No. 19-11341

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNITED STATES of AMERICA,
Plaintiff - Appellee.

v.

SAID AZZAM MOHAMAD RAHIM,
Defendant - Appellant.

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division
Case No. 3:17-CR-00169

BRIEF OF *AMICUS CURIAE* THE CONSTITUTIONAL LAW CENTER FOR MUSLIMS IN AMERICA IN SUPPORT OF APPELLANT

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SUPPLEMENTAL DISCLOSURE STATEMENT
OF INTERESTED PARTIES

Case No.* 19-11341*, Said Rahim v. United States

In compliance with Fed. R. App. P. 26.1(a) and 5th Cir. R. 28.2.1, the undersigned certifies that the list set forth below is a complete list of the persons and entities who have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America, Plaintiff-Appellee.
2. Said Rahim, Defendant-Appellant.
3. Counsel for Plaintiff-Appellee: United States Attorney; and Assistant United States Attorneys (trial and appellate), Errin Martin, Brian W. Portugal, and Taryn Meeks.
4. Counsel for Defendant-Appellant (trial and appellate): James Whalen.
5. Counsel on Amicus Curiae: Charles D. Swift, Constitutional Law Center for Muslims in America.

IDENTITY AND INTEREST OF AMICUS CURIAE [1]

The *Amicus* organization, the Constitutional Law Center for Muslims in America (CLCMA), is a national public interest organization and 501(C)(3) charity dedicated to advancing and protecting the civil rights of Muslim Americans. CLCMA focuses on cases involving national security, including prosecutions and sentencing under 18 U.S.C. §§ 2339A and 2339B. CLCMA's Director, Charles D. Swift, is a retired military officer with more than 20 years' experience in the law of war and national security. Mr. Swift served as counsel for Salim Hamdan in his challenge to the Military Commissions in Guantanamo Bay, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). He served as civilian counsel in Mr. Hamdan's subsequent trial by Military Commission. In federal court proceedings, Mr. Swift has represented over ten defendants facing material support charges.

Based on extensive experience in this area of law, *Amicus* respectfully submits that the trial court's application of the Terrorism Enhancement in U.S.S.G. § 3A1.4 to formulate Defendant-Appellant's sentence violated the Sentencing Reform Act and the Eighth Amendment's prohibition against cruel and unusual punishment.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), counsel for *Amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *Amicus*, made a monetary contribution intended to fund the preparation or submission of this brief. CLCMA is funded by a grant from the Muslim Legal Fund of America. This grant is made up of generous donations from the community at large. This brief has not been funded by any individual.

On August 7, 2020, *Amicus* received consent from Defendant-Appellant's counsel, James Whalen, to file this Amicus Brief in support of him. On November 2, 2020, counsel for the U.S. Government, Errin Martin, also consented to this filing.

CERTIFICATE OF CONSENT

Amicus counsel certifies that, pursuant to Fed. R. App. P. 29(a)(2), he obtained consent from both the Appellant Attorney, James Whalen, and the Appellee Government Attorney, Errin Martin, to file this Amicus brief.

/s/ *Charles D. Swift*
Charles D. Swift
Attorney for Amicus Curiae

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Said Rahim was convicted of conspiring and attempting to provide material support to a terrorist organization under 18 U.S.C. § 2339B, as well as multiple counts of providing a false statement. Section 2339B convictions call for a base offense level of 26, plus two more levels where material support is provided with the intent that it be used to commit a violent act. U.S.S.G. § 2M5.3(b)(1)(E). Based on the total offense level of 28, combined with Rahim's lack of criminal history, Rahim's Guidelines range would have been 78 to 97 months imprisonment.

This is, of course, not what happened. Instead, the Sentencing Guidelines' "Terrorism Enhancement" was applied, adding 12 more levels to Rahim's offense level, bringing the total up to level 40. Further, although Rahim had no criminal history, the enhancement assigned him to Criminal History Category VI, the highest category applied to career offenders. The Guideline range for an offense level of 40 and Category VI criminal history is 360 months to life. Rahim was sentenced to 360 months, or 30 years imprisonment.

If Rahim's conviction is affirmed, his sentence should nevertheless be vacated and this matter remanded for resentencing because imposition of the Terrorism Enhancement violates the Sentencing Reform Act and the Eighth Amendment.

First, courts are required to consider seven factors in developing an appropriate sentence, including the nature of the offense and the characteristics of

the defendant. 18 U.S.C. § 3553(a)(1). The Terrorism Enhancement, however, represents the antithesis of the § 3553(a) factors, and obliges courts to increase the offense level and Criminal History Category *without regard* for the actual crime or the defendant's actual criminal history. Even though the type of conduct subject to the enhancement varies significantly, the Terrorism Enhancement does not account for this variation and instead treats all terrorism defendants (from attempted bomber to perjurer) the same.

Second, the Terrorism Enhancement violates the Eighth Amendment's proportionality requirement by automatically assigning the defendant a Criminal History Category of VI no matter the defendant's actual criminal history, thereby increasing the Guidelines sentence by at least fifteen years. And while *United States v. Booker* deemed the Guidelines advisory, courts use the Terrorism Enhancement like it is mandatory. Indeed, district court attempts to apply the § 3553(a) factors to depart downward have been rebuffed by appellate courts demanding that they stick to the Guidelines range. This is despite the fact that such a severe increase is not supported by the empirical evidence, particularly where the defendant is a first-time offender. Without such evidence, the Terrorism Enhancement is an arbitrary and harsh rule applied out of visceral outrage for terrorism-related defendants.

And third, the Terrorism Enhancement violates the Eighth Amendment because its dramatic increase in sentences is based solely on the government's status

as the victim. The Framers, aware of the centuries-old tradition of kings brutally punishing dissidents for treason, created the Eighth Amendment to prevent the government from imposing unnecessarily harsh punishments in cases in which it was the only victim. But the Terrorism Enhancement does just that, by placing the government's status as "victim" above any other considerations about the crime or the defendant.

ARGUMENT

I. The Terrorism Enhancement Significantly Increases Sentences in Cases Where, and Because, the Victim is the Government.

In undertaking the War on Terror, the United States pursued a strategy of preventative prosecution by vigorously targeting individuals that supported terrorist organizations. A key part of this strategy was to incapacitate not only persons who had committed terrorist acts, but also those who could potentially commit terrorist acts or provide "material support to terrorist organizations."[2] *See* 18 U.S.C. §§ 2339A, 2339B.

While Congress, through §§ 2339A and 2339B, developed a policy for prosecuting and sentencing material support cases, the U.S. Sentencing Commission went further. That is, the Commission developed the Terrorism Enhancement at § 3A1.4 in the Sentencing Guidelines. Section 3A1.4 is one of five "Victim-Related

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[2] George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 CORNELL J. L. & PUB. POL'Y 517, 547-48 (2014).

Adjustments" in the Guidelines. *See* U.S.S.G § 3A1.4. Of the five, the Terrorism Enhancement is the most severe. *Id*. And, it is the only adjustment where the government is the victim. *Id.*

Under 18 U.S.C. § 2339A, courts are required to impose a specified sentencing scheme for defendants convicted of providing material support to terrorists or terrorist groups. The sentences for material support reflect Congress's intent to deter and punish terrorism-related crimes. The Terrorism Enhancement then, on top of the sentencing in § 2339A, increases the sentence for individuals convicted of "a federal crime of terrorism," i.e., crimes "calculated to influence or affect the conduct of government." *See* U.S.S.G § 3A1.4 (adopting the definition of "Federal Crime of Terrorism" in 18 U.S.C. § 2332b(g)(5)). The enhancement raises the offense level by 12, or to a level of 32, whichever is higher. It also uniquely ascribes to the defendant a Category VI criminal history, the highest level usually reserved for career offenders. *See United States v. Segura-Del Real*, 83 F.3d 275, 277 (9th Cir. 1996) ("Defendants are placed in category VI because they are the most intractable of all defendants."). The Terrorism Enhancement is the reason that individuals convicted of terrorism-related conduct, no matter how minor, receive abnormally long criminal sentences.

Applying the Terrorism Enhancement, the *minimum* possible Guidelines range for any offense is 210 to 262 months—that is, 17.5 to 21.8 years.[3] But more typically, the enhancement leads to a sentence of thirty years to life, or the statutory maximum, whichever is less. The result: it can put a criminal defendant away for thirty years to life for a crime that would otherwise result in a sentence of around five years.[4] That is precisely what happened in this case.

II. The Terrorism Enhancement Violates Both the Sentencing Reform Act and 28 U.S.C. § 991(b)(1)(A).

A. Congress requires courts to consider the objective factors in § 3553(a) to impose a sentence.

Pursuant to the Sentencing Reform Act of 1984, Congress requires courts to consider seven delineated factors to "impose a sentence sufficient, but not greater than necessary to comply with the [law's] purposes . . ." 18 U.S.C. § 3553(a). *See also* 28 U.S.C. § 991(b)(1)(A) (requiring the Commission to develop guidelines that take into account the § 3553(a) factors). The first of those factors is "(1) the nature and circumstances of the offense and the history and characteristics of the defendant." § 3553(a)(1). The second factor requires courts to consider a sentence to, among other things, reflect the seriousness of the crime, deter the defendant, and provide needed treatment to the defendant. § 3553(a)(2). The fourth and fifth factors

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[3] United States Sentencing Commission, Guidelines Manual, Ch. 5, Pt. A, 407 (Nov. 1, 2018).

[4] *Id.*

ask courts to consider the Guidelines range and policy statements issued by the Commission. § 3553(a)(4), (5). Prior to its amendment, § 3553(b)(1) made it mandatory for courts to follow the Guidelines referenced in the fourth factor. In *United States v. Booker*, the Supreme Court held that § 3553(b)(1) was unconstitutional and severed the provision to make the Guidelines "advisory". 543 U.S. 220, 245-46 (2005). Thus, "[§ 3553] requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id*. In other words, the Guidelines are just one of several factors that courts must consider when crafting a sentence.

B. The Terrorism Enhancement does not consider, and actually undermines, the objective factors required by federal law.

The Terrorism Enhancement violates 28 U.S.C. § 991(b)(1)(A)—and undermines 18 U.S.C. § 3553(a)—as its express language and application reveals the Commission does not advise courts to follow the § 3553(a) factors for terrorism-related cases. In fact, none of the § 3553(a) factors are encompassed within or referenced by the enhancement at all. Instead, the Terrorism Enhancement automatically increases the level of the offense and the Criminal History Category, neither of which are based on an evaluation of the defendant's conduct or characteristics or the need for the sentence imposed. *See* 18 U.S.C. § 3553(a).

In the context of a material support offense under 18 U.S.C. § 2339A or 2339B, the Terrorism Enhancement would not direct a court to consider objective

factors, such as the amount or kind of support given, whether the support was choate or inchoate, the defendant's actual role in the terrorist activity, or the extent of harm caused by the defendant's support. Rather, the enhancement hinges on a single question: was "the offense a felony that involved, or was intended to promote, a federal crime of terrorism," with "federal crime of terrorism" defined as an offense *calculated to influence or affect the conduct of government*. U.S.S.G. § 3A1.4(a); 18 U.S.C. § 2332b(g)(5). If the court finds, by a preponderance of the evidence, that the defendant provided material support to a terrorist or terrorist organization, then the Guidelines oblige the sentencing court to apply the Terrorism Enhancement with no adjustment for mitigating or aggravating conduct. *See United States v. Awan*, 607 F.3d 306, 317 (2d Cir. 2010) (citing 18 U.S.C. § 2332(b)(g)(5)(A)).

In reality, the type of criminal conduct subject to the enhancement varies significantly: from planning and participating in a terrorist attack that kills many people (i.e., what would likely be accompanied by life in prison to capital punishment) to making false statements to law enforcement officials (i.e., punishable by a maximum five-year prison sentence). *See, e.g., United States v. Benkahla*, 530 F.3d 300, 304, 307 (4th Cir. 2008) (applying the Terrorism Enhancement, the defendant's sentence for perjury was increased from approximately three years to 10-12 years, or up to four times the normal length for perjury). This range of conduct is not accounted for in the Terrorism Enhancement and the resulting Guidelines

range is thus often inconsistent with the statutes criminalizing and punishing the conduct. *Id*.

Moreover, the Terrorism Enhancement directly contradicts the language of the material support statutes, which acknowledge that there are different levels of support justifying different punishments. For example, while § 2339A permits a maximum sentence of fifteen years, if death results from the support provided, the maximum sentence increases to life. Likewise, under § 2339C, if a defendant provides financial support with the intent or knowledge that the funds will be used in an act of terrorism, the maximum sentence is twenty years. But if someone only conceals, rather than provides, financial support, the maximum is just ten years. By contrast, the minimum sentence under the Terrorism Enhancement is 17.5 years, *regardless of the type of material support provided*.[5] While the material support statutes' variation in sentencing shows that Congress intended for sentences to be "proportional to the culpability of the conduct, to the injury that can be directly attributed to a defendant's actions, and to the nature of the organization's actions," the Terrorism Enhancement treats an individual who provides any type of material support as harshly as the terrorist who himself commits violent acts.[6]

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[5] United States Sentencing Commission, Guidelines Manual, Ch. 5, Pt. A, 407 (Nov. 2018).

[6] James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 L. & INEQ. 51, 100, 116 (2010).

III. The Terrorism Enhancement Violates the Eighth Amendment.

A. Sentences under the Terrorism Enhancement are often grossly disproportionate to the defendant's conduct.

The Terrorism Enhancement violates the Eighth Amendment because it results in punishments that, like in Appellant's case, are grossly disproportionate to the defendant's conduct. In *Weems v. United States*, the Supreme Court first expressly considered proportionality—"that punishment for crime should be graduated and proportioned to the offense"—as grounds for an Eighth Amendment challenge. 217 U.S. 349, 357 (1910). There, the defendant was convicted of an offense against the government—namely, falsifying an official public record by a government official. *Id*. The sentence for the offense was at least twelve years.

The Court considered, *sua sponte*, whether *Weems's* conviction violated the Eighth Amendment and concluded that reading its prohibition against cruel and unusual punishment as barring only barbaric methods of execution and interrogation was insufficient to give meaning to the protections intended by the Framers. *Id*. at 368-69. Instead, "in the application of a constitution, therefore, [the Court's] contemplation cannot be only of what has been, but of what may be." *Id.* at 373.

Weems was convicted of an offense under an archaic criminal statute previously in place during the Spanish occupation of the Philippines and which was

subsequently adopted by the Philippine Commission.[7] Thus, while it was originally codified as a criminal statute, it was not a law promulgated by the legislature. *Id*. at 380, 382. The Court noted that the mandatory sentence for falsifying a government document was far greater than punishments prescribed for similar conduct that did not involve a government document. *Id*. at 381. The Court found that the archaic *non-legislatively* promulgated offense, in concert with the disparity between a government document and a non-government document, violated the Eighth Amendment. *Id*. It noted that that the judiciary must give deference to the legislature as the "function of the legislature is primary." *Id.* at 379. The only limitations on the legislature are "constitutional ones, and what those are, the judiciary must judge." *Id.*

The proportionality doctrine continues to inform both capital and noncapital sentencing, recognizing its limits based on the principle that sentencing is "properly within the province of legislatures, not courts." *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring). *See also Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (holding that the Eighth Amendment does not require strict proportionality but instead forbids sentences that are "grossly disproportionate"); *Ewing v. California*, 538 U.S. 11, 22 (2003) (holding that California's three strikes law was

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[7] The Philippine Commission was the upper house of the Philippine Assembly. Similar to the unique position of the Sentencing Commission, it was appointed by the President and had legislative powers. *See* Ronald E. Dolan, *United States Rule, Philippines: A Country Study*, U.S. LIBRARY OF CONGRESS (June 1991), http://countrystudies.us/philippines/ (last visited Nov. 18, 2020).

not grossly disproportionate); *Solem v. Helm*, 463 U.S. 277 (1983) (reversing a life sentence without parole as grossly disproportionate).

1. Because the Guidelines are not law, the tradition of judicial deference to the legislature in sentencing is inapplicable.

The Supreme Court's Eighth Amendment precedent giving deference to legislatures in sentencing should not apply to a non-legislative body like the Commission here. In the years since *Weems* noted that the sentence developed by the Philippine Commission was not law, the Supreme Court has never expressly decided whether, in the context of an Eighth Amendment challenge, to give the same kind of deference to sentencing rules of a non-legislative body. But similar to the sentencing in *Weems*, the Terrorism Enhancement is the product of an appointed Commission. And unlike the post-*Weems* cases, it is neither part of a mandatory sentencing scheme, nor is it the product of a legislative sentencing determination. *See Booker*, 543 U.S. at 331 (a Sixth Amendment case) (Breyer, J., dissenting in part) ("The [Guidelines] are *administrative*, not statutory, in nature. Members, not of Congress, but of a Judicial Branch Commission, wrote those rules."). Rather, the Commission is an independent agency in the judicial branch, where commissioners are nominated by the President and confirmed by the Senate. The Attorney General and the Chair of the U.S. Parole Commission serve as ex officio, nonvoting members

of the Commission.[8] *See Mistretta v. United States*, 488 U.S. 361, 393 (1989) ("The Commission . . . is an independent agency in every relevant sense."). Accordingly, in an Eighth Amendment proportionality analysis, the Commission, with its non-legislative Guidelines, is not due the same deference that the legislature receives.

2. The Terrorism Enhancement functions as a mandatory minimum sentence in terrorism-related cases.

Although the Guidelines were deemed advisory in *Booker*, because sentencing courts are required to consider them and must provide a sufficient justification for departing from them, they largely continue to act as mandatory.[9] *See Rita v. United States*, 551 U.S. 338, 366 (2007) (Stevens, J., concurring) ("I am not blind to the fact that, as a practical matter, many federal judges continued to treat the Guidelines as virtually mandatory after our decision in *Booker*."). Perhaps nowhere is this more evident than with the Terrorism Enhancement. Sentencing courts start from a place of little experience with terrorism-related cases, like the district judge noted in this case.[10] They rely on the Terrorism Enhancement in the Guidelines based on the assumption that the Commission, with superior knowledge and data, must

[8] United States Sentencing Commission, https://www.ussc.gov/ (last visited Nov. 13, 2020).

[9] "[T]he average sentence imposed for all cases has closely tracked the average guideline range—both before and after *Booker*." *See* United States Sentencing Commission, *Federal Sentencing: The Basics*, 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201510_fed-sentencing-basics.pdf.

[10] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 180, Transcript of Sentencing Hearing, 69 ("Mr. Rahim, we don't see many cases like this here. We might do maybe one case a year for the various courts . . .").

have created the Terrorism Enhancement for some logical and substantiated reason. *See Gall v. United States*, 552 U.S. 38, 46 (2007) (explaining that the Guidelines are the "product of careful study based on extensive empirical evidence"). While this assumption is inaccurate[11], terrorism defendants then receive severe punishments that, when reviewed by an appellate court, are given a "presumption of reasonableness." *See Rita,* 551 U.S. at 347. In other words, because the sentences are within the Guidelines range, appeals courts typically defer to the trial courts. It seems that the only time appellate courts have stepped in is to overturn sentences as *too lenient* when district judges vary downward from the Guidelines range created by the Terrorism Enhancement.[12] *See, e.g., United States v. Ressam*, 679 F.3d 1069 (9th Cir. 2012); *id.* at 1106 (Schroeder, J., dissenting) ("The majority's implicit assumption that terrorism is different . . . flies in the face of the congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses."); *United States v. Jayyousi*, 657 F.3d 1085, 1117 (11th Cir. 2011) (vacating sentence which varied downward from Guidelines range and remanding with instructions to increase sentence into range of 360 months to life). Thus, to call the Terrorism Enhancement "advisory" is to ignore reality—that no matter the route taken, we end up right back at applying the Terrorism

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[11] *See* discussion *infra* Section III.A.3.a.

[12] *See* Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO ST. L.J. 477, 525-27 (2014).

Enhancement's automatic offense level and Criminal History Category increases without regard for the defendant's conduct or characteristics.

3. The Terrorism Enhancement is disproportionate under *Weems* because it drastically increases a defendant's Criminal History Category even where the defendant has no prior offenses.

The Guidelines classify defendants by Criminal History Category based on their number of past offenses because, according to the Commission, courts should impose a sentence that will "protect the public from further crimes of the defendant" (18 U.S.C. § 3553(a)), and "repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation." U.S.S.G. § 4A1.1, Introductory Comment. "Prior convictions . . . serve under the Guidelines to place the defendant in one of six 'criminal history' categories; the greater the number of prior convictions, the higher the category. . . . the Guidelines seek to punish those who exhibit a pattern of 'criminal conduct.'" *Nichols v. United States*, 511 U.S. 738, 751 (1994) (Souter, J., concurring). In other words, the Criminal History Category is intended to increase sentences for "career offenders."

The Terrorism Enhancement, however, unnecessarily modifies the Criminal History Category so that defendants who have little to no criminal history, are placed in Category VI instead of Category I, increasing their Guidelines sentence by a

minimum of fifteen years.[13] Simply put, the Terrorism Enhancement *pretends* that first-time offenders are career offenders.[14] This increase in a defendant's Criminal History Category requires the sentencing court to ignore the facts and instead develop an inaccurate and unfair picture of the individual that leads to disproportionate punishments in contravention of the Eighth Amendment.

a. The empirical evidence does not support treating and sentencing first-time terrorism offenders like career offenders.

According to the Commission, "the guidelines represent an approach that begins with, and builds upon, empirical data." U.S.S.G. Part A, Introduction and Authority at 5 (2018). Indeed, the Supreme Court has repeatedly claimed that the reason courts should and do look to the Guidelines in imposing fair sentences is because the Commission develops the Guidelines by using empirical data. *See Rita*, 551 U.S. at 349 (outlining the "empirical approach" that the Sentencing Commission used to structure the Sentencing Guidelines); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007) (The Commission "has the capacity courts lack to 'base its determinations on empirical data and national experience. . . .'"). Despite this imperative, there was little empirical data on terrorism sentences when the

[13] For example, the Guidelines range for an individual with an offense level of thirty-six would be reduced from 324-405 months to 188-235 months. United States Sentencing Commission, Guidelines Manual, Chapter 5, Pt. A, 407 (Nov. 2018).

[14] None of the other "Victim-Related Adjustments" result in an automatic Criminal History Category increase. *See* U.S.S.G §§ 3A1.1-3.

Commission promulgated the Terrorism Enhancement in 1994.[15] Instead, the Terrorism Enhancement was created on the unsubstantiated assumption that terrorism defendants, no matter their individual situation, were so different from other defendants that an extreme increase in Criminal History Category was necessary across the board.[16]

Moreover, the evidence since 1994 strongly discredits the logic of the Terrorism Enhancement's blanket increase in Criminal History Category, particularly where the defendant is a first-time offender. According to the Commission, individuals with no criminal record have the lowest rate of recidivism.[17] One study cited by the Commission in 2004 determined that 93.2% of first-time offenders did not reoffend.[18] Based on this evidence, for non-terrorism defendants without a criminal history, courts regularly impose sentences below the advisory Guidelines range because they recognize that a lesser prison sentence is nonetheless a significant punishment and deterrent for someone who has never

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[15] *See* Brown, *supra* note 2, at 547.

[16] At the time, neither Congress nor the Commission could have envisioned how a group like ISIS would use the internet to ensnare individuals like Appellant, thereby exposing first-time non-violent offenders to statutory maximum sentences.

[17] *See* Sameer Ahmed, *Is History Repeating Itself: Sentencing Young American Muslims in the War on Terror*, 126 YALE L. J. (2017), https:// digitalcommons.law.yale.edu/ylj/vol126/iss5/5.

[18] *Recidivism and the "First Offender,"* United States Sentencing Commission (May 2004), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_First_Offender.pdf.

experienced prison.[19] The Commission has not, however, provided any evidence that terrorism-related defendants are an exception or reoffend at higher rates than others. To the contrary, the available data shows that individuals convicted of terrorism offenses do *not* reoffend at higher rates than those convicted of other crimes. Scott Shane, *Beyond Guantánamo, a Web of Prisons for Terrorism Inmates*, N.Y. TIMES (Dec. 10, 2011), https://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html. Of more than 300 prisoners who have completed terrorism sentences since 2001, "Justice Department officials and outside experts could identify only a handful of cases in which released inmates had been rearrested, a rate of relapse far below that for most federal inmates . . ." *Id*. Thus, "it appears extraordinarily rare for the federal prison inmates with past terrorist ties to plot violence after their release." *Id*. Because the Terrorism Enhancement automatically increases a defendant's Criminal History Category to VI, the fact that the defendant is a first-time offender with a low likelihood of recidivism is not only ignored but actually erased.

Courts scrutinizing this issue agree that the complete lack of evidence is a weak basis for the Terrorism Enhancement. Senior Judge George O'Toole, Jr., presiding over *United States v. Mehanna,* No. 09-10017-GAO (D. Mass. 2012),

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[19] *See, e.g.*, *United States v. Willis*, 479 F. Supp. 2d 927, 937 (E.D. Wis. 2007) (varying downwards because the "sentence provided a substantial punishment for someone . . . who had never before been to jail and who engaged in no violence").

criticized the mandatory Criminal History Category VI as "too blunt an instrument to have any genuine analytical value" and "fundamentally at odds with the design of the Guidelines" because it "imputes a fiction into the calculus." *Mehanna*, Sentencing Transcript (Doc. 480) at 8-9. Moreover, the Court in *United States v. Jumaev* recently refused to apply the enhancement because it "is not backed by any empirical evidence" and because "treating all 'terrorists' alike is impermissible under our sentencing paradigm." 2018 WL 3490886, *10, CR 12-0033 JLK (D. Colo. July 18, 2018). And the court explained in *United States v. Alhaggagi*:

> [T]he enhancement's treatment of criminal history-automatically assigning to all terrorism defendants a criminal history category of VI is inappropriate based on the seriousness of the crime, inappropriate based on assumptions about recidivism, and inappropriate as to this Defendant, warranting a downward departure.

2019 U.S. Dist. LEXIS 37889, 2019 WL 1102991 at *16 (N.D. Cal. March 8, 2019). *See also United States v. Khan*, No. 4:15-cr-00263, Judgment at Doc. 126 (S. D. Tex. July 2, 2018), *rev'd and remanded*, 938 F. 3d 713 (5th Cir. 2019), *resentenced* (sentencing the defendant to 18 months because he had no criminal history and terminated his plans). Courts applying the Terrorism Enhancement, on the other hand, conspicuously fail to cite any evidence to justify imposing the Guidelines' harsh sentences in terrorism-related cases.[20] The result is disproportionate and

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[20] McLoughlin, *supra* note 6, at 112-15.

inconsistent sentences across jurisdictions, a violation of both the Sentencing Reform Act and the Eighth Amendment.

b. Sentencing first-time terrorism offenders like career offenders causes harm akin to that caused by comparable sentencing during the War on Drugs.

The Terrorism Enhancement's harsh sentences resemble the now-denounced sentencing policies imposed during the "War on Drugs".[21] In response to the crack-cocaine epidemic and gang violence in the 1980s and 1990s, the Commission developed significant increases in the Guidelines range that did not consider the seriousness of the defendant's conduct or circumstances.[22] Thus, a first-time offender convicted of distributing 500 grams of methamphetamine would receive ten to twelve years in prison—higher than they would receive for rape, involuntary manslaughter, and extortion of over $5 million involving serious bodily injury.[23]

A primary purpose of the high mandatory sentences in the War on Drugs was to strip the discretion judges used when accounting for defendants' unique

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[21] *See* Ahmed, *supra*, note 17 at 1524.

[22] Perry L. Moriearty & William Carson, *Cognitive Warfare and Young Black Males in America*, 15 J. GENDER RACE & JUST. 281, 290-91 (2012). This included creating twenty-nine mandatory minimum sentences for drug offenses with a one hundred-to-one sentencing disparity for crack versus powder cocaine.

[23] *An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants To Plead Guilty*, HUM. RTS. WATCH (Dec. 5, 2013), http://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead.

characteristics, because of a concern that judges were imposing lenient sentences.[24] But the Guidelines ranges for drug offenses were not based on evidence; rather, the Commission, and ultimately courts, justified harsher Guidelines ranges for drug offenses based on the narrative that young African American "super-predators" were a type of defendant unable to be rehabilitated.[25] The problem: in reality, the majority of drug offenders were not violent, hardened criminals, but were in fact capable of rehabilitation and reintegration into society.[26]

Similarly, courts that apply the Terrorism Enhancement seek to justify its steep increase by arguing, with no evidence, that "terrorists[,] [even those] with no prior criminal behavior[,] are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Jayyousi*, 657 F.3d at 1117; *see also United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003). This belief, "that terrorism is different, maybe even exceptional" is premised on "a type of visceral outrage at all conduct linked to terrorists that can taint the individualized and careful process that is supposed to go into a criminal

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[24] James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 359-60 (2009); *see also* Aziz Z. Huq & Christopher Muller, *The War on Crime as Precursor to the War on Terror*, 36 INT'L J. L. CRIME & JUST. 215, 218-19 (2008).

[25] *See* Ahmed, *supra* note 17, at 1554-55. S*ee also* The Changing Nature of Youth Violence: Hearing Before the Subcomm. on Youth Violence of the S. Comm. on the Judiciary, 104th Cong. 1, 24 (1996) (statement of John J. Dilulio, Jr.).

[26] *Punishment and Prejudice: Racial Disparities in the War on Drugs*, HUM. RTS. WATCH (May 1, 2000), http://www.hrw.org/legacy/reports/2000/usa/Rcedrg00-04.htm.

sentencing" and, despite the lack of evidence, is used to "justif[y] a departure from the normal standards."[27] Not only is this belief unsupported, its resultant sentencing enhancement also causes harm to the Muslim American community similar to that caused by the War on Drugs' harsh sentencing policies.[28] For the same reasons that the Guidelines' harsh drug sentences were eventually decried as unfair, ineffective, and disproportionate, courts should reject the Terrorism Enhancement.

B. The Terrorism Enhancement's harsh increase in sentences violates the Eighth Amendment because it is based solely on the government's status as the victim.

The Terrorism Enhancement also fails under constitutional scrutiny because it seeks to dramatically enhance sentences where the government is the victim, including where a governmental "interest" is the only victim. The Eighth Amendment's prohibition on cruel and unusual punishment arose out of concern that the new federal government—intending to stifle dissent among its citizens—could institute cruel and unusual punishments against anyone who opposed to it. This was not a theoretical fear; rather, it originated from punishments that the Stuart Kings and others imposed for crimes of treason just a few generations before the

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27 Said, *supra* note 12, at 521.

28 Ahmed, *supra* note 17, at 1556. "These [similar] negative effects include (1) increasing discrimination by reinforcing stereotypes of African Americans and Muslims as inherently dangerous, (2) furthering distrust of law enforcement among African Americans and Muslims, . . . and (3) failing to effectively rehabilitate drug and terrorism offenders and reintegrate them into society." *Id*.

Revolution.[29] In *Wilkerson v. Utah*, the Supreme Court identified common punishments for treason and high treason: being drawn and quartered, or dragged to the place of execution for treason; being disemboweled alive, beheaded, and quartered, in high treason; or in the case of treason committed by a woman, being burned alive. 99 U.S. 130, 135 (1878). As the victim of treason was the government (there, the monarchy) alone, the Stuart Kings' goal—and the result—in punishing these crimes so severely was clear: suppress dissent and maintain power.

Perhaps the most well-known example of a punishment against someone accused of high treason was in 1606 against Guy Fawkes, who was sentenced to be hanged, drawn and quartered. Fawkes was a member of a group of English Catholics who were involved in the Gunpowder Plot of 1605, which planned to blow up King James and Parliament in an effort to end the English government's persecution of Roman Catholics. The plot failed. As punishment, Fawkes's dead body was drawn and quartered, and, as was the custom, his body parts were then distributed to "the four corners of the kingdom," to be displayed as a warning to others that the king deemed traitors.[30] In other words, Fawkes's severe punishment was directly related to his acts being aimed at the government.

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[29] John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 WM. & MARY BILL RTS. J. 989 (2019).

[30] James Sharpe, *Who was Guy Fawkes? The Man Behind the Mask*. NAT'L GEOGRAPHIC HIST. MAG. (Nov. 12, 2017).

While Fawkes's crimes were serious, similarly extreme punishments were often imposed for much lesser crimes on the grounds of treason. Indeed, the definition of "treason" changed at the whims of the monarchy, depending on who was in power.[31] Thus, while some kings required an "overt act" against the government, others doled out treason convictions and brutal punishments for anyone who slandered the king.[32] Some even construed treason so broadly as to include "imagining the king's death."[33] After centuries of tyranny, the colonies, and later the Framers, sought to prevent such severe punishments for crimes against the federal government where the harshness of the penalty was increased solely because the government was the victim. *See Harmelin v. Mich.*, 501 U.S. at 968 (Scalia, J., concurring) (explaining historical evidence shows the "arbitrary sentencing power" exercised by the "infamous Chief Justice Jefferys of the King's Bench" was what led to the English Declaration of Rights, an early precursor to the Eighth Amendment).

Here, the Terrorism Enhancement functions in a similar manner except to conduct much less serious than Fawkes's. The material support statutes set forth specific sentence ranges depending on the severity of the conduct and the harm

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[31] *Historical Concept of Treason: English, American*, 35 IND. L. J., Iss. 1, Art. 4, 70 (1959).

[32] *Id*. at 73-75.

[33] *Id*. at 72, 73.

caused. By contrast, the Sentencing Commission, in creating and urging courts to utilize the Terrorism Enhancement, plainly placed the identity of the victim—the government—above the severity of the crime, the circumstances of the defendant, or any other relevant factors typically considered. The outcome defies logic and fairness. Where an individual conspires to build a bomb and actually acquires weapons, locates a target and drives to that target, they would receive a sentence of time served to three years if the intended target was *not* the government. *See, e.g., United States v. Stone*, 608 F.3d 939, 945 (6th Cir. 2010). But if the same person merely applauded attacks online or planned to travel abroad to join a terrorist group, they would receive a minimum recommended sentence of at least 17.8 years, and often a recommended sentence of thirty years to life. The only difference: the government is the victim. Any crime aimed at "influencing the conduct of government" will almost certainly receive the Terrorism Enhancement. U.S.S.G § 3A1.4. This is repugnant to the Eighth Amendment.

In this case, the victim is identified only as "the societal interest of preserving national security."[34] But the mere fact of a crime against government interests is not sufficient to withstand the Eighth Amendment prohibition on cruel and unusual punishments. Indeed, the same rationale would have been given for the punishments

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[34] *United States v. Said Azzam Rahim*, 3:17-cr-00169 (N.D. Tex. 2019), Doc. 136-1, Presentence Investigation Report.

meted out by the Stuart Kings for the broad range of conduct that encompassed crimes of treason and high treason. Individuals like Appellant should be sentenced in accordance with their personal characteristics, actual criminal history, and specific conduct. To discard the factors created by Congress and inflict exorbitant sentences *not* prescribed by Congress for a crime against the government is exactly the type of persecution the Eighth Amendment sought to prevent. As the Framers feared, "[c]ruelty might become an instrument of tyranny." *Weems*, 217 U.S. at 373.

CONCLUSION

Because imposition of the Terrorism Enhancement violates the Sentencing Reform Act and the Eighth Amendment, *Amicus* respectfully requests that if Defendant-Appellant's conviction is affirmed, this Court vacate his sentence and remand for resentencing consistent with the requirements of 18 U.S.C. § 3553(a).

Submitted this 1st day of December 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, a true and correct copy of the Brief of *Amicus Curiae* the Constitutional Law Center for Muslims in America (CLCMA) in Support of Appellant was forwarded to all counsel of record by the Electronic Filing Service Provider, if registered, otherwise by email, as follows:

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