NO.

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCISCO JOSEPH ARCILA RAMIREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

When a defendant has entered a plea of guilty to the offense of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1), or has been convicted of that offense after trial, is it permissible for the Court when determining the appropriate sentencing guideline calculation, to impose the twelve (12) level so-called "terrorism enhancement" pursuant to U.S.S.G. §3A1.4(a) and (b), without making specific findings that are supported by evidence in the record, that the defendant's actions were calculated (i.e. intended) to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government, or that he had the specific intent to do so, or is it sufficient to find that the defendant provided material support to an organization that he knew was engaged in terrorist activity or terrorism.

In other words, to justify the application of the harsh twelve (12) level enhancement provided for in U.S.S.G. §3A1.4(a) and (b), and the criminal history category of VI, does the fact that a defendant has merely pled guilty to providing material support to a foreign terrorist organization *per se* or automatically invoke the terrorism enhancement.

## PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

| | |
|---|---|
| Francisco Joseph Arcila Ramirez | Defendant/Appellant |
| United States of America | Plaintiff/Appellee |

## RELATED CASES

- *United States of America v. Francisco Joseph Arcila Ramirez*, Case No. 19-CR-20036-JEM-1, United States District Court for the Southern District of Florida. Judgment entered January 29, 2020 (vacated). [Appx. E]

- *United States of America v. Francisco Joseph Arcila Ramirez*, Case No. 20-10564, United States Court of Appeals for the Eleventh Circuit. Judgment entered November 1, 2021, *United States of America v. Francisco Joseph Arcila Ramirez*, 16 F.4th 844 (11th Cir. 2021), (District Court Judgment vacated and remanded) [Appx. D]

- *United States of America v. Francisco Joseph Arcila Ramirez*, Case No. 19-CR-20036-JEM-1, United States District Court for the Southern District of Florida. Judgment entered April 7, 2022 (after remand). [Appx. B]

- *United States of America v. Francisco Joseph Arcila Ramirez*, Case No. 22-11190, United States Court of Appeals for the Eleventh Circuit, Judgment entered May 16, 2023. *United States v. Francisco Joseph Arcila Ramirez,* Case No. 22-11190, 2023 WL 3477811 (May 16, 2023) (District Court Judgment affirmed) [Appx. A]

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Francisco Joseph Arcila Ramirez 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 22-11190 in that court on May 16, 2023, *United States v. Francisco Joseph Arcila Ramirez*, 2023 WL 3477811 (11th Cir. 2016), *reh'g and reh'g en banc denied* on February 23, 2024, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

## OPINIONS 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 of Florida, is contained in the Appendix at "A." (This opinion was not published, however can be found at 2023 WL 3477811 (May 16, 2023).

A copy of the Order denying rehearing and rehearing *en banc* is contained in the Appendix at "C."

A copy of the prior decision of the United States Court of Appeals for the Eleventh Circuit which vacated and remanded the original Judgment entered in the United States District Court for the Southern District of Florida is contained in the Appendix at "D." (This opinion was published and can be found at *United States of*

*America v. Francisco Joseph Arcila Ramirez*, 16 F.4th 844 (11th Cir. 2021), (November 1, 2021).

## 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 denying the timely-filed petition for rehearing and rehearing *en banc* was entered on February 23, 2024. 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 appellate jurisdiction of all final decisions of United States District Courts.

## STATUTORY AND RULES PROVISIONS INVOLVED

18 U.S.C.A. § 2332b(g)(5)
§ 2332b. Acts of terrorism transcending national boundaries

**(g) Definitions.**--As used in this section—

*******************************************

**(5)** the term "Federal crime of terrorism" means an offense that--

**(A)** is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
**(B)** is a violation of—

*******************************************

… 2339B (relating to providing material support to terrorist organizations) ……..;

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18 U.S.C.A. §2339B(a)(1)

Providing Material Support to a Designated Foreign Terrorist Organization

**(a) Prohibited activities.—**

**(1) Unlawful conduct.**--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

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U.S.S.G., § 3A1.4, 18 U.S.C.A.

§ 3A1.4. Terrorism

**(a)** If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

**(b)** In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

*Application Notes:*

1. "Federal Crime of Terrorism" Defined.--For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).

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## STATEMENT OF THE CASE

**A. District Court Proceedings.**

The Government filed a Superseding Indictment in the District Court, which in pertinent part charged Arcila-Ramirez with Providing Material Support to a Designated Foreign Terrorist Organization, in violation of Title 18, United States Code, Section 2339B(a)(1). [Pet. Appx. F]

Subsequently, Arcila-Ramirez pled guilty to the charge of providing material support to a foreign terrorist organization that is, the National Liberation Army ("ELN"), in violation of 18 U.S.C. §2339B(a)(1).

Arcila-Ramirez' guilty plea was based on a Factual Proffer that set forth the relevant facts as follows:

Beginning no later than August 16, 2018, and continuing until on or about January 11, 2019, in Miami-Dade County, in the Southern of Florida, and elsewhere, the defendant knowingly provided material support to a foreign terrorist organization, that is, the National Liberation Army (the "ELN"), knowing that the organization has engaged in, or engages in, terrorist activity or terrorism.

More specifically, on August 16, 2018, the defendant instructed two persons, J.S. and G.O., to purchase six (6) firearms in Miami-Dade County, in the Southern District of Florida, on the defendant's behalf. These firearms included the following: four (4) Draco 7.62mm caliber AK-style pistols and two (2) Zastava M92 7.62mm AK-style pistols. These firearms were then concealed in Husky air-compressors purchased by the defendant at a Home Depot in Miami-Dade County and shipped to

Barranquilla, Colombia. This shipment also contained approximately one hundred (100) AK-47 ammunition magazines that were also concealed inside the air-compressors.

On August 31, 2018, the defendant took a flight from Miami, Florida to Barranquilla, Colombia to broker the sale of the aforementioned six (6) firearms and AK-47 magazines.

On September 5, 2018, the defendant attended a meeting at a restaurant in Santa Marta, Colombia, where he met with Conspirator-1, a weapons broker, and a female accomplice to discuss the sale of the six (6) firearms to Conspirator-1. At that time, the defendant knew Conspirator-1 was a weapons broker for the ELN and other criminal and paramilitary groups. In addition to agreeing to the sale of the six (6) firearms to Conspirator-1 for the ELN, the defendant and Conspirator-1 further discussed the defendant selling other items, to include firearm magazines and firearm components to Conspirator-1 in the coming months. At the conclusion of this meeting, Conspirator-1 provided approximately sixty (60) million Colombian pesos to purchase the firearms.

Between September 7, 2018 and September 11, 2018, the six (6) firearms were extracted from the Husky air-compressors at a hidden location in Barranquilla, Colombia and loaded onto a truck, where they were then transferred to a farmhouse in the jungles of Cucuta, Colombia near the Venezuelan border. The area where the six (6) firearms were delivered is an area that is under the control and operational authority of the ELN.

On September 11, 2018, the defendant departed Barranquilla, Colombia for Miami, Florida, where he declared $26,567.00 USD during his entry into Miami International Airport, falsely claiming the currency was related to the "sale of cars" in Colombia, when, in fact, most of the money in his possession was instead related to the aforementioned sale of firearms to Conspirator-1 and the ELN.

Prior to the sentencing hearing, the United States Probation Office filed its Presentence Investigation Report, therein including the terrorism enhancement provided for in U.S.S.G. §3A1.4(a) and (b), to wit: a twelve (12) level increase in the guideline calculation and a criminal history category of VI.

The sentencing hearing was held on January 28, 2020 before the United States District Court Judge Jose E. Martinez, at which time the District Court applied the terrorism enhancement and Arcila-Ramirez was sentenced to two hundred forty (240) months imprisonment and three (3) years supervised release. The Judgment was entered on January 29, 2020. [Pet. Appx. E]

Arcila-Ramirez appealed his sentence to the Eleventh Circuit Court of Appeals (11th Cir. Case No. 20-10564).

On November 1, 2021, the Eleventh Circuit Court of Appeals vacated Arcila-Ramirez' sentence and remanded the case for resentencing and fact finding inasmuch as the trial judge had failed to make the required "calculated" or "specific intent" findings, and therefore had erred in applying the U.S.S.G. §3A1.4's terrorism enhancement. (*United States v. Francisco Joseph Arcila Ramirez,* 16 F.4th 844 (11th Cir. 2021). [Pet. Appx. D]

A resentencing hearing was held in the District Court on April 6, 2022, at which time the court again applied the terrorism enhancement and again sentenced Arcila-Ramirez to two hundred forty (240) months' imprisonment and three (3) years supervised release. [Pet. Appx. B]

Arcila-Ramirez filed his timely Notice of Appeal to the Eleventh Circuit Court of Appeals (11th Cir. Case No. 22-11190).

**B. Court of Appeals Proceedings**

On May 16, 2023, the United States Court of Appeals for the Eleventh Circuit entered its *per curiam* opinion affirming the District Court Judgment entered after the resentencing. (*United States v. Francisco Joseph Arcila Ramirez,* 2023 WL 3477811 (11th Cir. 2023). [Pet. Appx. A]

On June 26, 2023, Arcila-Ramirez filed his Petition for Rehearing *En Banc*.[1]

On February 23, 2024, the Court of Appeals denied Arcila-Ramirez' Petition for Rehearing *En Banc,* therein treating his petition as a petition for rehearing as well. [Pet. Appx. C]

This timely Petition for Writ of Certiorari follows.

[1] The Eleventh Circuit Court of Appeals had granted a motion for extension of time to file the Petition for Rehearing *En Banc* up to and including June 27, 2023.

## REASONS FOR GRANTING THE WRIT

**In every case brought by the United States of America when someone has been convicted or has pled guilty to the offense of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1), the question arises as to whether or not to apply the very harsh terrorism enhancements provided for in U.S.S.G. §3A1.4(a) and (b). Therefore, lower courts are in need of guidance as to what findings and prerequisites must be present before the terrorism enhancements provided for in U.S.S.G. §3A1.4(a) and (b) are applied.**

It is submitted that there are compelling reasons for this Honorable Court to exercise its discretionary authority, since the issue raised herein has application to all individuals who have been convicted or have pled guilty to the offense of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1). In other words, the issue has great importance beyond the particular facts and parties involved.

Additionally, lower courts are in need of guidance as to what findings and prerequisites must be present before the terrorism enhancements provided for in U.S.S.G. §3A1.4(a) and (b) are applied, and this case is a good vehicle through which to provide such guidance.

In this case, Arcila-Ramirez had neither the specific intent to commit a crime that was calculated to influence, affect, or retaliate against a government, nor did he have the intent to promote another‘s federal crime of terrorism. He was only interested in selling firearms to make money, even perhaps knowing that some of the firearms may end up in the hands of a Colombian terrorist organization. Further, there was no evidence that Arcila-Ramirez intended to promote any plan by the ELN (terrorist organization) to commit a politically-motivated crime of terrorism. This is underscored in-part by the fact that he never had any direct contact with the ELN and only dealt with a Colombian firearms broker who had contacts within the ELN.

The key term, "a federal crime of terrorism," is defined to consist of two elements: (1) the commission of one of a list of specified felonies, which includes the material support offense at issue in this case, and (2) a specific intent requirement, namely, that the underlying felony was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. §2332b(g)(5).

In this case it is quite clear that Arcila-Ramirez, when he committed the offense of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1), did not have the specific intent to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. Therefore, by definition, his offense was not a felony that involved, or was intended to promote, "a federal crime of terrorism," and the twelve (12) level enhancement should not have been applied in this instance, nor should he have received a category VI criminal history designation.

**I. Distinguishing the terrorism enhancement from the elements of the underlying crime.**

The terrorism enhancement, U.S.S.G. § 3A1.4, imposes a significantly harsher punishment on those who commit certain types of crimes of terrorism. The enhancement increases a defendant's offense level to a minimum of 32 and designates a defendant's criminal history category as Category VI, regardless of whether the defendant has previously committed a crime. U.S.S.G. § 3A1.4. To trigger this enhancement, the government must prove elements distinct from those of the crime of conviction. Specifically, that the offense that was committed "involved, or was intended to promote, a federal crime of terrorism." *Id.*

The term "federal crime of terrorism" is defined as "an offense that is ... calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," 18 U.S.C. § 2332b(g)(5)(A), and that "is a violation of" certain enumerated statutes, 18 U.S.C. § 2332b(g)(5)(B). Both parts of § 2332b(g)(5) must be satisfied for there to be a "federal crime of terrorism" and to make the enhancement apply. *See United States v. Tankersley*, 537 F.3d 1100, 1113 (9th Cir. 2008); *United States v. Parr*, 545 F.3d 491, 504 (7th Cir. 2008).

The material support statute, by contrast, requires proof that a defendant attempted to, conspired to, or did provide "material support or resources to a foreign terrorist organization," knowing "that the organization is a designated terrorist organization" or "that the organization has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). It is possible for a defendant to provide material support to a terrorist group in violation of 18 U.S.C. § 2339B(a)(1) without intending that the support or resources would influence, affect, or retaliate against government conduct to satisfy the first prong of the definition of federal crime of terrorism. *See, e.g.*, *United States v. Chandia* (*Chandia I*), 514 F.3d 365, 376 (4th Cir. 2008).

The enhancement, therefore, does not automatically apply to all material support offenses. Congress created this distinction in order to punish certain dangerous terrorists more severely than persons who committed non-violent crimes. *See Tankersley*, 537 F.3d at 1113. Thus, to warrant a substantial increase in punishment pursuant to the terrorism enhancement, a defendant must have the requisite intent necessary to satisfy the definition of "federal crime of terrorism," beyond the intent required to establish a violation of the material support statute.

**II. The terrorism enhancement requires examining the specific intent with respect to the offense of conviction.**

Various circuits that have addressed the issue, have held that §2332b(g)(5)(A) imposes a specific intent requirement. *See, e.g.*, *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. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009) ("[C]omission of a federal crime of terrorism ... incorporates a specific intent requirement.") (quoting *Chandia I*, 514 F.3d at 376 ). Arcila-Ramirez agrees with this interpretation of § 2332b(g)(5) and the reasoning of the various circuits in adopting it. As the Second Circuit explained, § 2332b(g)(5) "does not require proof of a defendant's particular motive," which is "concerned with the rationale for an actor's particular conduct." *United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010). Rather, "'[c]alculation' is concerned with the object that the actor seeks to achieve through planning or contrivance." *Id.* The appropriate focus thus is not "on the defendant, but on his 'offense,' asking whether it was calculated, *i.e.*, planned—for whatever reason or motive—to achieve the stated object." *Id.* In other words, 2332b(g)(5) "is better understood as imposing a requirement 'that the *underlying felony* [be] calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.' " *Id.* (quoting *Stewart*, 590 F.3d at 138).

Stated another way, it is required that the *underlying offense*—the offense that violates one of the enumerated crimes in the second prong—be calculated to influence or affect government conduct. *See* 18 U.S.C. § 2332b(g)(5)(A). Thus, in determining whether the terrorism enhancement applies here, the court must analyze whether Arcila-Ramirez provided material support with the specific intent of influencing or affecting government conduct. *See* 18 U.S.C. § 2332b(g)(5)(A).

Now we shall consider whether the evidence supported a finding that Arcila-Ramirez' conduct met the definition of a federal crime of terrorism required for §3A1.4 to apply.

**III. The terrorism enhancement does not apply in this case.**

It is undisputed that Arcila-Ramirez' conviction satisfies the second prong of the definition of federal crime of terrorism. The crime of conviction here—providing material support in violation of 18 U.S.C. § 2339B(a)(1)—is one of the enumerated statutes in 18 U.S.C. § 2332b(g)(5)(B).

The remaining question is whether Arcila-Ramirez' conduct satisfies the first prong: whether his providing material support to a terrorist organization by selling firearms to a Colombian firearms broker who had among his customers a Colombian terrorist organization was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5)(A). It was the Government's burden to prove that element by a preponderance of the evidence.

It is respectfully submitted that the District Court erred in applying the terrorism enhancement because it centered its analysis on the ELN (the terrorist organization), not on Arcila-Ramirez' conduct or specific intent in committing the charged offense. It is Arcila-Ramirez' position that it was required that the District Court consider the latter, whereas the offense itself implicates the former. Specifically, Arcila-Ramirez argues in-part that because the District Court failed to determine whether he knew how the firearms sold to the Colombian firearms broker were to be used, it could not find that he *specifically intended* that the firearms would be used to coerce or intimidate a government.

**A. Calculated to influence or affect the conduct of government by intimidation or coercion.**

Arcila-Ramirez pled guilty to providing material support to a terrorist organization. His offense conduct involved in-part the selling of firearms to a Colombian firearms broker who had among his customers a Colombian terrorist organization (the ELN). The District Court concluded that this conduct was calculated to influence or affect government conduct by intimidation or coercion because Arcila-Ramirez had "expressed his motives or his knowledge in the factual proffer in support of the plea agreement, and that the circumstantial evidence in this case is far beyond a preponderance of the evidence."

The District Court's logic holds true in the broadest sense—any support given to a terrorist organization ultimately inures to the benefit of its terrorist purposes. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 29, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). However, it is submitted that this reasoning misses the mark in the context of the terrorism enhancement because it fails to properly differentiate between the intent required to sustain a material support conviction pursuant to 18 U.S.C. § 2339B(a)(1) and the intent required to trigger the terrorism enhancement pursuant to U.S.S.G. § 3A1.4.

As explained above, the material support statute requires only that the defendant have "knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts." *Id.* at 12, 130 S.Ct. 2705. U.S.S.G. Section 3A1.4, in contrast, requires the defendant's specific intent that the offense "influence or affect the conduct of government by intimidation or coercion." 18 U.S.C. § 2332b(g)(5)(A).

In cases involving violent acts of terrorism, specific intent is relatively easy to identify, either from the statements or admissions of the defendant or the nature of the offense. But, where the conduct underlying the conviction does not involve violent terrorist acts, as is true in many material support cases, those "acts cannot, standing alone, support application of the terrorism enhancement." *Chandia I*, 514 F.3d at 376. In such cases, evidence beyond the facts underlying the offense conduct must reflect that the defendant had the enhancement's requisite intent.

The Second Circuit's decision in *United States v. Stewart* is instructive. 590 F.3d at 93. In *Stewart*, defendant Mohammed Yousry served as a translator between a convicted terrorist and his legal team. Some of these translated messages concerned the terrorist's support for the termination of a cease-fire and a return to violence between al-Gama'a, a terrorist organization in Egypt, and the Egyptian government. *Id.* at 103–07. Yousry was ultimately convicted of providing and concealing material support to that conspiracy in violation of 18 U.S.C. § 2339A. *Id.* at 108. The district court, however, did not apply the terrorism enhancement to Yousry's conviction, finding that "he did not act with the requisite state of mind." *Id.* at 136. On appeal, the Second Circuit agreed. *Id.* at 136–37. The court held that, despite Yousry's proximity to the messaging scheme and the scheme's role in benefiting al-Gama'a, the government failed to show that Yousry sought to influence or affect the conduct of government. *Id.* at 138.

Similarly, Arcila-Ramirez' actions—even though selling of firearms to a Colombian firearms broker who had among his customers a Colombian terrorist organization may ultimately inure to the benefit of the ELN and its terrorist purpose in the long run—such is not accompanied by the necessary mental state to trigger the enhancement. In this instance, the District Court abused its discretion in concluding otherwise.

The District Court's conclusion rests on the erroneous assumption that when Arcila-Ramirez sold firearms to the Colombian firearms broker in this instance, he necessarily understood and intended that the sale of those firearms was to bolster support for ELN terrorist attacks on government. Unlike conspiring to bomb a federal facility, planning to blow up electrical sites, attempting to bomb a bridge, or firebombing a courthouse—all of which have triggered the enhancement— selling of firearms to a Colombian firearms broker who had among his customers a Colombian terrorist organization does not inherently or unequivocally constitute conduct motivated to "affect or influence" a "government by intimidation or coercion." 18 U.S.C. § 2332b(g)(5)(A). In other words, one can sell firearms without knowing how those firearms will be used; whereas it is difficult to imagine someone bombing a government building without knowing that bombing would influence or affect government conduct.

The District Court's "cause and effect" reasoning is insufficient because the cause—selling firearms—and the effect—influencing government conduct by intimidation or coercion—are much too attenuated to warrant the automatic triggering of the enhancement. Instead, to properly apply the enhancement, the District Court had to determine that Arcila-Ramirez knew the firearms would ultimately be used to intimidate or coerce government conduct and that he had that specific intent. *See Awan*, 607 F.3d at 317–18; *Chandia I*, 514 F.3d at 376.

In the case at bar, the District Court did not make sufficient factual findings concerning Arcila-Ramirez' knowledge of how the firearms that he sold were to be ultimately used, nor were there any facts upon which to base a conclusion that he had the specific intent to intimidate or coerce government conduct.

**B. Calculated to retaliate against government conduct.**

Further, Arcila-Ramirez disputes any conclusion that in selling of firearms to a Colombian firearms broker who had among his customers a Colombian terrorist organization, he had the specific intent to *retaliate* against government conduct.

Cases applying the retaliation prong rely on evidence that the defendant intended to respond to specific government action. For example, in *United States v.*

*Van Haften*, 881 F.3d 543 (7th Cir. 2018), the defendant, a registered sex offender, was apprehended while travelling to Turkey to try to join ISIS. His Facebook posts and notes reflected his belief that the United States government had ruined his life by placing him on the sex offender registry. *Id.* at 544–45. The district court concluded that he "sought to join ISIS, at least in part, because he wanted to retaliate against the government for its treatment of Muslims in general and specifically for its treatment of [the defendant] as a designated sex offender." *Id.* at 544. *See also United States v. Salim*, 549 F.3d 67, 76–77 (2d Cir. 2008) (finding the retaliation prong satisfied where the defendant's attack "was in retaliation for judicial conduct denying [the d]efendant's applications or substitution of counsel"); *United States v. Abu Khatallah*, 314 F. Supp. 3d 179, 198 (D.D.C. 2018) (finding that the defendant "joined the attack [on the U.S. Special Mission in Benghazi] in order to retaliate against the U.S. government for its presence in Libya.").

While providing support to terrorist groups inevitably strengthens their ability to retaliate against government conduct, it is not enough that such support will generally "lead[ ] to" more acts of terrorism. That reasoning does not distinguish between conduct that satisfies the material support statute and the specific intent required to establish calculated retaliation for purposes of the terrorism enhancement. One should look to whether the offense itself is "calculated ... to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5)(A). In this case there was no evidence whatsoever that Arcila-Ramirez sought revenge on any particular government or for any specific government conduct.

Although it is true that Arcila-Ramirz entered his plea of guilty to the charge of providing material support to a foreign terrorist organization in violation of 18 U.S.C. §2339B(a)(1), it is submitted that this fact does not *per se* or automatically invoke the extraordinarily harsh "Terrorism Enhancement," that provides for a twelve (12) level guideline increase and a criminal history category of VI (*U.S.S.G. §3A1.4(a) and (b)*).

In *United States v. Arcila Ramirez*, 16 F.4th 844 (11th Cir. 2021), the first time this case was before the Eleventh Circuit, that court analyzed the issue at hand, and concluded that the trial court had erred in imposing the "Terrorism Enhancement," when it failed to make the required "findings" as to whether Arcila-Ramirez' actions were calculated (i.e., intended) to influence, affect, coerce, intimidate, or retaliate against a government, and erred when the court failed to make any findings as to whether Arcila-Ramirez had the specific intent to do so.

U.S.S.G. §3A1.4(a) provides that the terrorism enhancement applies if the defendant's "offense is a felony that involved, or was intended to promote, *a federal crime of terrorism*." (Emphasis supplied.) U.S.S.G. § 3A1.4(a). The structure of §3A1.4 establishes two separate bases for applying the enhancement: (1) when the defendant's offense "involved" *a federal terrorism crime*; or alternatively, (2) when his offense was "intended to promote" *a federal terrorism crime*. (Emphasis supplied.)

In this case, the key terms are "involved" and "a federal crime of terrorism."

In examining the "involved" question the Eleventh Circuit noted that it had already concluded that the term "involved" in this guideline "means to 'include.' "

*United States v. Mandhai*, 375 F.3d 1243, 1247-48 (11th Cir. 2004) (citing *United States v. Graham*, 275 F.3d 490, 516 (6th Cir. 2001)); *see also United States v. Arnaout*, 431 F.3d 994, 1001 (7th Cir. 2005) ("The ordinary and plain meaning of 'involved' means 'to include.' ") (citing *Random House Webster's College Dictionary* 1042 (2d ed. 1997)). As the Fifth Circuit explained, an offense "involved" a federal crime of terrorism if the crime of conviction itself is a federal crime of terrorism or if the relevant conduct includes such a crime. *United States v. Fidse*, 862 F.3d 516, 522 (5th Cir. 2017).

Similarly, the Second Circuit concluded that "a defendant's offense 'involves' a federal crime of terrorism when his offense includes such a crime, *i.e.*, the defendant committed, attempted, or conspired to commit a federal crime of terrorism ... or his relevant conduct includes such a crime." *United States v. Awan*, 607 F.3d 306, 313-14 (2d Cir. 2010); *see also United States v. Wright*, 747 F.3d 399, 407 (6th Cir. 2014) (stating "the terrorism enhancement can be applied to inchoate offenses, such as attempt and conspiracy"); *Graham*, 275 F.3d at 516 (same).

The Eleventh Circuit noted that as to the other key term, a '*federal crime of terrorism,*' the application notes to §3A1.4 state that "[f]or purposes of this guideline, '*federal crime of terrorism*' has the meaning given that term in 18 U.S.C. § 2332b(g)(5)." U.S.S.G. § 3A1.4 cmt. n.1.

Title 18 U.S.C. § 2332b(g)(5) provides that a "[f]ederal crime of terrorism" means "an offense that":

(1) *"is calculated to influence or affect the conduct of government by intimidation or*

*coercion, or to retaliate against government conduct*," (Emphasis supplied.) *and* (2) "is a violation of" one of the criminal statutes listed in § 2332b(g)(5)(B). 18 U.S.C. § 2332b(g)(5)(A)-(B). This definition is written in the conjunctive, and both prongs must be satisfied. *Fidse*, 862 F.3d at 524 & n.6; *Graham*, 275 F.3d at 514.

Since Arcila Ramirez's statute of conviction, 18 U.S.C. § 2339B, is one of the listed statutes and therefore satisfied the "involved" prong, the next question is whether Arcila Ramirez's offense or relevant conduct was *calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct*.

The Eleventh Circuit examined its prior precedent, noting that this circuit has affirmed U.S.S.G. § 3A1.4(a) terrorism enhancements in two previous decisions. *See United States v. Mandhai*, 375 F.3d 1243 (11th Cir. 2004); *United States v. Jayyousi*, 657 F.3d 1085 (11th Cir. 2011).

The *Mandhai* Court also discussed the first prong of the definition of a "federal crime of terrorism," which is an offense "calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct." *Id.* In that case the court concluded there was substantial evidence supporting the district court's fact finding that the object of Mandhai's crime—destroying buildings by fire or explosives—was to influence or affect government conduct, or to retaliate against past government action. *Id.* The Court emphasized that "the terrorism enhancement does not hinge upon a defendant's ability to carry out specific terrorist crimes or the degree of separation from their actual implementation." *Id.* Rather, the terrorism enhancement applied "even though the record reflects that Mandhai lacked both the means and the ability to carry out" the planned bombing without help "that was not present." *Id.*

In *Jayyousi*, the defendants were convicted of: (1) conspiring in the United States to murder, kidnap, or maim persons overseas, in violation of 18 U.S.C. §956(a)(1); (2) conspiring to provide material support, knowing or intending that they would be used in carrying out a conspiracy to murder, kidnap, or maim overseas, in violation of 18 U.S.C. §§ 371 and 2339A; and (3) a substantive 18 U.S.C. § 2339A offense. 657 F.3d at 1091-92. The trial evidence showed that the defendants, while ostensibly engaged in charitable fundraising in a Muslim community in Florida, were, in fact, operating a "support cell" that sent funds, recruits, and equipment overseas to terrorist groups seeking to create Islamic states through violent jihad against secular governments. *Id.* at 1092-1101.

On appeal, the two defendants challenged the district court's application of U.S.S.G. § 3A1.4's terrorism enhancement. *Id.* at 1114. The district court examined both prongs of § 2332b(g)(5)'s definition of a "federal crime of terrorism." *Id.* at 1114-15. It determined that the defendants' crimes were listed in § 2332b(g)(5)(B). *Id.* at 1115. The district court then explicitly found that "the defendants' activities were calculated to influence, affect, or retaliate against government conduct." *Id.* at 1114. As to this fact finding, ample trial evidence established that the defendants "wished to impose Sharia throughout the Middle East and remove government in the process." *Id.* at 1115. The district court reasoned (1) that the indictment charged that the object of the conspiracy was to advance violent jihad and to commit acts of murder and maiming for the purpose of opposing existing governments, and (2) thus there was (within the jury's verdict) "a finding that the defendants' actions were intended to bring about the downfall of governments that were not Islamic or not Islamic enough." *Id.* at 1114-15.

On appeal, the defendants argued that "their benign motive" was to "assist[ ] the oppressed Muslims" in other countries with humanitarian aid and therefore their conduct "was not calculated to influence or affect the conduct of any [foreign] government." *Id.* at 1114.

The Eleventh Circuit affirmed the terrorism enhancement. *Id.* at 1115. As to §2332b(g)(5)(A)'s requirement that the defendants' offenses be "calculated" to influence or affect government conduct, "[t]he record demonstrate[d] that the defendants' support activities were intended to displace 'infidel' governments that opposed radical Islamist goals." *Id.* The trial evidence included the defendants' statements "about their desire to impose Sharia, toppling existing governments in the process." *Id.* The Eleventh Circuit emphasized that "what the [defendants'] activity was calculated to accomplish" was relevant, not "the defendants' claimed motivation behind it ...." *Id.* The defendants' personal motive "is simply not relevant." *Id.* (quoting *Awan*, 607 F.3d at 317).

In examining whether Arcila Ramirez's 18 U.S.C. § 2339B material support offense is a "federal crime of terrorism" as defined by 18 U.S.C. § 2332b(g)(5) and was "calculated" to influence, affect, intimidate, or retaliate against government conduct, the Eleventh Circuit went on to explain the meaning of the term "calculated" in the statutory sense, citing accepted dictionary definitions. *See* 18 U.S.C. § 2332b(g)(5)(A). The ordinary and plain meaning of "calculated" is planned to accomplish a purpose or intended. *See Calculated, Merriam-Webster Online Dictionary*, https://merriam-webster.com/dictionary/calculated (last visited Oct. 21, 2021) ("Planned or contrived to accomplish a purpose; Deliberate, intended."); *Calculated, Black's Law Dictionary* (11th ed. 2019) ("Planned so as to achieve a specific purpose; deliberate."); *Calculate, Oxford English Dictionary* (2d ed. 1989) ("To plan or devise with forethought; to think out; to frame."). "[C]alculated" means "planned—for whatever reason or motive—to achieve the stated object." *United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010). "'Calculation' is concerned with the object that the [defendant] seeks to achieve through planning or contrivance." *Id.* (citing *Calculated*, *Webster's Third New International Dictionary Unabridged* 315 (1986)).

The Eleventh Circuit then observed that other circuits have read the phrase "calculated to" as creating something akin to, or closely resembling, "a specific intent" requirement. *See United States v. Alhaggagi*, 978 F.3d 693, 699-700 (9th Cir. 2020); *United States v. Ansberry*, 976 F.3d 1108, 1127-28 (10th Cir. 2020); *United States v. Mohamed*, 757 F.3d 757, 759-60 (8th Cir. 2014); *United States v. Wright*, 747 F.3d 399, 408-09 (6th Cir. 2014); *United States v. Hassan*, 742 F.3d 104, 148 (4th Cir. 2014); *Awan*, 607 F.3d at 317.

The Eleventh Circuit found the Second Circuit's *Awan* decision regarding the term "calculated" to be instructive. Defendant Awan was convicted of, *inter alia*, conspiring to provide, and providing, material support (funds) to the KCF, a Sikh terrorist organization in India, in violation of 18 U.S.C. § 2339A. *Awan*, 607 F.3d at 309-10. The district court found that there was insufficient evidence that the defendant's conduct was "calculated" to influence or affect the conduct of government or to retaliate against government conduct under § 2332b(g)(5)(A). *Id.* at 312, 316. The district court had reasoned that it would be "speculative to conclude that the defendant ... was motivated by a desire to influence the policies of the Indian government or retaliate for some unspecified wrong." *Id.* at 316. Instead, the district court made a fact finding that the defendant's motive in providing the funds to the KCF was "the prestige or potential influence he obtained by associating with [the KCF's leader] and with the Pakistani intelligence services." *Id.*

In vacating the denial of the terrorism enhancement, the Second Circuit held, *inter alia*, that § 2332b(g)(5) does *not* require the government to prove the defendant's motive for committing the crime of conviction. *Id.* at 313. The Second Circuit explained that the word " '[c]alculation' is concerned with the object the actor seeks to achieve through planning and contrivance," rather than with the actor's particular motive. *Id.* at 317. The proper focus of the "calculation element" of § 2332b(g)(5)(A) is not "on the defendant but on his 'offense,' asking whether it was 'calculated,' i.e., planned—for whatever reason or motive—to achieve the stated object." *Id.* The Second Circuit explained that "a person may intend and may commit an offense that is so calculated even if influencing or retaliating against government is not his personal motivation." *Id.*

As to Awan's offense, the Second Circuit observed that "there [was] little doubt that Awan (1) knew that the objective of [the KCF's leader] and the KCF was to influence the Indian government through violence, and (2) *knew that the money he provided to the KCF would be used toward that end*." (Emphasis supplied.) *Id.* The Second Circuit acknowledged that Awan "may have been motivated, as the district court found, by a desire for ... prestige and potential influence." *Id.* It concluded, however, that "the government could still prove that Awan's offenses themselves were calculated to influence ... the conduct of government ... even if [Awan] lacked a specific political motive for committing them." *Id.* (quotation marks omitted).

Without deciding the issue, the Second Circuit indicated that "if the evidence showed that Awan engaged in criminal conduct with knowledge that confederates solicited his actions to effectuate politically motivated bombings in India, or homicidal attacks on the country's security forces or its political leaders, such proof could demonstrate that Awan's crimes were calculated to influence the conduct of government even if he was not personally motivated by that object." *Id.* at 317-18. The Second Circuit remanded for the district court to reconsider whether the evidence supported the terrorism enhancement. *Id.* at 318. With that background, the Eleventh Circuit then turned to Arcila Ramirez' case.

The Eleventh Circuit specifically stated that it agreed with *Awan* and their other sister circuits, that *"calculated" imposes an intent requirement. For U.S.S.G. § 3A1.4 to apply, the Government must satisfy the "calculated" prong of §2332b(g)(5)(A).* To do that, *the Government must show that the Defendant's offense* *was planned to influence, affect, or retaliate against government conduct, even if that was not the defendant's personal motive.* (Emphasis supplied.)

The Eleventh Circuit then observed what had happened, or did not happen, in Arcila Ramirez' first sentencing hearing with regard to the imposition of the "Terrorism Enhancement."

Specifically, the court noted that the district court made no fact findings as to the § 3A1.4 enhancement. Rather, the district court appeared to believe the mere fact that Arcila Ramirez had pled guilty to knowingly providing material support to a known foreign terrorist organization *per se* triggered the terrorism enhancement.

The Eleventh Circuit repeated that Arcila Ramirez's § 2339B(a)(1) offense—providing material support to a foreign terrorist organization—requires that he know that the ELN is a designated foreign terrorist organization and that the ELN has engaged in or engages in terrorism or terrorist activity. *See* 18 U.S.C. § 2339B(a)(1). *But §2339B(a)(1) does not contain the additional requirement found in §2332b(g)(5)(A), that the defendant's offense be "calculated" (i.e., planned or intended) to influence, affect, or retaliate against government conduct. Rather, it is only the definition of a "federal crime of terrorism" in § 2332b(g)(5)(A) that requires the defendant's offense be so "calculated."* (Emphasis supplied.)

To assume an offense listed in § 2332b(g)(5)(B) is *per se* a "federal crime of terrorism" without a separate finding as to "calculated" would render the "calculated" requirement in § 2332b(g)(5)(A) superfluous. *Fidse*, 862 F.3d at 524; *United States v. Chandia*, 514 F.3d 365, 376 (4th Cir. 2008) (vacating and remanding because the district court "did not make any factual findings related to the intent [i.e., calculation] element.").

The Eleventh Circuit noted that whether a defendant's offense is calculated (i.e., intended) to influence, affect, or retaliate against government conduct is a highly fact specific inquiry that requires examining the record as a whole. Sometimes, as in *Jayyousi* and *Mandhai*, the record will contain statements by the defendant expressing an intent to influence, affect, or retaliate against government conduct. *See Jayyousi*, 657 F.3d at 1115; *Mandhai*, 375 F.3d at 1246. However, because a defendant often will not admit his full knowledge or intentions, the district court may find the requisite calculation or intent existed based on circumstantial evidence and reasonable inferences drawn from the facts. As the Second Circuit emphasized, a defendant's knowledge that a terrorist organization solicited his actions to attack the government could demonstrate that a defendant's crimes were calculated to influence government conduct, even if the defendant was not personally motivated by the organization's object. *See Awan*, 607 F.3d at 317-18. Personal motive is not relevant. *Jayyousi*, 657 F.3d at 1115; *Awan*, 607 F.3d at 317.

In remanding this case for resentencing and fact finding, the Eleventh Circuit stated that with no "calculated" or specific intent finding at all, the district court erred in applying § 3A1.4's terrorism enhancement.

When this case was before the district court for a resentencing hearing, the trial court again failed to adequately make the requisite findings pertaining to the term "calculated," nor make findings as to the Defendant's "specific intent," nor did it base its so-called findings upon any facts in the record.

Rather, at Page 44, Lines 19-24, of the resentencing transcript the court stated: [Resentencing Transcript - Pet. Appendix G.]

> "I think there was ample evidence at the prior hearing that would have sustained a finding, but I did not make a finding. And I, therefore, make a finding that *the defendant did, in fact, know that this was a terrorist organization that was intended to intimidate, retaliate against, and overthrow the government of Colombia*." (Emphasis supplied.)

The trial court had missed the point again. The trial court again did not make findings as to whether *the Defendant's actions* were calculated (i.e., intended) to influence, affect, or retaliate against government, and whether *the Defendant* had the specific intent to influence, affect, or retaliate against government.

However and as noted above, at page 53, beginning on line 11, to page 54, line 15, of the resentencing transcript, the Government mentioned that the defense would be taking an appeal, and knowing that the "findings" of the court were wholly insufficient, then proceeded to spoon-feed the language the Government wanted to hear from the trial court, even though the court had already made its "findings," and the following ensued: [Resentencing Transcript - Pet. Appendix G.]

THE COURT: Thank you, sir. Anything further from either side?

MR. HUMMEL: Your Honor, I don't want to belabor things here.

THE COURT: Then don't.

MR. HUMMEL: I just want to make sure of one thing, because I know that Ms. Davide will be taking an appeal on this.

THE COURT: Of course.

> MR. HUMMEL: I just want to make sure that I heard that the Court was specifically making a finding that the second prong of this was met by the government's evidence in this case; that, in fact, his offense conduct was calculated to influence, affect, or retaliate against government conduct that is of the Colombian government.
>
> THE COURT: That is correct. I am making a finding that in addition to the findings that I made earlier, that the offense was calculated to influence, affect, or retaliate against the government conduct, that government being the government of Colombia. And I think it's important to note that it was the underlying offense that was calculated to influence, affect, or retaliate against government conduct and not necessarily the defendant's motives; but that he has expressed his motives or his knowledge in the factual proffer in support of the plea agreement, and that the circumstantial evidence in this case is far beyond a preponderance of the evidence. Yes, ma'am.
>
> MS. DAVIDE: No. No, sir. That's it.
>
> THE COURT: Anything further from either side?
>
> MS. DAVIDE: No, sir. Thank you.
>
> MR. HUMMEL: No, Your Honor.

It is very clear that the trial judge merely parroted back what was fed to him by the Government and did not apply any considered thought and judgment whatsoever. It is respectfully submitted that these cannot be considered to be "findings" of the court when they were generated in this manner. Additionally, the district court's newly found "findings" were not at all supported by any facts whatsoever. Arcila Ramirez was merely trying to make money sell the guns to the Colombian firearms broker, and very frankly, did not care who the Colombian firearms broker sold the firearms to.

Therefore, before the Government intervened to try to rehabilitate the faulty "findings" of the trial court, the very same deficiencies that existed the first time the

Eleventh Circuit considered this case remained. It is interesting to note, that even with the Government's proposed script for the trial court, there still was no finding as to the "specific intent" of the Defendant to influence, affect, or retaliate against the Colombian government.

The District Court erred in imposing the "Terrorism Enhancement," U.S.S.G. §3A1.4, where the Government failed to prove by a preponderance of the evidence that said enhancement applied, nor was there any other sufficient evidence to support the application of that "draconian" enhancement.

## CONCLUSION

It is respectfully submitted that based on the foregoing, this Honorable Court should grant its Writ of Certiorari to resolve this very significant sentencing issue that is present in every case where someone has been convicted or has pled guilty to the offense of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B(a)(1).

Respectfully submitted,

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