NO.____

In The

Supreme Court of the United States

JONATHAN GUERRA BLANCO,
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 attempting to violate that statute, 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 merely 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 or attempting to provide 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

Jonathan Guerra Blanco Defendant/Petitioner

United States of America Plaintiff/Respondent

RELATED CASES

- *United States of America v. Jonathan Guerra Blanco*, Case No. 22-10419, United States Court of Appeals for the Eleventh Circuit. Opinion entered May 23, 2024, *United States of America v. Jonathan Guerra Blanco*, 102 F.4th 1153 (11th Cir. 2024). [Appx. A]. *Per Curiam Order Denying Petition for Rehearing and Petition for Rehearing En Banc* entered August 7, 2024. [Appx. D].

- *United States of America v. Jonathan Guerra Blanco*, Case No. 20-CR-20245-RNS-1, United States District Court for the Southern District of Florida. Judgment entered January 31, 2022. [Appx. B]

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: **Page**

STATUTES AND RULES:

SENTENCING GUIDELINES:

TREATISES AND OTHER AUTHORITIES:

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Jonathan Guerra Blanco 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 22-10419 in that court on May 23, 2024, *United States of America v. Jonathan Guerra Blanco*, 102 F.4th 1153 (11th Cir. 2024), *reh'g and reh'g en banc denied* on August 7, 2024, which affirmed the judgment and sentence 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." (Opinion published at *United States of America v. Jonathan Guerra Blanco*, 102 F.4th 1153 (11th Cir. 2024)).

A copy of the *per curiam* order denying rehearing and rehearing *en banc* is contained in the Appendix at "D."

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 August 7, 2024. This petition is timely-filed pursuant to Sup. Ct. R. 13.1.

The district court had jurisdiction because petitioner was charged with violating a federal criminal law. 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)

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).

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).

STATEMENT OF THE CASE

A. District Court Proceedings.

On December 3, 2020, the Government filed its Information in the United States District Court for the Southern District of Florida, therein charging Guerra Blanco with attempting to provide material support or resources to designated foreign terrorist organizations, in violation of 18 U.S.C. §2339B(a)(1) and (2). [Pet. Appx. E]

On December 22, 2020, Guerra Blanco pled guilty to the sole count of the Information charging him with attempting to provide material support or resources to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B(a)(1) pursuant to a Plea Agreement and a Factual Proffer.

On March 10, 2021, the United States Probation Office filed the draft disclosure of the Presentence Investigation Report, therein imposing the twelve (12) level so-called "terrorism enhancement" and the criminal history category VI designation pursuant to U.S.S.G. §3A1.4(a) and (b). Guerra Blanco filed his Objections to the Presentence Investigation Report, therein objecting to the application of the "terrorism enhancement."

On October 12, 2021, the United States Probation Office filed the Final Addendum 1 disclosure of the Presentence Investigation Report, therein maintaining that the "terrorism enhancement" was properly imposed.

The sentencing hearing was held on January 28, 2022 before the Senior United States District Court Judge Robert N. Scola, Jr., at which time a sentence of one hundred ninety-two (192) months imprisonment and a life term of supervised release was imposed. [Pet. Appx. C]. The Judgment was entered on January 31, 2022. [Pet. Appx. B]. On February 8, 2022, the Defendant filed his timely Notice of Appeal.

B. Court of Appeals Proceedings

On May 23, 2024, the United States Court of Appeals for the Eleventh Circuit entered its opinion affirming the District Court Judgment. *United States of America v. Jonathan Guerra Blanco*, 102 F.4th 1153 (11th Cir. 2024 [Pet. Appx. A]

On August 7, 2024, the Court of Appeals denied Guerra Blanco's Petition for *Petition for Rehearing and Petition for Rehearing En Banc,* therein treating his *Petition for Rehearing En Banc* as a *Petition for Rehearing* as well. [Pet. Appx. D]

This timely Petition for Writ of Certiorari follows.

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), or attempting to violate that statute, 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.[1]

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[1] For U.S.S.G. §3A1.4(a) and (b) to apply, it is necessary that the Court find that the offense is a felony that involved, or was intended to promote, *a federal crime of terrorism,* which is defined in 18 U.S.C.A. § 2332b(g)(5) as follows: (5) the term "Federal crime of terrorism" means an offense that-- (A) is calculated to influence or affect the conduct of government by

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), or an attempt to violate that statute. 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, Guerra Blanco had neither the specific intent to commit a crime that was calculated to influence, affect, or retaliate against a government, therefore it is argued that the imposition of the "terrorism enhancement" was not appropriate.

Although he knew that the Islamic State of Iraq and al-Sham ("ISIS") was designated as a foreign terrorist organization and knew that ISIS had engaged in terrorist activity, when he assisted unofficial ISIS media networks to increase the dissemination of pro-ISIS messages and propaganda

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intimidation or coercion, or to retaliate against government conduct; and (B) is a violation of—2339B (relating to providing material support to terrorist organizations).

mainly to Spanish speaking viewers and/or listeners and translated ISIS media messages and coordinated translations into other languages, including English, French, German, and Indonesian, he did not have the specific intent to commit a crime that was calculated to influence, affect, or retaliate against a government. Essentially, Guerra Blanco took up ISIS' call to provide services in their online media operations, and Guerra Blanco provided such services to ISIS in that regard. Some of the propaganda materials were translations of articles previously disseminated in English outlets years before Guerra Blanco's conduct.

Further, there was no evidence that Guerra Blanco intended to promote any plan by ISIS to commit a politically-motivated crime of terrorism.

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 Guerra Blanco, when he committed the offense of attempting to provide 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). Guerra Blanco 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 Guerra

Blanco attempted to provide 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 Guerra Blanco's conduct met the definition of a federal crime of terrorism as required for §3A1.4 to apply.

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

It is undisputed that Guerra Blanco's 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 Guerra Blanco's conduct satisfies the first prong: whether his attempting to provide material support to a terrorist organization by his conduct 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.

Although he knew that the Islamic State of Iraq and al-Sham ("ISIS") was designated as a foreign terrorist organization and knew that ISIS had engaged in terrorist activity when he assisted unofficial ISIS media networks to increase the dissemination of pro-ISIS messages and propaganda mainly to Spanish speaking viewers and/or listeners and translated ISIS media messages and coordinated translations into other languages, including English, French, German, and Indonesian, he did not have the specific intent to commit a crime that was calculated to influence, affect, or retaliate against a government. Essentially, Guerra Blanco took up ISIS' call to provide services in their online media operations, and Guerra Blanco provided such services to ISIS in that regard. Some of the propaganda materials were translations of articles previously disseminated in English outlets years before Guerra Blanco's conduct. Mr. Guerra's operation of the media networks involved the production and dissemination of ISIS propaganda, recruiting materials, and instructional guides for committing acts of terror.

It is respectfully submitted that the District Court erred in applying the terrorism enhancement because it centered its analysis on ISIS (the terrorist organization), not on Guerra Blanco's conduct or specific intent in committing the charged offense. It is Guerra Blanco's position that it was required that the District Court consider the latter, whereas the offense itself implicates the former. Specifically, Guerra Blanco argues in-part that because the District Court failed to sufficiently determine whether he *specifically intended* that the publication of the translations of the ISIS media content would be used to coerce or intimidate a government.

Rather, in the Eleventh Circuit's view, the District Court reasoned that the publications entitled Open Source Jihad 1 and Open Source Jihad 2 "on their own establish[ed]" that "the offense was calculated to influence or affect the conduct of government by intimidation or coercion or retaliat[ion] against government conduct." In its view, the references to western governments in both exhibits introduced at the sentencing hearing made clear that Mr. Guerra was not promoting the killing of people "for no reason whatsoever, but in retaliation for the United States['] public support of Israel and [its] invasion of Afghanistan and Iraq." The court stressed that it was making "a clear finding that, even without [the video threatening the assassination of the Spanish judge], there is more than enough evidence to meet the government's burden in this case." The court added that this video made the finding "overwhelming, but even without [it], there's more than sufficient evidence to meet the government's burden."

It is respectfully submitted, that although the exhibits introduced at the sentencing hearing may have made it clear that the terrorist organization, ISIS, may have desired to retaliate against the United States for its public support of Israel and the invasion of Afghanistan and Iraq, that is a far different thing than saying that Guerra Blanco, himself, had the specific intent to retaliate against the United States.

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

Guerra Blanco pled guilty to attempting to provide material support to a terrorist organization. His offense conduct is outlined above. The District Court concluded that this conduct was calculated to influence or affect government conduct by intimidation or coercion because Guerra Blanco 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, Guerra Blanco's actions were not accompanied by the necessary mental state to trigger the enhancement. In this instance, the District Court abused its discretion in concluding otherwise and the Eleventh Circuit erred in failing to recognize that abuse of discretion.

The District Court's conclusion rested on the erroneous assumption that when Guerra Blanco translated and disseminated the publications and videos, he necessarily understood and intended that the dissemination of the publications and videos was to bolster support for ISIS 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—translating and disseminating the publications and videos 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 translate and disseminate publications and videos without knowing how those items would or could "influence or affect the conduct of government by intimidation or coercion," 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—translating and disseminating the publications and videos—and the effect—influencing government conduct by intimidation or coercion—are much too attenuated to warrant the triggering of the enhancement. Instead, to properly apply the enhancement, the District Court had to determine that translating and disseminating the publications and videos constituted conduct motivated to "affect or influence" a "government by intimidation or coercion," and that the publications and videos 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.

B. Calculated to retaliate against government conduct.

Further, Guerra Blanco disputes any conclusion that by translating and disseminating the publications and videos, 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 Guerra Blanco sought revenge on any particular government or for any specific government conduct.

Although it is true that Guerra Blanco entered his plea of guilty to the charge of attempting to provide 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), 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 the defendant's 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 he 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 Guerra Blanco'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 his 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 that 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 Guerra Blanco'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.

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 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 *United States v. Arcila Ramirez*, 16 F.4th 844 (11th Cir. 2021), 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.

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), or an attempt to violate said statute.

Clearly, the application of the "terrorism enhancement" has a profound impact on the ultimate sentence imposed in such cases, therefore guidance for the District Courts in applying that enhancement is essential.

Respectfully submitted,

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