. Like it's a really good idea like you were saying to hit hard over here and wait for the brothers to come in. I think you have an awesome idea, so. Yeah ever since we talked in the afternoon I've been thinking about everything, and I think it makes a lot of more since what you were saying.

Id. at 57. Almlak Benitez never offered a strong response to Skaik's statement and instead just went along with Skaik's view that it would be more cost effective to "do something in America rather than like going all half way across the world." *Id.* at 58. The two then continued their conversation in text messages in which they

generally discussed recruiting individuals and ISIS propaganda. *Id.* at 64-67. At one point, Benitez asked Skaik whether he knew how to make a bomb. *Id.* at 67. Skaik told Benitez that although he didn't know, he would find out and give Benitez everything he needs. *Id.* at 67-70.

After a couple of days, they scheduled a meeting in Homestead, Florida, although Benitez told Skaik that he did not own a car and is dependent upon being able to borrow his father's car. (DE 196:73,74). The following morning, Benitez informed Skaik that his father was asking for the car back so he could not drive to Homestead and returned to Key West. (DE 196:78). Skaik still insisted on meeting and told Benitez that he was heading down to where he is and Skaik stressed that Benitez should bring his weapons to the meeting even though Skaik did not bring his weapons. *Id.* Skaik asked Benitez for his address, but Benitez instead gave Skaik the address to a restaurant rather than to Benitez' home. *Id.* at 80, 81. Benitez expressed some concern about the firearms and having them in public, but Skaik re-assured him that it would be fine. *Id.* at 82.

On a secluded part of the beach, Mr. Suarez showed Skaik a bullet proof vest he bought on eBay, although he explained that he would still need to get the plates that actually make the vest bullet-proof. (DE 196:113, 121). Mr. Suarez also showed him an AR rifle that he just purchased. Mr. Suarez explained that he legally purchased it from a gun shop. *Id.* at 114, 115. Mr. Suarez also had two pistols. *Id.* at 116.

Mr. Suarez explained that he had contacted others on Facebook and that he had seen a video of Muslims on the Mexican border waiting to cross the border, although he was not entirely sure that the video was authentic. *Id.* at 110-113. The two continued to look at the weapons and discussed recruitment of Americans, presumably by ISIS. *Id.* at 128-130. Skaik abruptly stated that he and Mr. Suarez "can't take down a whole base," even though there was no prior talk of taking down a base. *Id.* at 130. Mr. Suarez responded that first, they must learn how to "make timers bomb." *Id.* He then discussed a scenario in which they plant bombs with thirty second timers and he doesn't care "who it's gonna hit." *Id.* at 130-131. Skaik told Mr. Suarez that he came across a website that explained how to make one. *Id.* at 131. Mr. Suarez expressed a need to be able to time any explosions and suggested that a parking lot in a mall would be a good idea where they could detonate a bomb under a car without fear that it would injure someone, but would send a signal that they were serious. *Id.* at 136, 137.

Mr. Suarez and Skaik kept talking about recruiting for ISIS and weapons and bombs. (DE 196:137-146). At one point, Mr. Suarez bragged that he had already purchased an AK-47 rifle, but that he had to wait the lawful waiting period before he could actually get it. *Id.* at 147. Skaik explained to Mr. Suarez that they need to be more organized and have a more professional appearance including a safe house and weapons storage if they were going to properly recruit others. *Id.* at 163-165. During the conversation, Mr. Suarez used his real name while talking on his cell phone to someone else. *Id.* at 158.

Mohammed Skaik and Mr. Suarez had several follow up meetings. At one meeting, Skaik told Mr. Suarez that he knew someone he had met at a mosque, who was "sympathetic to what ISIS was doing," who could help them. (DE 197:59). On June 3, 2015, Skaik introduced Mr. Suarez to that individual, Sharif. *Id.* at 64-67. Sharif told Mr. Suarez that he had been in the Army doing logistics and that although he did not know how to make explosives, he knew "some people" who did. *Id.* at 68, 69. Mr. Suarez and Sharif talked about doing something with an explosive around the Fourth of July somewhere in the Keys, possibly Marathon. *Id.* at 71-73, 81-91.

Sharif also testified at the trial. Sharif testified that he got Mr. Suarez' phone number from Skaik and tried calling Mr. Suarez over a month later on July 12, 2015, but that Mr. Suarez did not answer. (DE 198:117). Sharif tried calling the next morning, but again Mr. Suarez did not answer. *Id.* at 117, 118. Sharif finally got a hold of Mr. Suarez at around 7 p.m. on July 13, 2015. *Id.* at 118. At that point, Mr. Suarez had not communicated with Sharif in over a month. During that important conversation, Sharif was upset that he had not heard from Mr. Suarez in over a month and that Mr. Suarez was backing away from what they had discussed at the meeting. When Mr. Suarez attempted to give excuses for why he had not called and why he had done nothing to further the plan they had talked about, Sharif would not accept the excuses and wanted Mr. Suarez to re-commit to a plan to use a backpack explosive device. *Id.* at 121-137. Finally, Sharif coerced Mr. Suarez into re-committing to the use of the backpack device. *Id.* at 138. Even then,

Sharif pressed Mr. Suarez to commit to a specific plan, with a specific date and a specific target. *Id.* at 139-145. In return, Mr. Suarez attempted to back off by claiming that he may not have the funds to go through with the plan. *Id.* at 142, 154. Sharif, nevertheless pressed Mr. Suarez on the plan. *Id.* at 154-156.

Mr. Suarez tried to minimize without having Sharif think he is backing out by asking for something "real small, real small." *Id.* at 156. Sharif again pressed him for time asking "how soon" he wanted it. Again, Mr. Suarez tried to say that he may not have the funds, but Sharif shot him down saying that "someone with three jobs ought to have the money soon." *Id.* at 161. On a later call, Sharif warned Mr. Suarez about not backing out and failing to communicate with him. *Id.* at 179-180.

On July 24, 2015, Mr. Suarez received a phone call from "Omar," whom he had never met before. (DE 198:202, 203). Omar also testified at the trial. Omar told Mr. Suarez that Sharif had given him his number and that he would be the one that would be giving Mr. Suarez his "package with all the things that [he] gave to brother Sharif." *Id.* at 203. Much like Sharif, Omar expressed frustration that he had tried to contact Mr. Suarez, but that Mr. Suarez had ignored his calls. *Id.* Omar scolded Mr. Suarez and instructed him that he was to pick up whenever Omar called him. *Id.* at 204. He also told Mr. Suarez that his "package" would be ready soon and that he would deliver it to Mr. Suarez in Key West and he would instruct Mr. Suarez on its use. *Id.* at 204-209.

On July 26, 2015, Omar called Mr. Suarez to let him know the "package" was ready and Omar would deliver it the next day. (DE 198:210-213). On July 27, 2015,

Omar drove to Key West and met with Mr. Suarez. *Id.* at 214-217. Omar explained what the bomb was composed of and had Mr. Suarez set up the cell phone as the remote detonator. *Id.* at 135-240. Mr. Suarez started to call the cell number and Omar admonished him since that would detonate the explosive. *Id.* at 240. Omar then handed the bomb over to Mr. Suarez. *Id.* at 242. Omar showed Mr. Suarez the components and how they worked and then had Mr. Suarez test it. *Id.* at 246-255. When Mr. Suarez walked out of the vehicle with the device, he was immediately arrested by the F.B.I. *Id.* at 263.

Interstate Nexus

Edwin Swift, a tour operator from Key West, testified on behalf of the government. (DE 199:9). Swift's company operated a trolley in Key West, an aquarium, the Shipwreck Treasures Museum and other retail businesses. *Id.* at 12. Over defense objection, Swift was allowed to speculate as to the economic effect of an attack in Key West:

> I would imagine that, especially because Key West portrays itself as a laid-back, fun place to be in the tropics, and just a relaxing place, I would imagine that the immediate effect of an attack on Key West would be devastating to the economy. It would shatter our image and I can't speculate on how much it would reduce the economy, but it would be similar to the 9/11 and somewhat similar to Boston.
>
> * * *
>
> Well, our tours would be affected by the fact that people would cancel their vacations here in the immediate aftermath. I'm sure that the TDC, Tourist Development Council, would immediately try to get support from the state government to advertise heavily and hopefully try to recover the anticipation of what we would lose.

(DE 199:15).

Motion for Judgment of Acquittal

Counsel for Mr. Suarez moved for a judgment of acquittal arguing that the government had failed to prove the interstate nexus as required by § 2332a. (DE 199:176). Counsel for Mr. Suarez also moved for a judgment of acquittal as to Count Two. *Id.* at 179.

Mr. Suarez took the stand on his own behalf. (DE 200:21-90). Following the defense case, counsel for Mr. Suarez renewed his motions for judgment of acquittal and the court again denied them. *Id.* at 91.

Mr. Suarez was convicted on both counts. (DE 151). Prior to sentencing, counsel for Mr. Suarez filed a sentencing memorandum and a request for a downward variance. (DE 164). Counsel noted that Mr. Suarez was a first-time offender, referred to the psychological evaluation of Dr. Alejandro Arias (DE 164-1), and importantly, noted the extreme pressure that was placed on Mr. Suarez by his mother to reject a plea offer from the government that would have allowed Mr. Suarez to enter a plea to count two in return for a dismissal of count one. (DE 164:8-9). Count two carried a statutory maximum sentence of twenty years' imprisonment. Counsel for Mr. Suarez also noted the huge disparity that a Life sentence would have when compared with other similar terrorism prosecutions. *Id.* at 11, 12. Counsel for Mr. Suarez also filed a motion for downward departure, (DE 164, 165).

SENTENCING

At the sentencing hearing, Dr. Alejandro Arias testified on behalf of Mr. Suarez. (DE 190:10). Dr. Arias, a clinical psychologist, testified that he had evaluated Mr. Suarez on a couple of occasions. *Id.* at 12. Dr. Arias testified that a nonverbal intellectual measure of Mr. Suarez' I.Q. "place[d] him in what is called the borderline slash low average range." *Id.* at 13. Dr. Arias also testified that the results showed "verbal language deficits" as well "significantly elevated" levels of anxiety and depression on the part of Mr. Suarez. *Id.*

Dr. Arias explained that Mr. Suarez' problem may have stemmed from receiving insufficient oxygen during his birth. *Id.* at 14. Although Dr. Arias would not ascribe a direct causation, he did note that Mr. Suarez was clearly "an individual who has some intellectual deficits and some neurocognitive deficits." *Id.* at 15.

In terms of Mr. Suarez' cognitive abilities, Dr. Arias testified that there were some deficits in his visual memory. *Id.* Importantly, Dr. Arias testified that Mr. Suarez was "very naïve and gullible and easily swayed." *Id.* Dr. Arias summarized his initial evaluation of Mr. Suarez:

> So basically, that's my impression. There's an individual with – who tends to be easily influenced, low intellectual capacity, no prior background of criminal activity that I know of, at least, and basically an individual who, I think, can just kind of go with the flow, and not really modulate and control some of his actions and reactions to certain events.

Id. at 16.

Dr. Arias testified that he conducted a second evaluation of Mr. Suarez. Dr. Arias testified that the second evaluation revealed that Mr. Suarez lacked "internal cohesion . . . the ability to keep it together." *Id.* at 17. He also testified that Mr. Suarez suffered from low self-esteem and lacked the ability to make himself understood by others and when not able to properly express himself, a sense of frustration and irritability. *Id.* Importantly, Dr. Arias further testified that Mr. Suarez was "prone to retreat to fantasy." *Id.* Dr. Arias explained:

> Oftentimes when [an] individual retreats into fantasy [it] is because it's a very difficult time to deal with reality. So fantasy offers that escape from reality . . . In this particular case, Mr. Suarez's fantasy was feeling of power, a feeling of recognition, a feeling of being able to be noticed for something other than past failures that have occurred through throughout his lifestyle.

Id. at 17, 18.

Dr. Arias testified that it was more likely than not that Mr. Suarez' mom talked him out of taking a plea to lesser included. (DE 190:20). Over defense objection, the district court sentenced Mr. Suarez to a Life term of imprisonment as to Count One and a concurrent Twenty-Year term of imprisonment as to Count Two. (DE 171).

On appeal, the Eleventh Circuit affirmed Mr. Suarez's convictions and Life sentence. *United States v. Suarez*, 893 F.3d 1330 (11th Cir. June 27, 2018). The court of appeals held that: 1) the government only needed to prove a de minimis effect on interstate commerce for attempted use of a weapon of mass destruction; sufficient evidence supported a finding of material support of a terrorist

organization; and that Mr. Suarez's sentence of Life without the possibility of parole did not violate the Eighth Amendment and was reasonable.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's holding that the federal offense of attempting to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a, only requires proof of a *minimal* effect on interstate commerce is in direct conflict with this Court's established precedent, *United States v. Lopez*, 514 U.S. 549 (1995), which requires proof of a *substantial* effect on interstate commerce. Because the activity in question was not economic in nature, the court of appeals could not have relied on an aggregate effect on commerce.

In its opinion, the court of appeals acknowledged that the question of whether attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a, required proof of a substantial or minimal effect on interstate commerce was an issue of first impression in the Eleventh. *United States v. Suarez*, No. 17-11906 at *5 (11th Cir. June 27, 2018). However, the legal conclusion that § 2332a requires proof of a **substantial** effect on interstate commerce, not just a mere minimal effect as held by the panel, is mandated by this Court's established precedent, *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995).

This Court has noted "three broad categories of activity that Congress may regulate" under the Commerce Clause: 1) the use of the channels of interstate commerce; 2) the instrumentalities of interstate commerce; and 3) "activities having a substantial relation to interstate commerce . . . *i.e.*, those activities that

substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-559, 115 S. Ct. at 1629-1630 (emphasis added).

In its opinion, the Eleventh Circuit noted that it had not previously ruled on "the measure if evidence necessary to support the interstate commerce element of § 2332a." *Suarez*, 893 F.3d at 1334. Although it noted Mr. Suarez' argument that *Lopez* required a substantial effect on interstate commerce, the Eleventh Circuit rejected that argument. Instead, the Eleventh Circuit analogized the § 2332a violation with a Hobbs Act violation. *See id.* The Court of appeals then simply applied the same standard it applied in Hobbs Act cases to a violation of § 2332a, and held that the government need only prove a de minimis effect on interstate commerce. *Id.*

However, this Court has recently clarified that even in the context of a Hobbs Act violation, the government must prove a **substantial** effect on interstate commerce in order to meet the interstate commerce requirement under *Lopez*. *See Taylor v. United States*, 136 S. Ct. 2074, 2079 (2016). The caveat provided by this Court is that when the "activity is economic in nature," the government may prove the substantial effect in the aggregate. *Id.*

In Mr. Suarez' case there was no focus on economic activity. Even viewing the evidence in the light most favorable to the government, the plan here involved detonating an explosive device on a public beach. Under *Lopez*, the government was thus required to prove a *substantial* effect on interstate commerce rather than a *de minimis* effect and because there was no economic activity targeted, the government

could not rely on an aggregate theory to meet its burden. Simply, the evidence presented by the government, even when viewed in the light most favorable to the government, fell woefully short of proving a substantial effect on interstate commerce as required by this Court's precedent. In affirming the conviction, the court of appeals only found that the evidence presented demonstrated a "minimal effect on interstate commerce." *Suarez*, 893 F.3d at 1334.

II. The Eleventh Circuit failed to conduct the disproportionality analysis mandated by this Court in order to determine whether his sentence violated the Eighth Amendment. Under the proper analysis, the sentence of Life without the possibility of parole imposed on a young, emotionally-immature, first-time offender of low intelligence violated the Eighth Amendment prohibition against cruel and unusual punishment where Mr. Suarez was convicted of offenses where no person was killed, harmed or injured, and where the offenses were the result of a government sting operation.

The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S. Const., amend VIII. And, "[t]he Eighth Amendment's prohibition of cruel and unusual punishment 'guarantees individuals the right not to be subjected to excessive sanctions.'" *Miller v. Alabama*, 132 S. Ct. 2485, 2463 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183 (2005)). "That right

[] flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense." *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544 (1910)). "The concept of proportionality is central to the Eighth Amendment." *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

This Court has identified two general classifications of cases addressing the proportionality of sentence under the Eighth Amendment. *Graham*, 130 S. Ct. 2021. In the first classification, the court looks at the specific circumstances of the particular case to determine whether the sentence imposed is unconstitutionally disproportionate. *Id.* In the second classification, the court employs a categorical approach focusing on two subsets – the nature of the offense and the characteristics of the offender. *Id.* at 2021, 2022.

As to the first classification, the Court "**must begin** by comparing the gravity of the offense and the severity of the sentence." *Id.* at 2022 (citing *Harmelin v. Michigan*, 501 U.S. 957, 1005, 111 S. Ct. 2680 (1991) (opinion of Kennedy, J.)(emphasis added)). If that initial comparison leads to "an inference of gross disproportionality' **the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with sentences imposed for the same crime in other jurisdictions.**" *Id.* (emphasis added). "If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual." *Id.*

Harlem Suarez' sentence is a life sentence without the possibility of parole. The district court sentenced Harlem to a Life sentence. Harlem was sentenced under a federal sentencing system that came into being with the passing of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (SRA). The SRA created a new system of sentencing based on a determinate sentencing model under which the individual sentenced "must serve the full length of his term [and] parole and the United States Parole Commission are abolished." *United States v. Scoggins*, 880 F.2d 1204, 1208 (11th Cir. 1989). Mr. Suarez's sentence is thus a life sentence without the possibility of parole.

Mr. Suarez had no prior criminal record and is, thus, a first-time offender. He was convicted of attempting to use a weapon of mass destruction. Specifically, he took possession of what he believed to be a bomb given to him by an agent of the federal government. The bomb was in fact inert. Nobody was hurt or injured in this offense, and certainly, nobody was killed.

Harlem Suarez was a young, immature and gullible adult, when he committed his offense. He was just twenty-four years old when he committed the offense. At the sentencing hearing, Dr. Alejandro Arias, a clinical psychologist, testified that Mr. Suarez' I.Q. "place[d] him in what is called the borderline slash low average range." (DE 190:13). Dr. Arias explained that Mr. Suarez' problem may have stemmed from receiving insufficient oxygen during his birth. *Id.* at 14. Although Dr. Arias would not ascribe a direct causation, he did note that Mr. Suarez was clearly "an individual who has some intellectual deficits and some

neurocognitive deficits." *Id.* at 15. Dr. Arias testified that Mr. Suarez was "very naïve and gullible and easily swayed:" *Id.* Dr. Arias summarized his initial evaluation of Mr. Suarez:

> So basically, that's my impression. There's an individual with – who tends to be easily influenced, low intellectual capacity, no prior background of criminal activity that I know of, at least, and basically an individual who, I think, can just kind of go with the flow, and not really modulate and control some of his actions and reactions to certain events.

Id. at 16.

Dr. Arias further testified that Mr. Suarez was "prone to retreat to fantasy." *Id.* at 17. Dr. Arias explained:

> Oftentimes when [an] individual retreats into fantasy [it] is because it's a very difficult time to deal with reality. So fantasy offers that escape from reality . . . In this particular case, Mr. Suarez's fantasy was feeling of power, a feeling of recognition, a feeling of being able to be noticed for something other than past failures that have occurred through throughout his lifestyle.

Id. at 17, 18. In sum, the district court violated the Eighth Amendment when it determined that Mr. Suarez, a young and immature non-violent, first-time offender would never be fit to reenter society. *See id.*

Thus, in making the initial comparison, the underlying offense must be seen most generally as an attempted terrorist act, resulting from a government sting operation, committed by an immature, first time-offender, and in which no individuals were killed or harmed in any way. New York University conducted a comprehensive review of post 9/11 terrorism prosecutions from 2001 to 2011. *See* Center on Law and Security, New York University School of Law, Terrorist Trial

Report Card: September 11, 2001-September 11, 2011, available at http://web.archive.org/web/20160325042249/http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf (last visited November 21, 2018). The report notes that between 2001 and 2011, there were 310 defendants charged in terrorism and national security prosecutions. The courts resolved 204 cases, and 177, or 87%, of the cases resulted in convictions. The average sentence in those cases was **14 years**. A further breakdown based on specific charges shows that terror charge convictions resulted in an average sentence of just over **15 years**. Where a material support charge was the lesser charge, the average sentence was just under **15 years**. Even where a person was convicted of both a terror charge and a national security charge, the average sentence was **25 years**. Thus an initial comparison of the severity of the offense, an attempted terrorist act, resulting from a government sting operation, committed by a first time-offender, and in which no individuals were killed or harmed in any way, with the severity of the sentence, a Life sentence without the possibility of parole, presents an extraordinary case and leads to a clear "inference of gross disproportionality." *See United States v. Farley*, 607 F.3d 1294, 1343-44 (11th Cir. 2010).

That initial inference is confirmed by a comparison of sentences in the Southern District of Florida and sentences for similar or even more serious offenses nationally. The Sentencing Commission studies the length of imprisonment by primary offense category for each fiscal year. For fiscal year 2016, it reviewed a total of 2,013 sentences in the Southern District of Florida for defendants sentenced

to a term of imprisonment. U.S.S.C. Statistical Information Packet, Fiscal Year 2016, Southern District of Florida, Table 7, available at https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2016/fls16.pdf (last visited November 21, 2018). For those 2,013 sentences, the mean sentence was 59 months' imprisonment and the median sentence was 36 months' imprisonment. There was no specific offense category for terrorism. However, the Sentencing Guidelines applied to Mr. Suarez' offense provide that if death would have resulted from the offense, the Guidelines for murder would have applied. U.S.S.G. § 2M6.1(c). Nationally, the 84 sentences for murder had a mean sentence of 244 months' imprisonment and a median sentence of 210 months' imprisonment. Nationally, the 55 sentences for manslaughter had a mean sentence of 72 months' imprisonment and a median sentence of 68 months' imprisonment.

Mr. Suarez' sentence of Life imprisonment, when compared to all sentences in the Southern District of Florida, is grossly disproportional. Mr. Suarez' conviction for attempted use of a bomb is a very serious offense that could have resulted in someone getting injured or killed, even though the likelihood of actual injury or death was removed because it was a government sting and the purported bomb was inert. Nevertheless, even when comparing Mr. Suarez' sentence to sentences for murder, an offense in which someone was actually intentionally killed, Mr. Suarez' sentence is far greater than the average sentence for murder nationally. Because this comparison demonstrates that Mr. Suarez' sentence is grossly

disproportionate, his sentence is cruel and unusual in violation of the Eighth Amendment. *See Graham*, 130 S. Ct. at 2022.

However, on appeal, the Eleventh Circuit rejected that argument despite the empirical evidence presented demonstrating that the Life sentence was grossly disproportionate. The court of appeals rejected the argument even though it failed to address the proportionality argument raised by Mr. Suarez, other than to note that "successful Eighth Amendment challenges in non-capital cases are exceedingly rare," and that the Eleventh Circuit had "never held that a non-capital sentence for an adult has violated the Eighth Amendment." *Suarez*, 893 F.3d at 1335, 1336. The Eleventh Circuit then just focused on the second part of *Graham* dealing with a categorical prohibition on a Life sentence without the possibility of parole noting that Mr. Suarez was not a juvenile when he committed the offense. *Id.*

The Eleventh Circuit erred when it failed to conduct the proper disproportionality analysis as directed by this Court. *See Graham*, 130 S. Ct. 2022. If it had conducted the proper analysis, it would have been left with the inescapable conclusion that Mr. Suarez's sentence was grossly disproportionate and in violation of the Eighth Amendment.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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