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24-5116
No. _____

FILED

APR 15 2014

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MOHAMAD JAMAL KHWEIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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April 15th, 2024

QUESTIONS PRESENTED

The Terrorism Enhancement, found in the United States Sentencing Guidelines ("U.S.S.G") §3A1.4, when applied, "takes a wrecking ball" to the initial Guidelines range. George D. Brown, Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts, 23 Cornell J.L. & Pub. Pol'y 517, 520 (2014). It functions by both increasing the offense level at least 12 levels and elevating the defendant to the highest Criminal History Category, irrespective of his or her actual criminal history.

To apply the Terrorism Enhancement the intended victim of the conduct of conviction must be the United States. It applies "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. §3A1.4(a). The term "federal crime of terrorism" means "an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and is a violation of certain enumerated statutes. Id., appl. n.1; 18 U.S.C. §2332b(g)(5) (emphasis added).

The questions presented are:

- (1) whether the court below erred by upholding the application of Section 3A1.4's Terrorism Enhancement when the evidence presented at trial, or lack thereof, failed to prove Mr. Khweis's conduct met the burden necessary to reach the first prong of §3A1.4.
- (2) whether the function of the Terrorism Enhancement is impermissible under the sentencing paradigm.

PARTIES TO THE PROCEEDINGS

The caption contains the names of all the parties to the proceedings.

RELATED PROCEEDINGS

Khweis v. United States, App. for Extension of Time to File Writ of Cert., (Feb. 9, 2024), App. Resp. (Feb. 12, 2024) (Appx. B)

United States v. Khweis, No. 22-4406 (4th Cir. Aug. 4, 2023) (amend. Aug. 8, 2023) (decision below)

United States v. Khweis, 971 F.3d 453, 2020 U.S. App. LEXIS 28950 (4th Cir. Sept. 9, 2020), cert. denied, 141 S. Ct. 1712 (March 22, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review a judgement of the U.S. Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit decision under review is unreported, but is reproduced as App. A.

JURISDICTION

The Fourth Circuit issued it's amended decision on August 8, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

A. Section 2339B, Title 18 of the U.S. Code
(a) Prohibited activities

(1) Unlawful conduct. Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts to conspire 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 [8 U.S.C. §1182(a)(3)(B)]), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorizations Act, Fiscal Years 1988 and 1989 [22 U.S.C. §2656f(d)(2)]).

GUIDELINE PROVISION INVOLVED

A. Section 3A1.4 of the U.S. Sentencing Guidelines

(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 Note:

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).

that new provision applicable only to those specifically listed federal crimes of terrorism, upon conviction of those crimes with the necessary motivational element to be established of the sentencing phase of the prosecution, without having to wait until November 1996 for the change to become law." 142 Cong. Rec. H3305-01, H3337 (April 15, 1996) (emphasis added). AEDPA was signed into law in April 1996 and §3A1.4 was accordingly amended by the Sentencing Commission, effective November 1, 1996, to apply to a crime which "involved, or was intended to promote, a federal crime of terrorism," defined in Application Note 1 to refer to 18 U.S.C. §2332b(g).

B. PROCEEDINGS BELOW

Mr. Khweis was convicted, following a jury trial, of conspiracy to provide material support or resources to the Islamic State ("ISIS") in violation of 18 U.S.C. §2339B (Count One); of providing material support or resources to ISIS, also in violation of 18 U.S.C. §2339B (Count Two); and of possessing, using and carrying firearms in violation of 18 U.S.C. §924(c)(1)(A) (Count Three). Dist. Ct. Dkt. Entry 202.

The evidence presented at trial is that in 2015, Mr. Khweis was a resident of the Commonwealth of Virginia. Dist. Ct. Dkt. Entry 213 at 206. In December 2015, he sold some of his belongings and purchased a one-way ticket to London, United Kingdom. Dist. Ct. Dkt. Entry 214 at 67. After spending a few days in London, Mr. Khweis traveled to the Netherlands, and from there to Turkey. Id. After traveling in Turkey for a few days, he crossed the Syrian border and ultimately traveled to Iraq with an ISIS group. Dist. Ct. Dkt. Entry 213 at 219-220. Three

months after entering Syria, on March 14, 2016, Mr. Khweis left the ISIS group and was captured by Kurdish Peshmerga fighters near Sinjar Mountain in a Kurdish-controlled region of Iraq near the Syrian border. Dist. Ct. Dkt. Entry 214 at 11-12. Following his capture by the Peshmerga, Mr. Khweis was transported to a Kurdish Counter-Terrorism Directorate ("CTD") detention center in Erbil, Iraq. Id. at 17. The same day he was detained by the Peshmerga, Department of Defense employees learned that the Peshmerga had captured an American citizen and that the CTD would provide detailed information on the detainee the following day. Dist. Ct. Dkt. Entry 211 at 211. Ultimately, Mr. Khweis was handed over into United States custody on June 8, 2016.

Most of the evidence produced at trial was information derived from Mr. Khweis's electronic devices and statements he provided to the Government over many hours of interviews. The evidence showed that Mr. Khweis searched individuals, images, and videos related to ISIS before he left the United States and during his travels. See, Dist. Ct. Dkt. Entry 211 at 115-139. When Mr. Khweis was in Turkey, he made contact with ISIS supporters who could help him cross the border into Syria. Dist. Ct. Dkt. Entry 213 at 224-225. He was taken into Syria, and from there, to Iraq. He stayed at various safehouses and compounds run by ISIS and performed various services for the people with whom he was staying. E.g., id. at 226, 233, 236-38, 242-43. He stayed in Syria and Iraq for approximately two-and-a-half months before finding his way to surrender to the Peshmerga. Dist. Ct. Dkt. Entry 214 at 172-73. There was no evidence that Mr. Khweis took up arms or became involved in any direct actions against anyone.

After his conviction at trial, Mr. Khweis was sentenced to 180 months in prison on Counts One and Two and a consecutive sentence of 60 months on Count Three. Dist. Ct. Dkt. Entry 246 at 1-2.

Mr. Khweis filed a direct appeal from that conviction, Dist. Ct. Entry 248, raising, inter alia, whether the district court erred when it denied his motion to suppress certain statements, and whether Count One, conspiracy to provide material support to ISIS, is a crime of violence (and answer in the negative would require the conviction for Count Three to be vacated). The Fourth Circuit Court of Appeals affirmed the district court's denial of the motion to suppress, and vacated the conviction for Count Three after finding, with the agreement of the Government, that conspiracy to provide material support is not a crime of violence. Dist. Ct. Dkt. Entry 260. The case was remanded to the district court for resentencing on Counts One and Two. Id.; Dist. Ct. Dkt. Entry 296 at 3-4.

On June 28, 2022, the district court conducted a resentencing hearing. The district court determined that the victim-related adjustment under U.S.S.G. §3A1.4(a), for an offense involving, or intending to promote, a federal crime of terrorism, applies. Id. at 18. Specifically, the district court determined Mr. Khweis intended to promote ISIS's purpose. Id. at 68. The district court then determined that Mr. Khweis's total offense level is 40 and his criminal history category is IV, resulting in an advisory sentencing guideline range of 360 months to life. Id. at 19.

Ultimately, the district court sentenced Mr. Khweis to 168 months in prison, followed by ten years of supervised release. Id. at 65;

Dist. Ct. Dkt. Entry 287 at 1-2. Mr. Khweis appealed from that sentence. Dist. Ct. Dkt. Entry 289.

Mr. Khweis asked the lower court whether, inter alia, the district court erred when it applied the victim-related sentencing enhancement under U.S.S.G. §3A1.4, where the Government did not prove any of Mr. Khweis's conduct was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. Pet. Br. at 7, United States v. Khweis, No. 22-4406 (4th Cir. Aug. 4, 2023). The Government stated it did meet it's burden. App. Br. at 15-27.

The lower court found, citing the district court's findings, that the facts of Mr. Khweis's case "are at least as strong as those we found sufficient to demonstrate specific intent in [United States v. Chandia, 675 F.3d 329, 340 (4th Cir. 2021)]." App. A at 9-10. The lower court found the record establishes that Mr. Khweis intended to advance ISIS's purpose, therefore, the §3A1.4 enhancement is supported. App. A at 10.

REASONS FOR GRANTING THE PETITION

Mr. Khweis was convicted of conspiracy to provide material support or resources to ISIS, and of providing such material support or resources. Dist. Ct. Dkt. Entry 287 at 1. These convictions, however, are not de facto determinations that Mr. Khweis's conduct was calculated to influence or affect the conduct of the government or retaliate against the government. None of the evidence presented to the jury or to the district court support a finding that Mr. Khweis's conduct was calculated to influence or effect the conduct of the government or retaliate against the government. The evidence supports his convictions for providing material support to ISIS and nothing more. The victim-related specific offense characteristic of "terrorism" should not apply.

Moreover, the operation of the Terrorism Enhancement is not backed by any empirical evidence, and, by treating all "terrorists" alike is impermissible under the sentencing paradigm and provides for significant ripple effects.

1. Guidelines Section 3A1.4 is not applicable to Mr. Khweis's offense conduct.

Sentencing adjustments are meant to apply when specific conduct involved in a case includes behavior that is not otherwise part of the offense of conviction. E.g., U.S.S.G. Ch. 1, Part A ("[T]he guidelines take account of a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken, through alternative base offense levels, specific offense characteristics, cross references, and adjustments.").

The Guidelines Section that applies to Mr. Khweis's offenses of conviction, violations of 18 U.S.C. §2339B, providing material support or resources to designated foreign terrorist organizations, is Section 2M5.3. That Section is titled, "Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specifically Designated Global Terrorists, or For a Terrorist Purpose." Put simply, §2M5.3 applies when someone does what Mr. Khweis did: provide and conspire to provide, material support to ISIS.

Mr. Khweis was convicted of conspiracy to provide, and providing, material support to a foreign terrorist organization, in violation of 18 U.S.C. §2339B. To be designated a foreign terrorist organization an organization must meet the following criteria:

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182(a)(3)(B) of this title or terrorism (as defined in section 2656f(d)(2) of Title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.

8 U.S.C. §1189(1) (emphasis added).

If evidence that a person provided material support to an organization that attempts to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct, was sufficient to meet the definition of "federal crime of terrorism,"³ the §3A1.4 victim related adjustment would apply

3. Section 2332b(g)(5) defines "federal crime of terrorism" to be "an offense that is calculated to influence or affect the conduct of government by intimidation or coercion,

to every conviction for providing material support to a foreign terrorist organization. It does not. The guideline section that applies to such convictions is §2M5.3. See, U.S.S.C. Guideline Manual, Appx. A.

That is, if proof that a person provided material support to a foreign terrorist organization along was sufficient proof for the application of the §3A1.4 adjustment, the first part⁴ of the definition of "federal crime of terrorism" (an offense that is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct), Sec. 2332b(g)(5)(A), would be a surplusage.⁵ And to do so, as did the district court whose findings were affirmed by the lower court, violates the surplusage canon:

"The surplusage canon holds that it is no more the court's function to revise by subtraction than by addition. A provision that seems to the court unjust or unfortunate (creating the so-called casus male inclusus) must nonetheless be given effect."

Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 174 (2012).

The district court determined the victim-related adjustment

or to retaliate against government conduct." 18 U.S.C. §2332b(g)(5) (emphasis added). To be a "federal crime of terrorism" under 18 U.S.C. §2332b(g)(5), the conduct must also relate to violations of specific statutes; the statute under which Mr. Khweis was convicted, 18 U.S.C. §2339B, is one of those listed statutes.

4. The second part of the statute requires proof that a person engaged in conduct relating to the listed statutes. 18 U.S.C. §2332b(g)(5)(B). Mr. Khweis does not challenge the second prong of the statute.

5. Surplusage is defined as: Redundant words in a statute or legal instrument; language that does not add meaning. See, Black's Law Dictionary (11th ed.) at 1744.

applies, stating, "I am going to give the 3A1.4 terrorism enhancement. I think it clearly applies, as [Mr. Khweis] intended to promote the crime of terrorism." Dist. Ct. Dkt. Entry at 18. The district court then relied on the Government's listing of Mr. Khweis's conduct for its determination. Id. at 68 (listed at Dist. Ct. Dkt. Entry 291 at 7). Mr. Khweis then challenged the victim-related adjustment on appeal. The lower court reviewed the district court's application of the sentencing enhancement for clear error and legal conclusions, de novo. App. A at 7. It found, citing the district court's findings, that the facts of Mr. Khweis's case "are at least as strong as those we found sufficient to demonstrate specific intent in [United States v. Chandia (Chandia III), 675 F.3d 329, 340 (4th Cir. 2021)]." App. A at 9-10.

In Chandia III, the lower court affirmed the application of §3A1.4 where the defendant asked about training with Lashkar-e-Taiba (LET) in Pakistan and aided a LET leader who he knew was in the United States on LET business. 675 F.3d at 340. Those facts, inter alia, the lower court determined supported a reasonable inference that the defendant intended to advance LET's terrorist purpose. App. A at 10.

In affirming the lower court's finding, it concluded that the facts of Mr. Khweis's case were similar to those in Chandia III in that the record establishes that Mr. Khweis intended to advance ISIS's purpose. App. A at 10. Respectfully, the lower court got it wrong in Mr. Khweis's case.

A determination that a person provided material support to a

foreign terrorist organization requires proof that a person did so knowingly. See, United States v. Hassan, 742 F.3d 104, n.16 (4th Cir. 2014) (citing United States v. Chandia, 514 F.3d 365, 372 (4th Cir. 2008)); see also, 18 U.S.C. §2339B(a)(1) (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....). The intent to promote the crime of terrorism is the crime of providing material support to a foreign terrorist organization. It is not proof that Mr. Khweis's conduct was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

At trial, the Government proved the second prong for showing conduct relates to a "federal crime of terrorism" - that he provided, and conspired to provide, material support to ISIS. The Government did not prove, or present any substantive of, Mr. Khweis acting in a manner calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. Moreover, the Government did not present any evidence, circumstantial, inferential, or suggestive, that any of Mr. Khweis's conduct had anything to do with the United States. This, because Mr. Khweis's offense was not "calculated to influence or affect the conduct of government." Therefore, the Government did not meet it's burden to prove that §3A1.4 should apply in Mr. Khweis's case.

2. The Terrorism Enhancement is impermissible under the sentencing paradigm.

The Terrorism Enhancement exemplifies a lack of consideration by the Sentencing Commission. The VCCLEA directed the Sentencing Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103-322, 108 Stat. 1796 (1994). The Sentencing Commission carried out that directive by promulgating §3A1.4 of the Sentencing Guidelines.⁶ As explained above, the Terrorism Enhancement in §3A1.4 functions both by increasing the offense level and the defendant's Criminal History Category, moving the Guidelines range to the far right-hand corner of the prized Sentencing Table.

There are two principle objections to this operation of the Terrorism Enhancement, and as will be shown below, Mr. Khweis is not alone with these objections. First, the enhancement itself is not backed by any empirical evidence. Second, treating all "terrorists" alike is impermissible under the sentencing paradigm bringing with it significant ripple effects.

Section 2M5.3 has an "internal enhancement mechanism to calibrate

6. For descriptions of the evolution of the Guideline, see James P. McLoughlin, Jr., Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations, 28 Law & Ineq. 51, 59-62 (2010); Sameer Ahmed, Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror, 126 Yale L.J. 1520, 1527-28 (2017).

the severity of the sentence to the culpability of the conduct and harm," McLoughlin, supra, at 73, but that distinction is lost with the Terrorism Enhancement, which frequently results in Guidelines ranges that equal the maximum statutory sentence and fail to differentiate between various levels of conduct. This effect was artfully described by the Probation Office in an unrelated case:

What is clear from [my] research is despite a significant range of conduct that can produce a conviction for material support, the sentencing guidelines result in a nearly identical range in each case, regardless of the underlying conduct.

United States v. Jumaev, No. 1:12-cr-00033 (D.Colo. July 18, 2018) (Doc. 1915-1, PSR Ex. A at 4); accord McLoughlin, supra, at 54 ("[T]he Guideline automatically and uniformly increases a defendant's offense level, ensuring a defendant will be sentenced as if his or her offenses are among the most serious offenses addressed by the Sentencing Guidelines regardless of where the offense level fits on the spectrum of 'material support.'") (footnotes omitted).

Moreover, "[d]econstructing defendants and their offenses, and placing both on the spectrum of similar defendants convicted of similar crimes, is a classic sentencing practice. It requires nuance and careful discrimination between and among cases and defendants based on the factors enumerated in 18 U.S.C. §3553. That nuance is impossible under a Guideline that is structured as bluntly as U.S.S.G. [§]3A1.4. McLoughlin, supra, at 108 (footnotes omitted).

As demonstrated by the almost universal application of the Terrorism Enhancement to crimes related to terrorism, the additional

findings it requires do not remedy its lack of calibration.

The Guidelines were developed to "further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G. Ch. 1, Pt. A. In enacting the Sentencing Reform Act of 1984, "Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." Additionally, it "sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." Id. As countless others have commented, the Terrorism Enhancement runs contrary to these aims. As the Honorable George A. O'Toole opined:

I do not think the Guidelines applied in accordance to their terms do an adequately reliable job in balancing the relevant sentencing factor[s] for several reasons: First the terrorism adjustments that we referred to when we set the Guidelines range operate in a way that is too general to be convincingly reliable in a given case. Both the 12-level adjustment to the offense level and the automatic assignment of a Criminal History Category VI which are applied in any case that can be fairly characterized as a terrorism case, regardless of the particular facts, not only make the recommendation unuseful as a guide in a particular case but it is actually, in my view, contrary to and subversive of the mission of the Guidelines which is to address with some particularity the unique facts of the given case.

United States v. Mehanna, No. 1:09-cr-10017-GAO (D.Mass. Apr. 12, 2012), Sentencing Transcripts, Doc. 439 at 69:14-24.

Put simply, the circumstances of individuals convicted of crimes of terrorism (or who intended to promote crimes of terrorism) differ

greatly, and sentencing without crediting those difference results in disproportionate sentence and disparities in sentencing.

In considering the Enhancement, Professor George D. Brown has posited the question: "Is terrorism sufficiently unique (and dangerous) that it justifies a sentencing 'rule' that goes against notions of individualized sentences that reflect the inevitable differentiation among criminals?" Brown, supra, 520. The answer is that it is not. There is no rational basis for concluding that all individuals labeled as "terrorists" and all crimes of "terrorism" are equal. "Graduation of offenses" is an important value in criminal law. George D. Brown, Notes on A Terrorism Trial - Preventive Prosecution, "Material Support" and the Role of the Judge After United States v. Mehanna, 4 Harv. Nat'l Sec. J.1, 54 (2012). "We do not treat a purse-snatcher like a rapist, [yet] the Enhancement reflects a different view: a terrorist is a terrorist." Id. The requirement to view any terrorist as every terrorist goes against the basic principles of sentencing and the factors set forth in 18 U.S.C. §3553(a).

We wish to further note that defendant's in a §2339B case will usually face a sentencing range well in excess of the statutory maximum of 20 years, when §3A1.4 is applied, regardless of what he specifically did and regardless of whether he has no prior record, or a terrible one. The case of Mr. Khweis was an example. He ended up with an advisory guideline range of 360 months to life, which defaulted to 240 months under U.S.S.G. §5G1.1(a). In this sense, §3A1.4 resembles the child pornography guideline, §262.2, which has roundly been criticized by the

courts, in that it recommends sentences near or above the statutory maximum even in mine run cases.

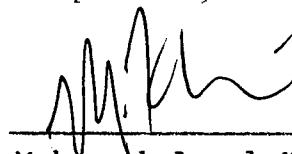
Finally, as the Honorable Judge Charles R. Breyer noted, §3A1.4 was enacted pursuant to a congressional directive and absent empirical evidence. See, United States v. Alhaggagi, 372 F.Supp. 3d 1005, 1014-15. Such guidelines do not exemplify the Sentencing Commission's exercise of it's characteristic institutional rule, see, Kimbrough v. United States, 552 U.S. 85, 109 (2007), and are generally entitled to less respect. See, United States v. Reyes-Hernandez, 624 F.3d 405, 418 (7th Cir. 2010).

CONCLUSION

The petition for Writ of Certiorari should be granted.

Prepared with the Assistance of Bryan Matthew Cooney on this 15th day of April, 2024 and respectfully submitted by Mohamad Jamal Khweis on this 1 day of July, 2024.

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