No.

IN THE
SUPREME COURT OF THE UNITED STATES

AZIZJON RAKHMATOV
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

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

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Question Presented

Whether a sentence based on racial and ethnic bias can be appealed pursuant to the Constitutional rights to due process and equal protection of the laws, to counsel, and against cruel and unusual punishment, and the statutory right to appeal, notwithstanding an appellate waiver in a guilty plea agreement?

LIST OF PARTIES

The parties are the Petitioner, Azizjon Rakhmatov, and the Respondent, United States of America.

RELATED CASES

1. *United States v. Abdurasul Juraboev, Akhror Saidakhmetov, Abror Habivov, Azizjon Rakhmatov, Akmal Zakirov, Dilkayat Kasimov*, defendants. 15 Cr. 95, United States District Court for the Eastern District of New York. Judgment entered against Azizjon Rakhmatov on January 15, 2021: Judgment entered against Abdurasul Juraboev on October 17, 2017; Judgment entered against Akhror Saidakhmetov on December 20, 2017; Judgments pending against Abror Habivov, Akmal Zakirov and Dilkayat Kasimov.

2. *United States v. Abdurasul Juraboev, et.al., Azizjon Rakhmatov,* appellant, Court of Appeals for the Second Circuit, Docket # 21-151/167, judgment dismissing the appeal September 3, 2021, reconsideration denied October 13, 2021.

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Petitioner Azizjon Rakhmatov respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The judgment and order of the Court of Appeals denying reconsideration of its judgment and order dismissing the appeal was rendered on October 13, 2021. The Judgment/Order is attached hereto in Appendix A. The judgment and order of

the Court of Appeals dismissing the appeal was rendered on September 3, 2021, and is attached hereto in Appendix B. The District Court oral opinion that the guilty plea waiver term of years was the agreed-upon sentence mandated in the guilty plea agreement was rendered on August 15, 2019. The transcript of the proceedings is attached hereto as Appendix E. The Findings of Fact and opinion of the District Court for its sentence of petitioner were rendered during sentence proceedings on January 14, 2021, and in its Memorandum and Order of January 15, 2021. The transcript of the sentence is attached hereto in Appendix C. The Memorandum and Order is attached hereto as Appendix D. The District Court's order denying petitioner's written objections to the sentence, entered January 24, 2021, is attached hereto as Appendix F.

JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C.§1254(1). The decision of the Court of Appeals was rendered on September 3, 2021, reconsideration was denied on October 13, 2021.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and 18 U.S.C.§§ 3553(a), 3742, 2332, 2339 and F.R. Crim.P. 32, 51(b), 52, USSG 3A1.4, 2M5.3 are attached hereto in Appendix G.

STATEMENT OF THE CASE[1]

This petition seeks review of the judgment of the United States Court of Appeals dismissing the appeal (and denying reconsideration of the dismissal) from the judgment of the United States District Court for the Eastern District of New York rendered on January 15, 2021, convicting petitioner on his guilty plea of conspiracy to provide material support to a foreign terrorist organization (18 U.S.C. §2339B) and sentencing him to 150 months imprisonment and lifetime supervised release with special conditions.

Petitioner was indicted on May 16, 2016, in three counts of conspiracy and attempt to provide material support to a foreign terrorist organizations (FTO), and conspiracy to use a firearm during a crime of violence (18 U.S.C. §924(c)). On August 15, 2019, petitioner pleaded guilty to one count of conspiracy to provide material support to an FTO. His plea agreement did not stipulate to imposition of the Terrorist Enhancement (USSG 3A1.4(a)). He did stipulate to the following facts:

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[1] "A." citations refer to Appellant's Appendix in the Second Circuit
"AB." citations refer to Appellant's Brief in the Second Circuit
"GB." citations refer to Government's Brief in the Second Circuit
"SuppA." citations refer to the Supplemental Appendix in the Second Circuit
"SA." citations refer to the Special Appendix attached to Appellant's Brief in the Second Circuit

a. Azizjon Rakhmatov, also known as "Abdulaziz," with other individuals, provided financial support for Akhror Saidakhmetov to travel to Syria to fight on behalf of the Islamic State of Iraq and al-Sham ("ISIS").

b. Rakhmatov agreed to collect money and contributed money to fund Saidakhmetov's travel to Syria to fight with ISIS. Rakhmatov sought to send Saidakhmetov to Syria to fight on behalf of ISIS against the government of Bashir al Assad and in order to protect those people who were engaged in hostilities against and were victims of that government.

c. During a telephone call on February 19, 2015, Rakhmatov agreed with Abror Habibov's request to collect money for Saidakhmetov's travel. Habibov suggested that Rakhmatov collect up to $2,000 and a minimum of $1,500. Rakhmatov agreed to try to collect money and to do so by February 25, 2015, the date of Saidakhmetov's travel.

d. During a telephone call on February 24, 2015, Habibov asked Rakhmatov to raise at least $2,000 for Saidakhmetov, $1,000 of which Saidakhmetov would need to purchase "a pencil," referring to a firearm.

e. On February 24, 2015, following the telephone call set forth above, Rakhmatov transferred $400 into Akmal Zakirov's bank account via peer-to-peer transfer. Rakhmatov made this money transfer to Zakirov's account intending to fund Saidakhmetov's travel to and expenses in Syria to fight on behalf of ISIS.

f. In addition, Rakhmatov discussed with other individuals the idea of going to Syria. For several years prior to February 2015, Rakhmatov gave and collected money to support fighters in Syria, their families, and widows of men killed in battle.

Petitioner faced a maximum sentence of 15 years, but waived his right to appeal only a sentence at or below 12.5 years of imprisonment (A. 148-55).

The District Court erroneously advised petitioner, over his repeated attempted objections, and contrary to the law (*Garza v. Idaho*, 139 S.Ct. 273 (2019)), that,

> If you violate this agreement and elect to file an appeal resulting in your sentence being vacated or set aside or if you otherwise challenge your conviction or sentence, **you could very well face a much greater sentence than the one you received under this plea agreement**. Specifically, you could receive a sentence of up to 15 years of imprisonment, which is the equivalent of the statutory maximum provided by the Congress of the United States for the crime charged in Count One of the Superceding Indictment.

(Proceedings August 15, 2019, at pp. 16-17, 16-29; A. 110-11, 110-23 (emphasis added)).[2]

The Presentence Report (PSR) set forth the statutory maximum of 15 years for one count of material support to an FTO, and posited a Guideline sentence of 360 months to life by application of the Terrorist Enhancememt (USSG 3A1.4(a)), which added 12 points to the base offense level and automatically raised his Catagory of Criminal History to Category VI. The PSR also claimed, without providing evidentiary support, petitioner's "participation in the instant offense was that of an ISIL [ISIS] supporter and sympathizer [who] ... conspired to the fullest extent to provide funds for Saidakhmetov's travel to Syria in an effort to join ISIL, a designated FTO [foreign terrorist organization], and fight in a violent jihad." In a PSR addendum dated November 2, 2020, the Probation Department claimed that petitioner "was part of a large group of conspirators whose goal

[2] Petitioner's counsel repeatedly attempted to object to this instruction, but the Court cut him off repeatedly, would not let him explain and instead, to no purpose, insisted on orally reciting the entire plea agreement, even though counsel stated that the problem was not with the agreement.(A. 111-23).

was to kill non-Muslims." (p. 11 ¶25). No evidentiary support was provided. The government ultimately did not contest that "the sentencing record may not establish that Rakhmatov himself is an ISIS terrorist or a vocal ISIS supporter." (Gov't "Supplemental Opposition" letter of 12-8-20 at p. 1; A. 348), but nonetheless argued that petitioner's contribution of money to one man to travel to join ISIS to fight against Assad was the equivalent of a contribution to ISIS to "establish an Islamic State in their [Iraq and Syria] place." (*Id* at 3; A. 350).

Petitioner's plea agreement included the stipulation that prior to the contribution which constituted the offense of conviction, he had contributed money to help fighters against the Assad regime in Syria and their families. He did not stipulate, and denied, that he knew that any of those contributions were going to ISIS. The government, without evidence, asserted nonetheless that "a group of individuals ... either planned to travel to Syria to j**oin ISIS** or financed the travel of other individuals to Syria to **join ISIS** ... [petitioner] contributed money to that network for a period of several years ... [petitioner] ... and others were part of an extensive financial support network ... financing travel to Syria by individuals wishing to join and fight on **behalf of ISIS** ... the group began raising money in approximately 2012 seeking contributions of $20 or $50 from participants every two weeks." (Gov't Sentence Memorandum, 10-16-20 at p. 3, emphasis added; A. 322).

In his documented sentence memoranda, petitioner objected to the attribution to him, without evidence, that he embraced ISIS's goals of violent jihad. He informed the District Court that he is 34 years old with no criminal record and no record of prior association with ISIS, other jihadi or terrorist organizations, or such ideology or philosophy. He came to the United States from Uzbekistan approximately ten years ago, married here, had children. He carried on a business buying and selling used cars and selling Iphones and other gadgets out of kiosks in shopping malls under the leases and tutelage of Abror Habibov, the man who importuned him for the $400 contribution while he and Habibov were in the midst of a business deal, and, who eventually became the government witness against him.

As explained by the Uzbekistan historian, Prof. Adeeb Khalid, petitioner associated in a traditional Uzbeki-Muslim cultural association called a "choyhana" or tea party, which engaged in the culture and religious customs of charity. They contributed money to help the people in Syria who were fighting against the massacres conducted by the Assad regime against Muslims. The government presented no evidence that these contribution went to ISIS or that petitioner knowingly" so intended the ones he made through the choyana.

In February, 2015, while petitioner was in the midst of seeking Habibov's help in securing I-phones for $400 for resale, Habibov asked petitioner to contribute money to help someone, whom petitioner did not know, to travel to Syria to fight against Assad

with ISIS. Petitioner resisted getting involved, but ultimately gave $400 to Habibov to keep the Iphone deal alive, to reciprocate Habibov's years of helping him to earn a living at the mall kiosks Habibov leased, and to help in the fight against the massacre of Muslims by Assad in Syria.

As documented in petitioner's sentence submissions to the District Court, (Sentence Memorandum at pp. 19-23; A. 179-83), the Assad regime has murdered 500,000 people since 2011, used chemical weapons on its people, bombed 595 hospitals and clinics, and imprisoned and tortured medical personnel. The United States government designates the Assad regime "a State Sponsor of Terrorism." Four federal District Court Judges have held the regime responsible for the deaths of several American citizens. In his report to the District Court, Dr. Khalid explained that, "The Syrian civil war was seen by many Muslims around the world as the assault of a dictatorial regime on innocent Muslims. It became a *cause celebre* especially among Muslims living in Europe and North America, who saw the struggle against the Syrian regime of Bashar al-Assad was a 'just war' ..." (Report of Prof. Adeeb Khalid, Ex. 3, Defendant Azizjon Rakhmatov's Sentence Memorandum; A. 220). Petitioner argued *inter alia* that the Terrorist Enhancement to the Sentencing Guideline did not apply to him, a man who gave a small money contribution at the behest of his boss for the good cause of fighting solely against the murderous Assad regime, *albeit*, together with ISIS. Other objections were made to the PSR and its Addendum. The Sentence Memorandum detailed the life-long

good works of petitioner, the written commendations from prison officials, and chaplains and others, and the beauty of his painstakingly drawn, cut and pasted paper pop-up cards made in prison. (A. 183-201).

At the sentencing hearing on January 14, 2021, defense counsel orally reiterated the objections to the PSR and the arguments for the most lenient parsimonious sentence, the base offense level Guideline, and twice asked the Court to delete from the PSR and Addendum the inflammatory language attributing ISIS jihadi terrorist killing motives to petitioner (Sentence Proceedings, at pp. 43, 62; A. 396, 415, 366-96, 436).

The Court then made an oral statement regarding the sentence and its intention to impose 150 months imprisonment and lifetime supervised release with special conditions previously unannounced and not stated in the PSR (Sentence Proceedings at pp. 63-82; A. 416-35), and stated that its typical practice is to use a memorandum and order on the day of sentence or the next day "so you will have at that." (*Id* at p. 85; A. 438), and reserved decision to that order (*Id* at 62-63; A. 415-16).

Following the oral statement, petitioner reiterated his objections to the PSR and the Guidelines, which the Court stated were overruled, as were his objections to the conditions of supervised release (*Id* at 82-85; A. 435-38). The Court adopted the facts as stated in the PSR, "barring any errors contained therein to the extent they are not inconsistent with this opinion." [sic] (*Id* at 76, 82; A. 429, 435).

Consistent with its typical practice to complete the sentence in a written order and its statement that it would address in that order petitioner's request for deletion of inflammatory language from the PSR, the Court issued on January 15, 2021 its "Memorandum and Order." The order states, "the Court now sentences [petitioner] and provides a complete statement of reasons ... Defendant is hereby sentenced to 150 months incarceration, a lifetime of supervised release, and a $100 mandatory special assessment" (Sentence Memorandum and Order, January 15, 2021, at p. 1; Special Appendix 1). The Court made no mention of petitioner's request for deletions from the PSR, other than to say that it adopted the facts of the PSR, "barring any errors contained therein, to the extent they are not inconsistent with this opinion." [sic] (*Id* at p.9).

The remainder of the Sentencing Memorandum and Order consisted of a quotation of the 18 U.S.C. §3553(a) factors, some random facts from petitioner's life, and the conclusion that the sentence complied with the sentencing factors.

On January 17, 2021, petitioner filed written objections to the Court's sentence Memorandum and Order of January 15, and to the oral sentence statement made at the hearing on January 14. (Letter January 17, 2021; A. 443). Petitioner reiterated the objections made in his sentence submissions and at the hearing, that the sentence was based on inflammatory innuendo, and was otherwise unsupported and unlawful, and that the sentence failed to make reasonable inquiry, and to specifically resolve, the factual and legal disputes among the parties and the Probation Department, contained no

rationale, let alone one based on the unique circumstances of petitioner and the case, and was a violation of the Constitutional rights to due process and equal protection, and against cruel and unusual punishment. 18 U.S.C. §3553(a); F.R.Crim.P. 32.

By letter on January 22, 2021, the government argued that petitioner's written objections were not cognizable under F.R. Crim.P. 35(a), were barred by his plea agreement, and were not meritorious. (A. 446).

On January 24, 2021, petitioner replied to the government's letter that the objections of January 15 were, by the Court's own typical practice, part of the sentencing process itself, that the plea agreement appeal waiver did not apply to objections during the sentence process itself, or to objections to the Court's failure to delete inflammatory language from the PSR, and was unenforceable for the reasons that the sentence was unlawful, that F.R. Crim.P. 35(a) did apply, and that the objections included failure of notice of the Guideline departure which did not occur until the sentence itself. (A. 448).

On January 25, the District Court denied petitioner's objections by treating them as a Rule 35(a) motion barred by the plea agreement. (Decision and Order, Special Appendix 10).

Petitioner filed notices of appeal from the sentence and from the denial of his written objections to the sentence. The government moved to dismiss the appeals on the grounds of the guilty plea agreement waiver of appeal. Petitioner filed a brief in opposition to the motion, which consisted in essence of the brief on the

unconstitutionality of the biased sentence as reason that the waiver should not be enforced. The government filed a "merits" brief defending the sentence. Petitioner, on his motion, was granted additional time to file a Reply to the government's merits brief, and, prior to that deadline, filed a motion to file an oversized Reply brief. Prior to decision on the motion, the Court of Appeals issued its order of September 3, 2021, dismissing the appeal. Petitioner moved for reconsideration arguing that the Court had not considered his Reply brief before its decision and asking it to do so on reconsideration and to deny the government's motion to dismiss. On October 13, 2021, the Court issued its order denying reconsideration.

REASONS FOR GRANTING THE WRIT

A SENTENCE BASED ON RACIAL AND ETHNIC BIAS CAN BE APPEALED PURSUANT TO THE CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS, TO COUNSEL AND AGAINST CRUEL AND UNUSUAL PUNISHMENT, AND THE STATUTORY RIGHT TO APPEAL, NOTWITHSTANDING AN APPELLATE WAIVER IN A GUILTY PLEA AGREEMENT

Petitioner's sentence was imposed by a Judge who expressly adopted the racially inflammatory invective of the PSR and of the government which labeled petitioner, without evidence, an ISIS supporter and sympathizer who intended to kill non-Muslims in violent jihad. This Court is urged to clarify that such a sentence is not immune from appeal based on a guilty plea waiver of appeal. The biased sentence was imposed with only a quoted recitation of the §3553(a) factors, and no other reasons were given for the

arbitrary application of the draconian Guideline Terrorist Enhancement of 30-years-to-life to the basic Guideline level of 5 to 7 years on a man who, at the behest of his boss. only made a $400 contribution for the sole reason to help another man to travel to Syria, to fight with ISIS against the terrorist massacres of Muslims by the Assad regime in Syria. Petitioner denied any ideological or religious motivations and support of ISIS apart from this one instance of help for a fighter against Assad. The government offered no evidence to the contrary.

Such a sentence is a miscarriage of justice, an abidcation of judicial responsibility, unlawful and unreasonable, unconstitutional and bears unfavorably on the reputation of judicial proceedings. Thus, the plea agreement waiver of appeal is unenforceable; the appeal should be heard; the sentence should be vacated, and the case should be remanded to a different Judge.

In attempt to support application of the Terrorist Enhancement, and the maximum sentence, the Probation Department and the government asserted falsely, without evidence, that petitioner's "participation in the instant offense was that of an ISIL [ISIS] supporter and sympathizer [who] ... conspired, to the fullest extent, to procure funds for Saidakhmetov's travel to Syria in an effort to join ISIL ... and fight in a violent jihad" (PSR, ¶25), that petitioner "was part of a loose group of conspirators whose goal was to kill all non-Muslims" (PSR Addendum). Over petitioner's repeated objections and requests for an order that those words

be deleted from the PSR (Sentence Proceedings at A. 367, 370, 372, 382, 396, 415-16), and despite the government's concession "that the record may not establish that Rakhmatov himself was an ISIS terrorist or a vocal ISIS supporter" (Gov't. Letter 12-8-20 at p. 1; A. 348), and without inquiry, hearing and a statement of reasons, the Court adopted the innuendos as fact and refused to delete them from the PSR. (Sentence Proceedings at 83; A. 436; Memorandum and Order, Special Appendix 9).

These unproven inflammatory attributions to petitioner, created the falsehood that petitioner, in fact a working and family man with no prior connections to ISIS or to its brand of ideology and fanaticism, violence or terrorism or terrorist organizations, who at the behest of his mentor made a one time $400 contribution only for the specific purpose of helping another join in the defense against the Assad massacres in Syria, was a dangerous and violent ISIS religious fanatic, who embraced all of ISIS' goals of mass murder, had met the requirements of the Guideline Enhancement and needed to be confined for as long as possible. The Court's adoption of this falsehood, without inquiry, hearing, or statement of reasons, unconstitutionally prejudiced the Court and the sentencing process in this case and created the appearance that the sentencing Judge was biased against petitioner, and did not consider the factual and legal issues, and its

own discretion and responsibility regarding the Terrorist Enhancement and the sentence.

This Court has specifically held that a conviction for material support to an FTO is based only on "knowledge about the organization's connections to terrorism, **not specific intent to further the organization's terrorist activities**." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16-17 (2010) (emphasis added). "The statute criminalizing material support does not [even] prohibit being a member of one of the designated groups ... what [§2339B] prohibits is the act of giving material support ..." *Id* at 37 (citation omitted). This Court rejected the interpretation that the statute required proof that a defendant had intended to further an FTO's illegal activities. *Id* at 17.

The attribution to petitioner of the goals of ISIS prejudiced and distorted the District Court's conclusory finding that the Terrorist Enhancement applied. Although ISIS' goals are "calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct", the prerequisites for imposition of the Terrorism Enhancement (USSG 3A1.4(a); 18 U.S.C. §2332(b)(g)(5)), these were not petitioner's goals; there was no evidence to the contrary, and the Terrorist Enhancement was not meant to be applied to him. The attributions also prejudiced the exercise of the District Court's

discretion not to apply the Terrorist Enhancement, even if it found that petitioner technically qualified. *Kimbrough v. United States*, 552 U.S. 85 (2007).

A defendant's right to appeal is statutory (18 U.S.C. §3742(a)(1)), but its procedures must comport with Constitutional principles (*United States v. Ready*, 82 F.3d 551 (2d Cir. 1996) superseded on other grounds, *United States v. Cook*, 722 F.3d 477 (2d Cir. 2013)), and must not be unduly burdened. *North Carolina v. Pearse,* 395 U.S. 711, 724 (1969). In a guilty plea agreement, a defendant can waive the right to appeal certain issues, but he cannot waive the right to appeal itself. *Garza v. Idaho*, *supra* at 748. Any waiver is construed strictly against the government, is conditioned on the sentencing being conducted according to established principles of law (*United States v. Archie*, 771 F. 3d 217 (4th Cir. 2014)), and it is reasonable for a defendant "to believe that his plea agreement written by the government lawyers, and scrutinized by his own lawyer, did not authorize an illegally imposed sentence .... [especially when] 'there was no satisfactory explanation [that] the consequences of [the] waiver of [the] right to appeal' included the waiver of an illegally imposed sentence." *United States v. Ready, supra* at 558, quoting *United States v. Baty*, 980 F.2d 977, 979 (5th Cir, 1992).

Appeal from a Constitutionally deficient sentence, a sentence imposed based on Constitutionally impermissible factors such as ethnic, racial or other prohibited biases, or imposed without enunciated rationale is not waived. *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir 2000); *United States v. Johnson*, 347 F.3d 412 (2d Cir. 2003). A

sentencing court's disregard of the sentencing factors mandated by 18 U.S.C. §3553(a) is appealable despite a waiver. *United States v. Lutchman*, 910 F.3d 33, 38 (2d Cir. 2018); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011), citing *United States v. Woltmann*, 610 F.3d 37 (2d Cir. 2010). "The decisive consideration [is whether] 'the sentence was reached in a manner that the plea agreement did not anticipate"' *United States v. Riggi*, *supra* at 148.

When a District Court fails to state in open court its reasons for the sentence imposed, the Court of Appeals remands for resentence, even in the absence of objection, (*United States v. Rosa*, 957 F.3d 113 (2d Cir. 2020)), hence courts should do so when those reasons include falsehoods, arbitrarily chosen, unchecked assumptions of fact, failure to consider the §3553(a) factors, and an erroneous fixed policy against those factors, such as choosing the sentence that will bar an appeal. "Confidence in a judge's use of reason underlies the public trust in the judicial institution," (*Rita v. United States*, *supra*), and that confidence and public trust are undermined when he/she gives no reason for the sentence or finds facts based on prejudice. *United States v. Rosa, supra,* at 121.

"Unlimited and unexamined" sentences (*United States v. Ready, supra* at 555; and *United States v. Riggi, supra*), and sentences not conducted according to established principles of law (*United States v. Archie, supra*), are not barred from review by appeal waiver. The appeal waiver does not preclude appeal of the District Court's failure to consider the §3553(a) factors and the Court's application of its own policy negating the

factors requiring consideration of the history and background of the defendant. *United States v. Woltmann, supra; United States v. Riggi, supra*. A sentence based on material false, inaccurate, and unreliable facts is against "public policy." *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). A sentence is a miscarriage of justice when it was based on impermissible factors seriously affecting the fairness of the sentencing. *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) citing *United States v. Olano* 507 U.S. 725, 732 (1993)).

Perhaps lacking clear directions from this Court, the Second Circuit did not follow its own rules in this case, and that of other Courts of Appeals, that an appeal waiver will not be enforced where the District Court relied on an impermissible factor such as status, or race, or on a racially based stereotype of a Muslim who commits a crime of material support for terrorism, and where the enforcement of the waiver would affect the integrity or public reputation of judicial proceedings, where the waiver would let stand an arbitrary irrational, and biased sentence. *United States v. Johnson*, *supra*; *United States v. Gomez-Perez, supra; United States v. Jacobson*. 15 F.3d 19 (2d Cir. 1994); *United States v Hahn*, *supra*.

The only reason to bar appeal based on the appeal waiver in the guilty plea agreement would be reluctance to dishonor the government's benefit of its supposed plea bargain. But, that reason is based on the assumption of equal bargaining power between the government and petitioner.

In this case, however, the government indicted petitioner not only for the crime to which he plead, conspiracy to provide material support, but with two additional counts, attempt to provide material support and conspiracy to use a firearm. Conviction on all three after trial, before a Judge who cautioned at the sentencing of a co-defendant on the single count of the indictment that he could have imposed a 30 years to life but for the statutory maximum for the single count (*United States v.* Saidakhmatov, sentencing 12-20-17, at SuppA. 39,35), subjected petitioner to that sentence and more. In this situation, the appeal waiver was not a benefit to the government resultant from a fair trade between equals.. "The prosecutor has all the power. The Supreme Court's suggestion that a plea bargain is a fair and voluntary contractual arrangement between two relatively equal parties is a total myth; it is more like a 'contract of adhesion' in which one party can effectively force its will on the other party." Judge Jed S. Rakoff, United States District Court for the Southern District of New York. *Why the Innocent Plead Guilty and the Guilty Go Free*. p. 26 Farrar, Straus and Giroux. 2021).

Petitioner was guilty of supplying the $400 contribution for the limited purposes in the record, and he sought to plead guilty and be sentenced for that crime alone. A sentence should be reversed when, as here, the petitioner "appears to have been punished as though he already had, or would [commit the most heinous] crime despite [expert testimony] to the contrary and [the defendant's]

lack of any such criminal history." *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010), and the appeal waiver should not insulate such a sentence from review.

At issue in this sentence was whether petitioner, convicted of one count of conspiracy to provide material support to a foreign terrorist organization (FTO), for making a $400 contribution, with a base Guideline offense level sentence of 63-78 months, and with no criminal record, and no other acts or statements of terrorist intent, should be sentenced to more time, by imposition of the Guideline Terrorist Enhancement which automatically raised the base offense level 12 points and the criminal history category to VI, resulting in a Guideline Sentence of 30 years to life, capped in this case only by the statutory maximum of 15 years.

The government had the burden to prove to the Court by a preponderance of the evidence facts that establish the elements of the Guideline Enhancement . *United States v. Gigante*, 94F.3d 53, 55 (2d Cir. 1996). The requirement for the Enhancement is that the offense of conviction involved, or was intended to promote, a federal crime of terrorism. USSG 3A1.4. A federal crime of terrorism is "an offense that ... is calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government conduct." 18 U.S.C. §2332b(g)(5). "A conviction for material support of a terrorist organization does not necessarily imply that the defendant committed an offense of terrorism or that

he provided firearms to that organization.[3] Not all material support for terrorism is calculated to affect government conduct or always involve weapons." *United States v. Banol-Ramos*, 516 Fed.Appx 43, 47 (2d Cir. 2013).

Congress specifically cautioned that the crime of providing material support to a terrorist organization is not a terrorist act. It is characterized as "terrorism" only if "motivated to affect the conduct of government or social policy." *House Report, H.R. Rep. No. 104-383, 1995 WL 731698, p.39.* "It is possible to be guilty of providing material support to a foreign terrorist organization but not guilty for the Terrorist Enhancement." *United States v. Fawsi Mustapha Assi*, 428 Fed.Appx. 570, 572 (6th Cir. 2011), quoting 18 U.S.C. §2332b(g)(5)(A). Even though "there is little doubt that [the defendant] (1) knew that the objective of [a codefendant and the terrorist organization] was to influence the Indian government through violence and (2) knew that the money he provided to [the terrorist organization] would be used toward that end," the Second Circuit holds that these facts alone are insufficient for imposition of the Enhancement. *United States v. Awan*, *supra* at 317. Other appellate courts have also declined to impose the enhancement on similar grounds. *United States v. Stewart (Yousry)*, 590 F.3d 93, 136-139 (2009); *United States v. Chandia* 514 F.3d 365 (4th Cir. 2008).

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[3] Referring to the separate enhancement of 2 points for providing firearms with the intent for use in a violent act. *USSG* 2M 5.3(b)(1).

District Courts in this District and elsewhere have also rejected application of the enhancement. *United States v. Shehadeh*, 2013 WL 6049001 (E.D.N.Y. 2013) (Vitaliano, J.). *United States v. Sihai Cheng*, 2016 WL 413077 (D. Mass. 2016).

For the Terrorism Enhancement to apply, the government must establish "that the defendant possessed the 'specific intent ... to commit an offense that was calculated to influence,' government conduct," by intimidation or coercion, or to retaliate against government conduct. *United States v.Banol- Ramos, supra* at 48. In *Banol-Ramos*, involvement with, and having a good deal of knowledge of, the terrorist organization, and participating in a hostage-taking of government police officials, did not constitute sufficient proof of the specific intent to influence the conduct by intimidation or coercion at the time of the offense of conviction.

In *Stewart (Yousry)*, the Enhancement could not be applied to the sentence for providing material support to a conspiracy to murder persons in a foreign country, "because the defendant did not act with the requisite state of mind." 509 F.3d at 136. In support of the Enhancement, the government conceded that Yousry did not have the requisite purpose stated in §2332b, but argued that his conspirators did. The Court rejected the argument, because "there is no evidence that Yousry himself sought to influence or affect the conduct of the government." *Id* at 138.

In *United States v. Chandia, supra*, the Court rejected the government's argument that the defendant's active duties as the assistant to the leader of a terrorist organization, including his shipping of mateials to Pakistan for purposes of terrorist training, sufficed to support imposition of the Enhancement: "the acts underlying the conviction in this case were not violent terrorist acts." 514 F.3d at 376.

Judge Vitaliano of the Eastern District held that the Enhancement could not be applied to a defendant who had attempted to join the army to wage jihad and kill American soldiers. Judge Vitaliano held that, "his conduct in doing so was simply too remote from an attack on American soldiers abroad to qualify as conduct warranting the §3A1.4 [terrorist] enhancement." *United States v. Shehadeh, supra* at *2. "What he did, as opposed to what he hoped to do, could not be characterized as conduct sufficient to have been 'intended to promote' the oversees murder of Americans or any other 'federal crime of terrorism. *Ibid.*

United States v . Jumaev, No. 12-cr-00033-JLK, 2018 WL 3490886, 2018 U.S. Dist. Lexis, (D. Colo. June 18, 2018), is a case similar to this one. The defendant gave $300 to a terrorist organization with which he had no affiliation and no part in any of its decision-making structures, and the government presented no evidence that the terrorist organization was involved in conduct described in §2332b during the period the defendant was charged with conspiracy

to provide it material support, nor did the government prove that the defendant "knew about and certainly not that he intended to promote, any plan by [the terrorist organization] to commit politically-motivated crime of terrorism." (*Id* at A.62).

In *United States v. Sihai Cheng*, *supra* (D. Mass. 2016), the government argued that the Enhancement should apply to a defendant whose export of equipment which facilitated Iran's nuclear weapons program inherently influenced the conduct of the other governments around the world. The Court declined to impose the Enhancement, because there was no evidence of the defendant's specific intent to attack government infrastructure or targets.

According to the law and cases cited above, imposition of the Terrorist Enhancement was not warranted in petitioner's case, because the facts do not evidence petitioner's specific intent to be involved in calculating to influence or affect the conduct of the government by intimidation or coercion, to retaliate against government conduct, or to promote the calculation to influence or affect such conduct. 18 U.S.C. §2332b(g)(5); USSG §3A.1.4. These facts do not establish by a preponderance of the evidence that petitioner's general intent or hope that the Bashir al Assad government be opposed for its continuing massacre of Muslim civilians in Syria was the "specific intent" to commit a specific act of terrorist crime. *United States v. Shehadeh, supra.*

He had no specific intent, to attack government infrastructure or targets (*United States v. Sihai Cheng, supra*); he did not "promote a 'plan' [by ISIS] to commit a politically motivated crime of terrorism" (*United States v. Jumaev, supra,* A. 62). Any intent or plan to commit specific criminal acts by his coconspirators cannot as a matter of law be attributed to him (*United States v. Stewart (Yousry), supra*, at 136, 138). His knowledge that ISIS is a terrorist organization, and that the contribution was helping another person to join or even fight on its behalf, does not establish his specific intent to influence the conduct of government by intimidation or coercion. *United States v. Banol-Ramos, supra*. "[Petitioner's] conduct ... was simply too remote from an attack ... to qualify as conduct warranting this §3A1.1 enhancement" *United States v. Shehadeh, supra*, at *2.

The non-violent nature of acts of providing material support, even materials which might eventually be used in violent acts, "make this [a] case distinct from those that have applied the Terrorist Enhancement." *United States v. Sihai Cheng, supra*, at *5. Petitioner's agreement to provide material support to a terrorist organization does not alone constitute the specific intent required by the Enhancement, when, as here, there were no specific acts of violence, intimidation, or coercion by petitioner which might be a factor in support of such specific intent. *United States v. Stewart (Yousry), supra*; cf, *United States v. Banal-Ramos,*

(Ibarguen) supra. Petitioner's knowledge that the man he was helping intended to purchase a gun in Syria did not render petitioner's act of support a crime of violence. Neither conspiracy to posses a gun nor possession of a gun is an act of violence. *United States v. Gamez*, 577 F.3d 394 (2d Cir. 2009); *United States v. Barett*, 937 F.3d 126 (2d Cir. 2019).

Acts of non-violent material support provided to those fighting in self-defense against a brutally oppressive tyrannical regime do not constitute the "conduct" "calculated to influence or affect the conduct of government" within the language and intent of §2332(b)(g)(5). Nor do such acts constitute the statutory definition of "intimidation or coercion." The Al Assad regime is not a "government," within the terms and meaning of the statute. It is apparent from the language and intent of the legislation, and its interpretation by the courts, that massacres by what the United States regards as a "state sponsor of terrorism" (*https://www.State.gov/reports/country-reports-on-terrorism-2019/syria/*) are not the conduct that Congress intended to protect by passage of the statute and the Enhancement guideline.

USSG 3A1.4 is one of several "Victim Related Adjustments" which increase the guideline offense level. *USSG, Chapter Three, Part A*. The victims to be protected are Americans, for example the American military personnel killed in a discotheque bombing in Germany, the victims of the bombing of the U.S Embassy

in Beirut and the Pan Am flight 103, the individual victim American tourist Leon Klinghofer, and other Americans killed by terrorists. House Report, *H.R. Rep. 104-383, supra at 41.*

"With the bombing of the Alfred P. Murrah Federal Office Building in Oklahoma City, on April 19, 1995, the need for this legislation was dramatically and tragically reinforced." *Id* at p.37. The purpose is "to protect ourselves" (p. 38), "to protect the lives and safety of its citizens" (*Ibid*), against "harm to innocents", to protect "all Americans" against threats to "our public safety" (p. 41), to protect "innocents ... annihilated" (Ibid), to "protect our national security" (p. 47). The Report states that "it is up to our government to protect the lives and property of our citizens." *Id* at 46. "The government's interest in preventing the financing of terrorist activity is actually as great as its interest in maintaining a corruption free electoral process. 'The legitimacy of the objective of safe guarding our national security is "obvious and unarguable." ' " (p. 44). Our national interest is not protected by protecting a foreign terrorist regime like Syria from those who would use force against it. The Assad regime is not a victim according to the kinds of victims listed in the legislative history. The "intimidation and coercion" punished by the Enhancement is affirmative and unprovoked aggression against the United States or a friendly government, not against a terrorist state.

This Court holds that the prohibition against provision of material support to an FTO is justified because such support "furthers terrorism by straining the United States relationships with its **allies**." *Holder v. Humanitarian Law Project*, *supra,* at 33 (emphasis added). The legislation is not aimed at maintaining good relationships with enemy terrorist states such as Syria. As documented in this brief, *infra,* the Bashir Al Assad regime is a terrorist state that is responsible for murdering its own people and citizens of the United States.

The material support statute prohibits "aid for foreign terrorist groups that harm the United States partners abroad ... moderate governments with which the United States has vigorously endeavored to maintain close and friendly relations." *Holder v. Humanitarian Law Project, supra*, at 32.

Furthermore, the legislation was not intended to punish efforts to combat "state sponsored terrorist actions", that practiced by the Bashir Al Assad regime. The legislation even authorizes lawsuits against such foreign terrorist governments (*H.R. Rep, supra*, at 4), and "the Caesar Act" imposes sanctions specifically against Syria. It would be contrary to this Congressional intent to increase the punishment for federal criminal offenses motivated by the fight against state sponsored terrorist action.

The United States government designates the government of Bashir Al Assad of Syria "a State Sponsor of Terrorism." *https://www.State.gov/reports/country-reports-on-terrorism-2019/syria/* .

The regime of Bashir Al Assad's war against the Syrian population, three quarters Muslim, officially began in 2011, and it is estimated that since then the regime has killed 500,000 people, and that half of the 20 million inhabitants have fled the country. *The New York Times*, 12/5/19 at p. A6. The President of the United States signed into law in 2019, the Caesar Syria Civilian Protection Act, which is named after a Syrian photographer who shared with the world thousands of photographs he took of torture in Bashir Al Assad's prisons. The Act imposes financial sanctions on individuals and companies who assist the regime in the use of the international financial system and the global supply chain to continue to brutalize the Syrian people. *https://www.state.gov/caesar-syria-civilian-protection-act/* .

Physicians for Human Rights reports that since 2011, the regime has bombed 595 hospitals, clinics and medical personnel in Syria. *The New York Times*, 4/7/20 at p. A.19. According to Physicians for Human Rights, and the United Nations Commission of Inquiry, anyone in Syria providing medical assistance to those considered enemies of the regime are prosecuted without

lawyers in secret courts, and imprisoned and tortured. *The New York Times*, *12/5/19, supra.*

Secretary of State Mike Pompeo announced in September, 2019, that the United States has concluded that the Al Assad regime used chorine gas on its enemies in May, 2019, and that this was the latest in a series of banned chemical weapons attacks used by Assad, including sarin gas, which provoked a missile strike by the United States on a Syrian airbase in April, 2017. In April, 2018, the regime killed 40 people in a chemical attack, in retaliation for which, combined forces of the United States, Britain, and France launched strikes against Syrian chemical weapons storage facilities. Secretary Pompeo said that the United Stares is "going to do everything we can reasonably do to prevent that kind of thing from happening again." *The New York Times*, 9/26/19, *https://www.nytimes.com/2019/09/26/world/middleeast/syria-chemical-weapons-us.html* .

At least four federal District Court Judges have held Bashir Al Assad's regime responsible for the deaths of several American citizens killed in terrorist attacks sponsored in one way or another by the regime. *Colvin v. Syrian Arab Republic*, 363 F.Supp.3d 141 (D.D.C. 2018); *Foley v. Syrian Arab Republic*, 249 F.Supp.3d 186 (D.D.C. 2017); *Thuneibat v. Syrian Arab Republic*, 167 F.Supp.3d 22 (D.D.C. 2016); *Gates v. Syrian Arab Republic*, 580 F.Supp.2d 53 (D.D.C. 2011).

Dr. Adeeb Khalid, Professor of Asian Studies and History, in an analysis provided for this case reports,

> The Syrian civil war was seen by many Muslims around the world as the assault of a dictatorial regime on innocent Muslims. It became a *cause célèbre* especially among Muslims living in Europe and North America, who saw the struggle against the Syrian regime of Bashar al-Assad was a "just war" to stop the slaughter of innocents by a vile regime. Images of the war were shared widely on social media and on the internet ...
>
> . . .
>
> Mr. Rakhmatov was part of this broad phenomenon of global Muslim sympathy for Assad's victims. Coming from Uzbekistan, where expression of Islam had been tightly controlled, and having the burden of thinking that one had not been a "good Muslim" until recently, the impulse to help pious Muslims being gunned down by a vile regime was strong. Moreover, his support was directed against the Assad regime, not the United States.

(Khalid, Report, A. 220-21). Dr. Khalid reports that "social media appeals and raw emotional videos on YouTube moved many people, especially Muslims to act. Massive fundraising efforts commenced to help the victims of the war. Many saw contributing monetarily to the war and its victims as a pious deed, and not an act of terror." *Id.* at A. 221.

These views are further supported by the Report of Dr. Marc Sageman, psychiatrist and terrorism expert (See his report and resume, A. 225), who has studied hundreds of admitted jihadis, and who also interviewed and examined petitioner, his background, and this case, and the conclusions from research

studies, including, for example, the study conducted by the *International Center for the Study of Violent Extremism, reported on May 12, 2020*, in *Homeland Security Today.US.* hstoday.us/subject-matter-areas/counterterrorism/how-assads-atrocities-became-a-powerful-motivator-for-terrorist-recruitment/ The report is also found on the ICSVE website at *https://www.icsve.org/how-assads-atrocities-became-a-powerful-motivator-for-terrorist-recruitment/*. Dr. Sageman reported that petitioner does not exhibit the characteristics of a jihadist and that there is nothing in his background to evidence intention to commit other crimes, let alone terrorism.

Having interviewed 239 returned ISIS volunteers from Syria, people who had gone far beyond petitioner's contribution of a few hundred dollars to help another person go there to fight, the authors of the study concluded.

> Foreign fighters who traveled to ISIS were often motivated to do so by anger and sadness over Assad's atrocities toward his own people rather than affinity to ISIS's goals per se, as evidenced in this sample's responses, particularly among those who came early to the conflict zone.

ICSVE website, *supra* at 12. ". . . A deep hatred of Assad formed the primary backbone for many ISIS cadres willingness to fight." *Id* at 16.

The PSR applied both the 12 point terrorism enhancement of USSG 3A1.4(b) and the 2 point upward adjustment for "intent, knowledge or reasonable belief that [material support] was to be used to commit or assist in the commission of a

violent act" (USSG 2M5.3(b)(1)(E) (PSR at¶34). Petitioner's objections to the Terrorism Enhancement are argued, *supra*. Since the Enhancement was nonetheless applied, it is submitted that the additional application of the violent act upward adjustment, resulted in double counting. Rejection of petitioner's arguments against the Enhancement rendered violent acts covered by the Enhancement.

Impermissible double counting occurs when the same conduct, which constitutes an element of the offense of conviction or some other sentence enhancement is counted again to increase the sentence even more. *United States v. Hunter*, 795 Fed. Appx. 75, (2d Cir. 2020); *United States v. Maloney*, 406 F.3d 149 (2d Cir. 2005); *United States v. Anglin*, 169 F.3d 154 (2d Cir. 1999). In this case, the Court's ruling applying the Enhancement on the grounds of commission of a terrorist crime of "intimidation or coercion" (18 U.S.C. §2332b(g)(5)(A)) was, in effect, a ruling of the commission of violence. It is submitted that petitioner's sentence should not have been increased further for the same conduct, and he was deprived of due process of law and consideration of 18 U.S.C. §3553(a).

When he provided his material support for Saidakhmetov's travel to Syria, he had reason to believe that Saidakhmetov intended to possess a weapon there. Possession of a weapon is not a crime of violence (18 U.S.C. §16*; United States v. Gamez*, *supra*; *United States v. Soto-Rivera*, 811 F.3d (1st Cir. 2016); *United*

States v. Rollins, 836 F.3d 737 (7th Cir. 2016)), and petitioner's general purpose to help in the self-defense of victims of the Assad regime was not a violent act itself; his money contribution was too remote from any act of violence, and any violence in self-defense against an oppressive murderous regime is not the violence the terrorist upward adjustment was meant to punish.

The District Court chose the 12½ year sentence term by equating the plea agreement term of years barring appeal with the sentence to be imposed. Here, the ethnic invective informed the District Court's calculation of the Guidelines to include the Terrorist Enhancement (USSG 3A1.4), which raised petitioner's base Guideline sentence of 5¼ to 6½ years to well above the statutory maximum of 15 years. Then, the Court chose the sentence of 12½ years because, as he erroneously informed petitioner at the guilty plea proceedings, it was "the one you received under the plea agreement." (A. 110). The plea agreement did not mandate a specific term of years, but the Court treated it as such, because it equated the term of years which would bar the appeal with the sentence to be imposed. But, "no sentencing factor can **reasonably** be read to encompass the [the barring of an appeal]." *United States v. Park, supra* at 198 (emphasis added, vacating a sentence which took into account the unauthorized factor of the cost of incarceration).

The apparent purpose of this erroneous warning was to dissuade petitioner from filing the instant appeal, but filing the notice of appeal does not violate the agreement (*Garza v. Idaho, supra*; there is no "sentence [to be] receive[d] under the plea agreement", and petitioner would not "very well" face a greater sentence upon reversal. The plea agreement contained no agreed upon sentence, therefore the Court's reference to the sentence "under the agreement" must have been to the 12 year sentence that would bar the appeal under the agreement, a sentence which, it had apparently already determined it would impose.

The District Court's sentencing statements consisted of quotation of §3553(a) without analysis, no application to the facts of the case, and no explanation of reasons for doubling the sentence using the Terrorist Enhancement, except by misrepresenting that petitioner's contribution to Saidakhmatov's travel was only so that he could "fight on behalf of ISIS." (A. 422; SA. 4.).[4] "A fixed and mechanical approach in imposing sentence rather than a careful appraisal of the variable components relevant to the sentence upon an individual basis" requires vacatur of the sentence. *United States v. Schwarz*, 500 F.2d 1350, 1352 (2d Cir. 1974). Other than the unsupported inflammatory invective

[4] The plea agreement stipulation was: "[Petitioner] sought to send Saidakhmetov to Syria to fight on behalf of ISIS against the government of Bashir al Assad and in order to protect those people who were engaged in hostilities against and were victims of that government." AB. at 7-8; A.150).

which it found as fact, the District Court did not explain how it arrived at its conclusions that appellant was an ISIS "supporter and sympathizer" who made prior contributions to ISIS and conspired to fight in a "violent jihad" to "kill all non-Muslims", and thus that the intensely disputed Terrorist Enhancement applied when no such evidence was presented.

The insufficiency of the Court's statement of reasons cannot stand alone in isolation from the judicial bias and clearly erroneous factual findings. The Court's finding, based on nothing, that appellant is a jihadist killer, "infected [the sentence] with fundamental defects resulting in a miscarriage of justice." *United States v. Malcolm*, 432 F.2d 809, 815 (2d Cir. 1970).

The government's concession that the District Court failed to "articulate 'significant justification to support'" the term, and some of the conditions, of supervised release (GB. at 56, 57, citing *United States v. Brooks*, 889 F.3d 95, 101-02 (2d Cir. 2018)), applies to the prison sentence as well. The government normally contends that there is no need for a separate justification for the supervised release part of the sentence (*Id* at 56), but in this case it concedes that the rationale for the prison sentence is insufficient to cover the supervised release. "A sentence may nevertheless be remanded if other parts of the record suggest that the district court's sentence may have been influenced by error." *United States v. Ojeda*, 946 F.3d 622, 630 (2d Cir. 2020).

At the sentence hearing on January 14, the Court stated that the Memorandum and Order to be filed later that day or the next would complete the sentence and would include resolution of objections raised by appellant, which appellant could then "have at that." (Sentence Proceedings at 85; A. 435). The Memorandum and Order did not specifically address those objections, and upon its receipt appellant set forth objections to the sentence in a letter to the Court (Letter January 17, A. 443).

The District Court again erroneously avoided consideration of those objections by treating them as a motion pursuant to F.R.Crim.P. 35 to correct the sentence, and ruled that Rule 35 could not correct such errors and that appellant had waived the right to make such a motion by his plea agreement waiver of appeal. (Decision and Order, January 25, 2021, Special Appendix 10). This ruling was erroneous, because the objections were made as part of the sentencing process itself, and cited only alternatively to Rule 35, due to the Court's bifurcated process. See *United States v. Green,* 618 F.3d 120, 122 (2d Cir. 2010).

Given that the Court had announced at the sentence hearing that his sentence practice was to complete this process in a written Memorandum and Order which the parties could "have at" on the same day as the hearings or the next day, appellant's due process right to participate in that process included the opportunity to make objections to the written order. No law "force[s] a district court to finalize a sentence in a single day - even if the defendant raised at the hearing a post-sentencing objection that required

additional research and contemplation by the district court." *United States v. Luna-Acosta*, 715 F.3d 860, 867 (10th Cir. 2013).

Thus, the requirement that a defendant first give the District Court notice of objections to the sentence before raising them on appeal, "would be meaningless if a district court could not - even if it or one of the parties caught a mistake seconds after it was made - correct its initial announcement except for the limited circumstances listed in Rule 35." *Id* at 866. Also, "in the event such an error [the "other errors" of Rule 35] is only recognized later, it can be cured by appeal and remand. *United States v. Abreu-Cabrera*, 64 F.3d 67, 74 (2d Cir. 1995).

Furthermore, even treated as Rule 35 objections, the District Court's ability to modify the sentence under Rule 35(a) was jurisdictional. (See *United States v. McGauhy*, 670 F.3d 1149, 1158 (10th Cir. 2012), thus, "the appellate waiver did not waive the District Court's failure to recognize and exercise its jurisdiction to consider the motion to correct. Appellant filed a separate notice of appeal from the denial of his objections which the Court styled a Rule 35 motion.

Rule 35 did permit the District Court to correct "errors which would almost certainly result in a remand of the case to the trial court for further action" (*United States v. Abreu-Cabrera, supra* at 72, quoting Rule 35 Advisory Committee Notes) as, appellant submits, they would in this case. The Rule was traditionally "broadly available to correct an injustice in a conviction or a sentence." *United States v. Thompson*, 261 F.2d 809, 810

(2d Cir. 1958). The great jurist and scholar of sentencing, Marvin Frankel of the Southern District, once lowered a sentence for an attempted failure to file income taxes after President Nixon was granted a full parden for far more egregious criminal conduct. *United States v. Braun*, 382 F.Supp. 214 (S.D.N.Y. 1974).

More recently, the Second Circuit has held that the Rule applies to correct the failure of the sentencing court to consider Guideline policy. *United States v. Waters*, 84 F.3d 86 (2d Cir. 1996). In this case, the District Court failed to actually consider and apply the statutory factors and Constitutional due process. Courts have used the Rule to correct the prosecutor's breach of a plea agreement (*United States v. Bronstein,* 623 F.2d 1327 (9th Cir. 1980)), a Rule 35 "other error" which involved illegal action or inaction by a party to a sentencing, as is involved in this case with the Court's apparent use of the sentence to bar appeal. And, The District Court's failure to explain its sentence, which implies that unlawful purpose, is a grounds for correction under Rule 35. *United States v. Himsel*, 951 F.2d 144 (7th Cir, 1991); *Benson v. United States* 332 F.2d 288 (5th Cir. 1964); *United States v. Petroleum Corporation of Michigan*, 703 F.2d 94 (5th Cir. 1982).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE WRIT SHOULD ISSUE VACATING THE COURT OF APPEALS DISMISSAL OF THE APPEAL, ORDERING THAT THE

APPEAL BE REINSTATED AND THAT UPON

REINSTATEMENT, THE SENTENCE BE VACATED

AND REMANDED TO A DIFFERENT JUDGE

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of October, two thousand twenty-one.

United States of America,

Appellee,

v.

Azizjon Rakhmatov,

Defendant - Appellant.

ORDER

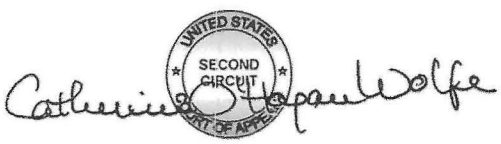
Docket Nos. 21-151(L), 21-167(CON)

Appellant moves for panel reconsideration and reconsideration *en banc* of the Court's September 3, 2021 order that granted in part the Government's motion to dismiss the appeal. The panel that determined the motion to dismiss has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion for reconsideration is DENIED. Appellant's motion for leave to file an oversized reply brief and to file a supplemental appendix will be determined in the ordinary course.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court



APPENDIX A

APPENDIX B

E.D.N.Y.–Bklyn
15-cr-95
Kuntz, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 3rd day of September, two thousand twenty-one.

Present:

John M. Walker, Jr.,
Guido Calabresi,
Raymond J. Lohier, Jr.,
Circuit Judges.

United States of America,

Appellee,

v.

21-151 (L),
21-167 (Con)

Abdurasul Hasanovich Juraboev, AKA
Abdulloh Ibn Hasan, et al.,

Defendants,

Azizjon Rakhmatov,

Defendant-Appellant.

The Government moves to dismiss this appeal as barred by the waiver of appellate rights contained in Appellant's plea agreement. Upon due consideration, it is hereby ORDERED that the motion is GRANTED in part and the appeal is DISMISSED with respect to Appellant's appeal of his term of imprisonment. Appellant has not demonstrated that the waiver of his appellate rights is unenforceable under *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000). Appellant's challenge to his term and conditions of supervised release, docketed under appeal 2d Cir. 21-151 (L), and the denial of his Federal Rule of Criminal Procedure 35(a) motion, docketed under appeal 2d Cir. 21-167 (Con), neither of which is covered by his appeal waiver, shall proceed in the usual course.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX B

UNITED STATES SECOND CIRCUIT COURT OF APPEALS

Catherine O'Hagan Wolfe

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

15-CR-95(WFK)

UNITED STATES OF AMERICA,

Plaintiff,

-against-

AZIZJON RAKHMATOV,

Defendant.

United States Courthouse
Brooklyn, New York

January 14, 2021
12:00 p.m.

----------x

TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
ALL PRESENT VIA VIDEOCONFERENCE
BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

APPEARANCES

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Also Present: SANJAR BABADJANOV, INTERPRETER
SHAYNA BRYANT, USPO

Court Reporter: LINDA D. DANELCZYK, RPR, CSR, CCR
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APPENDIX C

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

in this case, order of judgment.

All right. I will now hear from the defendant if he wishes to make a statement.

We can't hear you, sir. You have to unmute your phone, or have the officials there do it for you.

(Pause in the proceedings.)

THE COURT: We still cannot hear you, sir.

Are you getting the officials over to help you with that?

THE DEFENDANT: Hello?

THE COURT: Yes, we can hear you now.

THE DEFENDANT: Is that good?

MR. STERN: Yes.

THE COURT: Yes, we can hear you. Please proceed.

THE DEFENDANT: Yes. Thank you for giving me the chance to speak. And as I said in my letter, I can't -- I cannot bring the time back and I'm really sorry to be in this situation. I'm sorry. I'm sorry. Thank you.

THE COURT: Thank you, sir.

The Court has this to say: Perfect justice in this case would involve a power that neither I, nor any judge, nor any human being for that matter, has in his or her hands. It is challenging and humbling to sit here as the Court and to pass sentence on a fellow human being.

This case impacts your family. The case impacts the

victims of your crime. Ultimately, of course, this case impacts you, Mr. Rakhmatov. This case is ultimately about you. About what you did that brought us here today, a day of sadness and in tragedy.

On May 9th of 2016, the United States of America filed a superseding indictment against this defendant, Azizjon Rakhmatov, and his codefendants, charging him with: (1), conspiracy to provide material support to a foreign terrorist organization in violation of Title 18 of the United States Code, Section 2339B; (2), attempt to provide material support to a foreign terrorist organization in violation of Title 18 of the United States Code, Section 2339B; and (3), conspiracy to use a firearm in violation of Title 18 United States Code, Section 924(o). Superseding indictment ECF Number 135.

On August the 15th of 2019, the defendant pled guilty to Count One of the indictment, ECF Numbers 367 through 368.

The Court hereby sentences this defendant and sets forth its reasons for the defendant's sentence using the rubric of Title 18, United States Code, Section 3553(a) factors pursuant to 18 U.S.C., Section 3553(c)(2).

I begin the discussion with consideration for legal standard.

Title 18 of the United States Code, Section 3553 outlines the procedure for imposing sentence in a criminal

case. The starting point and the initial benchmark in evaluating a criminal sentencing is the guidelines sentencing range as stated in *Gall*, G-A-L-L, *versus United States*, 552 U.S. 38 at page 49, decided in 2007.

If and when a district court decides and chooses to impose a sentence outside of the sentence guidelines range, the court, quote, shall state in open court the reasons for its imposition of a particular sentence, and the specific reason for the imposition of a sentence different from at that described in guidelines, pursuant to 18 U.S.C., Section 3553(c)(2). The court must also state with specificity its reason for so departing or varying in a statement of reasons form.

The sentencing court's written statement of reasons shall be a simple, fact-specific statement explaining why the guidelines range did not account for a specific factor or factors under Section 3553(a), set forth by my brother Judge Jack Weinstein in *United States versus Davis*, 8-CR-332, 2010 Westlaw 1221709 at Star 1, Eastern District of New York, decided by Judge Weinstein on March 29th of 2010.

Section 3553(a), as has been noted by all counsel, provides a set of seven factors for this Court to consider in determining what sentence to impose on a criminal defendant. And the Court addresses each factor in turn.

The analysis is as follows:

A. The nature and circumstances of the offense and the history and characteristics of the defendant.

The first 3553(a) factor requires this Court to evaluate the nature and circumstances of the offense and the history and characteristics of the defendant, pursuant to 18 U.S.C., Section 3553(a)(1).

The defendant was born on December 28th in 1986, in the Tashkent, Uzbekistan to the marital union of Shokir, S-H-O-K-I-R, Rakhmatov and N-O-D-I-R-A Rakhmatov. Presentence report, paragraph 50, ECF Number 448 in the PSR.

His parents reside together in Uzbekistan. As disclosed earlier, his father is a truck driver and suffers from coronary disease. His mother is a homemaker and suffers from liver disease and a spinal condition. The defendant's parents are aware of his arrest and conviction and remain supportive of him.

The defendant was reared by both parents in a lower-income circumstance in a good family in Uzbekistan, as we heard earlier today. And it's reflected in paragraph 51.

He recalled have a childhood full of good memories and devoid of any form of abuse.

The defendant has a younger brother, Alisher, A-L-I-S-H-E-R, Rakhmatov who resides in Uzbekistan. The defendant's brother is healthy and has four children. The defendant is close with his brother who's aware of his arrest

and conviction and remains supportive of him.

In 2009, the defendant married F-E-R-U-Z-A, Feruza, last name B-A-Y-M-A-T-O-V-A in Uzbekistan. After a few months of marriage, the defendant decided to divorce. The marriage produced defendant's eldest daughter, age 10, who is healthy and attends school. The defendant's eldest daughter resides with his ex-wife in Uzbekistan. The defendant's ex-wife, who has remained angry at him for divorcing her while pregnant, has not remained in contact with the defendant. However, the defendant reports having supported his daughter financially, as we heard earlier today, prior to the instant arrest.

On March of 2011, the defendant left Uzbekistan and traveled to the United States of America on a tourist visa. The defendant then lived in New York City for several months before relocating to Syracuse, New York.

In 2013, the defendant moved to New Britain, Connecticut. ICE records indicate the defendant is not a legal resident of the United States and is currently subject to removal proceedings. Paragraph 53.

In 2012, the defendant began dating Miss Abibata, A-B-I-B-A-T-A, Kone, K-O-N-E. The couple married on June 3rd of 2016 in Syracuse, New York. The defendant's wife is a homemaker and suffers from stomach ulcers. The defendant has two children from his second marriage, ages five and four. Both children are healthy and reside with his wife.

Defendant's wife and younger children are experiencing significant financial hardship, as we heard earlier today, since the defendant's arrest and have had to face eviction and live in a shelter. Defendant's wife is aware of his arrest and conviction and remains supportive of him.

The defendant lives with cavities, recurring sinus infections, as well as chronic joint pain in the legs and shoulders related to his history of rheumatism. With respect to his mental health, the defendant reports suffering from fear his wife will not be able to cope financially in his absence. The defendant does not have a history of alcohol or drug abuse.

The defendant obtained a college degree in engineering while in Uzbekistan. He is fluent in Uzbek and speaks English.

Beginning in 2013, the defendant worked as a self-employed car salesman in Connecticut, earning $4,000 in gross profits each month. In 2012 to 2013, the defendant was a salesperson in a mall kiosk in Syracuse, New York. From 2004 until 2012, the defendant operated a jewelry store in Uzbekistan. The defendant appears unable at this time, however, to pay any fine.

On February -- strike that. In February of 2015, the defendant assisted his codefendants in raising money to

support codefendant Akhror, A-K-H-R-O-R, Saidakhmetov, S-A-I-D-A-K-H-M-E-T-O-V, to travel from the United States to Syria to join the Islamic State of Iraq and Syria, known as ISIS, a jihadist militant organization and a designated foreign terrorist organization, the FTO.

The defendant agreed to contribute his own funds toward Saidakhmetov's travel and to purchase a firearm and to further assist in raising funds from others. The defendant personally contributed $400 to fund Saidakhmetov's travel and expenses to Syria to fight on behalf of ISIS.

The second 3553(a) factor addresses the need for the sentence imposed and instructs the Court to consider the need for the sentence imposed, (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner, 18 U.S.C., Section 3553(a)(2).

This Court's sentence recognizes the seriousness of the defendant's offense and punishes the defendant accordingly. It seeks to deter this defendant from further criminal activity, and from disregarding the laws of the United States of America, and from engaging in illicit

activity.

Next, C, the kinds of sentences available.

The third 3553(a) factor requires a Court to detail the kinds of sentences available for the defendant pursuant to 18 U.S.C., Section 3553(a)(3).

The defendant pled guilty To Count One of the superseding indictment. By statute, the defendant faces a maximum term of imprisonment of 15 years, pursuant to 18 U.S.C., Section 2339B, effective December 1, 2009 through June 1, 2015. The defendant faces a further maximum term of supervised release for life. The defendant also faces a maximum fine of $250,000 pursuant to Section 3571(b)(3), and a mandatory special assessment of $100 pursuant to Section 3013, which I am required to impose in every case per count and individual.

D, the kinds of sentence and the sentencing range established for the defendant's offenses.

The fourth 3553(a) factor requires the Court to discuss the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant, as set forth in guideline Section 3553(a)(4)(A).

For a violation of Title 18 United States Code, Section 2339B, the applicable guideline is Section 2M, as in Mary, 5.3(a), United States Sentencing Commission Guidelines

Manual, Section 2M5.3(a).

The base offense level is 26, Section 5M.3(a). As the instant offense involved provision of material support with the intent, knowledge or reason to believe such support was to be used to assist in the commission of a violent act, the offense is increased by 2 levels, under 2M5.3(b)(1)(E), as reflected in the PSR, paragraph 34, and the government's memorandum at 10, and ECF Number 475 referred to as the government's memorandum.

Furthermore, as the offense is a felony intended to promote a crime of terrorism, the offense level is increased by 12 levels, pursuant to USSG Section 3A1.4(b), as referred to in the PSR Section 35, and the government's memorandum at 10. This results in an adjusted offense total level of 40.

The defendant has, however, demonstrated acceptance of responsibility for the offense, and accordingly, the offense level is decreased by 2 levels under USSG Section 3E1.1(a). Because the government was notified in a timely manner of the defendant's intent to enter a guilty plea, the offense level is decreased by 1 additional level, Section 3E1.1(b). This calculation yields a total offense level of 37.

Probation and the government agree with this calculation as set forth in the PSR, paragraph 33 to 42, government memorandum at 10.

The defendant argues the Court should disregard USSG Sections 2M5.3(b)(1)(E), and 3A1.4(b), arguing Section 3A1.4(b) is unconstitutional and unproven and to count both sections would be, quote/unquote, double counting. Defendant's first objection to the PSR at 1 through 11, ECF Number 474, the defendant's first objection.

The defendant's objection was argued again to the Court today this Court should use solely the base offense level without enhancement, which would result in an offense level of 26. The defendant makes that argument, and he made it again today through counsel, first objection 19, 24 and 41.

Probation and the government state the defendant's Criminal History Category is VI, pursuant to USSG 3A.1(b). PSR Section 45. Government memorandum at 10. Defense argues, however, USSG Section 3A1.4(b) is inapplicable and unconstitutional. The defendant's first objection at 1. As he has no criminal conviction, apart from the instant offense. The defendant argues his Criminal History Category is I, and cites that at page 10.

A total offense level of 37 and a Criminal History Category of VI would yield a guideline sentence term of approximately 360 months to life. USSG Chapter 5, Part A. However, as the parties both agree, statutorily authorized maximum sentence in this case is 15 years, the restricted guidelines term of imprisonment is 180 months. The guidelines

also recommend a fine of between 40,000 and 250,000. That is to say, Section 5E1.2(c)(3), (h)(1).

Total offense level of 26 and a Criminal History Category of I yields a guidelines term of imprisonment range of 63 to 78 months. Chapter 5, Part A. And the guidelines recommends a fine of $25,000 and $250,000 at that level. Section 5E1.2(c)(3).

For both calculated offense levels, the guidelines further recommend a term of supervised release of between two years and life, Section 5D1.2(a)(1), and advise the defendant is ineligible for probation, Section 5B1.1, note 1.

Probation recommends a sentence of 180 months in custody and lifetime supervised release with special conditions, as set forth in the U.S Probation Department's sentencing recommendation at 1, ECF Number 448-1. The government also requests a sentence of 180 months in custody. Set forth in the government memorandum at 1. Defense counsel requests a sentence of time served or within his calculated range of 63 to 78 months, as set forth in defendant's first objection 19, 24 and 41.

The fifth 3553(a) factor requires the Court to evaluate, quote, any pertinent policy statement issued by the Sentencing Commission, 18 U.S.C., Section 3553(a)(5). This factor is not relevant to the defendant's sentencing today, in the Court's view.

The sixth 3553(a) factor is the need to avoid unwarranted sentence disparities. The sixth 3553(a) factor requires the Court to consider the need to avoid unwarranted sentences -- unwarranted sentence disparities among defendants with similar records who have been found guilty of similar crimes, as set forth in 18 U.S.C., Section 3553(a)(6). For the reasons stated in this memorandum, and order, and considering the other six 3553(a) factors, the Court's sentence avoids unwarranted sentence disparities.

Finally, the seventh 3553(a) factor requires the Court to touch upon the need to provide restitution to any victims of the offense under 18 U.S.C., Section 3553(a)(7). This factor is not relevant to the defendant's sentence.

Therefore, the Court imposes a sentence as follows:

The sentence is 150 months of incarceration, followed by a lifetime of supervised release. No fine. And a $100 mandatory special assessment is appropriate and comports with the dictates of Section 3553(a). This sentence is consistent with and is sufficient but not greater than necessary to accomplish the purposes of Section 3553(a).

Now the defendant has waived his right to appeal the sentence, except as set forth in the plea agreement. And since there's been some discussion of the plea agreement today, it's already in evidence, I thought it was appropriate to read paragraph 5 of the plea agreement, which is in

evidence, as I said earlier today, Exhibit 2 admitted into evidence on August the 15th of 2019, and it reads -- paragraph 5 reads as follows:

The defendant agreed not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C., Section 2255 or any other provision, the conviction or sentence in the event that the Court imposes a term of imprisonment of 150 months or below. This waiver is binding without regard to the sentencing analysis used by the Court. The defendant also waives all defenses based on the statute limitations and venue with respect to any prosecution that is not time-barred on the date that this agreement is signed in the event that (a) the defendant's conviction is later vacated for any reason, (b) if the defendant violates the agreement, or (c) if the defendant's plea is later withdrawn. The defendant further waives the right to raise an appeal or on collateral review any argument (1) the statute to which the defendant is the pleading guilty is unconstitutional and (2) the admitted conduct does not fall within the scope of the statute. Nothing in the foregoing waiver of appellate and collateral review rights preclude defendant from raising a claim of ineffective assistance of counsel in an appropriate forum. The defendant waives any right to additional disclosure from the government in connection with the guilty plea. The defendant agrees that with respect to all charges

referred in paragraphs 1 and 6(a), he is not a, quote/unquote, prevailing party within the meaning of the "Hyde Amendment," 18 U.S.C., Section 3006A note, and will not file any claim under that law. The defendant agrees to pay the special assessment by check, payable to the clerk of court at or before sentencing. The defendant understands that he may be subject to removal as set forth in paragraph 7 below. Nonetheless, the defendant affirms that he wants to plead guilty and to waive his right to appeal as set forth at the beginning of this paragraph, even if the consequence is the defendant's automatic removal from the United States, close quote.

That is the entirety of paragraph 5 of the plea agreement.

Now the Court expressly adopts the factual findings of the presentence investigation report and any addenda thereto, barring errors contained therein, to the extent they are not inconsistent with this opinion.

The Court now directs the Probation Department to read that paragraph, and take your time and express the findings of the presentence investigation report. Please proceed to do so on the record out loud and take your time.

THE PROBATION OFFICER: My apologies, Your Honor, the Court is requesting that probation review --

THE COURT: Do you have any recommendations? You

made a sentence recommendation --

THE PROBATION OFFICER: Oh, the recommendation. Yes, yes. Sorry.

THE COURT: Hang on. Hang on. You made a recommendation --

THE PROBATION OFFICER: Okay.

THE COURT: -- with respect to supervised release. You recommended 180 months. And you recommended special conditions.

I want you to read those special conditions into the record. The Court adopts them, to the extent they are not erroneous as a matter of law. And I believe the sentence begins: The defendant shall submit.

Do you have it in front of you or not?

THE PROBATION OFFICER: Yes, I do, Your Honor. Yes.

THE COURT: Take your time and read it out loud into the record.

THE PROBATION OFFICER: The special conditions of supervised release are as follows:

The defendant shall submit to a mental health evaluation and --

(Court reporter interruption.)

THE COURT: Would you like me to read it out loud?

THE PROBATION OFFICER: It's not my background.

THE COURT: All right. Would the defendant -- hang

in the case from the defendant?

Mr. Stern, are you there? We can't hear you. I'm sorry.

MR. STERN: Sorry, Your Honor. Can you hear me?

THE COURT: We can hear you now.

MR. STERN: I think Your Honor has to rule on the other objections made to the PSR.

THE COURT: Those are overruled. Your other objections to the PSR are overruled.

I was asking you first if there are any outstanding counts that you wish to --

MR. STERN: Yes. Yes.

THE COURT: Why don't we address that so we don't have those lingering.

MR. STERN: Yes. I move to dismiss them.

THE COURT: Any objection, Mr. Pravda?

Did we lose Mr. Pravda?

MR. PRAVDA: No, Your Honor, the government formally moves to dismiss the counts.

THE COURT: Okay, so the motion to dismiss those counts is granted, the outstanding counts, right?

MR. STERN: Right.

THE COURT: Let's back up. Do we have any outstanding counts in this case?

MR. STERN: Yes.

THE COURT: Okay. Is there a motion to dismiss those counts, the ones that were not pled guilty to?

MR. STERN: Mr. Pravda?

MR. PRAVDA: Yes, Your Honor, the government moves to dismiss the open counts.

THE COURT: Yes.

Any objections from the defense?

MR. STERN: No.

THE COURT: Okay. Those counts are dismissed. Just want to keep it clear. That's fine.

MR. PRAVDA: Your Honor, I apologize. The government also moves to dismiss the underlying indictment.

THE COURT: Any objection to that motion?

MR. STERN: No.

THE COURT: That motion is granted. Okay.

Now, the objections, the other objections to the PSR that were made are overruled.

Anything else?

MR. STERN: Yes, Your Honor. I believe I have to object to some of the special conditions of supervised release.

THE COURT: You can object to them, but the objections are overruled. I've adopted them. You objected to them. So your record is clear that you object to them.

MR. STERN: Okay, thank you.

MR. PRAVDA: Your Honor, I just wanted to confirm something. I think you said that -- I apologize, I don't know if I heard it right.

So am I correct that you have adopted the guidelines calculation at set forth in the PSR?

THE COURT: Correct.

MR. PRAVDA: Thank you, Your Honor.

THE COURT: I will also, as is my standard practice, or my typical practice, I won't say standard, I will be filing a memorandum and order, which follows what I have read orally into the record, so you will have at that on ECF as well. That should facilitate your records. But you will have that and that will be filed if not the later today then certainly tomorrow you will have that.

Anything else?

MR. STERN: Yes, Judge. Would you please direct the court reporter to provide me with a copy of the sentencing minutes pursuant to the CJA?

THE COURT: Yes. So ordered.

MR. STERN: Thank you.

THE COURT: Anything else?

From the government, anything else?

MR. PRAVDA: No, Your Honor.

The last thing is, I know Your Honor went over the waiver paragraph in the plea agreement and explained that

because the sentence is 150 months the defendant has waived his right to appeal.

THE COURT: I certainly read it in haec verba from the plea agreement, which is in evidence. I don't know what more I can do except read it again.

Would you like me to read it again, Mr. Pravda?

MR. PRAVDA: No. Thank you, Your Honor, I appreciate that.

I would just ask the Court to advise the defendant that if he believes that there was anything improper, that he has only 14 days to raise that by way of appeal from the date of the filing of the judgment.

THE COURT: Consider the defendant so advised.

MR. PRAVDA: Thank you, Your Honor.

MR. STERN: I have one more thing, Judge.

THE COURT: Yes, of course.

MR. STERN: The request for a recommendation to the Federal Correctional Institution at Danbury, Connecticut.

THE COURT: Yes, as I stated, I will put that actually in the terms -- express written terms of the judgment. So you will have that recommendation to the prison folks in the actual judgment. And that is part of my order.

MR. STERN: Thank you, Judge.

THE COURT: And I will, as I said, also recommend that any health issues, both the ones you have identified

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

AZIZJON RAKHMATOV,

Defendant.

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MEMORANDUM & ORDER
15-CR-95-6 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge: On August 15, 2019, Azizjon Rakhmatov ("Defendant") pled guilty to Count One of the Superseding Indictment. The Court now sentences him and provides a complete statement of reasons pursuant to 18 U.S.C. § 3553(c)(2) of those factors set forth by Congress and contained in 18 U.S.C. § 3553(a). For the reasons discussed below, Defendant is hereby sentenced to 150 months of incarceration, a lifetime of supervised release, and a $100 mandatory special assessment.

BACKGROUND

On May 9, 2016, the Government filed a Superseding Indictment against Defendant and his co-defendants, charging him with: (1) Conspiracy to Provide Material Support to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; (2) Attempt to Provide Material Support to a Foreign Terrorist Organization, in violation of 18 U.S.C. § 2339B; and (3) Conspiracy to Use a Firearm, in violation of 18 U.S.C. § 924(o). Superseding Indictment, ECF No. 135. On August 15, 2019, Defendant pled guilty to Count One of the Indictment. ECF Nos. 367–68.

The Court hereby sentences Defendant and sets forth its reasons for Defendant's sentence using the rubric of the 18 U.S.C. § 3553(a) factors pursuant to 18 U.S.C. § 3553(c)(2).

DISCUSSION

I. Legal Standard

18 U.S.C. § 3553 outlines the procedures for imposing sentence in a criminal case. The "starting point and the initial benchmark" in evaluating a criminal sentence is the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 49 (2007). If and when a district court

chooses to impose a sentence outside of the Sentencing Guidelines range, the court "shall state in open court the reasons for its imposition of the particular sentence, and . . . the specific reason for the imposition of a sentence different from that described" in the Guidelines. 18 U.S.C. § 3553(c)(2). The court must also "state[] with specificity" its reasons for so departing or varying "in a statement of reasons form." *Id.*

"The sentencing court's written statement of reasons shall be a simple, fact-specific statement explaining why the guidelines range did not account for a specific factor or factors under § 3553(a)." *United States v. Davis*, 08-CR-0332, 2010 WL 1221709, at *1 (E.D.N.Y. Mar. 29, 2010) (Weinstein, J.). Section 3553(a) provides a set of seven factors for the Court to consider in determining what sentence to impose on a criminal defendant. The Court addresses each in turn.

II. Analysis

A. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

The first § 3553(a) factor requires the Court to evaluate "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

Defendant was born on December 28, 1986 in Tashkent, Uzbekistan to the marital union of Shokir Rakhmatov and Nodira Rakhmatov. Presentence Investigation Report ¶ 50, ECF No. 448 ("PSR"). His parents reside together in Uzbekistan. *Id.* His father is a truck driver and suffers from coronary disease. *Id.* His mother is a homemaker and suffers from liver disease and a spinal condition. *Id.* Defendant's parents are aware of his arrest and conviction and remain supportive of him. *Id.*

Defendant was reared by both parents under lower-income circumstances in Uzbekistan. *Id.* ¶ 51. He recalled having a childhood full of good memories and devoid of any forms of

abuse. *Id.* Defendant has a younger brother, Alisher Rakhmatov, who resides in Uzbekistan. *Id.* Defendant's brother is healthy and has four children. *Id.* Defendant is close with his brother, who is aware of his arrest and conviction and remain supportive of him. *Id.*

In 2009, Defendant married Feruza Baymatova in Uzbekistan. *Id.* ¶ 52. After a few months of marriage, Defendant decided to seek a divorce. *Id.* The marriage produced Defendant's eldest daughter, age 10, who is healthy and attends school. *Id.* Defendant's eldest daughter resides with his ex-wife in Uzbekistan. *Id.* Defendant's ex-wife, who has remained angry with him for divorcing her while pregnant, has not remained in contact with Defendant. *Id.* However, Defendant reports having supported his daughter financially, prior to his instant arrest. *Id.*

In March 2011, Defendant left Uzbekistan and travelled to the United States on a tourist visa. *Id.* ¶ 53. Defendant then lived in New York City for several months before relocating to Syracuse, New York. *Id.* In 2013, Defendant moved to New Britain, Connecticut. *Id.* ¶ 55. ICE records indicate Defendant is not a legal resident of the United States and is currently subject to removal proceedings. *Id.* ¶ 53.

In 2012, Defendant began dating Abibata Kone. *Id.* ¶ 54. The couple married on June 3, 2016, in Syracuse, New York. *Id.* Defendant's wife is a homemaker and suffers from stomach ulcers. *Id.* Defendant has two children from his second marriage, ages five and four. *Id.* Both children are healthy and reside with his wife. *Id.* Defendant's wife and younger children are experiencing significant financial hardship since Defendant's arrest and have had to face eviction and live in a shelter. *Id.* Defendant's wife is aware of his arrest and conviction and remains supportive of him. *Id.*

Defendant lives with cavities, recurring sinus infections, as well as chronic joint pain in the legs and shoulders related to his history of rheumatism. *Id.* ¶ 58. With respect to his mental health, Defendant reports suffering from fear his wife will not be able to cope financially in his absence. *Id.* ¶ 59. Defendant does not have a history of alcohol or drug abuse. *Id.* ¶ 60.

Defendant obtained a college degree in engineering while in Uzbekistan. *Id.* ¶ 61. He is fluent is Uzbek and speaks English. *Id.* ¶ 62. Beginning in 2013, Defendant worked as a self-employed car salesman in Connecticut, earning $4,000.00 in gross profits each month. *Id.* ¶ 64. From 2012 until 2013, Defendant was a salesperson at a mall kiosk in Syracuse, New York. *Id.* ¶ 65. From 2004 until 2012, Defendant operated a jewelry store in Uzbekistan. *Id.* Defendant appears unable to pay a fine. *Id.* ¶ 68.

In February 2015, Defendant assisted his co-defendants in raising money to support co-defendant Akhror Saidakhmetov's travel from the United States to Syria to join the Islamic State of Iraq and Syria ("ISIS"), a jihadist militant organization and designated foreign terrorist organization ("FTO"). *Id.* ¶¶ 3–4, 18–23. Defendant agreed to contribute his own funds towards Saidakhmetov's travel and the purchase of a firearm and to further assist in raising funds from others. *Id.* ¶¶ 19–22. Defendant contributed $400.00 to fund Saidakhmetov's travel and expenses in Syria to fight on behalf of ISIS. *Id.* ¶ 22.

B. The Need for the Sentence Imposed

The second § 3553(a) factor instructs the Court to consider "the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant

with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

The Court's sentence recognizes the seriousness of Defendant's offense and punishes Defendant accordingly. It seeks to deter Defendant from further criminal activity, from disregarding U.S. law, and from engaging in illicit activity.

C. The Kinds of Sentences Available

The third § 3553(a) factor requires the Court to detail "the kinds of sentences available" for Defendant. 18 U.S.C. § 3553(a)(3).

Defendant pled guilty to Count One of the Superseding Indictment. ECF Nos. 368–69. By statute, Defendant faces a maximum term of imprisonment of fifteen years. 18 U.S.C. § 2339B (effective Dec. 1, 2009, through June 1, 2015). Defendant further faces a maximum term of supervised release of life. *Id.* § 3583(j). Defendant also faces a maximum fine of $250,000.00, *id.* § 3571(b)(3), and a mandatory special assessment of $100.00, *id.* § 3013.

D. The Kinds of Sentence and the Sentencing Range Established for Defendant's Offenses

The fourth § 3553(a) factor requires the Court to discuss "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[.]" *Id.* § 3553(a)(4)(A).

For a violation of 18 U.S.C. § 2339B the applicable Guideline is section 2M5.3(a). United States Sentencing Commission, Guidelines Manual ("USSG") § 2M5.3(a). The base offense level is 26. *Id.* § 2M5.3(a). As the instant offense involved provision of material support with the intent, knowledge or reason to believe such support was to be used to assist in the commission of a violent act the offense level is increased by two (2) levels. *Id.* § 2M5.3(b)(1)(E); PSR ¶ 34; Gov't Sentencing Mem. at 10, ECF No. 475 ("Gov't Mem.").

Further, as the offense is a felony intended to promote a crime of terrorism, the offense level is increased by twelve (12) levels. USSG § 3A1.4(b); PSR ¶ 35; Gov't Mem. at 10. This results in an adjusted offense total of forty (40).

Defendant has demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two (2) levels. USSG § 3E1.1(a). Because the Government was notified in a timely manner of Defendant's intention to enter a plea of guilty, the offense level is decreased by one (1) additional level. *Id.* § 3E1.1(b). This calculation yields a total offense level of thirty-seven (37).

Probation and the Government agree with this calculation. PSR ¶¶ 33–42; Gov't Mem. at 10. Defendant argues the Court should disregard USSG §§ 2M5.3(b)(1)(E) and 3A1.4(b), arguing section 3A1.4(b) is unconstitutional and unproven and to count both sections would "be double counting." Def.'s First Obj. to PSR at 1–11, ECF No. 474 ("Def. 1st Obj."). Defendant suggests the Court should use solely the base offense level without enhancement, which would result in an offense level of 26. Def. 1st Obj. at 19, 24, 41.

Probation and the Government state Defendant's criminal history category is six (VI), pursuant to USSG § 3A1.4(b). PSR ¶ 45; Gov't Mem. at 10. Defendant argues USSG § 3A1.4(b) is inapplicable and unconstitutional. Def. 1st Obj. at 1. As he has no criminal convictions apart from the instant offense, Defendant argues his criminal history category is one (I). *Id.* at 10.

A total offense level of thirty-seven (37) and a criminal history category of six (VI) yields a Guidelines term of imprisonment of 360 months to life. USSG Ch. 5, Part A. However, as the statutorily authorized maximum sentence is 15 years, the restricted Guidelines term of

imprisonment is 180 months. USSG § 5G1.1(a). The Guidelines also recommend a fine of between $40,000.00 and $250,000.00. *Id.* § 5E1.2(c)(3), (h)(1).

A total offense level of twenty-six (26) and a criminal history category of one (I) yields a Guidelines term of imprisonment range of sixty-three (63) to seventy-eight (78) months. *Id.* Ch. 5, Part A. And the Guidelines recommend a fine of between $25,000.00 and $250,000.00. *Id.* § 5E1.2(c)(3).

For both calculated offense levels, the Guidelines further recommend a term of supervised release between two years and life, *id.* § 5D1.2(a)(1), and advise Defendant is ineligible for probation. *Id.* § 5B1.1 n.2.

Probation recommends a sentence of 180 months in custody and lifetime supervised release with special conditions. *See* U.S. Probation Dep't Sentence Recommendation at 1, ECF No. 448-1. The Government requests a sentence of 180 months in custody. Gov't Mem. at 1. Defense counsel requests a sentence of time served or within his calculated range of sixty-three to seventy-eight (63–78) months. Def. 1st Obj. at 19, 24, 41.

E. Pertinent Policy Statement(s) of the Sentencing Commission

The fifth § 3553(a) factor requires the Court to evaluate "any pertinent policy statement . . . issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(5). This factor is not relevant to Defendant's sentencing.

F. The Need to Avoid Unwarranted Sentence Disparities

The sixth § 3553(a) factor requires the Court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). For the reasons stated in this Memorandum and

Order, and considering the other six § 3553(a) factors, the Court's sentence avoids unwarranted sentence disparities.

G. The Need to Provide Restitution

Finally, the seventh § 3553(a) factor requires the Court to touch upon "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). This factor is not relevant to Defendant's sentencing.

CONCLUSION

A sentence of 150 months of incarceration, lifetime of supervised release, and a $100 mandatory special assessment is appropriate and comports with the dictates of § 3553. This sentence is consistent with, and is sufficient but no greater than necessary to accomplish, the purposes of § 3553(a)(2).

The Court expressly adopts the special conditions to supervised release recommended by Probation. *See* U.S. Probation Dep't Sentence Recommendation, ECF No. 448-1. Furthermore, the Court recommends the Defendant be transferred to Federal Correctional Institution, Danbury (FCI-Danbury), as his immediate family resides in Connecticut.

Finally, the Court re-issues its October 10, 2019 Order, and again orders the Warden of the Metropolitan Correctional Center to provide Azizjon Rakhmatov, #89329-053, with dental and medical care, to ensure, to the fullest extent that dentistry and medicine can provide, that Mr. Rakhmatov's teeth are repaired, maintained, and no longer cause him pain, and that the blockages of his sinuses and nasal passages are cleared and remain so." ECF No. 424.

The Court expressly adopts the factual findings of the Presentence Investigation Report and any addenda thereto, barring any errors contained therein, to the extent they are not inconsistent with this opinion.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: January 15, 2021
Brooklyn, New York

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

-against-

AZIZJON RAKIMATOV,

Defendant.

----------x

15-CR-95(WFK)

United States Courthouse
Brooklyn, New York

August 15, 2019
3:30 p.m.

TRANSCRIPT OF CRIMINAL CAUSE FOR PLEADING
BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

APPEARANCES

For the Government: UNITED STATES ATTORNEY'S OFFICE
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Also Present: NODIRA MATYAKUBOVA, Uzbek Interpreter

Court Reporter: Rivka Teich, CSR, RPR, RMR, FCRR
Phone: 718-613-2268
Email: RivkaTeich@gmail.com

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

APPENDIX E

the Court accept your guilty plea, you will be giving up your right to a trial by a jury of your peers and all the other rights I have just discussed with you.

There will be no trial in this case. There will be no appeal on the question of whether you did or you did not commit the crimes set forth in Count One of the Superseding Indictment.

Pursuant to paragraph 5 of your plea agreement, you may appeal or otherwise challenge your conviction or sentence only if the sentence I impose exceeds 150 months of imprisonment. If I were to impose a sentence that exceeds 150 months of imprisonment, you would have the right to appeal or otherwise to challenge that sentence to a higher court. Do you understand, sir?

THE DEFENDANT: Yes.

THE COURT: In sum, sir, you are waiving any right to appeal or otherwise challenge your conviction or sentence if this Court imposes a term at or below 150 months of imprisonment.

If you violate this agreement and elect to file an appeal resulting in your sentence being vacated or set aside or if you otherwise challenge your conviction or sentence, you could very well face a much greater sentence than the one you received under this plea agreement. Specifically, you could receive a sentence of up to 15 years of imprisonment, which is

the equivalent of the statutory maximum provided by the Congress of the United States for the crimes charged in Count One of the Superseding Indictment. Do you understand that, sir?

MR. STERN: Your Honor, I'm not sure I did. And I beg your pardon. Would you mind starting over with that one?

THE COURT: Yes. You could receive a sentence of up to 15 years imprisonment, which is equivalent to the statutory maximum provided by the Congress of the United States for the charges -- for the crimes charged in Count One of the Superseding Indictment.

MR. STERN: I'm sorry. I didn't understand or I didn't hear what would result in the sentence of 15 years. You said.

THE COURT: In sum, you are waiving any right to appeal or otherwise challenge your conviction or sentence if this Court imposes a term at or below 150 months of imprisonment. If, however, you violate your plea agreement and you file an appeal and if the result of that appeal is your sentence being vacated or set aside or if you otherwise challenge your conviction or sentence, you could very well subsequently face a much greater sentence than the one you receive under the plea agreement. Do you understand that?

MR. STERN: May I make sure?

THE COURT: Of course.

(Defense counsel confers with the defendant.)

MR. STERN: Can I have a moment to consult with the Government?

THE COURT: Of course.

(Discussion between counsel.)

THE COURT: Counsel, I don't mean to interrupt your colloquy, but would it be helpful just to -- in light of the fact you're having this colloquy now, perhaps I should simply read the plea agreement out loud on the record and see if everyone is on board with the written plea agreement that has been signed by the United States Attorney's Office, by defense counsel, and by the defendant, and see if there is any problem? Would that be something that would perhaps resolve any ambiguities that exist, or is there a problem with the written document?

MR. STERN: There isn't a problem with the written document.

THE COURT: Perhaps I should read the document and have everyone agree that you're bound by the terms and conditions of the written plea agreement. Is that the way we should proceed at this point? That way there won't be any confusion.

I take it there is confusion. The way I like to deal with confusion is to obviate it. Maybe I'll read the plea agreement and everyone can agree that that is what

everyone is agreeing to.

MR. STERN: Okay, but --

THE COURT: Is that acceptable?

MR. STERN: With the proviso that the Court's extrapolation in its last statement that if he were to appeal a conviction or sentence less than 150 months and the circuit accepted that appeal and vacated the sentence, which means the circuit didn't think the appeal waiver was operative or --

THE COURT: It could mean a lot of things.

MR. STERN: But the Court seems to think that he could --

THE COURT: I'll tell you what, rather into get what the Court seems to think, I'll tell what you the Court thinks.

I'll tell you that the Court has accepted in evidence the plea agreement which I'm now going to read in its entirety as follows and that the Court will be governed by applicable Second Circuit law and what the plea agreement states in its entirety.

Here is what the plea agreement, which is in evidence, states in its entirety, and this reflects the thinking of the Court and reflects Second Circuit authority.

"Pursuant to Rule 11 of the Federal Rule of Criminal Procedure, the United States Attorney's Office for the Eastern District of New York, ('the Office') and Azizjon Rakhmatov, the defendant, agree to the following:

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

v.

AZIZJON RAKHMATOV,

Defendant.

----------X

DECISION & ORDER
15-CR-95-6 (WFK)

WILLIAM F. KUNTZ, II, United States District Judge:

BACKGROUND

On August 15, 2019, Azizjon Rakhmatov ("Defendant") pled guilty to one count of conspiracy to provide material support to a foreign terrorist organization, as defined in 18 U.S.C. § 2399B. *See* ECF No. 367, Change of Plea Hearing as to Azizjon Rakmatov. The plea agreement noted this offense carries a maximum term of imprisonment of fifteen (15) years and contemplated an effective U.S. Sentencing Guidelines ("Guidelines") range of one hundred eighty (180) months' incarceration. *See* ECF 368, Plea Agreement at ¶¶1–2. Pursuant to the plea agreement, Defendant agreed "not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. § 2255 or any other provisions, the conviction or sentence in the event that the Court imposes a term of imprisonment of 150 months or below." *Id.* at ¶5. On January 15, 2021, this Court sentenced Defendant to 150 months of incarceration, a lifetime of supervised release, and a $100 mandatory special assessment. *See* ECF No. 485, Memorandum and Order as to Azizjon Rakmatov.

On January 17, 2021, Defendant moved to correct or amend the Court's sentence pursuant to Federal Rule of Criminal Procedure 35(a) ("Rule 35"). ECF No. 488, Letter Motion to Amend/Correct Memorandum and Order of January 15, 2021. Among other things, Defendant argued the sentence "was unreasonable, cruel and unusual, and contrary to 18 U.S.C. §3553(a), Fed. R. Crim. P. 32, due process and equal protection of the law, and greater than necessary to

accomplish the purposes of 18 U.S.C. §3552." *Id.* Upon the Court's request, the Government submitted a letter in opposition to Defendant's motion, *see* ECF No. 491, Response in Opposition to Letter Motion to Amend, to which Defendant replied on January 24, 2021, *see* ECF No. 492, Letter in Response to Government's Opposition. For the reasons stated below, Defendant's motion is DENIED.

DISCUSSION

I. Rule 35 is Inapplicable to Defendant's Request

"Rule 35 delineates a limited set of circumstances in which a sentence may be corrected or reduced." *Dillon v. United States*, 560 U.S. 817, 828 (2010). Specifically, Rule 35(a) allows for the correction of a sentence that resulted from an "arithmetical, technical, or other clear error." Fed. R. Crim. P. 35(a). Under Rule 35, the Court can only correct obvious errors. These corrections do not involve "reconsidering an application, reopening the issues resolved at the sentencing hearing, or reconsidering the sentence." *Bonilla v. United States*, 252 F. App'x 382, 383 (2d Cir. 2007) (citing *United States v. DeMartino*, 112 F.3d 75, 79 (2d Cir. 1997)); *see also United States v. Razzouk*, 11-CR-430, 2018 WL 2272713, at *1 (E.D.N.Y. 2018) (Ross, J.) (noting Rule 35(a) "is intended to be very narrow and to extend only to those cases in which an obvious error or mistake has occurred in the sentence") (citing *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995)).

Defendant seeks to amend and correct the Court's sentence because it was allegedly "imposed without reason, articulated and otherwise, with formulaic recitations of the Guidelines and § 3553(a) factors, and based on, *inter alia*, the falsehoods that Mr. Rakhmatov is a violent jihadi warrior sympathizer of ISS and intended killer of non-Muslims." *See* ECF No. 492, Letter in Response to Government's Opposition. These alleged deficiencies are not the "arithmetical,

technical, or other clear error[s]" imagined by Rule 35. Instead, Defendant asks the Court to reconsider both the facts and the Guidelines analysis underlying its originally imposed sentence; these considerations are outside the scope of a Rule 35 motion. *See, e.g., United States v. Ziming Shen*, 12-CR-68, 2014 WL 12680924, at *2 (E.D.N.Y. 2014) (Irizarry, J.) ("Rule 35(a) does not authorize a sentencing court to reconsider either the facts or the sentencing guidelines underlying its originally imposed sentence.") (internal citations omitted).

II. Defendant's Challenge is Otherwise Barred by his Plea Agreement

Even assuming, *arguendo*, Rule 35 permitted the requested modification, the challenge is barred by the terms of Defendant's Plea Agreement. The Second Circuit has "repeatedly held that a knowing and voluntary waiver of the right to appeal a sentence is presumptively enforceable." *See, e.g., United States v. Ojeda*, 946 F.3d 622, 629 (2d Cir. 2020); *United States v. Coston*, 737 F.3d 235, 237 (2d Cir. 2013); *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011). While Courts have declined to enforce such waivers in certain exceptional circumstances, these exceptions "occupy a very circumscribed area of our jurisprudence" and "we have upheld waiver provisions even in circumstances where the sentence was conceivably imposed in an illegal fashion or in violation of the Guidelines, but yet was still within the range contemplated in the plea agreement." *See United States v. Ojeda*, 946 F.3d 622, 629 (2d Cir. 2020); *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000) (citing *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995)).

Under the terms of the plea agreement, Defendant agreed not to challenge any sentence at or below one-hundred fifty (150) months' imprisonment. *See* ECF No. 368, Plea Agreement at ¶5 ("The defendant agrees not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. § 2255 or any other provisions, the conviction or sentence in the event that the Court

imposes a term of imprisonment of 150 months or below."). "This waiver is binding without regard to the sentencing analysis used by the Court." *Id.* Because Defendant's waiver was knowing and voluntary, and the imposed sentence was within the range contemplated by the plea agreement, Defendant's waiver is presumptively valid. Even if Rule 35 was applicable to Defendant's challenge, it would be barred by the terms of the plea agreement. *See United States v. Pierre-Louis*, 16-CR-541, 2019 WL 2235886, at *1 (S.D.N.Y. 2019) (McMahon, C.J.) (denying defendant's Rule 35 motion because defendant's plea agreement "waived his right to collateral attack his conviction and sentence" if the sentence was at or below the stipulated Guidelines range).

Accordingly, Defendant's Rule 35 motion is denied.

SO ORDERED.

s/ WFK

HON. WILLIAM F. KUNTZ, II
UNITED STATES DISTRICT JUDGE

Dated: January 25, 2021
Brooklyn, New York

APPENDIX G

United States Code Annotated
Constitution of the United States
Annotated
Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

Currentness

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.

<Historical notes and references are included in the full text document for this amendment.>

<For Notes of Decisions, see separate documents for clauses of this amendment:>

<USCA Const. Amend. V--Grand Jury clause>

<USCA Const. Amend. V--Double Jeopardy clause>

<USCA Const. Amend. V--Self-Incrimination clause>

<USCA Const. Amend. V-- Due Process clause>

<USCA Const. Amend. V--Takings clause>

U.S.C.A. Const. Amend. V, USCA CONST Amend. V
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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APPENDIX G

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment VIII. Excessive Bail, Fines, Punishments

U.S.C.A. Const. Amend. VIII

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

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<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 113B. Terrorism (Refs & Annos)

18 U.S.C.A. § 2332b

§ 2332b. Acts of terrorism transcending national boundaries

Effective: June 2, 2015
Currentness

(a) Prohibited acts.--

(1) Offenses.--Whoever, involving conduct transcending national boundaries and in a circumstance described in subsection (b)--

(A) kills, kidnaps, maims, commits an assault resulting in serious bodily injury, or assaults with a dangerous weapon any person within the United States; or

(B) creates a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States;

in violation of the laws of any State, or the United States, shall be punished as prescribed in subsection (c).

(2) Treatment of threats, attempts and conspiracies.--Whoever threatens to commit an offense under paragraph (1), or attempts or conspires to do so, shall be punished under subsection (c).

(b) Jurisdictional bases.--

(1) Circumstances.--The circumstances referred to in subsection (a) are--

(A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense;

(B) the offense obstructs, delays, or affects interstate or foreign commerce, or would have so obstructed, delayed, or affected interstate or foreign commerce if the offense had been consummated;

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(C) the victim, or intended victim, is the United States Government, a member of the uniformed services, or any official, officer, employee, or agent of the legislative, executive, or judicial branches, or of any department or agency, of the United States;

(D) the structure, conveyance, or other real or personal property is, in whole or in part, owned, possessed, or leased to the United States, or any department or agency of the United States;

(E) the offense is committed in the territorial sea (including the airspace above and the seabed and subsoil below, and artificial islands and fixed structures erected thereon) of the United States; or

(F) the offense is committed within the special maritime and territorial jurisdiction of the United States.

(2) Co-conspirators and accessories after the fact.--Jurisdiction shall exist over all principals and co-conspirators of an offense under this section, and accessories after the fact to any offense under this section, if at least one of the circumstances described in subparagraphs (A) through (F) of paragraph (1) is applicable to at least one offender.

(c) Penalties.--

(1) Penalties.--Whoever violates this section shall be punished--

(A) for a killing, or if death results to any person from any other conduct prohibited by this section, by death, or by imprisonment for any term of years or for life;

(B) for kidnapping, by imprisonment for any term of years or for life;

(C) for maiming, by imprisonment for not more than 35 years;

(D) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than 30 years;

(E) for destroying or damaging any structure, conveyance, or other real or personal property, by imprisonment for not more than 25 years;

(F) for attempting or conspiring to commit an offense, for any term of years up to the maximum punishment that would have applied had the offense been completed; and

(G) for threatening to commit an offense under this section, by imprisonment for not more than 10 years.

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(2) Consecutive sentence.--Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this section; nor shall the term of imprisonment imposed under this section run concurrently with any other term of imprisonment.

(d) Proof requirements.--The following shall apply to prosecutions under this section:

(1) Knowledge.--The prosecution is not required to prove knowledge by any defendant of a jurisdictional base alleged in the indictment.

(2) State law.--In a prosecution under this section that is based upon the adoption of State law, only the elements of the offense under State law, and not any provisions pertaining to criminal procedure or evidence, are adopted.

(e) Extraterritorial jurisdiction.--There is extraterritorial Federal jurisdiction--

(1) over any offense under subsection (a), including any threat, attempt, or conspiracy to commit such offense; and

(2) over conduct which, under section 3, renders any person an accessory after the fact to an offense under subsection (a).

(f) Investigative authority.--In addition to any other investigative authority with respect to violations of this title, the Attorney General shall have primary investigative responsibility for all Federal crimes of terrorism, and any violation of section 351(e), 844(e), 844(f)(1), 956(b), 1361, 1366(b), 1366(c), 1751(e), 2152, or 2156 of this title, and the Secretary of the Treasury shall assist the Attorney General at the request of the Attorney General. Nothing in this section shall be construed to interfere with the authority of the United States Secret Service under section 3056.

(g) Definitions.--As used in this section--

(1) the term "conduct transcending national boundaries" means conduct occurring outside of the United States in addition to the conduct occurring in the United States;

(2) the term "facility of interstate or foreign commerce" has the meaning given that term in section 1958(b)(2);

(3) the term "serious bodily injury" has the meaning given that term in section 1365(g)(3);

(4) the term "territorial sea of the United States" means all waters extending seaward to 12 nautical miles from the baselines of the United States, determined in accordance with international law; and

(5) the term "Federal crime of terrorism" means an offense that--

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(A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of--

(i) section 32 (relating to destruction of aircraft or aircraft facilities), 37 (relating to violence at international airports), 81 (relating to arson within special maritime and territorial jurisdiction), 175 or 175b (relating to biological weapons), 175c (relating to variola virus), 229 (relating to chemical weapons), subsection (a), (b), (c), or (d) of section 351 (relating to congressional, cabinet, and Supreme Court assassination and kidnaping), 831 (relating to nuclear materials), 832 (relating to participation in nuclear and weapons of mass destruction threats to the United States)[1] 842(m) or (n) (relating to plastic explosives), 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death), 844(i) (relating to arson and bombing of property used in interstate commerce), 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon), 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad), 1030(a)(1) (relating to protection of computers), 1030(a)(5)(A) resulting in damage as defined in 1030(c)(4)(A)(i)(II) through (VI) (relating to protection of computers), 1114 (relating to killing or attempted killing of officers and employees of the United States), 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons), 1203 (relating to hostage taking), 1361 (relating to government property or contracts), 1362 (relating to destruction of communication lines, stations, or systems), 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States), 1366(a) (relating to destruction of an energy facility), 1751(a), (b), (c), or (d) (relating to Presidential and Presidential staff assassination and kidnaping), 1992 (relating to terrorist attacks and other acts of violence against railroad carriers and against mass transportation systems on land, on water, or through the air), 2155 (relating to destruction of national defense materials, premises, or utilities), 2156 (relating to national defense material, premises, or utilities), 2280 (relating to violence against maritime navigation), 2280a (relating to maritime safety), 2281 through 2281a (relating to violence against maritime fixed platforms), 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States), 2332a (relating to use of weapons of mass destruction), 2332b (relating to acts of terrorism transcending national boundaries), 2332f (relating to bombing of public places and facilities), 2332g (relating to missile systems designed to destroy aircraft), 2332h (relating to radiological dispersal devices), 2332i (relating to acts of nuclear terrorism), 2339 (relating to harboring terrorists), 2339A (relating to providing material support to terrorists), 2339B (relating to providing material support to terrorist organizations), 2339C (relating to financing of terrorism), 2339D (relating to military-type training from a foreign terrorist organization), or 2340A (relating to torture) of this title;

(ii) sections 92 (relating to prohibitions governing atomic weapons) or 236 (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2122 or 2284);

(iii) section 46502 (relating to aircraft piracy), the second sentence of section 46504 (relating to assault on a flight crew with a dangerous weapon), section 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft), section 46506 if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft), or section 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility) of title 49; or

(iv) section 1010A of the Controlled Substances Import and Export Act (relating to narco-terrorism).

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(Added Pub.L. 104-132, Title VII, § 702(a), Apr. 24, 1996, 110 Stat. 1291; amended Pub.L. 104-294, Title VI, § 601(s)(1), (3), Oct. 11, 1996, 110 Stat. 3502; Pub.L. 107-56, Title VIII, § 808, Oct. 26, 2001, 115 Stat. 378; Pub.L. 107-197, Title III, § 301(b), June 25, 2002, 116 Stat. 728; Pub.L. 108-458, Title VI, §§ 6603(a)(1), 6803(c)(3), 6908, Dec. 17, 2004, 118 Stat. 3762, 3769, 3774; Pub.L. 109-177, Title I, §§ 110(b)(3)(A), 112, Mar. 9, 2006, 120 Stat. 208, 209; Pub.L. 110-326, Title II, § 204(b), Sept. 26, 2008, 122 Stat. 3562; Pub.L. 114-23, Title VIII, §§ 805, 811(d), June 2, 2015, 129 Stat. 309, 311.)

Footnotes

1 So in original. Probably should be followed by a comma.

18 U.S.C.A. § 2332b, 18 USCA § 2332b

Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 113B. Terrorism (Refs & Annos)

18 U.S.C.A. § 2339B

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

Effective: June 2, 2015
Currentness

(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).

(2) Financial institutions.--Except as authorized by the Secretary, any financial institution that becomes aware that it has possession of, or control over, any funds in which a foreign terrorist organization, or its agent, has an interest, shall--

(A) retain possession of, or maintain control over, such funds; and

(B) report to the Secretary the existence of such funds in accordance with regulations issued by the Secretary.

(b) Civil penalty.--Any financial institution that knowingly fails to comply with subsection (a)(2) shall be subject to a civil penalty in an amount that is the greater of--

(A) $50,000 per violation; or

(B) twice the amount of which the financial institution was required under subsection (a)(2) to retain possession or control.

(c) Injunction.--Whenever it appears to the Secretary or the Attorney General that any person is engaged in, or is about to engage in, any act that constitutes, or would constitute, a violation of this section, the Attorney General may initiate civil action in a district court of the United States to enjoin such violation.

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(d) Extraterritorial jurisdiction.--

(1) In general.--There is jurisdiction over an offense under subsection (a) if--

(A) an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)));

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction.--There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Investigations.--

(1) In general.--The Attorney General shall conduct any investigation of a possible violation of this section, or of any license, order, or regulation issued pursuant to this section.

(2) Coordination with the Department of the Treasury.--The Attorney General shall work in coordination with the Secretary in investigations relating to--

(A) the compliance or noncompliance by a financial institution with the requirements of subsection (a)(2); and

(B) civil penalty proceedings authorized under subsection (b).

(3) Referral.--Any evidence of a criminal violation of this section arising in the course of an investigation by the Secretary or any other Federal agency shall be referred immediately to the Attorney General for further investigation. The Attorney

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General shall timely notify the Secretary of any action taken on referrals from the Secretary, and may refer investigations to the Secretary for remedial licensing or civil penalty action.

(f) Classified information in civil proceedings brought by the United States.--

(1) Discovery of classified information by defendants.--

(A) Request by United States.--In any civil proceeding under this section, upon request made ex parte and in writing by the United States, a court, upon a sufficient showing, may authorize the United States to--

(i) redact specified items of classified information from documents to be introduced into evidence or made available to the defendant through discovery under the Federal Rules of Civil Procedure;

(ii) substitute a summary of the information for such classified documents; or

(iii) substitute a statement admitting relevant facts that the classified information would tend to prove.

(B) Order granting request.--If the court enters an order granting a request under this paragraph, the entire text of the documents to which the request relates shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(C) Denial of request.--If the court enters an order denying a request of the United States under this paragraph, the United States may take an immediate, interlocutory appeal in accordance with paragraph (5). For purposes of such an appeal, the entire text of the documents to which the request relates, together with any transcripts of arguments made ex parte to the court in connection therewith, shall be maintained under seal and delivered to the appellate court.

(2) Introduction of classified information; precautions by court.--

(A) Exhibits.--To prevent unnecessary or inadvertent disclosure of classified information in a civil proceeding brought by the United States under this section, the United States may petition the court ex parte to admit, in lieu of classified writings, recordings, or photographs, one or more of the following:

(i) Copies of items from which classified information has been redacted.

(ii) Stipulations admitting relevant facts that specific classified information would tend to prove.

(iii) A declassified summary of the specific classified information.

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(B) Determination by court.--The court shall grant a request under this paragraph if the court finds that the redacted item, stipulation, or summary is sufficient to allow the defendant to prepare a defense.

(3) Taking of trial testimony.--

(A) Objection.--During the examination of a witness in any civil proceeding brought by the United States under this subsection, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible.

(B) Action by court.--In determining whether a response is admissible, the court shall take precautions to guard against the compromise of any classified information, including--

(i) permitting the United States to provide the court, ex parte, with a proffer of the witness's response to the question or line of inquiry; and

(ii) requiring the defendant to provide the court with a proffer of the nature of the information that the defendant seeks to elicit.

(C) Obligation of defendant.--In any civil proceeding under this section, it shall be the defendant's obligation to establish the relevance and materiality of any classified information sought to be introduced.

(4) Appeal.--If the court enters an order denying a request of the United States under this subsection, the United States may take an immediate interlocutory appeal in accordance with paragraph (5).

(5) Interlocutory appeal.--

(A) Subject of appeal.--An interlocutory appeal by the United States shall lie to a court of appeals from a decision or order of a district court--

(i) authorizing the disclosure of classified information;

(ii) imposing sanctions for nondisclosure of classified information; or

(iii) refusing a protective order sought by the United States to prevent the disclosure of classified information.

(B) Expedited consideration.--

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(i) In general.--An appeal taken pursuant to this paragraph, either before or during trial, shall be expedited by the court of appeals.

(ii) Appeals prior to trial.--If an appeal is of an order made prior to trial, an appeal shall be taken not later than 14 days after the decision or order appealed from, and the trial shall not commence until the appeal is resolved.

(iii) Appeals during trial.--If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals--

(I) shall hear argument on such appeal not later than 4 days after the adjournment of the trial, excluding intermediate weekends and holidays;

(II) may dispense with written briefs other than the supporting materials previously submitted to the trial court;

(III) shall render its decision not later than 4 days after argument on appeal, excluding intermediate weekends and holidays; and

(IV) may dispense with the issuance of a written opinion in rendering its decision.

(C) Effect of ruling.--An interlocutory appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a final judgment, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(6) Construction.--Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States to protect against the disclosure of classified information, including the invocation of the military and State secrets privilege.

(g) Definitions.--As used in this section--

(1) the term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.);

(2) the term "financial institution" has the same meaning as in section 5312(a)(2) of title 31, United States Code;

(3) the term "funds" includes coin or currency of the United States or any other country, traveler's checks, personal checks, bank checks, money orders, stocks, bonds, debentures, drafts, letters of credit, any other negotiable instrument, and any electronic representation of any of the foregoing;

(4) the term "material support or resources" has the same meaning given that term in section 2339A (including the definitions of "training" and "expert advice or assistance" in that section);

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(5) the term "Secretary" means the Secretary of the Treasury; and

(6) the term "terrorist organization" means an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.

(h) Provision of personnel.--No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control.

(i) Rule of construction.--Nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.

(j) Exception.--No person may be prosecuted under this section in connection with the term "personnel", "training", or "expert advice or assistance" if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act).

CREDIT(S)

(Added Pub.L. 104-132, Title III, § 303(a), Apr. 24, 1996, 110 Stat. 1250; amended Pub.L. 107-56, Title VIII, § 810(d), Oct. 26, 2001, 115 Stat. 380; Pub.L. 108-458, Title VI, § 6603(c) to (f), Dec. 17, 2004, 118 Stat. 3762, 3763; Pub.L. 111-16, § 3(6) to (8), May 7, 2009, 123 Stat. 1608; Pub.L. 114-23, Title VII, § 704, June 2, 2015, 129 Stat. 300.)

18 U.S.C.A. § 2339B, 18 USCA § 2339B
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(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;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [2] **Sentencing.**--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

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(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the

order of judgment and commitment, to the Probation System and to the Sentencing Commission,,[3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846), section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), or section 70503 or 70506 of title 46, the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have--

(A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;

(B) a prior 3-point offense, as determined under the sentencing guidelines; and

(C) a prior 2-point violent offense, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.

(g) Definition of violent offense.--As used in this section, the term "violent offense" means a crime of violence, as defined in section 16, that is punishable by imprisonment.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216; Pub.L. 115-391, Title IV, § 402(a), Dec. 21, 2018, 132 Stat. 5221.)

Footnotes

1 So in original. The period probably should be a semicolon.

2 So in original. No subpar. (B) has been enacted.

3 So in original. The second comma probably should not appear.

18 U.S.C.A. § 3553, 18 USCA § 3553

Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 235. Appeal (Refs & Annos)

18 U.S.C.A. § 3742

§ 3742. Review of a sentence

Effective: April 30, 2003
Currentness

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

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The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.--In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure--

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.--If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals--

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.--Upon review of the record, the court of appeals shall determine whether the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that--

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

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(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.--If the court of appeals determines that--

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and--

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.--A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that--

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

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(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that--

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.--An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.--For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.--For purposes of this section--

(1) a factor is a "permissible" ground of departure if it--

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 213(a), Oct. 12, 1984, 98 Stat. 2011; amended Pub.L. 99-646, § 73(a), Nov. 10, 1986, 100 Stat. 3617; Pub.L. 100-182, §§ 4 to 6, Dec. 7, 1987, 101 Stat. 1266, 1267; Pub.L. 100-690, Title VII, § 7103(a), Nov. 18, 1988, 102 Stat. 4416; Pub.L. 101-647, Title XXXV, §§ 3501, 3503, Nov. 29, 1990, 104 Stat. 4921; Pub.L. 101-650, Title III, § 321, Dec. 1, 1990, 104 Stat. 5117; Pub.L. 103-322, Title XXXIII, § 330002(k), Sept. 13, 1994, 108 Stat. 2140; Pub.L. 108-21, Title IV, § 401(d) to (f), Apr. 30, 2003, 117 Stat. 670, 671.)

18 U.S.C.A. § 3742, 18 USCA § 3742
Current through P.L. 117-57. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 32

Rule 32. Sentencing and Judgment

Currentness

(a) [Reserved.]

(b) Time of Sentencing.

(1) In General. The court must impose sentence without unnecessary delay.

(2) Changing Time Limits. The court may, for good cause, change any time limits prescribed in this rule.

(c) Presentence Investigation.

(1) Required Investigation.

(A) In General. The probation officer must conduct a presentence investigation and submit a report to the court before it imposes sentence unless:

(i) 18 U.S.C. § 3593(c) or another statute requires otherwise; or

(ii) the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.

(B) Restitution. If the law permits restitution, the probation officer must conduct an investigation and submit a report that contains sufficient information for the court to order restitution.

(2) Interviewing the Defendant. The probation officer who interviews a defendant as part of a presentence investigation must, on request, give the defendant's attorney notice and a reasonable opportunity to attend the interview.

(d) Presentence Report.

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(1) Applying the Advisory Sentencing Guidelines. The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) Additional Information. The presentence report must also contain the following:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) information that assesses any financial, social, psychological, and medical impact on any victim;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;

(F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

(G) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

(3) Exclusions. The presentence report must exclude the following:

(A) any diagnoses that, if disclosed, might seriously disrupt a rehabilitation program;

(B) any sources of information obtained upon a promise of confidentiality; and

(C) any other information that, if disclosed, might result in physical or other harm to the defendant or others.

(e) Disclosing the Report and Recommendation.

(1) Time to Disclose. Unless the defendant has consented in writing, the probation officer must not submit a presentence report to the court or disclose its contents to anyone until the defendant has pleaded guilty or nolo contendere, or has been found guilty.

(2) Minimum Required Notice. The probation officer must give the presentence report to the defendant, the defendant's attorney, and an attorney for the government at least 35 days before sentencing unless the defendant waives this minimum period.

(3) Sentence Recommendation. By local rule or by order in a case, the court may direct the probation officer not to disclose to anyone other than the court the officer's recommendation on the sentence.

(f) Objecting to the Report.

(1) Time to Object. Within 14 days after receiving the presentence report, the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.

(2) Serving Objections. An objecting party must provide a copy of its objections to the opposing party and to the probation officer.

(3) Action on Objections. After receiving objections, the probation officer may meet with the parties to discuss the objections. The probation officer may then investigate further and revise the presentence report as appropriate.

(g) Submitting the Report. At least 7 days before sentencing, the probation officer must submit to the court and to the parties the presentence report and an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them.

(h) Notice of Possible Departure from Sentencing Guidelines. Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

(i) Sentencing.

(1) In General. At sentencing, the court:

(A) must verify that the defendant and the defendant's attorney have read and discussed the presentence report and any addendum to the report;

(B) must give to the defendant and an attorney for the government a written summary of--or summarize in camera--any information excluded from the presentence report under Rule 32(d)(3) on which the court will rely in sentencing, and give them a reasonable opportunity to comment on that information;

(C) must allow the parties' attorneys to comment on the probation officer's determinations and other matters relating to an appropriate sentence; and

(D) may, for good cause, allow a party to make a new objection at any time before sentence is imposed.

(2) Introducing Evidence; Producing a Statement. The court may permit the parties to introduce evidence on the objections. If a witness testifies at sentencing, Rule 26.2(a)-(d) and (f) applies. If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony.

(3) Court Determinations. At sentencing, the court:

(A) may accept any undisputed portion of the presentence report as a finding of fact;

(B) must--for any disputed portion of the presentence report or other controverted matter--rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and

(C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

(4) Opportunity to Speak.

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(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

(B) By a Victim. Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.

(C) In Camera Proceedings. Upon a party's motion and for good cause, the court may hear in camera any statement made under Rule 32(i)(4).

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

(A) Appealing a Conviction. If the defendant pleaded not guilty and was convicted, after sentencing the court must advise the defendant of the right to appeal the conviction.

(B) Appealing a Sentence. After sentencing--regardless of the defendant's plea--the court must advise the defendant of any right to appeal the sentence.

(C) Appeal Costs. The court must advise a defendant who is unable to pay appeal costs of the right to ask for permission to appeal in forma pauperis.

(2) Clerk's Filing of Notice. If the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf.

(k) Judgment.

(1) In General. In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. If the defendant is found not guilty or is otherwise entitled to be discharged, the court must so order. The judge must sign the judgment, and the clerk must enter it.

(2) Criminal Forfeiture. Forfeiture procedures are governed by Rule 32.2.

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CREDIT(S)

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94-64, § 3(31)-(34), 89 Stat. 376; Apr. 30, 1979, eff. Aug. 1, 1979, Dec. 1, 1980; Oct. 12, 1982, Pub.L. 97-291, § 3, 96 Stat. 1249; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(a), 98 Stat. 2014; Nov. 10, 1986, Pub.L. 99-646, § 25(a), 100 Stat. 3597; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Sept. 13, 1994, Pub.L. 103-322, Title XXIII, § 230101(b), 108 Stat. 2078; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 24, 1996, Pub.L. 104-132, Title II, § 207(a), 110 Stat. 1236; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 23, 2008, eff. Dec. 1, 2008; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Cr. Proc. Rule 32, 18 U.S.C.A., FRCRP Rule 32
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United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 35

Rule 35. Correcting or Reducing a Sentence

Currentness

(a) Correcting Clear Error. Within 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

CREDIT(S)

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(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 28, 1983, eff. Aug. 1, 1983; Oct. 12, 1984, Pub.L. 98-473, Title II, § 215(b), 98 Stat. 2015; Apr. 29, 1985, eff. Aug. 1, 1985; Oct. 27, 1986, Pub.L. 99-570, Title I, § 1009(a), 100 Stat. 3207-8; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 26, 2004, eff. Dec. 1, 2004; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Fed. Rules Cr. Proc. Rule 35, 18 U.S.C.A., FRCRP Rule 35
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United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)
Title IX. General Provisions

Federal Rules of Criminal Procedure, Rule 51

Rule 51. Preserving Claimed Error

Currentness

(a) Exceptions Unnecessary. Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving a Claim of Error. A party may preserve a claim of error by informing the court--when the court ruling or order is made or sought--of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

CREDIT(S)
(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

Fed. Rules Cr. Proc. Rule 51, 18 U.S.C.A., FRCRP Rule 51
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United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Three. Adjustments (Refs & Annos)
Part A. Victim-Related Adjustments (Refs & Annos)

USSG, § 3A1.4, 18 U.S.C.A.

§ 3A1.4. Terrorism

Currentness

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

(b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

CREDIT(S)

(Effective November 1, 1995; amended effective November 1, 1996; November 1, 1997; November 1, 2002.)

Federal Sentencing Guidelines, § 3A1.4, 18 U.S.C.A., FSG § 3A1.4
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United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Two. Offense Conduct (Refs & Annos)
Part M. Offenses Involving National Defense and Weapons of Mass Destruction (Refs & Annos)
5. Prohibited Financial Transactions and Exports, and Providing Material Support to Designated Foreign Terrorist Organizations (Refs & Annos)

USSG, § 2M5.3, 18 U.S.C.A.

§ 2M5.3. Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose

Currentness

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

(1) If the offense involved the provision of (A) dangerous weapons; (B) firearms; (C) explosives; (D) funds with the intent, knowledge, or reason to believe such funds would be used to purchase any of the items described in subdivisions (A) through (C); or (E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act, increase by 2 levels.

(c) Cross References

(1) If the offense resulted in death, apply § 2A1.1 (First Degree Murder) if the death was caused intentionally or knowingly, or § 2A1.2 (Second Degree Murder) otherwise, if the resulting offense level is greater than that determined above.

(2) If the offense was tantamount to attempted murder, apply § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder), if the resulting offense level is greater than that determined above.

(3) If the offense involved the provision of (A) a nuclear weapon, nuclear material, or nuclear byproduct material; (B) a chemical weapon; (C) a biological agent, toxin, or delivery system; or (D) a weapon of mass destruction, apply § 2M6.1 (Nuclear, Biological, and Chemical Weapons, and Other Weapons of Mass Destruction), if the resulting offense level is greater than that determined above.

CREDIT(S)

(Effective November 1, 2002; amended effective November 1, 2003; November 1, 2007; November 1, 2011.)

Federal Sentencing Guidelines, § 2M5.3, 18 U.S.C.A., FSG § 2M5.3

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As amended to 11-1-21.

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