NO._____

In The
Supreme Court of the United States

MAALIK ALIM JONES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court denied the Petitioner Due Process by impermissibly relying on the principle of collective punishment, and sentencing the Defendant based on guilt by association and responsibility for an organization's acts in which he did not participate, were not part of any conspiracy he joined, and/or for which he did not possess collective liability.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption of the case appearing on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Maalik Jones ("Petitioner") respectfully petitions this Court for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit affirming the sentence imposed upon him by the United States District Court for the Southern District of New York after his plea of guilty.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Second Circuit issued April 29, 2024, affirming the District Court's November 9, 2022, final Judgment and Order re-sentencing Petitioner, which came before that Court on remand from the Second Circuit, and is reproduced herein in the Appendix ("A."), at A. 1. The opinion is also reported at *United States v. Jones*, 100 F.4th 103 (2d Cir. 2024).

The transcript of the November 3, 2022, sentencing proceedings, during which the District Court provided its reasons for the sentence it imposed upon Petitioner, is reproduced herein at A. 28. The written November 9, 2022, final Judgment and Order of the District Court is reproduced herein at A. 20.

BASIS FOR JURISDICTION

The Court of Appeals for the Second Circuit issued its Decision and Order April 29, 2024. There has not been an application to extend the time period in which this Petition must be filed. Petitioner seeks review of a final decision by a federal Circuit Court of Appeals in a criminal case. Thus, jurisdiction for the Petition exists pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §2339B – Providing material support or resources to designated foreign terrorist organizations

(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).

18 U.S.C. 3553 – Imposition of a Sentence

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant[.]

18 U.S.C. §3661 – Use of Information for sentencing

No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

Geneva Convention IV, Article 33 - Individual responsibility, collective penalties, pillage, reprisals

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

Customary International Humanitarian Law, Rule 102: Individual Criminal Responsibility

No one may be convicted of an offence except on the basis of individual criminal responsibility.

STATEMENT OF THE CASE

Guilt in a criminal case is personal, and the sentencing of a criminal defendant should reflect that principle. Below, however, the District Court imposed upon Petitioner the maximum available sentence – 300 months – based on acts it acknowledged Petitioner did not commit, and for which he did not bear criminal responsibility and was not within the scope of the conspiracy to which he pleaded guilty, but which were committed by an organization with which Petitioner was affiliated (including some acts that occurred even before Petitioner began his affiliation with the organization).

The District Court's sentence therefore constituted an imposition of collective punishment, thereby denying Petitioner Due Process, and violating core principles of criminal justice identified by the Framers. The Second Circuit's opinion affirming the District Court's sentence likewise repeated that constitutional violation.

As set forth below, the use of collective punishment as a rationale for a sentence in a criminal case not only denies a defendant Due Process as defined by this Court throughout the course of its more than two centuries of jurisprudence, but also violates specific provisions of international humanitarian law to which the United States has bound itself through treaty and domestic law.

Regardless the repugnance of any particular organization – in this case, *al Shabaab*, designated a Foreign Terrorist Organization ("FTO") by the U.S. State Department – attributing all of the organization's acts to a defendant guilty of providing himself as personnel to that organization marks a departure from the limits of punishment recognized repeatedly by this Court, as well as by international humanitarian law.

Here, in contravention of those principles, Petitioner received the maximum sentence from the District Court because of the character and acts of the organization, and *not* his personal offense conduct or the scope of the conspiratorial agreeemnt charged against him. Accordingly, it is respectfully submitted that *certiorari* should be granted to address this important issue – arising more frequently today in the context of prosecution of terrorism and transnational organizational crime – and correct the error committed below.

A. *Procedural History*

1. *The Initial Indictment, and Petitioner's Initial Sentencing*

The initial January 11, 2016, Indictment charged Petitioner with (1) conspiracy to provide material support and resources to al Shabaab, a designated

Foreign Terrorist Organization ("FTO"), in violation of 18 U.S.C. §2339B (Count One); (2) providing material support and resources to al Shabaab, in violation of 18 U.S.C. §2339B (Count Two); (3) conspiracy to receive military training from al Shabaab, in violation of 18 U.S.C. §2339D (Count Three); (4) receiving military training from al Shabaab, in violation of 18 U.S.C. §2339D (Count Four); and (5) using and carrying an AK-47 assault rifle, rocket-propelled grenades, and other weapons in furtherance of the crimes of violence charged in Counts One through Four, in violation of 18 U.S.C. §§924(c)(1)(A)(i), (c)(1)(A)(ii), (c)(1)(A)(iii), (c)(1)(B)(i), and (c)(1)(B)(ii) (Count Five). *See* ECF # 8.[1]

Pursuant to a September 7, 2017, Plea Agreement, Petitioner pleaded guilty September 8, 2017, to all three Counts of a Superseding Information, charging (1) conspiracy to provide material support and resources to al Shabaab in violation of 18 U.S.C. §2339B (Count One); (2) conspiracy to receive military training from al Shabaab, in violation of 18 U.S.C. §2339D (Count Two); and (3) using and carrying an AK-47 assault rifle, rocket- propelled grenades, and other weapons in furtherance of the offenses charged in Counts One and Two, in violation of 18 U.S.C. §§924(c)(1)(A) and (c)(1)(B)(ii) (Count Three). *See* ECF # 71.

The maximum punishment on Count One was 180 months' imprisonment; for Count Two it was 120 months' imprisonment. Count Three required a 30-year prison term consecutive to the sentence(s) imposed on Counts One and Two. The District Court sentenced Petitioner May 29, 2018, to an aggregate prison term of

[1] "ECF" refers to the Electronic Case Filing system docket numbers in the District Court.

420 months consisting of 24 months on Counts One and 36 months on Count Two, running consecutively, and another consecutive 360 months on Count Three. *See* ECF # 87.

2. *Petitioner's First Appeal*

Petitioner appealed his conviction on Count Three only, and the Second Circuit, in a February 14, 2020, Order, vacated Petitioner's conviction on Count Three on the basis of this Court's decision in *United States v. Davis*, 588 U.S. 445 (2019), and remanded for re-sentencing. *See* ECF # 99.

3. *The Proceedings on Remand*

Following litigation whether the government could re-indict Petitioner, which the District Court permitted in a May 24, 2021, Opinion, *see* ECF # 138, the grand jury returned a four-count Superseding Indictment charging Petitioner with Conspiracy to Provide Material Support to a Foreign Terrorist Organization (*al Shabaab*), in violation of 18 U.S.C. §2339B (Count One); Provision of Material Support to a Foreign Terrorist Organization (*al Shabaab*), in violation of §2339B (Count Two); Conspiracy to Receive Military-Type Training From a Foreign Terrorist Organization (*al Shabaab*), 18 U.S.C. §2339D, in violation 18 U.S.C. §371 (Count Three); and Receipt of Military-Type Training from a Foreign Terrorist Organization (*al Shabaab*), in violation of §2339D (Count Four). *See* ECF # 148.

Counts One and Three of the S2 Superseding Indictment were the exact same as Counts One and Two of the earlier Superseding Information (ECF # 71) to which Petitioner had previously pleaded guilty, and which corresponded to Counts One

and Three of the initial Indictment (ECF # 8). The District Court, however, did grant Petitioner's motion to dismiss from the S2 Superseding Indictment the two Counts to which he had previously pleaded guilty, and which remained undisturbed by the Second Circuit's vacatur of the prior Count Three. *See* ECF # 138, at 2.

4. *Petitioner's Plea of Guilty to a New Superseding Information*

Ultimately, Petitioner and the government agreed to a disposition, and, pursuant to a written May 27, 2022, Plea Agreement, Petitioner pleaded guilty June 15, 2022, to both counts of a new S3 Superseding Information, charging a violation of 18 U.S.C. §2339B (conspiracy to provide material support to an FTO (*al Shabaab*) (Count One), and a violation of 18 U.S.C. §2339D (conspiracy to receive military-type training from an FTO) (Count Two). *See* ECF # 190.

Petitioner was sentenced again November 3, 2022. A. 28. In imposing the maximum sentence – 180 months on Count One, and 120 months on Count Two, running consecutively – the District Court seven times mentioned as a basis for its sentence that Mr. Jones had joined a "vicious" terrorist organization. A. 35, 65, 71, 75, 76.

For example, in announcing its sentence, the District Court stated that Mr. Jones "took the extraordinary step of leaving America and traveling to Somalia to join a vicious terrorist organization, and then staying with that organization for four years, while that organization repeatedly massacred innocent men, women and children, by the most vicious means imaginable." A. 75.

However, the District Court also made findings that Petitioner had *not* participated in those acts committed by *al Shabaab*, and noted that some occurred prior to Petitioner's affiliation with the organization. A. 35, 59, 65. *See also* **post**, at 16-18.

5. *Petitioner's Second Appeal*

In his second appeal to the Second Circuit, Petitioner, *inter alia*, challenged his sentence on the ground that the District Court denied him Due Process by impermissibly basing the 300-month sentence of imprisonment upon the concept of collective punishment in violation of the Fifth Amendment to the U.S. Constitution, the Geneva Convention, and international humanitarian law.

The Second Circuit issued its Opinion April 29, 2024, affirming Petitioner's conviction and sentence. Regarding the collective punishment issue, the Second Circuit concluded that while Petitioner "contends that the district court considered him guilty by association, effectively holding him responsible for activities of al-Shabaab in which he did not participate[,]" A. 16, 100 F.4th at 111, "the district court did not impermissibly rely on the principle of 'collective punishment[,]" because Petitioner's "conspiracy conviction sufficiently established his personal involvement in al-Shabaab's activities, which belies his claim that he was punished merely for being a member of the group." A. 16; *id.*, *citing United States v. Farhane*, 634 F.3d 127, 138 (2d Cir. 2011) (recognizing that 18 U.S.C. §2339B "prohibits the knowing provision of material support to a known terrorist organization," and "[p]roof of such provision (whether actual, attempted, or conspiratorial)," combined

with the requisite mens rea, "is sufficient to satisfy the personal guilt requirement of due process").

In addition, quoting the government's Brief, the Circuit added that Petitioner "agreed with others to provide [him]self as personnel to al Shabaab by traveling to Somalia for that purpose and attending an al Shabaab training camp." A. 16; *Id.*, at 111-12.

As a result, the Second Circuit determined that "the district court did not abuse its discretion in considering the extraordinarily violent and sectarian nature of al-Shabaab's terrorism at Jones's sentencing[,]" A. 17-18; *Id.*, at 112, and therefore "did not impermissibly rely on the principle of 'collective punishment.'" A 16; *id.*, at 111.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING WHETHER A SENTENCE BASED ON COLLECTIVE PUNISHMENT – AN ORGANIZATION'S ACTS IN WHICH THE DEFENDANT DID NOT PARTICIPATE – DENIES A DEFENDANT DUE PROCESS

Basing a sentence on collective punishment – for the acts of others, including organizations, for which the defendant does not bear criminal responsibility – contravenes fundamental principles of criminal justice, thereby denying a defendant Due Process and violating international humanitarian law ("IHL") and the United States' legal obligations thereunder. As a result, a sentence based on collective punishment constitutes both an unconstitutional and illegal sentence.

Here, as discussed below, the sentence imposed on Petitioner denied him Due Process because it relied improperly on collective punishment: the acts of *al Shabaab* in which even the sentencing court conceded Petitioner did *not* participate, and which were not within the scope of the offense conduct to which Petitioner pleaded guilty.

A. *The Historical Prohibition on Collective Punishment*

The Framers of the U.S. Constitution endeavored to distinguish the nascent United States from oppressive British monarchal rule by creating within the Constitution protections for those accused of crimes "designed to prevent punishment without culpability." John F. Stinneford, *Punishment Without Culpability*, 102 NORTHWESTERN J. CRIM. L. & CRIMINOLOGY 653, 665 (2013).

These multiple provisions codified by the Framers, when "[t]aken together . . . were supposed to ensure that punishment is not imposed in the absence or in excess of culpability." *Id.*, at 666. Those protections include within them the critical principle of personal guilt. As then-Massachusetts Supreme Court Justice Oliver Wendell Holmes summarized nearly a century later, "I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility[.]" Oliver Wendell Holmes, *Agency II*, 5 Harv. Law Rev. 1, 14 (Apr. 15 1891), available at https://www.jstor.org/stable/1322273?seq=1.

Nearly two centuries after the Framers crafted the Constitution, when the United States and other nations collaborated to create international legal bodies

and craft international conventions they hoped would prevent repetition of the many horrors of the Second World War, Justice Douglas reiterated those founding principles, cautioning:

> Guilt under our system of government is personal. When we make guilt vicarious we borrow from systems alien to ours and ape our enemies. Those short-cuts may at times seem to serve noble aims; but we depreciate ourselves by indulging in them.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 179 (1951) (Douglas, J., concurring).

Forty years later, Judge Richard Posner reiterated that "[collective punishment as a] principle is not . . . a part of our law. Proximity to a wrongdoer does not authorize punishment." *Hessel v. O'Hearn*, 977 F.2d 299, 305 (7th Cir. 1992) (cleaned up).

Justice Douglas's prescient words continue to provide critical guidance as 21st Century courts grapple with the challenge of adjudicating terrorism and transnational criminal gang prosecutions. These prosecutions are inevitably permeated with "the political context of a given incident" and/or "the more sensational or violent [] conduct" of the broader organization, which in turn can and does impermissibly influence the sentences courts assess individual defendants, particularly when the defendant before them was not directly involved in such conduct. *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 494 (2014). *See also* Wesley S. McCann, *Indefinite Detention in the War on Terror: Why the Criminal Justice System Is the Answer*, 12 LOY. U. CHI. INT'L L. REV. 109, 147 (2015).

It is precisely in these circumstances that "vicarious guilt" and collective punishment cannot serve as a "short-cut." *Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 179. Instead, sentencing courts must continue to do the difficult work of determining "a sentence sufficient, but not greater than necessary," 18 U.S.C. §3553(a), that is specific to the personal guilt of the defendant in front of them.

B. *Collective Punishment Constitutes a Denial of Due Process*

The Fifth Amendment's Due Process clause is among the "guarantees that protect judicial procedures[.]" Doctors Without Borders, The Practical Guide to Humanitarian Law ("*Guide to IHL*"), available at https://guide-humanitarian-law.org/content/article/3/collective-punishment/. In fact, the majority of the "Bill of Rights are procedural . . . [because] procedure [] spells much of the difference between rule by law and rule by whim or caprice." *McGrath*, 341 U.S. at 179 (Douglas, J., concurring).

As this Court declared in *Scales v. United States*, 367 U.S. 203 (1961), "[i]n our jurisprudence guilt is personal," ensuring that "no person may be punished for acts that he or she did not commit." *Id.*, at 224. Therefore, in order to "impos[e] punishment on a status or on conduct . . . by reference to the relationship," the "relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment." *Id.*, at 224-25.

Thus, Due Process jurisprudence has recognized that "[t]he technique . . . of guilt by association [is] one of the most odious institutions of history." *McGrath*,

341 U.S. at 178 (Douglas, J., concurring). In fact, "[a] legal duty to 'repudiate' – to disassociate oneself from the acts of another – cannot arise unless, absent the repudiation, an individual could be found liable for those acts." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 925 n.69 (1982). In that context, the Due Process guarantee includes protection from collective punishment.

C. *IHL That Is Binding on the U.S. Proscribes Collective Punishment*

Collective punishment is defined, for purposes of IHL, as

> not only to criminal punishment, but also to other types of sanctions, harassment or administrative action taken against a group in retaliation for an act committed by an individual/s who are considered to form part of the group. Such punishment therefore targets persons who bear no responsibility for having committed the conduct in question.

International Committee of the Red Cross ("ICRC"), International Humanitarian Law Databases ("ICRC IHL Databases"), available at https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-33.

Collective punishment is proscribed by the Geneva Conventions ("GC"). GC III Art. 87; GC IV Article 33, available at https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-33. IHL further provides that "no person may be punished for acts that he or she did not commit[,]" which "ensures that the collective punishment of a group of persons for a crime committed by an individual is also forbidden, whether in the case of prisoners of war or of any other individuals." *Guide to IHL*. *See also ICRC IHL Databases*, Volume II, Chapter 32, Section O (Rule 102): Individual Criminal Responsibility, from ICRC's study of customary International

Humanitarian Law (Cambridge Press: 2005) – "No one may be convicted of an offence except on the basis of individual criminal responsibility"), available at https://ihl-databases.icrc.org/en/customary-ihl/v1/rule102#Fn_D141 B47_00001.

That principle "is one of the fundamental guarantees established by the 1949 Geneva Conventions and their 1977 Additional Protocols[,]" and "[t]his guarantee is applicable not only to protected persons but to all individuals, no matter what their status or to what category of persons they belong, as defined by the Geneva Conventions (GCIV Art. 33)." *Id.*

The U.S. has adopted the Geneva Conventions, and in particular is bound by Common Article 3, which also prohibits "(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." GC Common Article 3, at 92, available at https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.32 _GC-III-EN.pdf. *See also Hamdan v. Rumsfeld,* 548 U.S. 557, 631-35 (2006) (the elements of Common Article 3 of the Geneva Convention are "requirements" the United States government must follow); *Hamdi v. Rumsfeld*, 542 U.S. 507, 549 (2004) (Souter, J., concurring) ("the United States is a party" to the Third Geneva Convention, and the contents therein have been adopted in U.S. federal law and military regulations).

Such "judicial guarantees" are those found in international human rights law and applicable under the U.S. Constitution, including the prohibition of *ex post facto* and collective punishments. *See also Guide to IHL* ("[r]espect for th[e] principle [of precluding collective punishment] can be ensured solely by establishing guarantees that protect judicial procedures").[2]

The protections conferred by Common Article 3 are also incorporated in the U.S. Code at 18 U.S.C. §2441, the War Crimes statute, which notes at §2441(5) ("Definition of grave breaches") that "[t]he definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article."

D. *The District Court Below Impermissibly Sentenced Petitioner Based on the Proscribed Factor of Collective Punishment*

Here, the District Court included in its sentencing rationale the prohibited factor of collective punishment. During Petitioner's sentencing proceeding, the District Court repeatedly remarked on the nature of *al Shabaab* and its violent activities – even as the District Court expressly acknowledged Petitioner did not participate in them – in justifying the 300-month prison sentence.

For example, in initially denying Petitioner's application to strike from the Pre-Sentence Report certain paragraphs regarding *al Shabaab*'s activities, the District Court stated that

> Al-Shabaab, both shortly before and during the defendant's membership in the organization, engaged in a

[2] In addition, "[s]tate practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts." *ICRC IHL Databases*, Volume II, Chapter 32, Section O.

> number of horrific and spectacular acts of terrorism that received wide international attention in the media. It is highly relevant to me that the defendant sought out and chose to join such a terrorist organization, and that he chose to remain a fighter in that terrorist organization for more than four years.

A. 34-35.[3]

The material support Petitioner provided was himself as personnel, and, as the District Court recognized, even as "personnel" Petitioner did not participate in the activities that the District Court nevertheless attributed to him for sentencing purposes. For instance, referring to Petitioner's initial May 2018 sentencing, the District Court recalled that during that proceeding the Court had concluded it could not "make a finding on whether [Petitioner] was involved in other acts of violence, other than the [August 2013] attack on the Kenyan military [at Afmadow in southern Somalia]." A. 34 (citing ECF # 88, at 40).

That one engagement near Afmadow was against regular, uniformed Kenyan military troops operating inside Somalia approximately 150 kilometers (93 miles) from the Kenyan border in any direction (west, southwest, or south). Petitioner suffered multiple gunshot and shrapnel wounds during that battle. Pre-Sentence Report, at ¶ 73 (ECF # 197).

In the 2022 sentencing hearing, the District Court was more declarative, repeatedly noting on the record that "there is no evidence that [Petitioner] was personally involved in committing any of these atrocities[,]" A. 66, or "that

[3] *See also* A. 65 ("[i]f there is a more vicious terrorist group than al-Shabaab, I don't know what it is"); A. 74 (describing al Shabaab as a "terrorist organization that is famous for indiscriminately killing women and children and other completely innocent people").

[Petitioner] had ever engaged in attacks on civilians personally[,]" A. 72. Similarly, the Court observed that "there is no evidence that [Petitioner] participated in, for example, the vicious attack on the Westgate Shopping Mall in Nairobi on September 21, 2013." A. 35.

Notwithstanding its separation of Petitioner from the activities of *al Shabaab* that most concerned the District Court, the District Court concluded that "the fact that he remain[ed] a fighter in al-Shabaab after that horrific event is a fact that I will take into consideration in determining his sentence." A. 35.

In fact, in the course of imposing sentence, the District Court described two more al Shabaab attacks in which Petitioner did not participate – one occurring even before Petitioner traveled to Somalia. A. 65. Indeed, it made those activities by *al Shabaab* a focal point of Petitioner's sentence:

- "While there is no evidence that [Petitioner] was personally involved in committing any of these atrocities, it is inconceivable that he was not aware of them, given their notoriety, and the fact that al-Shabaab publicly claimed responsibility for them." A. 66;
- "While I don't know what other al-Shabaab actions [Petitioner] may have participated in during the four years he spent with that terrorist organization, it is a fair inference, as I have said, that he was aware of the attacks and massacres I have mentioned. It is also a fair inference that he approved of these attacks and massacres, because he stayed with the organization for more than four years, until he believed that his own life was at risk from al-Shabaab." A. 67.

The District Court's repeated statements at sentencing demonstrated that it improperly based its sentence on collective punishment, holding Petitioner personally responsible for acts committed by *al Shabaab* as a whole – acts for which he was not present, and in which he did not participate or assist in planning or execution, or conspire to commit.

In that context, the District Court's construction of vicarious liability, affirmed by the Court of Appeals, would hold that every soldier who is part of a military unit that commits a war crime is liable for, and should be punished for, that offense, and that every soldier who did not leave the military promptly would be similarly accountable.

Yet that is not correct in either theory or practice. For instance, with respect to the 1968 My Lai massacre in South Vietnam, of the entire company that committed the massacre, the U.S. Army court-martialed only three officers and nine enlisted soldiers. *See* https://www.britannica.com/event/My-Lai-Massacre/Cover-up-investigation-and-legacy.

E. ***The Second Circuit's Opinion and the Government's Arguments Below***

The Second Circuit's consideration of the collective punishment issues is fully set forth **ante**, at 8-9. *See also* A. 16. It did not provide much explanation, and, as discussed **post**, at 24, to the extent it did it erroneously conflate conspiratorial liability for *al Shabaab*'s activities with the offense to which Petitioner pleaded guilty.

The Second Circuit did quote from the government's Brief on Appeal. A. 16; 100 F.4th at 111-12. *See also* **ante**, at 9. Thus, ostensibly the Second Circuit relied on arguments made by the government below. However, those arguments are without merit. While the government did not argue that a sentence based on collective punishment would be permissible, *see* Gov't Brief, at 45, (CA2 ECF # 54),[4] it contended instead that the District Court did not apply collective punishment to Petitioner, but rather relied on authorized sentencing principles in sentencing Petitioner.

The government advanced four arguments in its effort to rationalize the District Court's reliance on the conduct of *al Shabaab* generally and not on Mr. Jones's particular conduct. Each fails to justify what was, in fact, the inclusion of the proscribed element of collective punishment in Petitioner's sentence.

1. *The Scope of Federal Sentencing Statutes Do No Permit Collective Punishment*

For instance, the government pointed to the breadth of information a sentencing court is authorized to consider. Yet reference to the language in 18 U.S.C. §3661 quoted by the government, *see* Gov't Brief, at 43 (CA2 ECF # 54), only reinforces the *individual* concept of guilt and punishment:

> [a] sentencing court must consider, among other factors, "the nature and circumstances of the offense and the history and characteristics *of the defendant*," 18 U.S.C. § 3553(a)(1), and "[n]o limitation shall be placed on the information concerning the background, character, and conduct of *a person convicted of an offense* which a court of

[4] "CA2 ECF" refers to the ECF docket in the Second Circuit for Petitioner's appeal.

> the United States may receive and consider for the purpose of imposing an appropriate sentence, . . ."

18 U.S.C. §3661 (Emphasis added).

Likewise, 18 U.S.C. §3553 instructs that a sentencing court "shall consider," among other factors, "the nature and circumstances *of the offense* and the history and characteristics *of the defendant*[.]" 18 U.S.C. § 3553(a)(1) (emphasis added).

That focus on the *individual defendant* and *his* conduct could not be clearer, and refutes any notion that organizational activities in which a defendant does not participate should enhance a defendant's sentence.

2. *The Statutory Language of §2339B Focuses Exclusively on the Defendant's Conduct*

The government also cites the statutory language and scope of an offense to which Mr. Jones pleaded guilty, 18 U.S.C. §2339B: material support to a designated Foreign Terrorist Organization ("FTO"). Again, though, the government quotes, in its Brief, at 44 (CA2 ECF # 54), a passage from *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), that emphasizes the *individual*, and the personal conduct element, rather than collective, basis for liability:

> Section 2339B does not criminalize mere membership in a designated foreign terrorist organization. It instead prohibits providing "material support" to such a group.

Id., at 18.[5]

[5] *See also United States v. Romanello*, 2012 WL 27284, at *6 (E.D.N.Y. Jan. 4, 2012) ("'mere membership in an organized crime organization is not a[n] offense,'" under the Racketeering and Corrupt Organizations Act) (citing *United States v. Bonanno Organized Crime Family*, 683 F.Supp. 1411, 1429 (E.D.N.Y.1988)).

Likewise, the government's quotation from *United States v. Paracha*, No. 03 CR. 1197 (SHS), 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006), *see* Gov't Brief, at 44-45 (CA2 ECF # 54), reiterates that distinction as well as the limitations it places on liability and culpability:

> [b]y criminalizing the conduct of providing material support to any organization that is properly designated a foreign terrorist organization, and not the mere association with those organizations, *the statute properly focuses on the personal action of the individual*.

Id., at *28 (emphasis added) (*aff'd*, 313 F. App'x 347 (2d Cir. 2008)).

Nor does §2339B's requirement that a defendant know of the FTO's designation, or of the types of activities that led to the designation, cited by the government in its Brief, at 44 (CA2 ECF # 54), alter those constraints. Again, in *Humanitarian Law Project*, this Court determined that "Congress plainly spoke to the necessary mental state for a violation of §2339B, and it chose knowledge about the organization's connection to terrorism, *not specific intent to further the organization's terrorist activity*." 561 U.S. at 16-17 (emphasis added).

Consequently, the knowledge of the FTO's activities constitutes simply an element of the offense, and does not imply or permit an inference that the defendant adopted all of the FTO's activities. *See Paracha*, 2006 WL 12768, at *28 ("[b]ecause the statute requires that the person providing material support do so with knowledge that the organization has been designated a foreign terrorist organization, or knowledge of those unlawful terrorist acts which justify such designation, the due process requirement of personal guilt is satisfied"). *See also United States v. Al Kassar*, 660 F.3d 108, 130 (2d Cir. 2011) ("[t]he 'personal guilt'

requirement of the Due Process Clause is therefore satisfied by the knowing supply of material aid to a terrorist organization").

In fact, the legislative history cited by government, in its Brief, at 44-45 (CA2 ECF # 54), further buttresses the point: due to the indivisibility of an FTO's purpose and activities, liability attaches regardless of the purpose of the "material support" – whether directed at a benign or malicious or violent aspect of an FTO's operations. *See* Antiterrorism and Effective Death Penalty Act of 1996, PL 104-132, April 24, 1996, 110 Stat 1214 (legislative finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct").[6]

As a result, under §2339B

> an individual can appropriately be charged with 'personal guilt' for knowingly contributing 'material support or resources' to such an organization, and criminal penalties may properly be imposed for knowing conduct that serves to advance the efforts of such an organization, *notwithstanding any hope or desire that the 'material support or resources' in question will not be used in furtherance of the recipient FTO's illegal activities.*

United States v. Assi, 414 F. Supp.2d 707, 721-22 (E.D. Mich. 2006) (emphasis added).

[6] Thus, even providing a member of an FTO "a glass of water" could conceivably violate the statute under its expansive reach. *See Matter of A-C-M-*, 27 I&N Dec. 303, 314 (BIA 2018) Interim Decision #3928 (Wendtland, J., dissenting), available at https://www.justice.gov/eoir/page/file/1068811/download ("under the majority's strained interpretation, providing a glass of water to a thirsty individual who happened to belong to a terrorist organization would constitute material support of that organization, because the individual otherwise would have needed to obtain water from another source"). *See also United States v. Farhane*, 634 F.3d at 141 (medical doctor convicted "for offering to work for al Qaeda as its on-call doctor, available to treat wounded mujahideen who could not be brought to a hospital precisely because they would likely have been arrested for terrorist activities").

Therefore, Due Process requires that, when sentencing a defendant convicted under §2339B, the sentencing court *not* assess the conduct of the FTO as a whole, or whether the defendant "specifically intend[s] the underlying terrorist activit[ies.]" *United States v. Warsame*, 537 F. Supp. 2d 1005, 1021 (D. Minn. 2008). Rather the court is limited to the defendant's "personal guilt," and "the nature and circumstances of the offense and the history and characteristics *of the defendant*[.]" 18 U.S.C. § 3553(a)(1) (emphasis added).

3. *Conspiracy Law Does Not Convert a §2339B Into a Vehicle for Collective Punishment*

In addition, the government maintained that conspiracy law provides justification for the severity of Petitioner's sentence. *See* Gov't Brief, at 33 (CA2 ECF # 54). The Second Circuit essentially adopted that argument expressly in its opinion affirming Petitioner's conviction. A. 16; 100 F.4th at 111-12. *See also* **ante**, at 8-9.

Yet the conspiracy Petitioner was convicted of joining was *to provide material support,* and *not* to engage in the entire range of conduct committed by the FTO. As the Superseding Information alleges, the material support Petitioner provided was himself as personnel, and, as the District Court recognized, even as "personnel" Petitioner did not participate in the activities that the District Court nevertheless attributed to him for sentencing purposes. A. 35, 66, 67. *See also* **ante**, at 16-18.

Thus, the conspiracy charged, and to which Petitioner pleaded guilty, did not include that conduct, and the Second Circuit's quotation from the Government's Brief, that Petitioner "agreed with others to provide [him]self as personnel to al

Shabaab by traveling to Somalia for that purpose and attending an al Shabaab training camp[,]" A. 16; 100 F.4th at 111-12, misapprehends the scope of both §2339B and Petitioner's liability thereunder for sentencing purposes.

4. *There Is No Basis for Ignoring the Distinction Between a Defendant's Specific Material Support to an FTO and the Full Scope of the FTO's Activities*

Finally, in its Brief, at 45 (CA2 ECF # 54), the government contended – without reference to a single case or authority – that "[a] defendant's personal guilt for the provision of material support to an FTO cannot be divorced from the activities of such an organization." Gov't Brief, at 45 . That, however, *is* the essence of collective punishment.

The requirement of personal guilt does not empower a court to then dispense with that protection and sentence a defendant based on collective activity in which he did not participate, and which is not an element of the offense (of material support).

Consequently, the government's hypothesis, in its Brief, at 46 (CA2 ECF # 54), unsupported by any authority, that "when sentencing a defendant for providing material support to a designated FTO, it is entirely reasonable for a sentencing court to consider the nature of that FTO's activities as part of its assessment of the 'nature and circumstances of the offense,'" *quoting* 18 U.S.C. § 3553(a)(1), is fatally flawed because the *offense* is defined as limited to Petitioner's provision of *himself* as "material support," which by the District Court's own analysis did not include the conduct by others for which he held Petitioner responsible at sentencing.

Sentencing Petitioner on the basis of *al Shabaab*'s acts in which he did not have any involvement represented the very kind of collective punishment and vicarious guilt Justice Douglas warned against in *McGrath*, and the Constitution and IHL proscribe. That incongruity renders Petitioner's sentence – the maximum term – untenable as punishment imposed for his individual offense conduct, and not, impermissibly, as collective punishment for the full range of *al Shabaab*'s activities.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

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Respectfully Submitted,

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