

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3
4 August Term 2007

5
6 (Argued: May 13, 2008

Decided: December 2, 2008)

7
8 Docket No. 04-2643-cr

9 -----x
10 UNITED STATES OF AMERICA,

11 Appellee-Cross-Appellant,

12 -- v. --

13
14 MAMDOUH MAHMUD SALIM,

15
16 Defendant-Appellant-Cross-Appellee.

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18 -----x
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22 B e f o r e : NEWMAN, WALKER, and SOTOMAYOR, Circuit Judges.

23 Appeal by Defendant Mamdouh Salim from a 32-year sentence,
24 entered in the United States District Court for the Southern
25 District of New York (Deborah A. Batts, Judge), following a
26 guilty plea to conspiracy to murder and attempted murder of a
27 federal official in violation of 18 U.S.C. §§ 1114 and 1117. The
28 United States cross-appeals on the ground that the district court
29 erroneously refused to apply the terrorism sentencing enhancement
30 of section 3A1.4 of the United States Sentencing Guidelines on
31 the basis that the offense conduct did not transcend national
32 boundaries.

33 VACATED and REMANDED.

1 RICHARD LIND, New York, N.Y.,
2 for Defendant-Appellant-Cross-
3 Appellee.

4
5 JONATHAN S. KOLODNER,
6 Assistant United States
7 Attorney, of counsel, (Celeste
8 L. Koeleveld, Assistant United
9 States Attorney, of counsel,
10 on the brief), for Michael J.
11 Garcia, United States Attorney
12 for the Southern District of
13 New York, New York, N.Y., for
14 Appellee-Cross-Appellant.

15 JOHN M. WALKER, JR., Circuit Judge:

16 Defendant-Appellant Mamdouh Mahmud Salim ("Salim") appeals
17 from the 32-year sentence imposed in the Southern District of New
18 York (Deborah A. Batts, Judge) following his guilty plea to
19 conspiracy to murder and attempted murder of a federal official
20 in violation of 18 U.S.C. §§ 1114 and 1117. Salim contends that
21 the district court erroneously applied several sentence
22 enhancements under the United States Sentencing Guidelines
23 ("U.S.S.G."), including the enhancements for "Obstructing or
24 Impeding the Administration of Justice," U.S.S.G. § 3C1.1, for an
25 "Official Victim," U.S.S.G. § 3A1.2, and for "Restraint of
26 Victim," U.S.S.G. § 3A1.3. On cross-appeal, the United States
27 contends that the district court erred in failing to apply the
28 "Terrorism" enhancement of U.S.S.G. § 3A1.4, on the basis that
29 the offense conduct did not transcend national boundaries.
30 Because we reject Salim's claims but agree with the government
31 that the terrorism enhancement does not require such

1 transnational conduct, we remand with directions to the district
2 court to vacate the sentence and resentence.

3 **BACKGROUND**

4 In 1999, Salim and others were indicted in the Southern
5 District of New York on charges related to the 1998 U.S. Embassy
6 bombings in Kenya and Tanzania. The case was assigned to Judge
7 Leonard Sand and Salim was housed in the maximum security wing of
8 the Metropolitan Correctional Center (MCC).

9 On November 1, 2000, Salim stabbed corrections officer Louis
10 Pepe in the eye with a sharpened comb. The charges arising from
11 this attack were ultimately severed from the underlying
12 proceedings before Judge Sand, and, on April 3, 2002, Salim
13 pleaded guilty to conspiring and attempting to murder officer
14 Pepe in violation of 18 U.S.C. §§ 1114 and 1117 before Judge
15 Deborah Batts.

16 At the ten-day Fatico hearing, see generally United States
17 v. Fatico, 579 F.2d 707 (2d Cir. 1978), the government presented
18 the testimony of seven witnesses, several pieces of forensic
19 evidence, and crime scene photographs to support its theory that
20 Salim and "unspecified others" had concocted and acted upon an
21 elaborate but ultimately fruitless plan to escape the MCC by
22 taking hostages.

23 Inmates at the MCC were rotated between cells every 21 days.
24 On October 25, 2000 (six days before the attack) Salim was moved

1 from Cell One to Cell Six of Unit 10-South, where his cellmate
2 was Khalfan Mohamed, a co-defendant in the embassy bombings case.

3 In a pre-hearing submission, Salim contended that he
4 attacked Pepe in an attempt to escape, not to take hostages.
5 During the Fatico hearing, however, Salim's story changed. On
6 direct examination, Salim testified that during the summer of
7 1999, he had planned to escape the MCC with Mohamed Odeh, another
8 codefendant, but ultimately decided that the escape plan could
9 not work and abandoned it. Instead, Salim claimed, he attacked
10 Pepe to get his keys, unlock a visitation room on 10-South, and
11 attack his attorneys so that they would withdraw from
12 representing him and Judge Sand would have to grant substitute
13 counsel.

14 Salim claimed that he had grown increasingly frustrated with
15 counsel's performance and had written a letter to Judge Sand on
16 February 22, 2000 requesting substitute counsel. Judge Sand held
17 a hearing and denied the request, telling Salim that it was up to
18 him to solve his problems with his attorneys.

19 Salim wrote Judge Sand again on September 23 requesting
20 substitute counsel, and on October 2 thanking him for listening
21 to his problems and requesting a hearing before another judge.
22 Judge Sand referred the matter to Magistrate Judge Eaton, who
23 held a hearing on October 26, at which Salim (according to his
24 testimony at the Fatico hearing) insulted his attorneys and asked

1 "Are they waiting until I physically assault them? I didn't say
2 physically, but I said assault." In a letter dated October 27,
3 defendant expressed concern that he would not receive substitute
4 counsel and that he hadn't been given "enough time to express
5 [his] problem with the lawyers."

6 On October 30, Salim said he received a letter from
7 Magistrate Judge Eaton informing him of "his decision in writing,
8 not only verbally, that he will not allow attorney change." He
9 then concluded that he "only had one recourse, to attack [his
10 lawyers] physically, and in that instance they will be
11 resigning." He complained to his cellmate Mohamed, who agreed to
12 help Salim assault his lawyers, in part to atone for his "sin" of
13 testifying in a way that led to Salim's imprisonment.

14 On November 1, according to Salim's testimony, Salim was
15 awakened by Pepe, who informed him that his lawyers were in one
16 of 10-South's visitation rooms. Pepe took Salim to the visiting
17 room. He usually met with his lawyers face-to-face, but because
18 Salim said he needed to use the computer, he ended up separated
19 from his attorneys by a screen. Salim then said he needed to get
20 some more material from his cell. As Pepe escorted him to his
21 cell, Salim began singing, which was a prearranged signal to
22 Mohamed to ready himself for the attack. On arriving in Cell
23 Six, Mohamed grabbed Pepe's walkie-talkie, and Salim struck

1 Pepe's legs from behind and sprayed hot sauce in his eyes.¹ With
2 Pepe on the floor, Salim attempted to turn him over to get his
3 keys. Salim says he then "became crazy" and stabbed Pepe in the
4 eye with his sharpened comb-knife. The weapon penetrated the
5 corrections officer's eye and entered his brain. Salim then
6 locked Pepe in the cell and started back to the visitation room,
7 at which point other corrections officers arrived and subdued
8 him.

9 On September 25, 2003, the district court, in a lengthy
10 opinion, rejected the government's theory that Salim's assault on
11 Pepe was motivated by a hostage-taking/escape plan. United
12 States v. Salim ("Salim I"), 287 F. Supp. 2d 250, 300-01
13 (S.D.N.Y. 2003). The district court concluded that Salim's plan
14 was to attack his attorneys and thereby force Judge Sand to grant
15 his substitution motion. As a result, the district court
16 determined that the attack on Officer Pepe was designed "to
17 influence or affect by intimidation or coercion Judge Sand's
18 decision whether or not to substitute Defendant's counsel and
19 also was calculated to retaliate against judicial recommendations
20 and orders denying Defendant's applications for substitute
21 counsel." Id. at 304. The district court observed that Salim's
22 numerous requests for substitution were denied, showing that

1 ¹ A commissary request from October 26, the date of Salim's
2 hearing before Magistrate Judge Eaton, showed that Salim
3 requested five bottles of hot sauce and received two on that day.

1 Salim knew Judge Sand "had ultimate authority to replace" his
2 attorneys. Id. at 303.

3 The district court also found that Salim's alternative
4 explanation, that he only wanted to force the attorneys to
5 resign, and was unconcerned with Judge Sand's actions, was
6 "incredible," as "[d]efendant clearly did not believe his
7 attorneys could unilaterally withdraw or resign from his case."
8 Id. at 304.

9 In calculating Salim's Guidelines sentence, the district
10 court found, inter alia, that a three-level enhancement applied
11 under U.S.S.G. § 3A1.2(a) (the Official Victim enhancement)
12 because "Defendant attacked Officer Pepe while Pepe was
13 performing his official duties," and a two-level enhancement
14 under U.S.S.G. § 3A1.3 (the Restraint enhancement) because "Pepe
15 was physically restrained during the attack." Id. at 308-09.

16 The district court declined to apply the terrorism
17 enhancement of U.S.S.G. § 3A1.4, which incorporates the term
18 "Federal crime of terrorism" defined in 18 U.S.C. § 2332b(g). In
19 so holding, the district court's decision culminated in the
20 following conclusions:

21 From the plain text of 18 U.S.C. § 2332b, the following is
22 clear: 1.) Section 2332b(g), which inter alia, sets forth a
23 definition for "Federal crime of terrorism," explicitly
24 directs this definition to be construed "As used in this
25 section;" 2.) Section 2332b(f), wherein the term "Federal
26 crime of terrorism" is used, vests the Attorney General with
27 authority to investigate Federal crimes of terrorism, with
28 such authority being "in addition" to that already available

1 under Title 18; 3.) the Attorney General already has broad
2 authority to investigate crimes under Title 18; 4.) Section
3 2332b is entitled and addresses "Acts of terrorism
4 transcending national boundaries" (emphasis added); and 5.)
5 Section 2332b(g)(1) recites that "conduct transcending
6 national boundaries" means conduct occurring outside of the
7 United States in addition to the conduct occurring in the
8 United States. From the foregoing, it is apparent that a
9 "Federal crime of terrorism" is one that meets the
10 requirements at § 2332b(g)(5) and involves "conduct
11 transcending national boundaries."
12

13 Id. at 339. Because Salim's assault on Officer Pepe did not meet
14 the latter requirement, the district court held that the
15 terrorism enhancement did not apply. Id. at 354.

16 The district court initially declined to impose an
17 "obstruction of justice" enhancement under U.S.S.G. § 3C1.1 based
18 on inconsistencies between Salim's testimony at the Fatico
19 hearing and his pre-hearing submissions to the court. Id. at
20 315. On reconsideration, however, the court granted the
21 government's motion for this enhancement based on a different
22 theory, concluding that "Defendant testified untruthfully under
23 oath about a material fact with the specific intent to impede or
24 obstruct justice." Order at 7, United States v. Salim
25 ("Obstruction Order"), No. 01-cr-002 (S.D.N.Y. Apr. 7, 2004).

26 After applying the relevant enhancements, the district court
27 calculated Salim's guidelines range at 262-327 months
28 imprisonment. It then applied an upward departure under U.S.S.G.
29 § 5K2 and imposed a 32-year sentence. On a Crosby remand, see
30 United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), the

1 district court decided not to resentence. Salim filed the
2 instant appeal claiming the district court improperly enhanced
3 his sentence, and the government cross-appealed the district
4 court's decision not to apply the terrorism enhancement.

5 **DISCUSSION**

6 We review a district court's imposition of sentence under
7 "an abuse-of-discretion standard." Gall v. United States, 128
8 S. Ct. 586, 597 (2007). "The abuse-of-discretion standard
9 incorporates de novo review of questions of law (including
10 interpretation of the Guidelines) and clear-error review of
11 questions of fact." United States v. Legros, 529 F.3d 470, 474
12 (2d Cir. 2008). "[I]mproperly calculating" the applicable
13 "Guidelines range" constitutes a "significant procedural error"
14 warranting remand for resentencing under this standard. See
15 Gall, 128 S. Ct. at 597.

16 Salim argues that the district court improperly calculated
17 the applicable Guidelines range by erroneously applying the
18 obstruction of justice, official victim, and restraint of victim
19 enhancements. The government argues that the district court
20 erred by refusing to apply the terrorism enhancement on the basis
21 that a "Federal crime of terrorism" must involve transnational
22 conduct. We address each argument in turn.

23 **I. The Obstruction of Justice Enhancement**

24 "[T]o base a § 3C1.1 enhancement [for "Obstructing or

1 Impeding the Administration of Justice"] upon the giving of
2 perjured testimony, a sentencing court must find that the
3 defendant 1) willfully 2) and materially 3) committed perjury,
4 which is (a) the intentional (b) giving of false testimony (c) as
5 to a material matter." United States v. Zagari, 111 F.3d 307,
6 329 (2d Cir. 1997). The district court found that Salim
7 willfully gave perjured testimony at the Fatico hearing regarding
8 his motive for his scheme to assault his lawyers. Specifically,
9 Salim falsely claimed "that he did not intend to affect Judge
10 Sand's determination" to grant substitute counsel, and stated
11 that he only wanted to force his lawyers to resign of their own
12 volition. See Obstruction Order at 6.

13 **A. Material and False Statements**

14 Salim first contends that his motive for attempting to
15 attack his lawyers was not material because he only pleaded
16 guilty to attacking Pepe and not to any offense based on his
17 alleged plan to assault his lawyers.

18 This argument relies on an impermissibly narrow notion of
19 materiality. "'Material,'" for the purposes of the obstruction
20 enhancement, "means evidence, fact, statement, or information
21 that, if believed, would tend to influence or affect the issue
22 under determination." U.S.S.G. § 3C1.1 n.6 (emphasis added).
23 The issue under determination was whether the terrorism
24 enhancement applied, i.e., whether the attempted murder of Pepe

1 was "calculated to influence or affect the conduct of government
2 by intimidation or coercion, or to retaliate against government
3 conduct." 18 U.S.C. § 2332b(g)(5). In short, the district court
4 had to determine the purpose of Salim's attack. See Salim I, 287
5 F. Supp. 2d at 290 ("The purpose of the Fatico hearing was to
6 adduce facts sufficient to establish Defendant's intent in
7 attacking Officer Pepe on November 1, 2000.").

8 Absent Salim's statements, the district court could have
9 concluded, for example, that the assault on Pepe was an isolated
10 incident, fueled by anger at Magistrate Judge Eaton's recent
11 adverse recommendation and Judge Sand's prior refusal to
12 substitute counsel. Testimony that the assault was part of a
13 larger plan and statements alleging a credible motive for such a
14 plan would, if believed, undoubtedly make the district court less
15 likely to draw this conclusion, and therefore less likely to
16 conclude that Salim attacked Pepe in retaliation for government
17 conduct (a motive warranting application of the terrorism
18 enhancement). They are therefore material.

19 As to the element of falsity, the district court found that

20 Defendant's testimony that he believed substitution of
21 counsel would have occurred but for "the lawyers themselves"
22 is incredible. Defendant clearly did not believe his
23 attorneys could unilaterally withdraw or resign from his
24 case-Defendant sent letters to Judge Sand, requesting
25 substitution of counsel . . . and Defendant repeatedly
26 interrupted proceedings in 98-CR-1023 [the embassy bombings
27 proceeding] to address his requests to substitute counsel to
28 Judge Sand.
29

1 Salim I, 287 F. Supp. 2d at 304. These conclusions represent
2 findings of fact on the falsity of Salim's statements. Thus, we
3 can only reverse them if they are clearly erroneous. United
4 States v. Agudelo, 414 F.3d 345, 348 (2d Cir. 2005).

5 Salim contends that his testimony at the Fatico hearing was
6 consistent, rather than "evasive and contradictory," Obstruction
7 Order at 7. We disagree. The record supports the district
8 court's characterization of falsity: Salim knew that Judge Sand
9 had the authority to change his lawyers but had denied Salim's
10 request to do so, and that Judge Eaton had recommended denying
11 Salim's most recent request. However, Salim denied believing
12 that the judge would have no choice but to appoint new lawyers if
13 Salim attacked them. Moreover, Salim testified that he planned
14 to attack his lawyers in order to obtain substitute counsel, but,
15 during re-direct, he stated that he would never have attacked his
16 lawyers in a hostage-taking scheme because "[i]n Islam it is not
17 permissible for me to attack any lawyer as long as he represents
18 me." Faced with such conflicting indicia of motive and belief,
19 it would not be clearly erroneous for the district court to
20 conclude that, for example, Salim made a false statement when he
21 stated his belief that Judge Sand "had no problem giving me other
22 lawyers, but the problem was the lawyers themselves, they didn't
23 want to resign." Salim I, 287 F. Supp. 2d at 287.

1 In his reply brief, Salim argues that his testimony on the
2 issue of attorney substitution or withdrawal was certainly
3 plausible in light of both "the chronology of court proceedings
4 in the Embassy Bombing case," and an examination of a court
5 transcript containing language by Judge Sand that if remedial
6 attempts by the court to ameliorate the relationship between
7 Salim and his attorneys was not working, the court would consider
8 whether new counsel should be appointed. Appellant's Reply Br.
9 at 8. Even if we accept this contention, it would not establish
10 clear error. "Where there are two permissible views of the
11 evidence, the factfinder's choice between them cannot be clearly
12 erroneous." Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).
13 Accordingly, this argument fails.

14 **B. Guidelines Section 3C1.1 and "blatant perjury"**

15 Citing United States v. Williams, 79 F.3d 334 (2d Cir.
16 1996), and United States v. Catano-Alzate, 62 F.3d 41 (2d Cir.
17 1995), Salim contends that this court will not uphold an
18 obstruction enhancement "where a district court made no findings
19 that the allegedly false statement constituted blatant perjury."
20 Appellant's Br. at 64. Neither case supports this argument.

21 Williams and Catano-Alzate both interpret United States v.
22 Dunnigan, 507 U.S. 87, 95 (1993), in which the Supreme Court
23 advised that, when imposing the obstruction enhancement, "it is
24 preferable for a district court to address each element of the

1 alleged perjury in a separate and clear finding." The sentences
2 in Williams, 79 F.3d at 337, and Catano-Alzate, 62 F.3d at 42,
3 were vacated because the district court failed to make specific
4 findings as to the elements of the enhancement.

5 Here, by contrast, the district court issued a written order
6 citing Dunnigan and explicitly finding that Salim's statements
7 were "false," and "made intentionally." Obstruction Order at 5-
8 6. It also found that the statements, "[i]f believed[,] . . .
9 would have impacted the Court's analysis of whether Defendant
10 intended to influence or affect Judge Sand's decision . . . the
11 very basis for the Court's finding" as to the terrorism
12 enhancement. Id. This language, which largely tracks the
13 definition of "material" used in § 3C1.1 n.6, plainly constitutes
14 a "separate and clear finding" of the materiality element under
15 Dunnigan. See 507 U.S. at 95. Finally, having found all of the
16 elements of perjury, the district court went on to find that the
17 perjury was committed "in an attempt to obstruct justice."
18 Obstruction Order at 7. The district court plainly found all of
19 the elements of § 3C1.1 by a preponderance of the evidence, and
20 nothing in Dunnigan, Williams, or Catano-Alzate requires more.

21 C. Intent to Obstruct Justice

22 The district court found that Salim's "false statements
23 were provided in an attempt to obstruct justice." Obstruction
24 Order at 7. This finding was not clear error. First, as noted

1 above, we credit the district court's characterization of Salim's
2 statements as evasive and contradictory. Second, the district
3 court found, in its earlier order following the Fatico hearing,
4 that Salim's attack was motivated, in part, by a desire to
5 retaliate against Magistrate Judge Eaton's recent adverse
6 recommendation regarding Salim's efforts to obtain substitute
7 counsel. Salim I, 287 F. Supp. 2d at 304. If this finding is
8 correct, Salim's failure to mention this desire when asked to
9 describe his motive strongly suggests that his false testimony
10 was made with the specific intent to obstruct justice.

11 Salim argues that the district court's finding as to his
12 retaliatory motive was erroneous because he did not receive
13 notice of Judge Sand's latest denial of his motion until nine
14 days after he attacked Pepe. However, the district court's
15 finding was that the attack "also was calculated to retaliate
16 against judicial recommendations and orders denying Defendant's
17 applications for substitute counsel." Id. (emphasis added).
18 This finding plainly refers to Judge Sand's previous denials and
19 Magistrate Judge Eaton's adverse recommendation, and not just to
20 Judge Sand's October 31 denial. Because Salim knew of the former
21 orders and recommendation, his alleged ignorance as to the latter
22 order does not render the finding of retaliatory motive clearly
23 erroneous. As a result, there was no clear error in the district
24 court's resultant conclusion that Salim testified with an intent
25 to obstruct justice.

1 The fact that the district court applied a theory of the
2 terrorism enhancement different from the one urged by the
3 government does not alter our calculus. As suggested above,
4 supra Part I.A, the issue at the Fatico hearing was whether the
5 enhancement covered Salim's conduct, not whether the government's
6 theory that Salim was attempting to take hostages to escape the
7 MCC was correct. Accordingly, the district court's finding, in
8 support of the obstruction of justice enhancement, that Salim
9 willfully made false statements was not clearly erroneous.

10 **II. The Official Victim Enhancement**

11 The district court granted a three-level upward enhancement
12 under U.S.S.G. § 3A1.2(a) because Salim's victim was a government
13 officer and Salim's offense "was motivated by Officer Pepe's
14 official status." Salim I, 287 F. Supp. 2d at 307.

15 Salim first cites United States v. Goolsby, 209 F.3d 1079,
16 1081 (8th Cir. 2000), where a defendant, awaiting sentencing for
17 a drug conviction, assaulted a federal corrections officer during
18 an escape attempt. The Eighth Circuit held that the enhancement
19 could not be applied to the drug conviction because the officer
20 was not a victim of the drug offense. Id. at 1082. Goolsby is
21 readily distinguishable, however, because the underlying offense
22 here is attempted murder of a federal officer, and Pepe is
23 plainly the victim of this offense.

1 Next, Salim asserts that there was no proof that his offense
2 was motivated by Pepe's official status. But Salim's testimony
3 showed both knowledge of Pepe's status and an assault committed
4 to obtain a key that Pepe possessed only as a result of this
5 status. Given this evidence, the district court's finding that
6 the assault was motivated by the victim's official status was not
7 clear error. See United States v. Bailey, 961 F.2d 180, 182
8 (11th Cir. 1992) (finding that robbery was motivated by official
9 status when "defendant robbed the postmistress because, as a
10 postal employee, she was in possession of money orders and a
11 money order validation machine").

12 Finally, Salim argues that this enhancement should not apply
13 to an offense that specifically incorporates an officer's status.
14 In United States v. Padilla, 961 F.2d 322, 327 (2d Cir. 1992), we
15 rejected a similar argument with respect to 18 U.S.C. § 111,
16 which proscribes the assault of a federal officer, because the
17 enhancement, unlike the underlying statute of conviction,
18 required knowledge of the victim's status. Salim's statute of
19 conviction, 18 U.S.C. § 1114, while incorporating the victim's
20 official status as an element, does not require proof that the
21 motivation for the attack was the victim's status. Thus,
22 applying the enhancement here does not involve "impermissible
23 double counting" because "the guideline enhances for an
24 additional factor that will not be present in every conviction"

1 under the statute. Padilla, 961 F.2d at 327.

2 **III. The Restraint of Victim Enhancement**

3 The district court granted a two-level upward enhancement
4 under U.S.S.G. § 3A1.3 because Officer Pepe was physically
5 restrained in the course of the offense. Salim I, 387 F. Supp.
6 2d at 310. Salim argues that any restraint of Pepe after he was
7 disabled by the stabbing did not add to the basic crime. We
8 disagree. By pleading to attempted murder, Salim admitted that
9 he stabbed Pepe with murderous intent. Handcuffing a victim and
10 locking him in a cell after a potentially lethal attack prevents
11 a victim from seeking aid and thereby adds to the underlying
12 offense of attempted murder. See United States v. Rosario, 7
13 F.3d 319, 321 (2d Cir. 1993) (finding that restraint facilitated,
14 rather than constituted, the offense of conviction when "the
15 victim could do nothing about [his] situation because of the
16 physical restraint" (alteration in original) (internal quotation
17 marks omitted)).

18 **IV. The Terrorism Enhancement**

19 Section 3A1.4 of the Sentencing Guidelines provides that
20 "[i]f the offense is a felony that involved, or was intended to
21 promote, a federal crime of terrorism," the offense level will be
22 increased by 12 levels (and be no lower than level 32) and
23 defendant's criminal history category shall be Category VI.
24 U.S.S.G. § 3A1.4. The commentary to that section provides that

1 “‘federal crime of terrorism’ has the meaning given that term in
2 18 U.S.C. [§] 2332b(g) (5).” Id. n.1.

3 In turn, 18 U.S.C. § 2332b(g) (5) provides that

4 the term “Federal crime of terrorism” means an offense that-
5 (A) is calculated to influence or affect the conduct of
6 government by intimidation or coercion, or to retaliate
7 against government conduct; and
8 (B) is a violation of [certain enumerated sections,
9 including 18 U.S.C. § 1114].

10
11 In its sentencing opinion, the district court found “that
12 Defendant’s attack on Officer Pepe was in furtherance of his
13 intent to affect or influence Judge Sand’s decision about
14 substitution of counsel, and was in retaliation for judicial
15 conduct denying Defendant’s applications for substitution of
16 counsel,” Salim I, 287 F. Supp. 2d at 303, and rejected Salim’s
17 claim that there was no evidence of these facts on the record.
18 Id. at 323. It also noted that “Defendant was convicted of an
19 offense enumerated at 18 U.S.C. § 2332b(g) (5) (B).” Id.

20 Despite its finding that Salim’s offense met both elements
21 of the § 2332b(g) (5) definition, the district court nonetheless
22 refused to apply the terrorism enhancement because it discerned a
23 third requirement. The district court held that “it is apparent
24 that a ‘Federal crime of terrorism’ is one that meets the
25 requirements at § 2332b(g) (5) and involves ‘conduct transcending
26 national boundaries.’” Id. at 339 (emphasis added) (quoting 18
27 U.S.C. § 2332b(a) (1)). Because Salim’s offense did not satisfy

1 this third requirement, the district court concluded that the
2 terrorism enhancement was inapplicable.

3 The district court opined that “[t]his definition of a
4 ‘Federal crime of terrorism’” incorporating a “transnational
5 conduct” element “reconciles the textual directives of the
6 different subsections of 18 U.S.C. § 2332b, as well as the
7 specific and broad context in which the term ‘Federal crime of
8 terrorism’ occurs.” Id. We disagree, and conclude that the
9 district court’s interpretation is irreconcilable with the text
10 of both subsection (g) (5) in particular and section 2332b as a
11 whole.

12 Apart from its appearance in subsection (g), which defines
13 the terms used elsewhere in section 2332b, the term “Federal
14 crime of terrorism” is used only once in the statute. Section
15 2332b(f) provides in relevant part:

16 In addition to any other investigative authority with
17 respect to violations of this title, the Attorney General
18 shall have primary investigative responsibility for all
19 Federal crimes of terrorism, . . . , and the Secretary of
20 the Treasury shall assist the Attorney General at the
21 request of the Attorney General.

22
23 18 U.S.C. § 2332b(f) (emphasis added).

24 The district court concluded that, unless a “Federal crime
25 of terrorism” only referred to crimes involving transnational
26 conduct, subsection (f) would be meaningless because other
27 sections of Title 18 already give the Attorney General “broad

1 authority to investigate violations" of that Title. Salim I, 287
2 F. Supp. 2d at 338. Thus, in order for subsection (f) to convey
3 authority "[i]n addition to" the Attorney General's existing
4 authority, "the extended authority must be in areas not before
5 authorized." Id. Because the Attorney General already had
6 investigative authority over purely intra-national offenses under
7 Title 18, this section could not convey any additional authority
8 (despite its obvious intent to do so) unless Federal crimes of
9 terrorism covered only crimes involving conduct transcending
10 national boundaries.

11 This argument cannot be reconciled with the statutory text
12 of subsection (g) (5), in which a transnational conduct
13 requirement is nowhere to be found. The district court erred in
14 deriving such a requirement from its reading of subsection (f).
15 Subsection (f) does not give the Attorney General additional
16 "authority" to investigate Federal crimes of terrorism, it gives
17 that officer "primary investigative responsibility" for such
18 crimes. 18 U.S.C. § 2332b(f) (emphasis added). Whatever the
19 exact meaning of "primary investigative responsibility," it is
20 plainly distinct from "investigative authority" because it
21 envisions an authority expressly superior to that possessed by
22 another actor. It is not meaningless to give an executive
23 officer primary investigative responsibility over a certain
24 category of crimes, even if he has pre-existing authority to
25 investigate the same crimes.

1 Prior to the passage of section 2332b, we presume, both the
2 Attorney General and the Secretary of the Treasury had certain
3 "investigative authority" with respect to violations of Title 18.
4 See, e.g., 18 U.S.C. § 1030(d)(1) (giving the Secret Service, a
5 division of the Treasury Department, authority to investigate
6 offenses involving computer fraud). When subsection (f) became
7 effective, the Attorney General was given primary investigative
8 responsibility with respect to certain Title 18 crimes
9 (specifically, those offenses that constituted Federal crimes of
10 terrorism) over the Secretary of the Treasury. The district
11 court overlooked the fact that one official's authority may be
12 enhanced by making it superior to that of another official, and
13 not just by increasing the number of crimes to which it extends.
14 As a result, subsection (f) is coherent on its face, and thus
15 undercuts any perceived need to read an extra-textual
16 "transnational conduct" element into the definition of Federal
17 crimes of terrorism.

18 The district court also asserted that its transnational
19 conduct element "harmonizes" the definition of Federal crime of
20 terrorism with the focus of section 2332b as a whole, "which is
21 'Acts of terrorism transcending national boundaries.'" Salim I,
22 387 F. Supp. 2d at 339 (quoting the title of 18 U.S.C. § 2332b).
23 We recognize that the offenses punished by section 2332b are
24 those "involving conduct transcending national boundaries," 18

1 U.S.C. § 2332b(a) (1), but Salim was not charged with or convicted
2 of violating that statute. Our focus is only on subsection
3 2332b(g) (5), the particular subsection of section 2332b that the
4 Sentencing Commission cross-referenced in the commentary to
5 U.S.S.G. § 3A1.4. The sentencing enhancement for a federal crime
6 of terrorism is not limited to conduct that constitutes an
7 offense under section 2332b; it applies to any conduct that meets
8 the definition of subsection (g) (5). Congress could have defined
9 "Federal crime of terrorism" to include a requirement that the
10 offense conduct transcend national boundaries, but it did not.
11 Instead, it defined two distinct terms, "Federal crime of
12 terrorism" and "conduct transcending national boundaries," and
13 neither term references the other. 18 U.S.C. § 2332b(g) (1), (5).
14 "[C]ourts must presume that a legislature says in a statute what
15 it means and means in a statute what it says there. When the
16 words of a statute are unambiguous, then, this first canon is
17 also the last: the judicial inquiry is complete." Conn. Nat'l
18 Bank v. Germain, 503 U.S. 249, 253-54 (1992) (internal citations
19 and quotation marks omitted).² Our refusal to incorporate a
20 transnational conduct element in the definition of "Federal crime

1 ² For this reason, Salim's rule of lenity argument also fails.
2 See United States v. Canales, 91 F.3d 363, 367-68 (2d Cir. 1996)
3 ("The rule is inapplicable unless after a court has seized on
4 every thing from which aid can be derived, it is still left with
5 an amiguity." (internal quotation marks and alterations
6 omitted)).

1 of terrorism" accords with the judgment of our sister circuits.
2 See United States v. Harris, 434 F.3d 767, 773 (5th Cir. 2005)
3 ("The definition of a 'federal crime of terrorism' . . .
4 encompasses many offenses, none of which has an element requiring
5 conduct transcending national boundaries."); United States v.
6 Hale, 448 F.3d 971, 988 n.1 (7th Cir. 2006); see also United
7 States v. Dowell, 430 F.3d 1100, 1105, 1110-12 (10th Cir. 2005)
8 (assuming without deciding that the terrorism enhancement applied
9 to domestic terrorist acts involving the destruction of an IRS
10 office in Colorado Springs); United States v. Graham, 275 F.3d
11 490, 496, 513-19 (6th Cir. 2001) (applying the "domestic
12 terrorism enhancement" to conduct by domestic militia that was
13 "planning to attack government targets on an unspecified future
14 date").

15 Salim contends that the district court's refusal to apply
16 the enhancement was correct for a separate reason: the rulings of
17 a judge do not constitute "government conduct" under 18 U.S.C. §
18 2332b(g) (5) (A). This argument is patently meritless. As the
19 district court properly observed, "it is hardly a novel
20 construction . . . to conclude that the 'conduct of government'
21 embraces" judicial rulings, such as the substitution of assigned
22 counsel. Salim I, 287 F. Supp. 2d at 329. Salim cites no case
23 reaching a contrary conclusion. If a federal judge is a
24 "government official," United States v. Adelman, 168 F.3d 84, 86

1 (2d Cir. 1999), it follows that a magistrate judge's
2 recommendations regarding, and a district judge's ruling on,
3 requests to substitute counsel constitute "government conduct"
4 for the purposes of 18 U.S.C. § 2332b(g)(5) and, by reference,
5 U.S.S.G. § 3A1.4.

6 As we have noted, Salim also argues that while his planned
7 attack on his lawyers may have been calculated to influence the
8 conduct of government, his actual attack on Pepe was not. We
9 reject this myopic view of the purpose of the attack. And even
10 if it were correct, this argument provides no basis for upholding
11 the district court's refusal to apply the enhancement, because of
12 the district court's alternative finding: that the attack on Pepe
13 was "calculated to retaliate against judicial recommendations and
14 orders denying Defendant's applications for substitute counsel."
15 Salim I, 287 F. Supp. 2d at 304. As noted previously, see supra
16 Part I.C, Salim has failed to demonstrate that this finding, a
17 second basis for applying the terrorism enhancement, was clearly
18 erroneous.

19 Because the district court fell into legal error by holding
20 that a Federal crime of terrorism must involve conduct
21 transcending national boundaries, we conclude that the sentence
22 imposed was unreasonable based on the procedural failure to
23 calculate the appropriate Guidelines range. See Gall, 128 S. Ct.
24 at 597. As a result, we need not reach the question of whether

1 the district court appropriately departed upward from the
2 applicable Guidelines range under U.S.S.G. § 5K2. We have
3 considered the remaining arguments made by Salim and his counsel
4 and find them to be without merit.

5
6

CONCLUSION

7 For the foregoing reasons, we REMAND to the district court
8 with directions to VACATE Salim's sentence and resentence in
9 accordance with this opinion.