

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

SAID AZZAM MOHAMAD RAHIM,
Petitioner

-v-

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question 1: This Court should resolve the circuit split that has developed by finding that the twelve-level terrorism enhancement under U.S.S.G. §3A1.4 requires a finding of specific intent pursuant to 18 U.S.C. § 2332B(g)(5).

Question 2: Imposing a twelve-level terrorism enhancement, automatically making a defendant's criminal history a category VI, on a criminal defendant when the underlying elements of the crime were not established by proof beyond a reasonable doubt is incongruous to this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

STATEMENT REGARDING PARTIES TO THE CASE

The names of all parties to the case are contained in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Said Azzam Mohamad Rahim, respectfully petitions for a Writ of Certiorari to the United States Supreme Court from the United States Circuit Court of Appeals for the Fifth Circuit in *United States v. Rahim*, No. 19-11341, 2021 WL 2065902 (5th Cir. May 21, 2021).

OPINIONS BELOW

In 2019, after being convicted at the conclusion of a trial by jury, the United States District Court for the Northern District of Texas Dallas Division (District Court) sentenced Said Azzam Mohamad Rahim (“Rahim”) to a total of 360 months (30 years) imprisonment. The Fifth Circuit Court of Appeals (Fifth Circuit) affirmed Rahim’s conviction and sentence via unpublished opinion on May 21, 2021. (Appendix A). On that same day, the Judgment was entered and filed. (Appendix B).

STATEMENT OF JURISDICTION

This Petition is being filed within 150 days after entry of the Judgment, pursuant to Supreme Court Emergency Orders (Order List: 589 U.S. and Order List: 594 U.S.). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides that those accused of a crime have the right to a trial by an impartial jury. U.S. Const. amend. VI.

18 U.S.C. § 2339B makes it a crime to knowingly conspire, or attempt, to provide material support or resources to a foreign terrorist organization. 18 U.S.C. § 1001 makes it a crime to make false statements to a federal agency.

U.S.S.G. § 3A1.4 provides a 12-level terrorism enhancement if “the offense is a felony that involved, or was intended to promote, a federal crime of terrorism.” This enhancement is added to a defendant’s base offense level and the criminal history category automatically becomes the maximum of VI. U.S.S.G. § 3A1.4.

INTRODUCTION

This case provides the Court an opportunity to resolve a circuit split that has developed as to whether a specific intent requirement is incorporated in the twelve-level terrorism enhancement under U.S.S.G. § 3A1.4 pursuant to 18 U.S.C. § 2332B(g)(5).

This case also provides the Court an opportunity to exercise its supervisory power because a United States Court of Appeals has departed from the accepted and usual course of judiciary proceedings by granting a twelve-level enhancement when the elements of the underlying crime were not established by proof beyond a reasonable doubt by the trier of fact.

STATEMENT OF THE CASE

In spring 2016, the Federal Bureau of Investigations (FBI) started investigating the internet-based application, Zello, amid suspicions that some of its users were

utilizing the app as a means of supporting the Islamic State of Iraq and al-Sham (“ISIS”). The FBI discovered the existence of the “State of the Islamic Caliphate” channel on Zello, which had over 10,000 subscribers. The channel was open, so any Zello user could listen to its content. Through its investigation, as well as through other investigative means seemingly authorized by a series of warrants obtained pursuant to the Foreign Intelligence Surveillance Act (“FISA”), the Government came to believe that Rahim and others were utilizing this program “to support and promote” ISIS.

For months, as part of the FBI’s investigation, the Government utilized a variety of covert investigative techniques, including but not limited to, surveillance of Rahim at his home and business, audio recordings of his interactions with customers, monitoring of his online accounts and chats, and monitoring of airline records and transactions. Through monitoring the Zello channel and Rahim’s online accounts and chats, the Government could see that Rahim was active on the channel. The Government stated that Rahim served on committees and as an administrator and moderator on the channel, that he was regarded as an expert on ISIS by other users, and was a frequent voice on the channels, often answering users’ questions and giving lengthy sermons. According to the Government, Rahim recruited fighters to travel to the Caliphate to join ISIS there, counseled followers to commit terrorist

attacks in ISIS's name in other countries, and celebrated terrorist attacks committed on behalf of ISIS. In early 2017, Rahim stopped speaking on the channel.

Through monitoring Rahim's airline records and transactions, the Government became aware that Rahim purchased round-trip airline tickets, departing Dallas Fort Worth International Airport (DFW) on March 5, 2017, at 4:10 p.m. for Amman, Jordan, with a return flight to DFW on May 9, 2017. Rahim was set to visit his daughter, who resides in Jordan with her mother. However, the Government alleged that Rahim was making these travel plans not to visit family, but instead to join ISIS and wage jihad on their behalf.

On March 5, 2017, Rahim arrived at DFW with intentions on traveling to Jordan. By this point, the Government had already filed for, and received, search warrants to seize and search all of Rahim's personal belongings, carry-on items, and checked luggage. Yet, they admittedly did not have sufficient probable cause to arrest Rahim. Thus, an interrogation was necessary. Immediately upon passing through security, Rahim was detained by law enforcement agents, who identified themselves as members of the Joint Terrorism Task Force. These agents escorted Rahim to a private room, a few hundred feet from his departing gate, that had previously been prepared with video cameras in anticipation of the interrogation. The agent simply told Rahim that there was an issue with his ticket, and they would assist him in fixing the issue if he could answer some questions. They did not inform

him that he was suspected of terrorist activity. After the interrogation, and his plane had already departed, Rahim was advised nothing could be done and he would not be able to travel that day. Upon leaving the interrogation room, but still within the airport, Rahim was arrested based upon his allegedly false statements made to agents during this interrogation and was transported to Dallas County Jail. On March 6, 2017, Rahim was taken before Magistrate Judge Renee Harris Toliver and was charged by Complaint for the false statements.

A Grand Jury returned a six-count Indictment on March 22, 2017, charging Rahim with six counts of false statement to a federal agency in violation of 18 U.S.C. § 1001. On October 17, 2018, a Second Superseding Indictment was filed against Rahim. Counts One and Two alleged Rahim committed conspiracy and attempted to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B. Counts Three through Eight were the initial six charges, which alleged Rahim made various false statements to a federal agency, in violation of 18 U.S.C. § 1001.

On April 30, 2019, Rahim plead not guilty to the Second Superseding Indictment and a four-day jury trial began. Upon the Government's closing, counsel for defense urged a Motion for Acquittal under Rule 29, which the Court denied. On May 3, 2019, the jury returned a verdict of guilty on all counts.

The Presentence Investigation Report (PSR) was filed on July 12, 2019. The PSR noted Rahim's total offense level of 40 and the enhanced guideline imprisonment range of 360 months to 1,056 months and criminal history category of VI.¹ Rahim's objections to the PSR were filed on August 22, 2019. Defense Objection Two objected to PSR paragraphs 45, 46, and 48, as they formed the basis for the twelve (12) level enhancement pursuant to U.S.S.G. § 3A1.4, arguing that the Government did not meet the first two prongs that is required under the definition of "federal crime of terrorism." Additionally, defense argued that such enhancement requires the Court to engage in extra judicial fact finding, which would violate Rahim's Sixth Amendment right to a trial by jury.

On December 11, 2019, Rahim again appeared before Judge Jane J. Boyle for sentencing. Counsel for Rahim argued objections to the PSR and renewed the Rule 29 Motion for Acquittal, all of which were overruled by the Court. Judge Boyle sentenced Rahim to 360 months (30 years) incarceration, with supervised release for a period of two (2) years upon release, and ordered he pay a mandatory \$100.00 special assessment fee for each count of conviction for a total of \$800.00. A Notice of Appeal was timely filed on December 13, 2019. The Fifth Circuit affirmed Rahim's conviction and sentence via an unpublished opinion on May 21, 2021.

¹ Before the terrorism enhancement was wrongly applied, Rahim's guideline imprisonment range was 78 months to 98 months, and he had a criminal history category of I.

REASONS FOR GRANTING THE WRIT

ISSUE I: This Court should resolve the circuit split that has developed by finding that the twelve-level terrorism enhancement under U.S.S.G. § 3A1.4 requires a finding of specific intent pursuant to 18 U.S.C. § 2332b(g)(5).

Confusion in the circuit courts has developed on whether 18 U.S.C. § 2332B(g)(5)(A), which defines “federal crime of terrorism,” incorporates a specific intent requirement. *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009); *United States v. Hassan*, 742 F.3d 104, 148-49 (4th Cir. 2014); *United States v. Wright*, 747 F.3d 399, 408 (6th Cir. 2014); *United States v. Mohamed*, 757 F.3d 757, 760 (8th Cir. 2014); *United States v. Alhaggagi*, 978 F.3d 693, 700 (9th Cir. 2020); *United States v. Ansberry*, 976 F.3d 1108, 1127 (10th Cir. 2020). A split on this issue developed when the Fifth Circuit refused to address it in *Rahim*. *United States v. Rahim*, No. 19-11341, 2021 WL 2065902 (5th Cir. May 21, 2021) (stating: “Though we have not expressly done so, many of our sister courts have held that 18 U.S.C. § 2332b(g)(5)(A) incorporates a specific intent requirement.”). By creating this opinion, and not deciding on the issue even after being asked to do so, the Fifth Circuit has developed a split in the circuit courts.

ISSUE II: The District Court’s considerations at sentencing were inconsistent with this Court’s standards under *Apprendi*.

Twenty-one years ago, this Court decided that any fact (other than a prior conviction) that increases penalty for crime beyond the prescribed statutory

maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2363, 147 L. Ed. 2d 435 (2000).

While *Apprendi* provided good groundwork for defendants whose sentences are unconstitutionally enhanced by a judge without a fact being established by proof beyond a reasonable doubt, this Court needs to clarify how to properly apply *Apprendi* – especially in relation to terrorism enhancements. Currently, confusion over the decision in *Apprendi* and its application has caused detriment for defendants who are given enhanced Guideline ranges unjustly, such as Rahim.

This issue is worthy of this Court’s attention. When a Court incorporates a specific intent requirement into a “federal crime of terrorism,” this becomes a fact which alters the legally prescribed punishment so as to aggravate it, making it a constituent part of a new offense, which must be submitted to a jury. *See Alleyne v. United States*, 570 U.S. 99, 114-15, 133 S. Ct. 2151, 2162, 186 L. Ed. 2d 314 (2013). When a Court, as the Fifth Circuit did in *Rahim*, disregards this Court’s ruling under *Apprendi*, and engages in extra judicial fact finding to find specific intent, a defendant’s Sixth Amendment right to a trial by jury is violated. *See Rahim*, 2021 WL 2065902; *Apprendi*, 530 U.S. at 490.

There is a need for this Court to clarify when and how to apply *Apprendi* – especially regarding the terrorism enhancements under U.S.S.G. § 3A1.4 pursuant to 18 U.S.C. § 2332B(g)(5).

ARGUMENT AND AUTHORITIES

The decision below has created a circuit split as to whether a specific intent requirement is incorporated in the twelve-level terrorism enhancement under U.S.S.G. § 3A1.4 pursuant to 18 U.S.C. § 2332B(g)(5).

The decision below was wrongly decided because the District Court’s extra judicial fact finding was inconsistent with the intent of this Court in light of *Apprendi* and will continue to allow district courts to violate a defendant’s Sixth Amendment right to a trial by jury.

Most of the circuit courts have decided that specific intent is required to apply the twelve-level terrorism enhancement under U.S.S.G. § 3A1.4 pursuant to 18 U.S.C. § 2332B(g)(5).²

This Court adequately ensured in *Apprendi* that any facts that increase the prescribed range of penalties to which a criminal defendant is exposed are elements of the crime, which means the Sixth Amendment provides defendants to have a jury

² The Second, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits have all found a specific intent requirement. *See United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009); *United States v. Hassan*, 742 F.3d 104, 148-49 (4th Cir. 2014); *United States v. Wright*, 747 F.3d 399, 408 (6th Cir. 2014); *United States v. Mohamed*, 757 F.3d 757, 760 (8th Cir. 2014); *United States v. Alhaggagi*, 978 F.3d 693, 700 (9th Cir. 2020); *United States v. Ansberry*, 976 F.3d 1108, 1127 (10th Cir. 2020).

find those facts beyond a reasonable doubt. *Alleyne*, 570 U.S. at 114-15 (*quoting Apprendi*, 530 U.S. at 490).

I. This Court now needs to clarify whether the phrase “federal crime of terrorism” requires a finding of specific intent.

Section 3A1.4 of the Sentencing Guidelines authorizes a twelve-level enhancement for “a felony that involved, or was intended to promote, a federal crime of terrorism.” To define the phrase “federal crime of terrorism,” the guidelines provision directs us to 18 U.S.C. § 2332B(g)(5). See § 3A1.4, cmt. n.1. There are two requirements for an offense to be considered a federal crime of terrorism: first, the offense must be “calculated to influence or affect the conduct of the government by intimidation or coercion, or to retaliate against government conduct,” and second, the underlying act must be included within an enumerated list of eligible offenses. *Wright*, 747 F.3d at 407. In order for the sentencing court to apply a terrorism enhancement, the government must show beyond a preponderance of the evidence that these two requirements have been met. *Id.* Six of the United States Circuit Courts have determined the phrase “calculated to influence or affect the conduct of government,” to include a specific intent requirement. *Stewart*, 590 F.3d 93; *Hassan*, 742 F.3d 104; *Wright*, 747 F.3d 399; *Mohamed*, 757 F.3d 757; *Alhaggagi*, 978 F.3d 693; *Ansberry*, 976 F.3d 1108.

The Fifth Circuit refused to expressly decide that 18 U.S.C. § 2332B(g)(5)(A) incorporates a specific intent requirement. *Rahim*, 2021 WL 2065902, at *7.

Instead, the Court claimed that even if specific intent was a requirement, though they have not expressly found so, the evidence clearly established that Rahim sought to influence and retaliate against the United States and other governments. *Id.* The Fifth Circuit in *Rahim* made no finding of specific intent, but still imposed the terrorism enhancement, resulting in his Guideline range going from 78 – 97 months to 360 – life due to the increase in offense level and a criminal history category going from I to VI.

Were this Court to make a decision regarding a specific intent requirement under 18 U.S.C. § 2332B(g)(5), there would be less confusion in applying the twelve-level terrorism enhancement and resolve the circuit split that has developed because of the Fifth Circuit’s Opinion in *Rahim*.

II. The District Court’s considerations at resentencing were inconsistent with this Court’s standards under *Apprendi*.

Not only did the Fifth Circuit in *Rahim* refuse to definitively incorporate a specific intent requirement, but still claim there was specific intent, it engaged in extra judicial fact finding to do so, therefore violating Rahim’s Sixth Amendment right to a trial by jury. In applying this enhancement, a finding of specific intent (see above argument) is required. Further, it is the *jury*, not the court, who is legally authorized to make such a finding. Specific intent is a different and higher mental state than knowingly, which was the mental state for each of the underlying terrorism related counts the jury found him guilty on. Therefore, the District Court took the

jury's verdict and illegally expanded it by improperly answering a question that should have remained in the province of the jury.

While the enhancement did not specifically raise the statutory minimum, it drastically increased his guideline range in violation of the Sixth Amendment. "The essential Sixth Amendment inquiry is whether a fact is an element of the crime. When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." *Alleyne*, 570 U.S. 99. Furthermore, "it is no answer to say that the defendant could have received the same sentence with or without the fact." *Id.*

The finding of fact by the Court and not the jury that Rahim acted with specific intent is an element of the crime and whether Rahim acted with specific intent to influence a government should have been submitted to the jury. Under *Apprendi*, this is an unconstitutional result as a legislature removed from the jury the assessment of facts that increase the prescribed range of penalties to which Rahim was exposed when such facts must be established by proof beyond a reasonable doubt. *Apprendi*, 530 U.S. 466.

CONCLUSION

For the forgoing reasons, the Court should grant the Petition for Writ of Certiorari and definitively resolve the question of whether 18 U.S.C. § 2332B(g)(5)(A), which defines "federal crime of terrorism," incorporates a specific

intent requirement. Not doing so will continue to allow the district courts to violate a defendant's Sixth Amendment right to a trial by jury. Mr. Said Azzam Mohamad Rahim respectfully asks the Court to grant a Writ of Certiorari.

Respectfully submitted this 18th day of October 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAILING

I hereby certify that, on the 18th day of October 2021, the original Petition and its Appendix, **as well as the Motion to Proceed in Forma Pauperis**, were sent to the Court by overnight mail.

I also certify that on the same day, one copy of both the Petition and its Appendix were sent to Said Azzam Mohamad Rahim, at:

Terre Haute FCI
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Lastly, I hereby certify that, on the same day, a true and correct copy of this Petition and Appendix was sent by overnight mail, as well as email, to:

Solicitor General of the United States
950 Pennsylvania Ave., N.W.; Room 5616
Washington, DC 20530-0001

/s/ James P. Whalen
JAMES P. WHALEN

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the Petition for a Writ of Certiorari contains 3,731 words, excluding the parts of the Petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

SIGNED THIS THE 18th DAY OF OCTOBER 2021.

/s/ James P. Whalen
JAMES P. WHALEN