APPENDIX

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BAKHTIYOR JUMAEV,

Defendant - Appellant.

No. 18-1296

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:12-CR-00033-JLK-2)

Caleb Kruckenberg, New Civil Liberties Alliance, Washington, D.C., for Defendant-Appellant.

James C. Murphy, Assistant United States Attorney, Denver, Colorado (John C. Demers, Assistant Attorney General, National Security Division, U.S. Department of Justice, Washington, D.C.; Joseph Palmer and Steven L. Lane, Attorneys, National Security Division, U.S. Department of Justice, Washington, D.C.; Jason R. Dunn, United States Attorney, Denver, Colorado, with him on the briefs), for Plaintiff-Appellee.

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **EID**, Circuit Judge.

EID, Circuit Judge.

Defendant-appellant Bakhtiyor Jumaev and his co-defendant Jamshid Muhtorov were convicted, after separate trials, of conspiring to provide material

support or resources to a designated foreign terrorist organization, and knowingly providing or attempting to provide material support or resources to a designated foreign terrorist organization, in violation of 18 U.S.C. § 2339B.[1] Both appealed, and, with the parties' consent, we procedurally consolidated the cases. In an opinion issued concurrently with this one, we reject Muhtorov's claims, including his Sixth Amendment speedy trial claim, and affirm his convictions. *Muhtorov*, slip op. at 1, 106–63. In this decision, we address Jumaev's claims, of which there are three. First, like Muhtorov, Jumaev asserts that his Sixth Amendment speedy trial right was violated. Second, Jumaev maintains that the district court abused its discretion by declining to severely sanction the government for its discovery conduct. Third, Jumaev contends that the extraterritorial search warrants for his home, phone, and computer were issued in violation of Rule 41 of the Federal Rules of Criminal Procedure. Exercising jurisdiction under 28 U.S.C. § 1291, we conclude that each of Jumaev's claims fails, and we affirm.

I

A

Jumaev is a refugee from Uzbekistan. In 2009, he met Muhtorov, a fellow Uzbekistan refugee. The two lived far apart—Jumaev, in Philadelphia, Pennsylvania, and Muhtorov in Denver, Colorado. But Philadelphia, it turned out, was one of the

[1] Muhtorov was also convicted on a third count not brought against Jumaev. *See United States v. Muhtorov*, No. 18-1366, slip op. at 1, 3, 115 (10th Cir. Dec. 8, 2021).

few cities in the United States where a trucking class was offered in Russian, and Muhtorov, who struggled with English but spoke Russian, wished to obtain a commercial trucker's license. Muhtorov decided to take the class in Philadelphia, and a mutual friend arranged for Muhtorov to stay with Jumaev while Muhtorov was there.

Jumaev and Muhtorov became friendly during Muhtorov's visit. The two had similar backgrounds. Both had left Uzbekistan due to government brutality, and both were Muslim. They also shared a mutual interest in the Islamic Jihad Union ("IJU"), a State Department–designated foreign terrorist organization with ties to al-Qaeda. After Muhtorov returned to Colorado, the two men stayed in contact.

Unbeknownst to Jumaev and Muhtorov, the government was intercepting their communications. Through warrantless surveillance of a non–United States person living abroad conducted pursuant to section 702 of the Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008 ("Section 702"), Pub. L. No. 110-261, 122 Stat. 2436 (codified at 50 U.S.C. § 1881a), the government had become aware that Muhtorov was connected to the IJU. Once Muhtorov was on the government's radar, the government used communications intercepted via Section 702 to support applications to surveil Muhtorov under the Foreign Intelligence Surveillance Act of 1978 ("FISA" or "traditional FISA"), Pub. L. No. 95-511, 92 Stat. 1783. The government also obtained information via traditional FISA surveillance that was eventually used against Jumaev.

In the course of surveilling Jumaev and Muhtorov, the government discovered that the men wished to provide money to the IJU for the "wedding," a code word that referred to the Jihadist cause. Specifically, they contemplated that Jumaev would send $300 to Muhtorov as a "wedding gift," and that Muhtorov would then give the money to the IJU.

Bank records show that a $300 check dated on or about March 10, 2011 was made out to Muhtorov by a known associate of Jumaev, Ilkhom Sobirov. On January 21, 2012, Muhtorov was arrested at Chicago O'Hare International Airport. He had on him a one-way ticket to Turkey, nearly $3,000 in cash, two new iPhones, and a new iPad.

B

On March 14, 2012, Jumaev was charged, via a criminal complaint filed in the District of Colorado, with conspiring to provide material support or resources to a designated foreign terrorist organization. That same day, a magistrate judge in the District of Colorado issued an arrest warrant for Jumaev and extraterritorial search-and-seizure warrants for Jumaev's home, cellular phone, and laptop computer in Philadelphia. Incriminating material was found on Jumaev's devices, and Jumaev was promptly arrested and detained pending trial. On March 20, 2012, a superseding indictment, charging both Jumaev and Muhtorov, added a second count as to Jumaev alleging that he knowingly provided or attempted to provide material support or resources to a designated foreign terrorist organization. On March 22, 2012, a second superseding indictment was returned, which deleted Jumaev's and

Muhtorov's aliases from the indictment caption but was otherwise identical to the first superseding indictment. From the filing of the first superseding indictment onward, Jumaev's and Muhtorov's cases proceeded largely in tandem, with the two filing numerous joint motions and objections addressing discovery, scheduling, and other matters.

The pretrial proceedings over the next six years were complicated and protracted. Discovery, in particular, proved to be a bottleneck. Jumaev and Muhtorov together broadly requested (1) all statements they had made that were in the government's possession, by which they meant "not just the statements made or given to government investigators or agents, but also all recorded conversations or communications including e mails and other written communications that they [were] alleged to have authored, as well as any statements made to third parties in whatever form," App'x Vol. I at 463; (2) "any transcriptions or summaries of any such statements and translations into English thereof," *id.*; (3) grand jury materials; and (4) exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). The resulting discovery was voluminous, and, because many of the materials were classified, the government had to initiate numerous *ex parte*, *in camera* hearings pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, to determine whether otherwise discoverable classified material could be withheld from the defense. Additionally, the government had acquired a large number of recordings of Jumaev and Muhtorov

speaking in Uzbek, Tajik, and Russian, and translating those materials was difficult because Uzbek and Tajik translators with security clearances were scarce.

On October 25, 2013, the government provided Muhtorov, but not Jumaev, notice that it would offer evidence at Muhtorov's trial that was obtained or derived from surveillance conducted pursuant to Section 702. On January 29, 2014, Muhtorov moved to suppress the evidence that was obtained or derived from Section 702 surveillance. Before Muhtorov filed his motion, the government informed Jumaev that he was not an "aggrieved person" as to the Section 702 acquisitions at issue—which was critical information, because by statute only an "aggrieved person" is permitted to "move to suppress . . . evidence obtained or derived from . . . electronic surveillance" conducted pursuant to FISA, including Section 702. 50 U.S.C. § 1806(e); *see id.* § 1881e(a)(1) (deeming Section 702 surveillance to be "electronic surveillance" that falls within the scope of 50 U.S.C. § 1806(e)). Notwithstanding the fact that the government told him he had not been "aggrieved," Jumaev joined Muhtorov's motion.

The district court denied the joint motion on November 19, 2015, nearly two years after it was filed. With respect to Muhtorov, the district court resolved the motion on the merits in the government's favor. But with respect to Jumaev, the district court concluded, consistent with the representation the government had made to Jumaev before he joined Muhtorov's motion, that Jumaev was not an "aggrieved

person" under 50 U.S.C. § 1806(e) and thus he could not seek suppression of Section 702 evidence nor bring an as-applied challenge to the constitutionality of the statute.[2]

On May 18, 2016, the government filed a third superseding indictment. The third superseding indictment added two new charges—counts 5 and 6—against Jumaev and Muhtorov for conspiring to provide personnel to a designated foreign terrorist organization knowing or intending that the personnel be used to prepare for or carry out a conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country. The government maintained that Jumaev and Muhtorov had attempted to help Jumaev's son study at a madrassa with ties to terrorism.

Eventually, the district court set a discovery deadline of September 1, 2016 and a trial date of March 13, 2017 for both Jumaev and Muhtorov. On the date of the discovery deadline, the government produced a hard drive containing approximately 39,000 files of recorded statements. This did not, however, prove to be the end of discovery. In fact, discovery productions continued well after the discovery deadline—though subsequent productions were much smaller than the one that occurred on September 1, 2016.

On October 17, 2016, Muhtorov filed a motion to sever his trial from Jumaev's. A little over a month later, the district court granted the motion. *United*

[2] To the extent Jumaev presented a facial challenge, it was resolved by the district court's rejection of Muhtorov's as-applied and facial challenges. *See* App'x Vol. III at 119; *see also Muhtorov*, slip op. at 22 n.11 (noting that because Muhtorov's as-applied Section 702 challenge fails, his "facial challenge necessarily fails" as well).

States v. Muhtorov, No. 12-cr-33-JLK, 2016 WL 11612426, at *1–2 (D. Colo. Nov. 29, 2016). The district court found the severance to be appropriate because Muhtorov anticipated he might call Jumaev as a witness. *Id.* at *1. It also concluded that the need for separate, simultaneous translators for the different languages used in Muhtorov's and Jumaev's statements would make a joint trial cumbersome. *Id.* at *2. Muhtorov's trial was moved back to July 31, 2017, but Jumaev's trial remained scheduled to begin on March 13, 2017. Despite the severance, many aspects of the pretrial proceedings remained joined.

On November 4, 2016, Jumaev moved to suppress the evidence derived from the searches of his home, phone, and computer. He asserted that the magistrate judge violated Federal Rule of Criminal Procedure 41 when she issued the extraterritorial warrants pursuant to which the evidence was obtained. On January 31, 2017, the district court denied Jumaev's motion to suppress.

On February 28, 2017, less than two weeks before Jumaev's trial was set to begin, Jumaev moved for the first time to dismiss the indictment on the grounds that his Sixth Amendment right to a speedy trial had been violated. Jumaev argued that the five years he had spent waiting to go to trial were excessive and the fault of the government. Additionally, he maintained that the large quantity of discovery produced on the discovery deadline, the additional productions made after the deadline, and the government's decision to bring two new charges (counts 5 and 6) against him more than four years after he was first indicted had prevented his defense team from being ready to go trial on the scheduled date.

On March 1, 2017, the government voluntarily dismissed counts 5 and 6—the counts that had been added by the third superseding indictment. On March 13, 2017—the day that was meant to be the start of trial—the district court denied Jumaev's speedy trial motion. At the same time though, the district court sanctioned the government for its delayed filing and dismissal of counts 5 and 6. Specifically, the district court entered an order prohibiting the government from using any evidence pertaining to counts 5 and 6 in its case in chief. Jumaev then moved for a continuance to give his lawyers additional time to prepare his defense. The district court granted the motion and rescheduled the trial for January 8, 2018.

On November 30, 2017, the district judge informed the parties that he unexpectedly needed to undergo medical treatment. To accommodate this development, Jumaev's trial start date was moved again, this time to March 12, 2018.

On February 16, 2018, a few weeks before the new trial start date, Jumaev moved a second time to dismiss the indictment on speedy trial grounds. The district court again denied Jumaev's motion. Also in February 2018, the government finally made its last discovery production to Jumaev.

On March 2, 2018, the district court sanctioned the government for discovery conduct that had occurred in December 2017. That month, Jumaev's defense team traveled to Kazakhstan to depose a witness, Sobirov, who had acted as a confidential human source for the government. The government, however, failed to disclose potential impeachment information about Sobirov until the morning of his deposition. The district court determined that the timing of the government's disclosure

prevented Jumaev's defense team from being able to effectively use the potential impeachment information during Sobirov's deposition. Accordingly, the district court ordered that the jury be read an instruction concerning "the information that was belatedly disclosed by the government and not elicited during [the] deposition." App'x Vol. VII at 406.

Jumaev's trial began on March 12, 2018. On April 30, 2018—a little over six years after Jumaev was initially arrested and charged—Jumaev was convicted on both of the remaining counts against him (counts 1 and 2).[3] On July 18, 2018, the district court sentenced Jumaev to time served—76 months and 3 days—as well as ten years of supervised release.[4] Jumaev now appeals.

II

We begin with Jumaev's Sixth Amendment speedy trial claim. "The Sixth Amendment guarantees that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.'" *United States v. Medina*, 918 F.3d 774, 779 (10th Cir. 2019) (alteration in original) (quoting U.S. Const. amend. VI). To evaluate whether a defendant's Sixth Amendment speedy trial right has been violated, we

[3] Counts 3 and 4 pertained solely to Muhtorov.

[4] Jumaev was released into the custody of the U.S. Department of Homeland Security. The government seeks to remove Jumaev from the United States, and on January 12, 2021, the Board of Immigration Appeals entered a final order of removal. Jumaev, though, has challenged that order in a separate appeal. *See Jumaev v. Garland*, No. 21-9513 (10th Cir. filed Feb. 2, 2021). On May 14, 2021, this court issued a stay of removal. Order, *Jumaev*, No. 21-9513 (May 14, 2021). Jumaev's immigration appeal otherwise remains pending.

apply the four-part balancing test set forth by the Supreme Court in *Barker v. Wingo*, 407 U.S. 514 (1972). "The four factors are: '(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant.'" *Medina*, 918 F.3d at 780 (quoting *United States v. Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006)). "We review the legal question of whether there was a Sixth Amendment violation de novo and any underlying district court factual findings for clear error." *United States v. Frias*, 893 F.3d 1268, 1272 (10th Cir. 2018).

Although six years is an exceptionally long time to await trial, Jumaev's claim lacks merit in this instance. As noted above, we conclude in our separate *Muhtorov* opinion that Muhtorov's speedy trial claim fails. And that conclusion resolves Jumaev's claim, too. In all critical respects, Jumaev's claim is substantially similar, and often identical, to Muhtorov's. In fact, as we detail below, to the extent Jumaev's claim differs from Muhtorov's, the material differences render Jumaev's claim the weaker one. Accordingly, for largely the same reasons that Muhtorov's claim falls short, we determine that Jumaev's Sixth Amendment speedy trial claim likewise fails.[5]

We first weigh each of the *Barker* factors. We then balance them.

[5] The dissent's primary criticisms of our speedy trial analysis here are the same as those lodged against our speedy trial analysis in *Muhtorov*. *See* Dissent at 1 (dissenting "[f]or the reasons stated in" the *Muhtorov* dissent and "incorporat[ing] that dissent in its entirety"). As we detail in *Muhtorov*, we respectfully disagree with those objections.

A

1

The first *Barker* factor—the length of the delay—weighs strongly in Jumaev's favor. This first factor "typically serves as a gatekeeper." *Frias*, 893 F.3d at 1272. "We examine the other factors only when the delay is presumptively prejudicial, satisfied by '[d]elays approaching one year.'" *Id.* (alteration in original) (quoting *United States v. Batie*, 433 F.3d 1287, 1290 (10th Cir. 2006)). "The delay period starts with the indictment or arrest, whichever comes first." *United States v. Nixon*, 919 F.3d 1265, 1269 (10th Cir. 2019). It ends "upon conviction." *Betterman v. Montana*, 136 S. Ct. 1609, 1613 (2016).

If a defendant can show that the delay is presumptively prejudicial, we must then "decide how much weight to assign this delay, considering the length of time and the complexity of the federal case." *Nixon*, 919 F.3d at 1270. In making this assessment, we consider "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim." *Doggett v. United States*, 505 U.S. 647, 652 (1992). Unsurprisingly, "[t]he greater the delay, the more th[is] factor favors the defendant." *United States v. Hicks*, 779 F.3d 1163, 1168 (10th Cir. 2015).

Here, the roughly six-year delay "is well beyond the one-year delay that courts have deemed sufficient to clear the 'gate' and allow consideration of the remaining three *Barker* factors." *Muhtorov*, slip op. at 116. And while it is shorter than the six and a half years that Jumaev's co-defendant Muhtorov spent waiting for trial, it is

still longer than delays that we have concluded favor the defendant at the first *Barker* factor. *See Batie*, 433 F.3d at 1290–91 (17-month delay); *United States v. Margheim*, 770 F.3d 1312, 1326 (10th Cir. 2014) (23-month delay); *United States v. Seltzer*, 595 F.3d 1170, 1176–77 (10th Cir. 2010) (two-year delay); *Jackson v. Ray*, 390 F.3d 1254, 1261 (10th Cir. 2004) (four-and-one-third-year delay). Accordingly, "when considered 'as one factor among several,'" this six-year delay "weighs strongly in favor of [Jumaev]." *Muhtorov*, slip op. at 117 (quoting *Seltzer*, 595 F.3d at 1176).

Our conclusion is not altered by the fact that a long delay can be justified for a "serious, complex . . . charge." *Barker*, 407 U.S. at 531. As we observe in *Muhtorov*, "[t]his consideration cuts in different directions in [these] case[s]." Slip op. at 117. "On the one hand, the investigation included traditional FISA . . . , which created procedural complexities." *Id.* But on the other, the underlying conduct was straightforward, particularly in Jumaev's case. The government itself stressed this point during trial, explaining to the jury that "this [was] a simple case" concerning a single transaction in which Jumaev "sent $300 to a man named Jamshid Muhtorov" "knowing that Jamshid Muhtorov was going to go support a terrorist group called the Islamic Jihad Union." App'x Vol. XVIII at 598–99, 2662. In the end, we need not resolve this tension. Even assuming that this case was "complex" for purposes of the first *Barker* factor, a six-year delay is still so long that the first *Barker* factor weighs strongly in favor of finding a constitutional violation in this case. *See Muhtorov*, slip op. at 118 (reaching the same conclusion with respect to Muhtorov's delay of six and a half years).

2

The second *Barker* factor—the reason for the delay—does not weigh in favor of a speedy trial violation. "Because the prosecutor and the court have an affirmative constitutional obligation to try the defendant in a timely manner the burden is on the prosecution to explain the cause of the pre-trial delay." *Muhtorov*, slip op. at 119 (internal quotation marks omitted) (quoting *United States v. Brown*, 169 F.3d 344, 349 (6th Cir. 1999)). In turn, delays can count in favor of a speedy trial violation even when "there is no evidence that the government intentionally delayed the case for the explicit purpose of gaining some advantage." *Seltzer*, 595 F.3d at 1179. However, "pretrial delay is often both inevitable and wholly justifiable," such as when "[t]he government . . . need[s] time to collect witnesses against the accused [and to] oppose his pretrial motions." *Doggett*, 505 U.S. at 656.

As we explain in *Muhtorov*, the delay in these cases was due to discovery, which lasted for Jumaev until February 2018. *See Muhtorov*, slip op. at 127 & n.62.[6]

[6] As noted above, toward the end of 2017, the district judge alerted counsel that he unexpectedly needed to undergo medical treatment, and, as a result, Jumaev's trial was moved from January 2018 to March 2018. App'x Vol. IV at 832, Vol. XIII at 1080. For the same reason, Muhtorov's trial was similarly moved, from March 2018 to May 2018. *Muhtorov*, slip op. at 127. Because the government completed discovery in Muhtorov's case in January 2018—four months before Muhtorov's trial occurred—we consider the delay caused by the district judge's medical treatment in the course of assessing Muhtorov's speedy trial claim. *See id.* at 127, 136–38. But with respect to Jumaev, discovery was completed later than in Muhtorov's case and trial occurred sooner—just one month after the government finished its discovery productions. As a result, delays due to discovery productions eclipsed the delay due to the district judge's medical treatment, eliminating the need to address the district judge's medical situation as part of our analysis of Jumaev's claim.

The government, therefore, must "provide an acceptable rationale for the delay." *Seltzer*, 595 F.3d at 1177. This is no easy task in light of the considerable length of the delay. But, ultimately, the government has carried its burden. "Given the volume of materials requested, meeting those requests required time, particularly when the materials had to be translated from uncommon languages—Uzbek and Tajik—by translators with security clearances," who were few and far between. *Muhtorov*, slip op. at 131. Additionally, "[t]he district court's and the parties' obligations to comply with CIPA significantly complicated the discovery process" in ways that were unavoidable. *Id.* at 129. For these reasons, the lengthy period of discovery was justified.[7]

The dissent's approach differs slightly from ours here. It reasons that "[b]ut for . . . government-caused delay, the trial would have begun in March 2017," and "therefore [the dissent] would attribute the entire additional year's delay [from March 2017 to March 2018] to the government," including the "additional two months until March 2018 due to the district court judge's illness." Dissent at 3 n.3. In our view, these different paths lead to the same destination, for, like the dissent, we count the entire period from March 2017 to March 2018 as delay that the government must justify. However, unlike the dissent, our basis for reaching this conclusion is that discovery was not completed until February 2018, making an earlier trial impossible. The dissent's analysis does not necessarily conflict with our own—indeed, in *Muhtorov* we *do* weigh the delay caused by the judge's medical treatment against the government, albeit not heavily. *See* slip op. at 136–38. But in this case we do not, at the end of the day, reach the issue of the judge's illness.

[7] As we detail in section III, *infra*, Jumaev asserts that the government violated its discovery obligations in this case by (1) failing to meet the September 1, 2016 discovery deadline; (2) bringing new charges against him late into the proceedings, which forced his defense team to revisit and reevaluate the discovery that had been produced up until that point; and (3) delaying the disclosure of potential impeachment information concerning a witness, Sobirov, until the morning of that witness's deposition. *See* Reply Br. at 27–28. Although Muhtorov does not also raise these claims on appeal, they do not render Jumaev's case dissimilar from

The dissent takes issue with this analysis. Most of its disagreements concern the reasoning we employ in *Muhtorov*, *see* Dissent at 2–3 & n.2, and we address those critiques in that opinion. But the dissent also posits, with respect to Jumaev specifically, that "[t]he excessive governmental delay in responding to timely discovery requests made by . . . Jumaev is even more compelling [than in Muhtorov's case] because the government waited to provide discovery information long in its possession until the eve of Jumaev's first scheduled trial," "caus[ing] an additional delay of one year." *Id.* at 1. It thus concludes that "the second Barker factor" should "weigh[] even more heavily in Jumaev's favor than," in the dissent's view, "it did for Muhtorov." *Id.* at 4.

For three reasons, we are unconvinced that Jumaev's case is stronger than Muhtorov's when it comes to the second *Barker* factor. First, the dissent's argument appears to be premised on the notion that the March 2017 postponement of Jumaev's trial was solely the result of discovery "produced [by the government] for the first

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Muhtorov's for purposes of the second *Barker* factor. Jumaev's claim concerning the government's failure to meet the discovery deadline is simply a recasting of Jumaev and Muhtorov's general complaints about the slow pace of discovery. Similarly, the late-filed charges included in the third superseding indictment were brought against Jumaev as well as Muhtorov, *see* App'x Vol. III at 262–63, so any time lost due to that development affected them both, *see Muhtorov*, slip op. at 139 (explaining that "Muhtorov would not have 'faced trial . . . earlier than he did but for' the . . . filing and dismissing of the third superseding indictment" "[g]iven that the discovery process happened before, during, and after [that] event[]" (first omission in original) (quoting *Doggett*, 505 U.S. at 657)). Finally, while the late disclosure of potential impeachment information about Sobirov is an issue unique to Jumaev, that late disclosure had no impact on Jumaev's trial date, and therefore is not relevant to our assessment of the second *Barker* factor.

time shortly before trial." *Id.* at 3. The dissent believes, apparently, that we should look favorably on Jumaev because until he received the government's "eleventh-hour" disclosures, he believed he would be able to proceed to trial on the March 2017 date. *Id.* Yet the dissent's factual premise does not hold. As Jumaev himself explained in his first speedy trial motion, "[g]iven the huge number of intercepted communications provided on September 1, 2016, the Jumaev defense ha[d] not [as of March 2017] had the time or resources to review these communications [with Jumaev and an interpreter], let alone know which ones need[ed] to be translated for the preparation of transcripts for trial." App'x Vol. VI at 703. Accordingly, Jumaev would not have been ready to go to trial on the initial start date even absent the government's productions after September 1, 2016, for his defense team was still working through the communications that had been produced by the discovery deadline. Second, the dissent's argument similarly lacks support in the law. We are unaware of any authority that suggests the constitutional import of a pretrial delay increases when it occurs close to a scheduled trial date. Third, given that Muhtorov's trial date was pushed back at the same time as Jumaev's and for the same amount of time, we fail to see how the delay is more "compelling" in Jumaev's case. If anything, Muhtorov's situation was the more compelling one, for by that point Muhtorov had already spent roughly two months longer than Jumaev in pretrial detention, and the order of Jumaev's and Muhtorov's trials guaranteed that Muhtorov would have to wait longer still for a jury to hear his case.

In sum, while the delay in this case was due to discovery, the government has justified the delay. The second *Barker* factor therefore weighs against finding a constitutional violation.

3

a

The third *Barker* factor—Jumaev's assertion of his right to a speedy trial—also weighs against a speedy trial violation. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." *Barker*, 407 U.S. at 531–32. "[F]ailure to assert the right," on the other hand, "will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 532. Though a defendant bears the burden to assert his right, a defendant does not "waive[] any consideration of his right to speedy trial for any period prior to which he has not demanded a trial." *Id.* at 525. Rather, "the ultimate inquiry is 'whether the defendant's behavior during the course of litigation evinces a desire to go to trial with dispatch.'" *Muhtorov*, slip op. at 142 (quoting *Batie*, 433 F.3d at 1291). Thus, "'[w]e may weigh the frequency and force of [the defendant's] objections' to the delay." *Margheim*, 770 F.3d at 1328 (first alteration in original) (quoting *United States v. Latimer*, 511 F.2d 498, 501 (10th Cir. 1975)). "A defendant's early and persistent assertion of his right to a speedy trial will tip the third factor in his favor, but efforts to stall the proceedings, such as 'moving for many continuances,' will 'tip the balance of this factor heavily against the

defendant.'" *Medina*, 918 F.3d at 781 (internal quotation marks omitted) (quoting *Margheim*, 770 F.3d at 1328).

Jumaev argues that the motions to dismiss he filed in the trial court sufficiently asserted his constitutional right to a speedy trial. We determine otherwise, for Jumaev's motions were not timely. The first was submitted on February 28, 2017, less than two weeks before the then-scheduled trial date of March 13, 2017. The second was filed on February 16, 2018, less than a month before his trial finally did occur and about five years and eleven months after he was arrested and charged. We have previously recognized that the third *Barker* factor weighs against a defendant who chooses "not to assert his right to a speedy trial until trial itself [is] imminent." *United States v. Kalady*, 941 F.2d 1090, 1095 (10th Cir. 1991). And we find that that principle applies here. By waiting until just thirteen days before trial was set to begin to raise his first speedy trial objection, Jumaev tipped this factor in the government's favor.

Notably, Jumaev's requests for a speedy trial differ from those of his co-defendant Muhtorov, who did adequately assert his speedy trial right. While both Muhtorov and Jumaev waited years to file their first speedy trial motions, Muhtorov's motions were more frequent and more timely. For instance, Muhtorov, like Jumaev, filed two counseled motions. But, unlike Jumaev, Muhtorov *also* submitted several pro se motions in which he "expressed his frustration with delays." *Muhtorov*, slip op. at 143. The first of these, in particular, included an analysis of the four *Barker* factors and was filed five months before Muhtorov's then–trial date. *See*

id. at 143–45. Muhtorov's counseled motions, too, stand in contrast to Jumaev's. For example, Muhtorov's first counseled motion was filed approximately four months prior to trial instead of only two weeks beforehand. *See id.* at 143, 145. Muhtorov's persistence and diligence show that he "did not intend on waiting until the eve of trial to assert the right for the first time." *Id.* at 145. Jumaev's tardiness, by contrast, leaves open the possibility that he "merely . . . mov[ed] to dismiss after the delay ha[d] already occurred." *United States v. Gould*, 672 F.3d 930, 938 (10th Cir. 2012) (internal quotation marks omitted) (quoting *Batie*, 433 F.3d at 1291).

In reaching this conclusion, we recognize that when these cases began, the government believed—and represented—that discovery would be completed within months, not years. *See* App'x Vol. XI at 228. A full appreciation for the difficulties that discovery would present developed only gradually, and for that reason, Jumaev and Muhtorov's failure to register speedy trial objections closer to the start of the proceedings is understandable. *See Barker*, 407 U.S. at 528 (instructing that a defendant is not obligated to submit a "pro forma demand [for a speedy trial] . . . immediately after appointment of counsel" to preserve his right). Indeed, this context helps explain why Muhtorov's assertion of his speedy trial right was sufficient despite the late date on which it was lodged; in an ordinary case, a speedy trial objection first raised roughly five years after the indictment would be untimely. *See Nixon*, 919 F.3d at 1272 (determining that the third *Barker* factor weighed against a defendant who "waited almost a year to invoke his right to a speedy trial"); *United States v. Black*, 830 F.3d 1099, 1121 (10th Cir. 2016) (suggesting that an initial

assertion of the speedy trial right "13 months after the First Superseding Indictment" is "late"); *United States v. Koerber*, 10 F.4th 1083, 1110 (10th Cir. 2021) (finding that a first assertion of the speedy trial right "over four years after [the defendant's] initial indictment" was not "'frequent' or 'forceful'"). But this context does not justify the entirety of Jumaev's delay. It was ultimately Jumaev's "burden to actively assert his right." *Yehling*, 456 F.3d at 1244; *see also Muhtorov*, slip op. at 140 ("The defendant has the 'burden of showing he desired a speedy trial.'") (quoting *Gould*, 672 F.3d at 938). And Jumaev has not demonstrated that the government's unexpected discovery delays prevented him from asserting his speedy trial right until trial was virtually at hand.

Focusing on the number of motions he filed, Jumaev insists that he did meet his burden. He observes that he objected on speedy trial grounds on two separate occasions. Reply Br. at 15. And, citing our decision in *United States v. Seltzer*, he says that "this Court has held that if a defendant has 'twice asserted his speedy trial rights' this 'put[s] both the district court and the government on notice that the defendant wishe[s] to proceed to a prompt resolution of his case,' and thus 'weighs strongly' in his favor." *Id.* (alterations in original) (quoting *Seltzer*, 595 F.3d at 1179).

Jumaev overreads *Seltzer*. *Seltzer*'s analysis did not turn solely on the number of motions filed; such a rule would permit a defendant to prevail on this factor simply by "rapid-fire filing [speedy trial] motions" shortly before trial. *Margheim*, 770 F.3d at 1329; *see also Batie*, 433 F.3d at 1291 (explaining that a speedy trial motion

submitted after "delay has already occurred" "could be, indeed may well be, strategic"). Rather, *Seltzer* held that the third *Barker* factor weighs in the defendant's favor when his speedy trial requests are "repeated" *and* "prompt." *Seltzer*, 595 F.3d at 1179. Applying that principle here, although "both [Jumaev] and the *Seltzer* defendant 'brought . . . repeated requests,' . . . only the *Seltzer* defendant did so *promptly*." *Margheim*, 770 F.3d at 1329 (first omission and emphasis in original) (quoting *Seltzer*, 595 F.3d at 1179). Jumaev's two motions, therefore, did not sufficiently assert his speedy trial right.

Finally, Jumaev's other pretrial conduct casts further doubt on his claim that he prioritized a speedy trial. *See United States v. Tranakos*, 911 F.2d 1422, 1429 (10th Cir. 1990) (explaining that the third *Barker* factor weighs against a defendant who "moves for dismissal on speedy trial grounds" but whose "other conduct indicates a contrary desire"). Jumaev points out that he objected to the slow pace of the government's discovery efforts throughout the proceedings, which is true. But more revealing is Jumaev's decision to join Muhtorov's motion seeking suppression of evidence acquired pursuant to Section 702. This was an issue of significant novelty and complexity, and it was clear that the issue would take a substantial period of time to litigate. For instance, one filing Jumaev and Muhtorov submitted in support of the motion—a notice of supplemental authority—was 420 pages long. *See* App'x Vol. II at 53–472. Moreover, Jumaev knew that his chances of prevailing on the motion were close to zero. After all, the government informed Jumaev two months before he joined Muhtorov's motion that he was not an "aggrieved person" as

to the Section 702 acquisitions at issue. *Id.* Vol. I at 605, 608. And the district court corroborated this claim—while further indicating that Jumaev likely lacked standing to bring the Section 702 challenge—at a hearing that took place when the joint motion was pending. *Id.* Vol. XI at 266–67. Today, Jumaev acknowledges that "the case against [him] had virtually nothing to do with FISA." Reply Br. at 13.[8] Nevertheless, Jumaev insisted on litigating the Section 702 issue. That choice reveals that he was not "focused completely on proceeding to trial." *Margheim*, 770 F.3d at 1329.[9]

Based on the foregoing, we conclude that Jumaev did not adequately assert his speedy trial right.[10]

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[8] In keeping with this acknowledgment, Jumaev has not appealed the denial of the Section 702 suppression motion. Muhtorov, though, has appealed that ruling, and we address it in the opinion dedicated to his claims. *See Muhtorov*, slip op. at 6–75.

[9] The dissent maintains that "Jumaev's decision to join Muhtorov's . . . suppression motion in 2014 did not evidence Jumaev's lack of eagerness to go to trial" because "Jumaev and Muhtorov remained as co-defendants in a single trial until the November 2016 severance," and therefore, "regardless of whether he joined the motion, [Jumaev] could not progress toward trial until the motion was decided in November 2015." Dissent at 7 n.7. The dissent never explains, however, why Jumaev could not have asked for a severance once it became clear that Muhtorov's case would require resolution of the complicated issues surrounding Section 702 surveillance. Indeed, when Muhtorov asked for a severance, it was granted. *See Muhtorov*, 2016 WL 11612426, at *1–2.

[10] In addition to the foregoing analysis, we note that (1) Jumaev did not object to a number of continuances requested by the government under the Speedy Trial Act ("STA"), 18 U.S.C. §§ 3161–3174, *see* App'x Vol. I at 489, 491, 529, 542, 548, and (2) Jumaev himself requested a nine-month continuance on March 13, 2017, the date his trial was initially scheduled to occur, *see id.* Vol. XVIII at 86, 90. We do not, however, count these continuances against Jumaev. Just as in *Muhtorov*, once Jumaev committed himself to litigating the Section 702 issue his "failure to object [to STA continuances] sooner was understandable in light of [the] pending motions to

b

For four principal reasons, the dissent disagrees with our analysis of the third *Barker* factor. Though we understand the dissent's frustration with the length of time it took for Jumaev's case to get to trial, we are unpersuaded by the dissent's arguments.

First, the dissent contends that by "tip[ping] this factor in favor of Muhtorov because his . . . pro se motions expressed frustration with the delay" but not granting equal credit to Jumaev, we "require counseled defendants to file pro se motions in order for Barker's assertion-of-the-right factor to weigh in their favor." Dissent at 6. Not so. We contrast Jumaev's motions with Muhtorov's to illustrate why, despite the many similarities between their cases, Jumaev's assertions of the right fell short even as Muhtorov's successfully crossed the third-*Barker*-factor threshold. But what matters for purposes of this comparison is not that some of Muhtorov's motions were pro se. What matters is that Muhtorov's motions—regardless of whether they were counseled or pro se—were more frequent and more timely than Jumaev's. *See Medina*, 918 F.3d at 781 (explaining that "[a] defendant's early and persistent assertion of his right to a speedy trial will tip the third [*Barker*] factor in his favor").

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suppress." Slip op. at 146 (explaining that "[i]t may have been pointless for [Muhtorov] to object to the STA continuances given the pending suppression motions"). As for Jumaev's own motion for a continuance, he filed it only after his first speedy trial motion was denied, and he maintained that the continuance was necessary, in part, due to the government's ongoing document productions. *See* App'x Vol. XVIII at 85–86. Given that the government did continue to produce discovery well after March 13, 2017, we agree that Jumaev's request for a continuance did not necessarily run counter to a desire to proceed to trial quickly.

To treat Jumaev's and Muhtorov's assertions as equivalent when conducting this analysis would be to essentially ignore Muhtorov's pro se motions—something that the dissent acknowledges we cannot do. *See* Dissent at 6 (recognizing that "Barker's third factor requires us to consider the . . . additional pro se motions for a speedy trial filed by Muhtorov"). Thus, accounting for Muhtorov's pro se motions when we weigh Jumaev's and Muhtorov's objections, the conclusion that Muhtorov's were made with greater "frequency and force," *Margheim*, 770 F.3d at 1328 (quoting *Latimer*, 511 F.2d at 501), is inescapable.[11]

Second, the dissent criticizes us for not "weigh[ing] the conduct of *both* parties." Dissent at 8 (emphasis added). In its view, because "the government repeatedly assured [Jumaev] that discovery would be forthcoming," Jumaev did all that was required of him when "[h]e waited on the government to fulfill its responsibilities, diligently and persistently filing discovery motions that were not met in a timely fashion." *Id.* at 8–9.[12] Our analysis is not blind to the government's conduct. As our discussion in the preceding section makes clear, we have factored

[11] The dissent also claims that our analysis, at the very least, "penalize[s] Jumaev by faulting him for not augmenting the motions filed by his counsel with pro se motions." Dissent at 6. This, again, is an inaccurate representation of our reasoning. We do not punish Jumaev for not filing pro se motions. We simply adjudge that the two delinquent motions Jumaev did file were insufficient to tilt the third *Barker* factor in his favor.

[12] In expressing this opinion, the dissent says that "Jumaev did not seek continuances." Dissent at 9. That is not true. As mentioned above, Jumaev did, in fact, ask for a nine-month continuance after his first speedy trial motion was denied. *See supra* note 10. But because we do not count this request against Jumaev, *see id.*, this discrepancy is immaterial.

the government's initial representations concerning discovery into our assessment of the timeliness of Jumaev's first speedy trial motion. *See supra* section II.A.3.a. But when all is said and done, the burden is on the defendant "to actively assert his right." *Yehling*, 456 F.3d at 1244. Consequently, even when delay is attributable to the government, the third *Barker* factor weighs against a defendant who "merely . . . mov[es] to dismiss after the delay has already occurred." *Gould*, 672 F.3d at 938 (internal quotation marks omitted) (quoting *Batie*, 433 F.3d at 1291). Nor is it enough for a defendant to complain about the pace of discovery without expressly raising a speedy trial objection. As we note in *Muhtorov*, Jumaev and Muhtorov (and now, too, the dissent) "offer[] no authority that . . . objections to the slow pace of discovery productions are akin to the assertion of a speedy trial right." Slip op. at 144 n.78.

Third, the dissent maintains that we act uncharitably toward Jumaev by "[s]imply comparing the time between filing of their first counseled speedy trial motions and Muhtorov and Jumaev's respective trial dates." Dissent at 9. It says that such a comparison "ignores that, after severance, Jumaev was required to proceed to trial first, before Muhtorov," and accordingly there was a "shorter practical window between the November 29, 2016 severance and the first scheduled trial date on March 13, 2017 available for Jumaev to assert his speedy trial right." *Id.* This argument is without legal foundation. Our caselaw instructs that there are two key periods we look to when assessing the timeliness of a defendant's assertion of the right: the time elapsed since indictment or arrest (whichever comes first), *see, e.g.*,

Nixon, 919 F.3d at 1272; *Black*, 830 F.3d at 1121, and the time left before trial, *see Kalady*, 941 F.2d at 1095. Nothing in our precedent suggests that we should alter these measurements to account for a co-defendant's trial date. Even if, however, we were to make the adjustment the dissent calls for and use only Jumaev's initial trial date when comparing Jumaev's and Muhtorov's first speedy trial objections, the juxtaposition would still be unfavorable to Jumaev. Muhtorov's initial motion was submitted on February 1, 2017—roughly four weeks before Jumaev filed his first motion, and nearly six weeks before Jumaev's trial was set to begin. This contrast illustrates, once again, that if Jumaev was committed to asserting his speedy trial right, he had no reason to wait until a mere thirteen days prior to trial to start objecting to the length of the proceedings.

Fourth, the dissent says we should not "fault Jumaev for joining Muhtorov's motion to suppress § 702-derived evidence." Dissent at 7 n.7. It contends (1) that the legality of the Section 702 surveillance was "a relevant issue in Jumaev's case" because evidence to be used against Jumaev was, at bottom, the product of that surveillance; (2) that "the government's assertion that Jumaev was not an 'aggrieved person' entitled to notice . . . was open to good faith challenge by Jumaev below"; (3) that "the belated government assurances that Jumaev was not an 'aggrieved person' were far from unequivocal, requiring several defense motions to gain a clear articulation of the government's position"; (4) that "Jumaev's decision to join in Muhtorov's motion . . . was far from a bad faith attempt to delay the trial"; and (5) that "[t]o the extent . . . additional delay resulted from [Jumaev's] decision [to

join Muhtorov's motion], which it did not given that the cases were not severed until a year after the motion to suppress was decided, it should not be weighed heavily against Jumaev." *Id.* at 2, 7 n.7.

None of these arguments convinces us to overlook Jumaev's decision to join Muhtorov's motion. With respect to the dissent's first and second contentions that the Section 702 surveillance was relevant to Jumaev's case and open to good faith challenge, Jumaev himself has fatally undercut such claims. By Jumaev's own admission, "the case against [him] had virtually nothing to do with FISA." Reply Br. at 13. Similarly, Jumaev has taken the wind out of the sails of the dissent's third contention that the government's assurances that Jumaev was not "aggrieved" were "belated" and "equivocal." As Jumaev notes in his reply brief, "[t]he government . . . 'made clear to [his] counsel in 2013 that the [Section 702] Notice did not apply to him.'" *Id.* (quoting Aple. Br. at 26). And 2013 was certainly early enough to inform Jumaev's decision to join Muhtorov's motion, which was not filed until 2014. As for the dissent's fourth contention—concerning whether Jumaev made a bad faith attempt to delay the trial—this argument inverts the test we apply when weighing the third *Barker* factor. The question is not whether the defendant acted in bad faith to affirmatively slow down the proceedings; it is whether the defendant demonstrated that he wished to proceed to trial quickly. *See Batie*, 433 F.3d at 1291. And Jumaev has not made that showing. Finally, as for the dissent's fifth contention, we agree with the dissent that Jumaev's decision to join Muhtorov's motion did not produce additional delay. That delay would have occurred anyway due to the slow pace of

discovery. *See supra* section II.A.2. But Jumaev could not have known that such delay was inevitable at the time that he joined Muhtorov's motion. Indeed, Jumaev himself states that early in the case he "believed the government's representations that discovery disclosures would be complete[d]" relatively quickly and that a trial would "follow[] closely thereafter." Reply Br. at 19. Thus, his decision to join Muhtorov's motion shows that he was more interested in litigating a complicated and tangential legal issue than in "go[ing] to trial with dispatch." *Batie*, 433 F.3d at 1291. And that "contrary desire" is what matters for purposes of the third *Barker* factor. *Tranakos*, 911 F.2d at 1429.

In brief, Jumaev's long-delayed speedy trial motions were inadequate assertions of his speedy trial right. The third *Barker* factor weighs in the government's favor.

4

Lastly, the fourth *Barker* factor—prejudice—weighs in Jumaev's favor, though only moderately. "The individual claiming the Sixth Amendment violation has the burden of showing prejudice." *Medina*, 918 F.3d at 781 (internal quotation marks omitted) (quoting *Seltzer*, 595 F.3d at 1179). However, "[i]n cases of 'extreme' delay, the defendant need not present specific evidence of prejudice, but can rely on a 'presumption of prejudice' resulting from the prolonged delay." *Id.* (quoting *United States v. Frater*, 495 F. App'x 878, 882 (10th Cir. 2012) (unpublished)). "Generally, the court requires a delay of six years before allowing the delay itself to constitute prejudice." *Seltzer*, 595 F.3d at 1180 n.3. "Absent . . . an 'extreme' delay, the

defendant must provide specific evidence of how the delay was prejudicial." *Medina*, 918 F.3d at 781 (quoting *Margheim*, 770 F.3d at 1329). "[I]n assessing whether [the defendant] has alleged prejudice with sufficient particularity, we focus on the interests the speedy-trial right was designed to safeguard: (1) 'preventing oppressive pretrial incarceration'; (2) 'minimizing anxiety and concern of the accused'; and (3) 'limiting the possibility that the defense will be impaired.'" *Margheim*, 770 F.3d at 1329 (brackets omitted) (quoting *Barker*, 407 U.S. at 532).

"Based on our discussion of the second *Barker* factor, we cannot attribute six years of delay to the government." *Muhtorov*, slip op. at 152. Accordingly, this fourth factor turns on whether Jumaev has demonstrated specific prejudice. Jumaev attempts to do so by showing oppressive pretrial incarceration and impairment of his defense. We consider each in turn.

a

Jumaev has established that he suffered prejudice due to his pretrial incarceration. "Because the seriousness of a post-accusation delay worsens when the wait is accompanied by pretrial incarceration, oppressive pretrial incarceration is the second most important [interest]." *Jackson*, 390 F.3d at 1264. And as we recognize in *Muhtorov*, extended pretrial incarceration, on its own, can be prejudicial. *See Muhtorov*, slip op. at 153. That is the case here. Just as "the mere fact of [Muhtorov's] incarceration for six-and-a-half years weighs in favor of finding prejudice," so too do Jumaev's six years of pretrial incarceration support a prejudice

finding. *Id.* "By any measure, [six] years of pretrial incarceration is extraordinary." *Id.*

Additionally, Jumaev has shown that his pretrial incarceration was particularly oppressive because he spent that incarceration "in Denver, far from his friends in Pennsylvania," and during that time was "only . . . able to see one of his sons via videoconference for 10 minutes." Aplt. Br. at 57 (quoting Suppl. App'x (Pleadings) at 154). Like we do for Muhtorov, we credit Jumaev's claims. *Muhtorov*, slip op. at 153. "*Barker* itself noted that time in jail for a pretrial detainee can disrupt family life and thereby be prejudicial." *Id.* And the distance Jumaev was forced to spend away from his home in Philadelphia—over 1700 miles—undoubtedly exacerbated the isolation caused by his incarceration.

In two instances, however, Jumaev fails to show a nexus between his pretrial incarceration and the conditions that he claims were oppressive. He contends that he experienced prejudice because (1) Denver was particularly far away from his family in Uzbekistan and (2) he had to "live[] with the knowledge that his communications with his family and friends were monitored for an extended period of his life, such that his private concerns ha[d] become public." Aplt. Br. at 57–58 (second alteration in original) (internal quotation marks omitted) (quoting Suppl. App'x (Pleadings) at 154). Neither of these arguments withstands scrutiny. As for the first argument, Jumaev's theory appears to be that his pretrial imprisonment would have been less burdensome vis-à-vis his separation from his family in Uzbekistan had he been in Pennsylvania rather than Colorado. Yet given that Pennsylvania is still half a world

away from Jumaev's homeland, this proposition makes little sense. As for the second argument, Jumaev apparently references the fact that the government surveilled him while it was building its case. That surveillance, though, would have come to light regardless of whether Jumaev was incarcerated before trial. Therefore, the fact that Jumaev learned he was surveilled bears no relation to whether his pretrial incarceration was oppressive.

We are also unpersuaded by Jumaev's final argument concerning the oppressiveness of his pretrial incarceration. Jumaev maintains that his pretrial incarceration was oppressive because "it is likely that [he] would have received a . . . shorter . . . term of imprisonment" had he not been incarcerated before trial, given that "his time served was already near the top of his advisory guideline range by the time of sentencing." Reply Br. at 24. Observing that "[t]he Supreme Court has recognized that pretrial custody can be particularly oppressive when it involves 'dead time' in jails that 'offer little or no recreational or rehabilitative programs,'" he says that "[h]ad [he] gone to trial earlier, he likely would have spent less *total* time in custody that [sic] he did in *pretrial* custody." *Id.* at 25 (quoting *Barker*, 407 U.S. at 532–33).[13] This in turn, he continues, "suggests that the time in custody was particularly oppressive." *Id.*

[13] Although Jumaev references the principle that incarceration is more oppressive when it occurs in "local jails" that "lack . . . rehabilitation programs and visiting privileges," *Muhtorov*, slip op. at 154, he does not specifically claim that he spent time in such a place, and the record discloses that he was incarcerated at a federal facility—the Englewood Federal Detention Center—from March 30, 2012 through his release in 2018, *see, e.g.*, App'x Vol. VI at 695.

This argument carries no water. Jumaev cites no case that has treated the sentence imposed *post*-conviction as relevant to assessing the constitutional validity of *pre*trial proceedings. And even supposing a defendant's sentence can be a valid component of the speedy trial analysis in an appropriate case, Jumaev fails to present a compelling argument as to why the sentence imposed in this instance rendered the pretrial incarceration oppressive. Jumaev's period of pretrial detention—76 months and 3 days—fell within the applicable sentencing guidelines range of 63 to 78 months. Suppl. App'x (Pleadings) at 145. And although, practically speaking, the length of that pretrial incarceration prevented the district court from selecting a sentence on the low end of the relevant range, *see id.* at 158, it is not clear that, at bottom, Jumaev's pretrial detention was the reason he received a long sentence. After all, the district court said during the sentencing hearing that "[t]he crimes with which Mr. Jumaev has been convicted are undoubtedly grave and he must be sentenced accordingly"—reasoning that indicates a sentence on the high end of the guidelines range was on the table regardless of how much time Jumaev had already served. *Id.* at 153. In these circumstances, we cannot say that Jumaev's sentence of time served demonstrates that his pretrial incarceration was oppressive.

Notwithstanding the failures of some of Jumaev's arguments, on the whole, Jumaev has demonstrated prejudice due to the nature and length of his six years of pretrial incarceration.

b

Jumaev has also demonstrated prejudice due to impairment of his defense. "[T]he most serious [interest] is the 'hindrance of the defense' because the inability of a defendant to adequately prepare his case skews the fairness of the entire system." *Seltzer*, 595 F.3d at 1179–80 (quoting *United States v. Toombs*, 574 F.3d 1262, 1275 (10th Cir. 2009)). "On this interest, we have held that a defendant should show 'that the delay resulted in the loss of specific evidence or the unavailability of certain witnesses.'" *Frias*, 893 F.3d at 1273 (quoting *Hicks*, 779 F.3d at 1169). Impairment of the defense also occurs when "witnesses lose their memory of events that are critical to the theory of defense." *Margheim*, 770 F.3d at 1329.

To establish impairment from lost testimony, a defendant must make three showings. First, the defendant must "state[] with particularity what . . . testimony would have been offered," *Jackson*, 390 F.3d at 1265 (alteration in original) (internal quotation marks omitted) (quoting *Tranakos*, 911 F.2d at 1429), and explain how the lost testimony was "material," *Margheim*, 770 F.3d at 1330, or "meaningful," *Medina*, 918 F.3d at 782. Second, the defendant must "present evidence that the delay caused the . . . unavailability." *Jackson*, 390 F.3d at 1265. Third, the defendant must establish that he "t[ook] steps, when possible, to preserve testimony." *Id.* "But when a defendant is not 'on notice of the need to preserve testimony' or has no 'realistic opportunity to do so,'" we do not "view the failure to preserve testimony as fatal to a claim of prejudice." *Muhtorov*, slip op. at 150–51 (quoting *Jackson*, 390 F.3d at 1265).

Jumaev tries to demonstrate prejudice due to loss of testimony in two ways: the failure of his own memory, and the unavailability of his former roommate Jakhonghir Rakhimov as a witness. He succeeds in the latter attempt, but the weight of his showing is reduced because Rakhimov's testimony would not have been exculpatory or central to Jumaev's defense.

We first address Jumaev's assertion that his own recollection suffered from the passage of time. Jumaev says that because his memory failed, he was unable "to give context to the volumes of recorded conversations he had been a part of seven years prior to his trial." Reply Br. at 21. And he further claims that "[t]hese lapses in his memory were exploited by the government" at trial, used to show "that [his] explanations about his discussions with the FBI and Mr. Muhtorov were 'neither reliable nor credible.'" *Id.* at 22 (emphasis omitted) (quoting App'x Vol. XVIII at 2717).

We accept that Jumaev can satisfy the second and third impairment-of-the-defense requirements with respect to this lost testimony. We do not doubt that Jumaev's recollection of the relevant events faded, to at least some degree, over the long span of time at issue. *See Seltzer*, 595 F.3d at 1177 n.2 (noting "the dangers of memory loss or distortion over time"); *see also Edmaiston v. Neil*, 452 F.2d 494, 500 (6th Cir. 1971) (concluding that the defendant's "own memory was understandably vague with regard to events occurring eight and one-half years before trial"). Additionally, there is no indication that Jumaev had reason to know—at the outset, when his memory was still fresh—that the proceedings would last so long as to cause

his memory to falter, such that he needed to take steps to preserve his own testimony. Finally, even if Jumaev had anticipated that his memory would fail, preserving his testimony was not a realistic option: it would have been impractical for him to record every detail he could recall about every conversation he had ever had (1) with Muhtorov or (2) that pertained to the IJU. Accordingly, Jumaev has established that the delay here produced the loss of his testimony and that preservation was neither required nor feasible.

Jumaev falls short, however, in his attempt to show that the lost testimony was material. Jumaev does not assert prejudice on the grounds that his testimony would have been exculpatory. Instead, he claims that the government used his poor recollection against him "as evidence of his evasiveness," undermining his credibility with the jury. Aplt. Br. at 55. The record does not bear out Jumaev's characterization of the government's trial arguments. True, the prosecutor who made the government's closing statement contended that Jumaev "said plenty of things that are neither reliable nor credible." App'x Vol. XVIII at 2717. But she was likely referring to the fact that, by Jumaev's own admission, he had lied to the FBI on multiple occasions, not to the fact that Jumaev had struggled to remember certain details when he testified. *See id.* at 1879, 1882–83, 1887. Further, at that point in her closing, the prosecutor was not trying to cast doubt on Jumaev's testimony. To the contrary, she was trying to convince the jury that, despite the lies Jumaev had previously told to the FBI, incriminating statements he made to the FBI after he was arrested *were* credible. *See id.* at 2710–13, 2717. Jumaev thus fails to show that the

government used his lack of recollection against him. Ergo, he has not demonstrated that he was prejudiced by the loss of his own testimony.

Turning to Jumaev's argument about the unavailability of Rakhimov, we conclude that Jumaev fares better on this score. The government does not contest that the march of time rendered Rakhimov—who could not be located for Jumaev's trial—unavailable as a witness. Nor does the government maintain that Jumaev had notice that he needed to attempt to preserve Rakhimov's testimony. The sole question, then, is whether Jumaev has pointed to particular testimony from Rakhimov that would have been material to Jumaev's case.

Jumaev has done so. Relying on an interview of Rakhimov conducted by the FBI, he shows that, had Rakhimov been available, Rakhimov would have testified that Jumaev "was a simple primitive man who did not understand Islam." Aplt. Br. at 56 (internal quotation marks omitted) (quoting App'x Vol. V at 37). And this testimony, Jumaev further explains, could have cast doubt on the government's claim that Jumaev was serious about joining Muhtorov in the pursuit of religious extremism. *Id.*; *see* App'x Vol. XVIII at 2707–09. Thus, Rakhimov's testimony "arguably 'would have aided [Jumaev's] defense,'" rendering it material. *Muhtorov*, slip op. at 156 (quoting *United States v. Trammell*, 133 F.3d 1343, 1351 (10th Cir. 1998)).

That said, "we do not weigh this prejudice heavily" because Rakhimov's testimony "would not have been exculpatory or central to the defense." *Id.* at 158. Rakhimov's testimony would not have directly contradicted the government's theory

that Jumaev was radicalized; the jury could have determined that Jumaev turned to religious extremism even though he "did not understand Islam." Moreover, the actions charged in the indictment occurred in 2011 and 2012, while Rakhimov was Jumaev's roommate only until 2008. App'x Vol. V at 37. The jury, therefore, could have concluded that in the years after Rakhimov lived with Jumaev, Jumaev's understanding of Islam grew. Indeed, lending support to such a conclusion, Rakhimov himself would have testified that Jumaev "was teaching himself" about Islam using "videos and . . . tapes" and by "listening to sermons from . . . Anwar Aulaqi," a well-known cleric who had been "'blacklisted' by the United States." *Id.* In short, even though Rakhimov's testimony was material, it was neither exculpatory nor central to his defense. For that reason, we do not find this prejudice substantial.

B

We now turn to balancing the *Barker* factors, but given the substantial similarities between this case and Muhtorov's, we need not belabor the analysis. The first, second, and fourth *Barker* factors carry essentially the same weights here that they carry in *Muhtorov*. In both cases, (a) the first *Barker* factor weighs heavily in favor of finding a constitutional violation because a delay of six years or more is substantial, (b) the second *Barker* factor does not weigh in favor of a violation because the government has justified the discovery delay, and (c) the fourth factor weighs in favor of a violation due to the oppressive pretrial incarceration and the loss of a witness, though does not weigh as heavily as it would had the witness's testimony been exculpatory or central to the defense. *Muhtorov*, slip op. at 158. The

only significant difference between these cases is that for Jumaev, the third factor—assertion of the right to a speedy trial—weighs against finding a violation. *Muhtorov* makes clear that even if the third factor tipped toward a constitutional violation, Jumaev's claim would not succeed "given the quantity and nature of the discovery, and the overall good faith and diligence of the government and the district court in bringing this case to trial." *Id.* at 162–63. *A fortiori*, with the third factor weighing against Jumaev, his speedy trial claim fails.

III

We next consider Jumaev's discovery-sanctions claim.[14] "We review a district court's decision to impose sanctions, and the court's choice of sanction, for an abuse of discretion." *United States v. Golyansky*, 291 F.3d 1245, 1249 (10th Cir. 2002).

Jumaev maintains that the government "violated the court's discovery orders in two ways." Reply Br. at 27. First, he says that "[t]he government undoubtedly

[14] In his opening brief, Jumaev appeared to raise, in addition to the argument we consider here, an argument that the government failed to timely fulfill its obligations under *Brady v. Maryland*. *See* Aplt. Br. at 59 ("The court erred in declining to impose sufficient sanctions for the government's repeated violations of its *Brady* obligations and the court's discovery orders."). In his reply brief, however, Jumaev clarifies that he does not "argu[e] a constitutional violation based on the late disclosure of *Brady* material." Reply Br. at 27. Rather, he argues only "that the district court erred by declining to impose sufficient sanctions for discovery violations." *Id.* Because Jumaev has "intentionally relinquished" his *Brady* argument, we do not address it. *Folks v. State Farm Mut. Auto. Ins. Co.*, 784 F.3d 730, 737 (10th Cir. 2015) (internal quotation marks omitted) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011)); *see also United States v. Augustine*, 742 F.3d 1258, 1264 n.1 (10th Cir. 2014) (declining to consider arguments that were "abandoned . . . in [the] reply brief").

disregarded the September 1, 2016, discovery deadline imposed by the court." *Id.* Yet rather than, as Jumaev argues the district court should have done, penalize the government for this conduct, the district court granted a nine-month continuance. *See id.* at 27–28; App'x Vol. XVIII at 86, 90.[15] Second, Jumaev observes that "the trial court twice sanctioned the government for" its discovery conduct. Reply Br. at 28 (emphasis omitted) (citing App'x Vol. VII at 406, Vol. XVIII at 82–83). The first sanction was issued after the district found that the government "caused the defense team to have to revisit and reevaluate all of the discovery that had been provided to it by the Government" by waiting over four years after the initial indictment to bring two new charges against Jumaev (count 5 and count 6). App'x Vol. XVIII at 83. As remedies for the government's conduct, the district court granted the aforementioned continuance (which served multiple functions), as well as entered "[a]n order of preclusion . . . prevent[ing] the Government from offering any of the Count 5 and 6 evidence in its possession in its case in chief." *Id.* The second sanction was issued when the district court determined that the government "disturbed the balance between the parties" by waiting to disclose potential impeachment information about a witness, Sobirov, until the morning of the witness's deposition in Kazakhstan. App'x Vol. VII at 406. The district court corrected this imbalance by "instruct[ing]

[15] Jumaev moved for this continuance because he needed more time to review discovery produced by the September 1, 2016 deadline. *See supra* notes 10, 12. He also did so, though, because (among other reasons) the government produced discovery after the September 1, 2016 deadline. *See id.* Hence, we agree with Jumaev that the continuance was, in part, a means of addressing the government's post-deadline discovery production.

the jury on the information that was belatedly disclosed by the government and not elicited during Mr. Sobirov's deposition." *Id.* The question Jumaev presents on appeal is whether the district court's choice of remedies in these three instances was an abuse of discretion.[16]

Under Rule 16(d)(2) of the Federal Rules of Criminal Procedure, a district court has broad discretion in choosing a sanction upon determining that a party has violated a discovery obligation. "[T]he court may: (A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms and conditions; (B) grant a continuance; (C) prohibit that party from introducing the undisclosed evidence; or (D) enter any other order that is just under the circumstances." Fed. R. Crim. P. 16(d)(2). When selecting the sanction, a

[16] The government contends that Jumaev "has not shown any discovery order . . . violations," Aple. Br. at 19, a claim that appears to be premised on the fact that, although the government was sanctioned for its discovery conduct, it was not sanctioned for violating an *order* of the district court pertaining to discovery. While the government's assertion is partially correct as a factual matter, the government offers a distinction without a difference. The government is subject to discovery obligations in a criminal case regardless of whether the district court issues discovery orders, and the district court's authority to order sanctions for late compliance with discovery obligations—as well as our review of such an order—is unaffected by the source of the discovery obligation that was violated. *See* Fed. R. Crim. P. 16(d)(2) (authorizing a district court to issue sanctions for violations of the discovery obligations imposed by Rule 16 of the Federal Rules of Criminal Procedure, including those obligations created by a district court order issued pursuant to Rule 16(d)(1)); *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009) (indicating that district courts have authority under Rule 16 to remedy belated disclosures that violate *Brady* rather than Rule 16 itself); *United States v. Gonzales*, 164 F.3d 1285, 1291–92 (10th Cir. 1999) (observing that "[e]ven where Rule 16 is inapplicable, the courts have discretion to exclude evidence as a sanction for violation of a discovery order," *id.* at 1291, and employing the same legal standard used in Rule 16 cases).

district court considers the factors we first announced in *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988): "(1) the reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery [obligation]; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance." *Id.* at 1061. "[T]hese three factors," however, "should merely guide the district court in its consideration of sanctions; they are not intended to dictate the bounds of the court's discretion." *Id.*

Although the choice of sanction is committed to the district court's discretion, we have instructed that "[t]he court should impose the least severe sanction that will accomplish prompt and full compliance with" the violated discovery requirement. *Gonzales*, 164 F.3d at 1292. "The preferred sanction is a continuance." *Golyansky*, 291 F.3d at 1249. "It would be a rare case where, absent bad faith, a district court should exclude evidence rather than continue the proceedings." *Id.*

Here, "the government acted diligently and without bad faith or negligence." *Muhtorov*, slip op. at 118.[17] Accordingly, to establish that the district court abused

[17] This observation from *Muhtorov* concerns the overall pace of discovery, and thus applies here only to the government's failure to complete discovery by the September 1, 2016 deadline. But we similarly find no evidence of bad faith concerning the filing of the third superseding indictment and the delayed disclosure of potential impeachment information about Sobirov. Jumaev points to only one possible instance of bad faith related to either of these events: that in response to Jumaev's motion to have Sobirov—an immigrant who had left the country after serving as a confidential human source for the government—paroled into the United States to testify at Jumaev's trial, the government asserted that the motion should be denied "because there was no way of knowing whether [Sobirov] would leave

its discretion by declining to impose more severe sanctions, Jumaev must demonstrate (1) prejudice to his defense (2) that the district court's sanctions did not cure. *See Golyansky*, 291 F.3d at 1249.[18] Jumaev fails to make such a showing.

We start with prejudice. Jumaev contends that "[t]he prejudice [he] suffered was, primarily, the extreme delay" caused by the belated discovery productions. Aplt. Br. at 64. He does not claim that this delay caused "prejudice as it relates to guilt or innocence." Reply Br. at 28. But, pointing to a Sixth Amendment speedy trial case, he says that "prejudice can come in the form of delay itself." *Id.* (citing *Doggett*, 505 U.S. at 657).

Jumaev's attempt to show that delay itself constitutes prejudice comes up short. Although Jumaev is correct that delay itself can be prejudicial for purposes of

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willingly after the trial." App'x Vol. VII at 405; *see* Aplt. Br. at 62, 64. The district court determined that "[t]his representation by the government was not forthright and bordered on deceitful," given that the government "had previously granted Mr. Sobirov deferred action and Significant Public Benefit Parole so that he could remain in the U.S." App'x Vol. VII at 405.

While the government's misrepresentation is troubling, in this appeal Jumaev does not take issue with the fact that Sobirov was unavailable to testify at Jumaev's trial. And critically, Jumaev never explains how the government's lack of candor in opposing his motion to have Sobirov paroled into the United States demonstrates that the timing of its disclosure of potential impeachment information about Sobirov was the product of bad faith. Indeed, any connection between the motion and the delayed disclosure is tenuous at best given that, a month before Sobirov's deposition, the government dropped its opposition to permitting Sobirov to enter the United States to testify. *See id.* at 332. Jumaev thus has not established that the discovery violations at issue were the product of bad faith.

[18] We have also indicated that, absent prejudice, a district court may suppress evidence that did not comply with discovery orders when doing so is necessary "to maintain the integrity and schedule of the court." *Wicker*, 848 F.2d at 1061. Jumaev does not argue that such circumstances were presented in this case.

a constitutional speedy trial claim, *see, e.g.*, *Frias*, 893 F.3d at 1272 (noting that when assessing the first *Barker* factor, delay "is presumptively prejudicial" if it "'approach[es] one year'" (quoting *Batie*, 433 F.3d at 1290)), "prejudice" means different things in different legal contexts. For instance, even in the speedy trial context, the prejudice analysis differs depending on which *Barker* factor is under consideration. *See Muhtorov*, slip op. at 148 n.81. So too, the *Wicker* prejudice analysis is its own inquiry. Specifically, when applying the *Wicker* prejudice factor, we ask whether "the delay impacted the defendant's ability *to prepare or present its case*." *Golyansky*, 291 F.3d at 1250 (emphasis added). Delay, therefore, is relevant to assessing prejudice under *Wicker* only to the extent that delay impaired the defendant's ability to mount his defense.

Jumaev makes no effort to show such impairment here. As discussed *supra* in section II.A.4.b., Jumaev argues as part of his speedy trial claim that the time his case took to get to trial (1) impaired his ability to recall important details when he testified and (2) rendered a witness who would have testified on his behalf, Rakhimov, unavailable. But Jumaev does not present these arguments in support of this discovery-sanctions claim. Nor is it clear that he could have made such arguments here—the delay at issue for this discovery-violation claim is not the entire pretrial period, but just the time from the September 1, 2016 discovery deadline until the government made its final production to Jumaev in February 2018. Consequently, Jumaev has not demonstrated that he suffered *Wicker* prejudice due to delay.

This is not to say that Jumaev suffered no prejudice. To the contrary, the late discovery productions and the belated superseding indictment caused Jumaev's defense team to need more time to prepare for trial. *See Golyansky*, 291 F.3d at 1250 (explaining that late productions can cause "unfair surprise"). And the last-minute disclosure of potential impeachment information about Sobirov prevented Jumaev's defense team from being able to effectively use that information during Sobirov's deposition. But it is only these harms—not "delay itself"—that the district court's orders needed to address.

With these harms in mind, we turn to whether the district court's sanctions cured the prejudice to Jumaev's defense, and we conclude that the district court crafted adequate remedies. First, to ensure that Jumaev's defense team was able to review discovery materials produced after September 1, 2016, as well as to make up for time that Jumaev's defense team had spent revisiting evidence after the filing of the third superseding indictment, the district court granted a continuance. App'x Vol. XVIII at 86, 90. Second, to prevent the late-filed charges from creating further additional work for the defense team, the district court forbade the government from using any evidence associated with counts 5 and 6 in its case in chief, even in support of the other counts. *Id.* at 83–84.[19] Third, to make up for the defense team's inability

[19] Prohibiting the use of such evidence in support of the other counts is what gave this part of the district court's order its teeth, as by the time the court was ready to rule on this discovery issue, the government had voluntarily dismissed counts 5 and 6. *See* App'x Vol. XVIII at 83.

to use potential impeachment evidence during Sobirov's deposition in Kazakhstan, the district court "instruct[ed] the jury on the information that was belatedly disclosed by the government and not elicited during Mr. Sobirov's deposition." *Id.* Vol. VII at 406. These orders redressed the prejudice caused by the government's delays and in turn were a proper exercise of the district court's discretion.

Focusing on the continuance remedy, Jumaev protests that the continuance actually "made [things] worse" because by that point he had already suffered through years of pretrial delays. Aplt. Br. at 64. In this respect, Jumaev is correct that a district court must keep a defendant's right to a speedy trial in mind when determining whether a continuance is an appropriate sanction for a discovery violation. *See United States v. Yepa*, 608 F. App'x 672, 680 (10th Cir. 2015) (unpublished) (determining that the district court acted within its discretion in deciding that a continuance was not a feasible sanction because a continuance would have "inequitably extend[ed] [the defendant's] pretrial incarceration"); *United States v. Ivory*, 131 F. App'x 628, 631 (10th Cir. 2005) (unpublished) (upholding the district court's decision to order a continuance as a discovery sanction when doing so "would solve the problem with respect to [the defendant] *without* impairing his speedy trial rights" (emphasis added)).[20] But here, for the reasons stated *supra* in section II,

[20] Unpublished cases cited in this opinion are not binding precedent, but we consider them for their persuasive value. *See* Fed. R. App. P. 32.1(a); 10th Cir. R. 32.1(A), (C).

Jumaev's speedy trial right was not violated. It follows, then, that Jumaev's speedy trial right did not render a continuance an inappropriate sanction in this instance.

To summarize, although the slow pace of discovery, the late-filed charges, and a last-minute disclosure of potential impeachment information caused Jumaev some prejudice, the district court's orders were sufficiently curative. The remedy that Jumaev most strongly objects to—the continuance—was not only within the district court's discretion to order, but is generally the preferred method for dealing with discovery violations. Accordingly, Jumaev's challenge to the district court's choice of discovery sanctions fails.

IV

Finally, we turn to Jumaev's claim that the evidence obtained from the execution of extraterritorial search warrants for his home, cellular phone, and laptop computer should have been suppressed. In considering Jumaev's challenge to the district court's denial of his suppression motion, we review the district court's legal determinations de novo and its factual findings for clear error, viewing the evidence in the light most favorable to the government. *United States v. Trujillo*, 993 F.3d 859, 864 (10th Cir. 2021).

The search warrants at issue were authorized by a federal magistrate judge, a federal judicial officer whose power to issue warrants is geographically constrained. As relevant here, Federal Rule of Criminal Procedure 41 "generally limits a federal magistrate judge's warrant-issuing authority to the district where he or she sits." *United States v. Krueger*, 809 F.3d 1109, 1110–11 (10th Cir. 2015); *see* Fed. R.

Crim. P. 41(b)(1) ("[A] magistrate judge with authority in the district . . . has authority to issue a warrant to search for and seize a person or property located within the district . . . .").[21] This general limitation, however, is subject to exceptions. *See* 28 U.S.C. § 636(a) (indicating that a federal magistrate judge has powers outside of "the district in which" he or she sits "as authorized by law"). Here, the government invokes the exception found in Federal Rule of Criminal Procedure 41(b)(3), which provides that "a magistrate judge—in an investigation of domestic terrorism or international terrorism—with authority in any district in which activities related to the terrorism may have occurred has authority to issue a warrant for a person or property within or outside that district." Fed. R. Crim. P. 41(b)(3); *see also* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, § 219, 115 Stat. 272, 291 (inserting Rule 41(b)(3) into the Federal Rules of Criminal Procedure). Because Federal Rule of Criminal Procedure 41(b) is entitled "Venue for a Warrant Application," we refer to Rule 41(b)(3)'s requirement that there be a connection between the magistrate judge's district and the terrorism activities under investigation as a "venue requirement."

Jumaev does not dispute that the investigation into his conspiracy with Muhtorov to provide material support to the IJU was an investigation of domestic or

[21] There are also statutory limits on a magistrate judge's authority. *See* 28 U.S.C. § 636(a); *see also Krueger*, 809 F.3d at 1117–18 (Gorsuch, J., concurring in the judgment) (emphasizing the importance of these statutory limits).

international terrorism sufficient to trigger Rule 41(b)(3). Nor does he contest that "activities related to the terrorism" occurred within the District of Colorado, the judicial district in which the magistrate judge who issued the warrants sat. Instead, his argument is a procedural one concerning the sufficiency of the warrant application materials that were submitted to the magistrate judge. *See* Aplt. Br. at 68. He contends that the materials "were deficient because they failed to attest to a single fact showing *any* connection to Colorado." *Id.* Due to this alleged failure to "present[] information to the magistrate demonstrating that she had statutory authority to issue the warrants," Reply Br. at 29, Jumaev argues that the magistrate judge's issuance of the warrants violated Rule 41, and that in turn the evidence obtained via those warrants must be suppressed, *see* Aplt. Br. at 68–69.[22]

Jumaev's argument founders because it is not supported by the text of Rule 41. No provision of Rule 41 mandates that an application for a Rule 41(b)(3) warrant

[22] We assess whether a Rule 41 violation justifies suppression using the analytical framework this court adopted in *United States v. Pennington*, 635 F.2d 1387 (10th Cir. 1980). "Under this framework, we begin by considering whether Rule 41 was in fact violated." *Krueger*, 809 F.3d at 1113. "If so, we typically proceed by determining whether that specific Rule 41 violation rises to the level of a Fourth Amendment violation." *Id.* "If we determine that the Rule 41 violation is *not* of constitutional import, we then consider whether the defendant can establish that, as a result of the Rule violation, '(1) there was "prejudice" in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule.'" *Id.* at 1114 (quoting *Pennington*, 635 F.2d at 1390).

Because we conclude that Rule 41 was not violated, we resolve this case at the first step of the *Pennington* analysis. Further, for the same reason, we do not address the government's alternative argument that the good faith exception to the exclusionary rule applies.

address 41(b)(3)'s venue requirement. The only reference to the 41(b)(3) venue requirement is found in Rule 41(b) itself, a part of Rule 41 that other circuits have recognized "is a substantive provision," not one that "detail[s] the procedures for obtaining and issuing warrants." *United States v. Berkos*, 543 F.3d 392, 397–98 (7th Cir. 2008) (emphasis omitted); *see also United States v. Ackies*, 918 F.3d 190, 201 (1st Cir. 2019) (adopting the Seventh Circuit's view). By contrast, the part of Rule 41 that does speak to the procedure for obtaining a search-and-seizure warrant—Rule 41(d)—points to just one thing that must be shown in a search-and-seizure warrant's application materials: "probable cause to search for and seize a person or property." Fed. R. Crim. P. 41(d)(1) ("After receiving an affidavit or other information, a magistrate judge . . . *must* issue the warrant if there is probable cause to search for and seize a person or property . . . ." (emphasis added)). Given that this is the only application requirement identified in the rule, it follows that an application's omission of information pertaining to the 41(b)(3) venue requirement is not a Rule 41 violation. "After all, 'common sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one requirement] implies' the exclusion of others." *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1312 (10th Cir. 2012) (Gorsuch, J.) (brackets omitted) (quoting *Arizona v. United States*, 567 U.S. 387, 432 (2012) (Scalia, J., concurring in part and dissenting in part)); *see also Keene Corp. v. United States*, 508 U.S. 200,

208 (1993) (noting that courts have a "duty to refrain from reading a phrase into [a] statute when Congress has left it out").[23]

Although we determine that Rule 41 does not obligate the government to address the 41(b)(3) venue requirement in its warrant application materials, we do not go so far today as to hold that a magistrate judge may issue an extraterritorial warrant pursuant to Rule 41(b)(3) without having *any* basis for concluding that activities related to the terrorism under investigation may have occurred in her district, so long as the government could have showed such a connection at the time the warrant was issued. We need not decide that question, because in this case the magistrate judge was given the information she needed to determine that relevant terrorism activities had occurred in Colorado. To start, the warrant application materials here may have been enough on their own to allow the magistrate judge to discern the Colorado connection, for in support of the warrant applications the government submitted an affidavit that detailed at length Jumaev's interactions with Muhtorov, and Muhtorov had already been indicted on a terrorism charge in the District of Colorado. *See* App'x Vol. I at 217, Vol. VI at 52–70. But even if the application materials themselves failed to establish the link to Colorado, the government provided more: it also filed a criminal complaint against Jumaev that alleged he had "conspire[d]" "with others" "*in the county of Denver in the State and*

[23] Rule 41 also lays down requirements as to what must be in a warrant. *See* Fed. R. Crim. P. 41(e)(2) ("Contents of the Warrant"). Again, information about venue is not among those requirements. *See id.*

District of Colorado." *Id.* Vol. VI at 50–51 (emphasis added). The warrant applications, the affidavit, and the criminal complaint were clearly intended to be considered as a single package; in fact, the affidavit pulled double duty, expressly supporting both the warrant applications and the complaint. *Id.* at 52. And together, these submissions allowed the magistrate judge to discern that at least some of the numerous terrorism-related activities described in the affidavit had occurred in Colorado. No more was necessary.

Jumaev argues that this analysis conflicts with the Supreme Court's decision in *Whiteley v. Warden*, 401 U.S. 560 (1971). There, the Court held that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate," because "[a] contrary rule would . . . render the warrant requirements of the Fourth Amendment meaningless." *Id.* at 565 n.8. Extending this logic, Jumaev contends that to permit the government to rely on a criminal complaint to help satisfy the 41(b)(3) venue requirement would be to sanction the very type of "rehabilitation" that *Whiteley* forbids. *See* Reply Br. at 31–32.

Jumaev's reliance on *Whiteley* misses the mark. The government here did not try to supplement its warrant affidavit after realizing that the affidavit was deficient. Rather, the government submitted the complaint that referenced Colorado *alongside* the affidavit and the applications. Further, *Whiteley* concerned the probable-cause requirement imposed by the Fourth Amendment, *see* 401 U.S. at 564–65, not a venue

requirement listed in a rule of procedure. *Whiteley*, therefore, is easily distinguished from the case at hand.

Jumaev nevertheless insists that the "reasoning behind" *Whiteley* is "in play here." Reply Br. at 31–32. He says that "the magistrate must be informed of some of the underlying circumstances"; "otherwise, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 32 (brackets and internal quotation marks omitted) (quoting *Aguilar v. Texas*, 378 U.S. 108, 114–15 (1964)). Jumaev again ignores that this reasoning concerned the process by which the government establishes *probable cause*—something that the Constitution identifies as essential to the issuance of a warrant. *See* U.S. Const. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."). The process a magistrate judge must use to determine that the government has satisfied a venue provision found in rules of criminal procedure, by contrast, is a subject about which the Fourth Amendment has nothing to say. *Whiteley*'s reasoning thus has no application in this case.

In sum, no provision of Rule 41 demands that Rule 41(b)(3)'s venue requirement be addressed in the warrant application materials. And even assuming without deciding that a magistrate judge must have a basis for concluding that Rule 41(b)(3)'s venue requirement is satisfied before issuing a 41(b)(3) warrant, we conclude that the magistrate judge had such a basis here. Thus, the extraterritorial

search warrants for Jumaev's home, cellular phone, and laptop computer did not violate Rule 41.

V

For the foregoing reasons, we AFFIRM Jumaev's convictions and the district court's judgment.

18-1296, United States v. Jumaev
LUCERO, Senior Judge, dissenting.

For the reasons stated in my dissent in the companion case of co-defendant Jamshid Muhtorov, I respectfully dissent from the decision not to vacate Bakhtiyor Jumaev's conviction for want of a speedy trial.[1] See United States v. Muhtorov, No. 18-1366, slip op. at 1-24 (10th Cir. Dec. 8, 2021) (Lucero, Senior J., dissenting) (hereinafter "Muhtorov dissent"). I incorporate that dissent in its entirety herein. The excessive governmental delay in responding to timely discovery requests made by defendant Bakhtiyor Jumaev is even more compelling because the government waited to provide discovery information long in its possession until the eve of Jumaev's first scheduled trial. This caused an additional delay of one year. Such delay is attributable to the government under the Barker factors discussed in my earlier dissent. Barker v. Wingo, 407 U.S. 514 (1972). As in that dissent, the government has failed to show that the delays resulting from its discretionary decisions were necessary. See United States v. Seltzer, 595 F.3d 1170, 1178 (10th Cir. 2010).

I

Jumaev was indicted for conspiring with Muhtorov to provide material support to a designated terrorist organization and for knowingly providing such support. From their indictments in 2012 to the severing of their cases on November 29, 2016, Jumaev and

[1] Jumaev also contends that the district court abused its discretion by declining to severely sanction the government for its discovery violations and that the extraterritorial search warrants issued in his case violated Rule 41. (Op. at 2.) Because I would vacate his conviction on the basis of a speedy trial violation, I do not address these contentions.

Muhtorov were fused together as defendants in a joint trial. As a result, the government's decisions on § 702 notice, discovery production, and CIPA procedures directly affected both defendants, because absent severance, one could not go to trial without the other. Adding to their conjoined destiny, the evidence against Jumaev was directly derived from the traditional FISA surveillance of Muhtorov, itself a product of the § 702 surveillance of Muhtorov, making the legality of its collection a relevant issue in Jumaev's case.

The unwarranted delays caused by the government that are described in the Muhtorov dissent—the delay in the provision of the § 702 notice, the delay in meaningful discovery production, and the failure to begin the CIPA § 4 evaluation until after November 19, 2015—are present in full measure in Jumaev's case, as are the delays resulting from the government's decisions not to clear counsel, its failure to adequately resource translation services, its seeking of a third superseding indictment in May 2016, and its chosen CIPA procedures. I weigh the government's conduct heavily against it under the second factor of Barker to conclude that Muhtorov's right to a speedy trial was violated.[2] See Muhtorov dissent, at 4-23. Perforce, the same conclusion that I drew with

[2] For Jumaev, my colleagues determine that "the first, second, and fourth Barker factors carry essentially the same weights here that they carry in Muhtorov." (Op. at 38.) In other words, for them, the length of the delay weighs heavily in favor of a constitutional violation and the prejudice arising from this delay weighs in Jumaev's favor, but the decisive second factor—the reason for the delay—weighs against him. (Op. at 38-39.) As I did in Muhtorov, I would also weigh the prejudice factor more heavily in Jumaev's favor. In evaluating this factor we must "recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." Doggett v. United States, 505 U.S. 647, 655 (1992). This presumption of prejudice "cannot alone carry a Sixth Amendment claim without regard to the other Barker criteria, [but] it is part of the mix of relevant facts, and its

respect to Muhtorov is applicable here. Further, my colleagues in the majority conducted a rigid and formalistic Barker analysis and fault Jumaev for not filing a pro se speedy trial motion separate and apart from those filed by his counsel.

II

Jumaev was incarcerated for six years as he awaited trial, hostage to the same series of inexplicable—or at least unexplained—government decisions I described in depth in the Muhtorov dissent. See id. Exacerbating the unwarranted delay described in the Muhtorov dissent, eleventh-hour discovery production by the government caused an additional year's delay in Jumaev's trial from March 2017 to March 2018[3] while he "languish[ed] in confinement under unresolved charges." Betterman v. Montana, 136 S. Ct. 1609, 1614 (2016). The context of Jumaev's motion for a speedy trial is telling. In late February 2017, just two weeks before the scheduled trial date and after years of futilely filing motions to compel discovery, Jumaev sought dismissal of the charges because of the government's belated disclosure of a substantial portion of Brady and Rule 41 material that included 29 trial exhibits it produced for the first time shortly before trial.

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importance increases with the length of delay." Id. at 656 (citation omitted and emphasis added).

[3] Although the initial continuance granted after the district court denied Jumaev's requested remedy of dismissal was for ten months until January 2018, the trial was delayed for an additional two months until March 2018 due to the district court judge's illness. But for the government-caused delay, the trial would have begun in March 2017, therefore I would attribute the entire additional year's delay to the government. See United States v. Carini, 562 F.2d 144, 149 (2d Cir. 1977) (illnesses of judges are institutional delays properly chargeable to the government). As the record makes clear, replacement of the trial judge during his treatment would have delayed the trial longer as the available replacement would have required time to become familiar with the case.

This late production of evidence—evidence that had been in the custody of the government since the time of Jumaev's arrest or before—made it impossible for his counsel to be prepared for the trial that was scheduled to begin on March 13, 2017. For Jumaev, this eve-of-trial production of constitutionally-required evidence necessitated dismissal for violation of a speedy trial because, as his counsel argued, counsel would be forced to provide ineffective assistance if the trial proceeded. His first speedy trial motion was filed to oppose the unwarranted additional delay staring Jumaev in the face—delay directly caused by the unexplained late production of evidence in the possession of the government for more than five years.[4] Jumaev, like Muhtorov, was not required to trade one constitutional right for another; the Constitution protects both. Muhtorov dissent, at 17-18. Because the governmental delays described in the Muhtorov dissent were exacerbated for Jumaev, whose scheduled trial was continued as a direct result of the government's eleventh-hour production of discovery material it long had in its possession, the second Barker factor weighs even more heavily in Jumaev's favor than it did for Muhtorov.

[4] Jumaev's March 2017 motion was filed only after his speedy trial motion was denied, a decision which the district court recognized forced his counsel to seek a continuance or go to trial and provide ineffective assistance. For Jumaev, the March 2017 speedy trial motion was filed to avoid the additional delay necessitated by the government's late production of discovery, including disclosure of trial exhibits on the eve of trial; it was not filed "after the delay has already occurred." (Op. at 26 (quotation omitted).) The record is clear that absent the government's late disclosures, Jumaev was ready to proceed to trial in March 2017. Late production of constitutionally required discovery by the government continued until the eve of the March 2018 trial. (See Op. at 14 n.6.) Counsel for Jumaev argued below that these late disclosures included unclassified evidence long in the possession of the government that was not required to be analyzed under CIPA.

III

The third Barker factor—assertion of the speedy trial right—similarly supports Jumaev's claim. The majority comes to the opposite conclusion because (1) Jumaev neither augmented his counseled motions with pro se filings nor (2) filed his speedy trial motions as early as did Muhtorov. The Barker analysis conducted by my colleagues is not faithful to the requirements of that case. Barker requires that its balancing test weigh "the conduct of both the prosecution and the defendant." 407 U.S. at 530. Rather than carrying out this ad hoc and contextual analysis, the majority instead conducts a highly rigid and formulistic evaluation of whether Jumaev asserted his right to a speedy trial. See id. at 522 ("[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case . . . .").

My research fails to disclose any cases or authorities that hold that a counseled defendant must file pro se motions for denial of a speedy trial separate and apart from those of his counsel. My colleagues fail to enlighten me further on that point. To the extent that the majority creates a new precedent for this circuit compelling defendants to file pro se motions separate and apart from those of their counsel in order to assert speedy trial rights or implies that such filings give greater weight to an assertion of the right to a speedy trial, I am compelled to separate myself from this jurisprudentially problematic proposition.

Although Barker's third factor requires us to consider the two additional pro se motions for a speedy trial filed by Muhtorov,[5] it is obvious that we cannot require counseled defendants to file pro se motions in order for Barker's assertion-of-the-right factor to weigh in their favor. To say it another way, although we must consider Muhtorov's pro se motions when evaluating whether he asserted his speedy trial right, we cannot penalize Jumaev in comparison.[6] My colleagues so penalize Jumaev by faulting him for not augmenting the motions filed by his counsel with pro se motions. (Op. at 19-20.) The majority appears to tip this factor in favor of Muhtorov because his two pro se motions expressed frustration with the delay. Yet Jumaev did not accede happily to the delays in bringing his case to trial. The two speedy trial motions filed by his counsel, which exhaustively detail his persistent and diligent efforts to access the discovery to which he was constitutionally entitled and to move the case to trial, are equally expressive of his frustration, and additional pro se motions were not necessary.

Although my colleagues acknowledge that Jumaev "objected to the slow pace of the government's discovery efforts throughout the proceedings," (Op. at 22), they give

[5] Appellate review of Muhtorov's pro se motions is problematic because the motions were, permissibly, not accepted by the district court. See generally United States v. Dunbar, 718 F.3d 1268, 1278 (10th Cir. 2013) ("Defendant ha[s] no right to submit motions other than through his attorney."); United States v. Bennett, 539 F.2d 45, 49 (10th Cir. 1976) ("[P]ermission for [hybrid representation is] recognized as being discretionary with the trial court.").

[6] Both Muhtorov and Jumaev filed two counseled motions for a speedy trial violation; the sole difference in the number of speedy trial motions are the two pro se motions filed by Muhtorov. I conclude that both Muhtorov and Jumaev sufficiently asserted their right to a speedy trial, and disagree that this factor weighs against Jumaev.

him little credit for these efforts, and instead focus myopically on measuring the time between the filing and the scheduled trial dates.[7] This type of formulistic, truncated

[7] My colleagues in the majority fault Jumaev for joining Muhtorov's motion to suppress § 702-derived evidence. They assert that Jumaev "knew that his chances of prevailing on the motion were close to zero," in part because the "government informed Jumaev two months before he joined Muhtorov's motion that he was not an 'aggrieved person' as to the Section 702 acquisitions at issue," and therefore, Jumaev's decision to join the motion demonstrates that he was not actually eager to go to trial. (Op. at 22-23.) Problems abound with this analysis. First, the government's assertion that Jumaev was not an "aggrieved person" entitled to notice is an unsettled question of statutory interpretation that, although not presently contested in this appeal, was open to good faith challenge by Jumaev below. Second, contrary to the majority's assertion, the belated government assurances that Jumaev was not an "aggrieved person" were far from unequivocal, requiring several defense motions to gain a clear articulation of the government's position. Third, in accordance with the government's decision to try them jointly, Jumaev and Muhtorov remained as co-defendants in a single trial until the November 2016 severance. Therefore, Jumaev's decision to join Muhtorov's second suppression motion in 2014 did not evidence Jumaev's lack of eagerness to go to trial because, regardless of whether he joined the motion, he could not progress toward trial until the motion was decided in November 2015, which was more than a year before severance. Finally, as recognized by the district court, the government's interpretation that Jumaev was not an "aggrieved person" under the statute does not resolve the constitutional derivative evidence inquiry or his facial challenge to the constitutionality of § 702 surveillance.

The majority asserts that "the district court corroborated this claim [that Jumaev's chances of success on the motion to suppress were close to zero] . . . at a hearing that took place when the joint motion was pending." (Op. at 22.) In doing so, the majority once again ignores context—at this June 2015 hearing, the district court told the parties "what he was going to do, and what it means" in regard to the defendants' motion to suppress § 702 evidence. Far from evidencing a foregone conclusion that Jumaev's "chances of prevailing on the motion were close to zero," id., it instead was a preliminary ruling on that very question. Given that the evidence used against Jumaev was derived from § 702 surveillance, albeit one step removed from that of Muhtorov, Jumaev's decision to join in Muhtorov's motion to suppress evidence derived from § 702 surveillance was far from a bad faith attempt to delay the trial. To the extent that additional delay resulted from this decision, which it did not given that the cases were not severed until a year after the motion to suppress was decided, it should not be weighed heavily against Jumaev.

analysis was rejected by the Supreme Court as "insensitive to a right which we have deemed fundamental." Barker, 407 U.S. at 529-30. Barker requires "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Id. at 530. Our analysis must decide "whether the defendant's behavior during the course of litigation evidences a desire to go to trial with dispatch." United States v. Batie, 433 F.3d 1287, 1291 (10th Cir. 2006). When I weigh the conduct of both parties as required by Barker, I cannot conclude that Jumaev did not sufficiently assert his right to a speedy trial.

In the initial years of Jumaev's incarceration, the government repeatedly assured him that discovery would be forthcoming. In May 2012, it asserted that discovery would be provided in June 2012. When that did not ensue, in October 2012, the government asserted that the required discovery (which included the requested defendants' statements and Brady material) would be provided by June 2013. Very little was provided, with no discovery provided between September 2014 and April 2015. In March 2016, the government resisted defense efforts to compel discovery and a trial date. The defendants

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My colleagues contend that Jumaev acknowledges that "the case against [him] had virtually nothing to do with FISA," cherry picking this purported admission from his reply brief. (Op. at 23 (citing Reply Br. at 13).) To the contrary, in his reply Jumaev was pointing out the contradiction in the government's simultaneous assertion that FISA and CIPA did not apply to him and its insistence that FISA and CIPA still limited its ability to comply with its discovery obligations. My colleagues further question my failure to explain why Jumaev could not have moved for severance earlier. (Op. at 23 n.9.) The more appropriate question is how he was to assess this decision without notice of the involvement of § 702 evidence in the case against him for more than 23 months, or any meaningful discovery until September 2016. His inability to evaluate this decision was caused by the government's obfuscation of the source of its evidence against him until after October 2013.

requested a discovery cut-off of July 1, 2016 to facilitate progress to trial, but the government pushed the date back to September 1, 2016. The filing of the Third Superseding Indictment by the government in May 2016 "mandated" an additional trial delay. Finally, as discussed above, belated discovery following the court-imposed discovery cut-off resulted in an additional year's delay in trial. Unlike Batie, Jumaev did not seek continuances. He waited on the government to fulfill its responsibilities, diligently and persistently filing discovery motions that were not met in a timely fashion. If this is the conduct I am weighing, the balance easily comes down on Jumaev's side of the scale.

The majority also ignores that, after severance, Jumaev was required to proceed to trial first, before Muhtorov. Simply comparing the time between filing of their first counseled speedy trial motions and Muhtorov and Jumaev's respective trial dates ignores the shorter practical window between the November 29, 2016 severance and the first scheduled trial date on March 13, 2017 available for Jumaev to assert his speedy trial right. It similarly ignores that Jumaev's first motion to dismiss on speedy trial grounds was not filed to take advantage of delay that had already occurred. (Op. at 25-27.) Although significant, and in my mind unexplained, delay had already occurred, this motion was instead filed because the government's continued discovery delays and late production had necessitated another year's delay in addition to the years-long delay already caused by the government. Jumaev's second motion to dismiss for a speedy trial violation highlighted the late production of required discovery that continued throughout this additional year of delay. The majority agrees that "discovery was not completed

until February 2018, making an earlier trial impossible." (Op. at 15 n.6.) Such continued late production of constitutionally required discovery raises significant questions about the readiness of the government to have gone to trial in March 2017, and failure to meet its discovery obligations does not show "necessity" for the delay under Seltzer.

My colleagues view the motions filed by Jumaev as not timely. (Op. at 19.) But Jumaev had been eager to proceed to trial in March 2017 before the government's eleventh-hour disclosure that required the additional delay in trial. Far from being untimely, Jumaev's motions represent the culmination of years of conduct seeking to proceed to trial. When I assess Jumaev's conduct during the course of the litigation, his persistent motions seeking the disclosure he had requested and was constitutionally due does not show a defendant "who moves for dismissal on speedy trial grounds when his other conduct indicates a contrary desire." United States v. Tranakos, 911 F.2d 1422, 1429 (10th Cir. 1990). As a result, I would weigh Barker's third assertion-of-the-right factor heavily in Jumaev's favor.

IV

For the reasons described herein and in the Muhtorov dissent, I weigh all four Barker factors heavily in favor of Jumaev and conclude his conviction must be vacated for want of a speedy trial. Any other result would "not [be] consistent with the interests of defendants, society, or the Constitution." Barker, 407 U.S. at 528.

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Jane K. Castro
Chief Deputy Clerk

December 08, 2021

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RE: 18-1296, United States v. Jumaev
Dist/Ag docket: 1:12-CR-00033-JLK-2

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Elizabeth Goitein
J. Bishop Grewell
James C. Murphy

CMW/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 12-cr-00033-JLK

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. BAKHTIYOR JUMAEV,

Defendant.

MEMORANDUM OPINION AND ORDER ON SENTENCING

Kane, J.

After his co-defendant Jamshid Muhtorov informed him that the Islamic Jihad Union (IJU) was in need of financial support, Defendant Bakhtiyor Jumaev mailed Mr. Muhtorov $300. Mr. Jumaev wrote only a single check, and the funds never reached the IJU or any other foreign terrorist organization. Mr. Jumaev had no specific plot or plan and did not intend to further any via his contribution. The idea to aid the terrorist organization was proposed and facilitated entirely by Mr. Muhtorov. Indeed, Mr. Jumaev had no direct contact with the members of any terrorist organization. And, significantly, he never committed any act of violence, nor did he advocate for any particular violent act.

Mr. Jumaev now comes before me for sentencing after having been found guilty by a jury of two counts in violation of 18 U.S.C. § 2339B, namely (1) conspiring and (2) attempting to provide material support in the form of $300 to the IJU, a designated foreign terrorist organization. Although his actions certainly are sufficient for the jury to have found him guilty of these two very serious crimes, the above summary illustrates how his guilt rests on far less

culpable conduct than that of all other defendants of which I have been made aware who have been convicted under the same statute.

I.

BACKGROUND

Mr. Jumaev is a 51-year-old Muslim immigrant. He was born in 1966, in Samarkand, Uzbekistan. At that time, Uzbekistan was part of the Soviet Union and subject to repressive Soviet policies that basically outlawed religion, including Islam, the majority religion in Uzbekistan. In that environment, Mr. Jumaev completed grade school, obtained vocational training in cooking and trading in goods, served as a cook in Ukraine in the Soviet Army, and worked in his relatives' tombstone business. He also married and started a family.

Then, in 1991, Uzbekistan became a sovereign state with Islam Karimov as its President. During Karimov's 25-year reign, repressive policies and government controls took on new forms. Individuals were permitted to practice Islam but only as the regime saw fit. Religious figures were persecuted by the government for not adhering to its specifications. Access to information and freedom of the press were greatly restricted as well. In fact, Freedom House, a nonpartisan think tank in Washington, D.C., consistently gave Uzbekistan some of the lowest possible ratings for the existence of democratic freedoms. Trial Tr. at 1007:2-25; ECF No. 1832.

In the mid- to late-1990s, the economy in Uzbekistan suffered, and a large segment of the population began to migrate to other places in search of employment. Mr. Jumaev likewise suffered from the economic situation and ultimately left his family in Uzbekistan to work in Israel for two and a half years to support them. After he returned to Uzbekistan, in 1999, Mr. Jumaev was found by the Uzbek security service, known as the SNB, to be in possession of

cassette tapes of religious leaders who were disfavored by the government. As a result, he was jailed, interrogated, and beaten.

These circumstances prompted Mr. Jumaev to travel to the United States the following year on a temporary visa. He first came to New York City, but settled in Lehighton, Pennsylvania, and then Philadelphia. Soon after arriving, he was struck by a car when riding a bicycle and was severely injured. He could not work, depended on others for support, and was unable to send money to his family in Uzbekistan during his year-long convalescence. Over the following decade, Mr. Jumaev found steady employment as a gas station attendant and a custodian, living a meager lifestyle so that he could consistently send money to his wife and three sons. He frequently worked night shifts and traveled hours to and from his jobs. Still, he talked with his family on almost a daily basis until his arrest in this case.

Mr. Jumaev met his codefendant Jamshid Muhtorov in December 2009 when one of his roommates arranged for Mr. Muhtorov to stay in their apartment for a month while Mr. Muhtorov obtained his commercial driver‘s license. Mr. Muhtorov was also from Uzbekistan, and he and his family had moved as refugees to Denver in 2006. He had similarly experienced brutality at the hands of the Uzbek authorities and was exploring his Muslim faith in the United States.

Over the months that passed, Mr. Jumaev and Mr. Muhtorov developed a long-distance friendship in which they discussed a wide variety of topics, such as their families, Islam, current events, and the immigrant experience in the U.S. They also conversed about the Islamic Jihad Union and the Islamic Movement of Uzbekistan (IMU), the history of the two foreign terrorist organizations, and related propaganda videos they found online. In speaking about these organizations, Mr. Jumaev and Mr. Muhtorov often used ambiguous code words, like wedding, resort, Switzerland, alpinists, and sportsmen. It is clear from their communications, though, that

they both sympathized with the principal goal of the two organizations—to overthrow the regime of Islam Karimov.

According to Dr. Guido Steinberg, a renowned expert in terrorism, the Islamic Jihad Union spun off from its older sister the Islamic Movement of Uzbekistan around 2001 or 2002 to focus their efforts globally and not just on Uzbekistan. In its heyday, from 2006 to 2009, the IJU had at most 100 to 200 members, but many considered it to be mostly obsolete by 2009 as its numbers dwindled to around a dozen. The organization has been affiliated with al-Qaeda and the Afghan Taliban and has fought U.S. and coalition forces in Afghanistan.

In February 2010, Mr. Jumaev was detained by U.S. Immigration and Customs Enforcement for overstaying his visa, and his bond was set at $3,000. In order to be released and to return to work, Mr. Jumaev borrowed various amounts from friends and acquaintances, including $500 from Mr. Muhtorov.

Mr. Jumaev struggled to manage his and his family's debts after his arrest, so he did not pay Mr. Muhtorov back for many months. Mr. Muhtorov routinely hinted to Mr. Jumaev that he was having financial difficulties. And, eventually, in March 2011, Mr. Muhtorov relayed that the IJU, with which he had been communicating over the internet, was in dire need of financial support. Gov't Trial Ex. 125A at 2. Mr. Jumaev gathered $300, and used a friend's check to send the money to Mr. Muhtorov. A few days later, Mr. Jumaev asked Mr. Muhtorov if he had received the ~~"~~wedding gift." Gov't Trial Ex. 128A at 1.[1] The check was later delivered and used by Mr. Muhtorov's wife for their family's expenses.

[1]The conversation went as follows:

BJ: . . . has the wedding gift arrived? The wedding gift?
JM: No, it hasn't yet.
BJ: It still hasn't made it there?
JM: . . . No.
BJ: Glory be to Allah! But I've sent it out last week!

Mr. Muhtorov bragged to Mr. Jumaev and others for months about his scheme to go to Turkey to study and then to travel to ~~–t~~he wedding." Mr. Jumaev encouraged Mr. Muhtorov and even stated that he was envious. *See* Gov't Ex. 131A at 3. In January 2012, Mr. Muhtorov put his plans into action. He purchased a one-way ticket to Turkey and discussed with his wife the possibility of him not returning. Before boarding the plane, though, Mr. Muhtorov was arrested. He was carrying $2,865 in cash, two new iPhones, and a new iPad.

After Mr. Muhtorov's arrest, FBI agents interviewed Mr. Jumaev twice at his house. Mr. Jumaev was not fully forthright with the agents during those interviews, specifically as to his use of code words with Mr. Muhtorov, the full scope of their discussions, and his internet activity. On March 15, 2012, Mr. Jumaev was arrested and was interrogated by FBI agents for three and a half hours. He has been in detention since that date.

Regrettably, the complexities of the evidence and the nature of the charges delayed the commencement of Mr. Jumaev's trial until March 12, 2018. The trial was extensive, lasting seven weeks and involving hundreds of exhibits and tens of witnesses. The resources expended—to bring foreign witnesses and experts here, to depose witnesses abroad, to ensure accurate translations, to sift through mountains of evidence, and to exhaustively litigate the relevant issues—were great.

But Mr. Jumaev was entitled to a fair trial and put forward the type of legitimate defenses that necessitate a trial. He argued that he was only repaying his debt to Mr. Muhtorov, a duty that, in his culture, was incredibly important. He claimed he was oblique about the debt

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JM: We haven't checked the mail yet. We'll check the mail. [To someone in the back] Have you, by any chance, checked the mail recently? A check should be coming—
BJ: . . . God willing, it will. Hmm…
JM: It hasn't come yet. It will, God willing…
Gov't Trial Ex. 128A at 1.

repayment because, according to Uzbek custom, it would have been inappropriate and even offensive to directly discuss debt repayment. Additionally, he presented Mr. Muhtorov as an exaggerator who he thought was full of hot air. And Mr. Jumaev sought to demonstrate that any admissions he made during his post-arrest interrogation were involuntary, equivocal, and inconsistent.

The jury deliberated over 15 hours and recessed for a weekend before returning the verdict. The jurors undoubtedly took their responsibilities seriously and returned the verdict only after careful consideration of the evidence presented and the law given.

Post-verdict, I have received and reviewed the initial and final Presentence Investigation Reports (ECF Nos. 1885 & 1915), Mr. Jumaev's Objections (ECF No. 1910) and the Addendum (ECF No. 1916) to the Presentence Report, the government's Amended Sentencing Statement (ECF No. 1884), Mr. Jumaev's Sentencing Statement and Motion for a Variant Sentence (ECF No. 1908), Mr. Jumaev's Supplement thereto (ECF No. 1917), and Mr. Muhtorov's Memorandum Regarding Sentencing Guidelines (ECF No. 1918). Mr. Jumaev additionally submitted a letter he authored to the Court (ECF No. 1919) in which he stands on his innocence and iterates that he has been denied his right to a speedy trial and other arguments as to why he believes he was denied a fair trial. I have considered all of these submissions, including the contents of Mr. Jumaev's letter, in reaching the conclusions detailed below.

II.

THE U.S. SENTENCING GUIDELINES RANGE[2]

I have previously notified the parties that I find the U.S. Sentencing Guidelines to be illogical and inadequate for sentencing Mr. Jumaev. I elaborate on that conclusion further below. But, first, I calculate the applicable Guidelines range as required. *See Gall v. United States*, 552 U.S. 38, 49 (2007). If the following calculation is in error, however, it has no impact on the eventual sentence. *See United States v. Sabillon-Umana*, 772 F.3d 1328, 1334 (10th Cir. 2014) (acknowledging that remanding for resentencing does not help the defendant or enhance the integrity of judicial proceedings when a district judge analyzes a case under alternative theories and indicates he or she would arrive at the same sentencing conclusion either way); *United States v. Gieswein*, 887 F.3d 1054, 1062-63 (10th Cir. 2018).

A. Calculation of the Guidelines Range

U.S. Sentencing Guideline § 2M5.3(a) sets the Base Level for a conviction under 18 U.S.C. § 2339B at 26. Mr. Jumaev's two counts are grouped together under the Sentencing Guidelines because they involve a common criminal objective and constitute part of a common scheme or plan. *See* U.S.S.G. § 3D1.2.[3] Mr. Jumaev has no known criminal history, making his Criminal History Category I. So, without any adjustments or departures, Mr. Jumaev's Guidelines range would be 63 to 78 months' imprisonment.

[2]Apart from these rulings on the applicable Sentencing Guidelines provisions, no finding is necessary concerning Mr. Jumaev's remaining objections or clarifications to the Presentence Investigation Report because the controverted matters have either been addressed through revisions to the Report or will not be taken into account in imposing the sentence. The factual statements in the Report are otherwise adopted.

[3]"All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule: . . . (b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2.

The Guideline for convictions under 18 U.S.C. § 2339B, however, provides for a two level increase "[i]f 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 . . . ." U.S.S.G. § 2M5.3(b)(1).

The government claims that Mr. Jumaev had a reason to believe that the funds he provided would be used to obtain dangerous weapons or firearms or to commit or assist in the commission of a violent act. As support, it relies on Mr. Jumaev's viewing of IJU and IMU terrorist propaganda videos, his discussions with Mr. Muhtorov on their duty to participate in the "wedding," and his comments on YouTube videos in support of violent jihad. Mr. Jumaev was familiar with the IJU's purpose and its activities and readily admitted to knowing that it was a foreign terrorist organization. Thus, he necessarily had a reason to believe, at a minimum, that any funds provided to the IJU would have been used to commit or assist in the commission of a violent act. I find the two-level increase under § 2M5.3(b) is applicable. That finding bumps Mr. Jumaev's offense level up to 28, resulting in a range of imprisonment of 78 to 97 months.

That is not the end of the story, though. For crimes related to terrorism, I must evaluate the application of the so-called Terrorism Enhancement in U.S.S.G. § 3A1.4. And, here, I must also address the government's suggestion that I apply the Obstruction of Justice Enhancement in § 3C1.1 as well as Mr. Jumaev's entreaty that I apply the mitigating role adjustment in § 3B1.2 and the criminal history and aberrant behavior departures in §§ 4A1.3 and 5K2.20, respectively.

Adjustments

1. § 3A1.4: Terrorism Enhancement

The Terrorism Enhancement, when applied, ~~"t~~akes a wrecking ball" to the initial Guidelines range. George D. Brown, *Punishing Terrorists: Congress, the Sentencing Commission, the Guidelines, and the Courts*, 23 Cornell J.L. & Pub. Pol'y 517, 520 (2014). It functions by both increasing the offense level at least 12 levels and elevating the defendant to the highest Criminal History Category, irrespective of his or her actual criminal history. In full, the Terrorism Enhancement states:

> (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.

U.S.S.G. § 3A1.4. The ~~"f~~ederal crime of terrorism" the Enhancement references is that defined in 18 U.S.C. § 2332b(g)(5): ~~"[~~A]n offense that—(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—[a list of enumerated offenses, including] (i) section . . . 2339B (relating to providing material support to terrorist organizations) . . . ." If the Enhancement were to apply to Mr. Jumaev's offenses, his sentencing range would skyrocket to 360 months' imprisonment.

The government's argument regarding application of the Terrorism Enhancement is disappointing. For such a ~~"d~~raconian" enhancement,[4] I would expect the government to muster more than a single paragraph justifying its application. The government's entire argument is:

> The record is replete with evidence that JUMAEV and MUHTOROV intended to retaliate against the actions of both the Uzbek and United States Government.

[4] ~~"U~~.S.S.G. [§] 3A1.4 is draconian." James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 Law & Ineq. 51, 54 (2010).

> Further, the offense conduct here was plainly one that ―involved, or was intended to promote," the crimes listed above. U.S.S.G. § 3A1.4(a). Indeed, violations of 18 U.S.C. § 2339B, the counts of conviction, are specifically listed in the definition of a ―Federal crime of terrorism." JUMAEV explained his anger at both the Uzbek and U.S. government to agents during his interview on March 15, 2012. Accordingly, the defendants' offense level [sic] should be increased by 12 levels.

Gov't's Am. Sentencing Statement at 10-11, ECF NO. 1884.[5] Mr. Jumaev, in turn, spends seven pages presenting the specific standard for application of the enhancement and demonstrating that the record does not fulfill that standard. If I were to base my ruling on the efforts of the parties alone, I would find the enhancement inapplicable. I do not, however, fall into this temptation.

I base my ruling instead on the standard taken from *United States v. Awan*, 607 F.3d 306, 313 (2d Cir. 2010). There, the Second Circuit explained that the disjunctive phrase from U.S.S.G. § 3A1.4—if the offense involved, OR was intended to promote, a federal crime of terrorism—―makes clear that the predicate offense must either (1) _involve' a federal crime of terrorism or (2) be _intended to promote' a federal crime of terrorism, and that each clause has a separate meaning." *Awan*, 607 F.3d at 313. ―A defendant's offense _involves' a federal crime of terrorism when his offense includes such a crime, *i.e.*, the defendant committed, attempted, or conspired to commit a federal crime of terrorism as defined in 18 U.S.C. § 2332b(g)(5), or his relevant conduct includes such a crime." *Id.* at 313-14. Since Mr. Jumaev's convictions are under 18 U.S.C. § 2339B, a crime enumerated in § 2332b(g)(5)(B), I must only find, under that prong, that Mr. Jumaev had the ―specific intent" to commit offenses that were ―calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." *See id.* at 316-17. ―_Calculation' is concerned with the object that the actor seeks to achieve through planning or contrivance . . . Section 2332b(g)(5)(A) does not

[5]Persisting with its trying habits, the government fails to tailor its filing and argument to Mr. Jumaev.

focus on the defendant but on his ‗offense,' asking whether it was calculated, *i.e.,*, planned—for whatever reason or motive—to achieve the stated object." *Id.* at 317.

Alternatively, "[t]he ‗intended to promote' prong applies where the defendant's offense is intended to encourage, further, or bring about a federal crime of terrorism, even though the defendant's own crime of conviction or relevant conduct may not include a federal crime of terrorism." *Id.* at 314. So, even if Mr. Jumaev's offenses were not "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," the terrorism enhancement may apply if, with his offenses, he intended to promote another's commission of a crime in § 2332b(g)(5)(B) that was. *See id.* at 314-15. "[A]n offense is ‗intended to promote' a federal crime of terrorism when the offense is intended to help bring about, encourage, or contribute to" such a crime. *Id.* at 314.

Under both the "involves" or the "intended to promote prong," then, the Terrorism Enhancement only applies if I find that Mr. Jumaev had some intent that was not required for the jury to find him guilty. *See* Jury Instructions at 25, 29, ECF No. 1794-2 (requiring only knowledge for convictions under 18 U.S.C. § 2339B). I struggle to find that Mr. Jumaev had either the specific intent to commit crimes that were calculated to influence, affect, or retaliate against a government or the intent to promote another's federal crime of terrorism when the jury's conviction of him could rest only on his knowledge. Mr. Jumaev convincingly argues that he both could have intended to repay his debt to Mr. Muhtorov while knowing that the funds would go to support a foreign terrorist organization. I have no reason to believe that Mr. Jumaev would have ever sent money to the IJU if he had not been arrested by ICE and been loaned money by Mr. Muhtorov. Mr. Jumaev's offenses are the result of a convergence of factors that I detail throughout this Order, the most significant of which is that he owed a debt. The facts of this case are unique for that reason.

I cannot and do not find, under the "involves" prong, that Mr. Jumaev's offenses were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Although Mr. Jumaev may have wished for the overthrow of Uzbek President Islam Karimov or perhaps even for the U.S. government to alter its foreign policy, his offenses were not calculated to achieve that object. *See Awan*, 607 F.3d at 314. My best justification for that determination is common sense. Mr. Jumaev gave only $300 to a person who himself was short on cash and did not even know how to get the money to the intended organization. If Mr. Jumaev's offenses were truly calculated towards a political objective, Mr. Jumaev would have done more, e.g., contributed more money on more occasions via a more reliable conduit to a more robust organization. Simply put, his offenses were not calculated at all.

To fall within the "intended to promote" prong, Mr. Jumaev must have committed his offenses with the intent to help bring about, encourage, or contribute to another person's commission of a federal crime of terrorism.[6] Again, I am unable to find that Mr. Jumaev *intended* anything more than to repay his debt. The record does contain evidence that Mr. Jumaev would have approved of the commission of certain federal crimes of terrorism. But, as Mr. Jumaev asserts, there is no evidence in the record that he knew about, and certainly not that he intended to promote, any plan by the IJU to commit a politically-motivated crime of terrorism. This is underscored by the fact that Mr. Jumaev never had any direct contact with the IJU and that the organization was nearly defunct at that time. Even if it were sufficient for Mr. Jumaev to have intended generally to bring about, encourage, or contribute to federal crimes of terrorism, the government has not conclusively established that he sent Mr. Muhtorov the $300

[6]There is an argument that Mr. Jumaev's offenses intended to promote Mr. Muhtorov's commission of federal crimes of terrorism. It is not advanced by the government and I decline to make it on its behalf.

check with that intent. I, therefore, find that the Terrorism Enhancement is inapplicable to Mr. Jumaev's offenses.[7]

2. § 3C1.1: Obstruction of Justice Enhancement

The government additionally contends that the two-level Obstruction of Justice Enhancement appears to apply because Mr. Jumaev committed perjury in testifying at trial and provided materially false information to the Court. The enhancement only applies when:

> (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense . . . .

U.S.S.G. § 3C1.1. Application Note 4 to the Guideline provides as examples of qualifying conduct: "committing, suborning, or attempting to suborn perjury, . . . if such perjury pertains to conduct that forms the basis of the offense of conviction" and "providing materially false information to a judge or magistrate judge."

In determining what constitutes perjury for the purposes of the Obstruction of Justice enhancement, I rely on the federal criminal perjury statute, 18 U.S.C. § 1621. "A witness testifying under oath or affirmation violates this statute if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993). "[N]ot every accused who testifies at trial and is convicted will incur an enhanced sentence under § 3C1.1 for committing perjury . . . . [The accused's] testimony may be truthful, but the jury may

[7]This finding is inconsequential because, as I explain below, I would depart under U.S.S.G. §§ 4A1.3 and 5K2.20 to reduce the impact of the Terrorism Enhancement and would still grant a variance resulting in the same sentence.

nonetheless find the testimony insufficient to excuse criminal liability or to prove lack of intent." *Id.* at 95.

I will not speculate from the jury's verdict what testimony it rejected and what it accepted, and I cannot conclude, as the government does, that its conviction of Mr. Jumaev establishes that his testimony was false. The government provides as examples of his "lies" his testimony "that his $300 payment to MUHTOROV was repayment of a debt and not intended for the IJU, that he thought MUHTOROV was joking when he told the defendant about his contact with the IJU, and that he did not [believe][8] MUHTOROV intended to travel in order to join the IJU." Gov't Am. Sentencing Statement at 11. But the jury could have convicted Mr. Jumaev even while finding all of those statements to be true. Perhaps the jurors believed Mr. Jumaev's testimony that Mr. Muhtorov was an exaggerator and braggart but thought it was insufficient to counter his knowledge. I will not presume.

In over forty years of judging I have never imposed a harsher sentence because a defendant asserted his right to trial by jury or to testify at that trial. I am not about to do so now or in the future. I consider any trial "tax" or penalty to be contrary to the ages-long values and standards of our legal system.[9] It is more closely associated with the jurisprudence of Russia, as described by Dostoyevsky, than our own tradition as described by Benjamin Cardozo. In that vein, application of the Obstruction of Justice Enhancement here would be a violation of the concepts of justice and of ordered liberty.

[8]The government recounts that Mr. Jumaev testified that he did not "know" Mr. Muhtorov intended to travel in order to join the IJU. A more accurate summary of his testimony is that he did not believe Mr. Muhtorov was traveling for that purpose because he thought he was just bragging. *See, e.g.,* Trial Tr. at 1357:2-16, ECF No. 1843.

[9]Though not directly relevant to this case, the trial tax or trial penalty as expressed and encouraged in the Sentencing Guidelines is yet another reason to reject them.

3. § 3B1.2: Mitigating Role Adjustment

Mr. Jumaev first argues that his offense level should be decreased two to four levels under U.S.S.G. § 3B1.2(a) and (b) because his role in the offense was appreciably less than Mr. Muhtorov's. U.S.S.G. § 3B1.2 instructs:

> Based on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by **4** levels. (b) If the defendant was a minor participant in any criminal activity, decrease by **2** levels. In cases falling between (a) and (b), decrease by **3** levels.

U.S.S.G. § 3B1.2. While Mr. Jumaev's culpable conduct overall certainly pales in comparison to Mr. Muhtorov's, he was not a minimal or minor participant in the crimes with which he was convicted. Mr. Muhtorov made contact with IJU and was to deliver the funds, but the support that was to be provided originated with Mr. Jumaev and he was aware of and a participant in the full scope of the crime.

Departures

1. § 5K2.20: Aberrant Behavior Departure

Moving on to the departures Mr. Jumaev suggests, a downward departure may be warranted under U.S.S.G. § 5K2.20 ~~–in~~ an exceptional case" if ~~–(~~1) the defendant's criminal conduct meets the requirements of subsection (b); and (2) the departure is not prohibited under subsection (c)." U.S.S.G. § 5K2.20(a). Here, none of the prohibitions in subsection (c) apply. Subsection (b) reads:

> The court may depart downward under this policy statement only if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life.

U.S.S.G. § 5K2.20(b). Application Note 3 to § 5K2.20 permits me to consider ~~"t~~he defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense."

Until his immigration arrest, Mr. Jumaev had no interactions with law enforcement and held steady employment in the U.S. for almost ten years. His greatest concern in life was and I imagine still is providing for his family. Although his discussions with Mr. Muhtorov regarding the IJU and IMU and his admiration for them spanned years, he wrote only a single check. It is unclear what his motivation was in doing so, but as I found above, it was not a calculated action. He has been in detention for 76 months and has only three disciplinary incidents, all of which related to disagreements with staff. Presentence Report at 4, ECF No. 1915. Considering all the evidence, Mr. Jumaev is most likely to continue with his ~~"o~~therwise law-abiding life" once this case has terminated. I do have some reservation in applying this departure because I am troubled by Mr. Jumaev's failure to be fully forthright with law enforcement during their two interviews with them in early 2012 and by his testimony at trial revealing that his asylum application contained exaggerations. Nevertheless, I find that reduction of the offense level by two levels is justified under § 5K2.20.[10]

2. § 4A1.3: Criminal History Departure

For many of the same reasons that I depart under that provision, I determine that, if the Terrorism Enhancement were applicable to Mr. Jumaev's offenses, his criminal history would be overrepresented and he should benefit from a departure under U.S.S.G. § 4A1.3 as well. Section 4A1.3 provides: ~~"I~~f reliable information indicates that the defendant's criminal history category

[10]Again, if the Terrorism Enhancement were applicable to Mr. Jumaev's offenses, I would reduce his offense level to an even greater extent under § 5K2.20.

substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted." U.S.S.G. § 4A1.3(b)(1). The Terrorism Enhancement would move Mr. Jumaev, a 51-year-old with no criminal history, from a Criminal History Category of I to VI. A judge determining that [the Terrorism Enhancement] over-represents the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes' always has the discretion under § 4A1.3 to depart downward in sentencing." *United States v. Meskini*, 319 F.3d 88, 92 (2003); *United States v. Benkahla*, 501 F.Supp.2d 748, 758 (2007) (applying the Terrorism Enhancement and then a downward departure under § 4A1.3 to drop the defendant's criminal history category from VI back down to I).

Judge George O'Toole has eloquently explained the most salient reasons for departing under § 4A1.3 when the Terrorism Enhancement applies:

> [T]he automatic assignment of a defendant to a Criminal History Category VI is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this case, import a fiction into the calculus. It would impute to a defendant who has had no criminal history a fictional history of the highest level of seriousness.

United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass. April 12, 2012), Sentencing Tr. at 69:14-24, ECF No. 439. The assignment of a Criminal History Category of VI via the Terrorism Enhancement is purportedly based on the notion that, even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Meskini*, 319 F.3d at 92. But:

> There is no published statistical data demonstrating that defendants convicted of violating 18 U.S.C. §§ 2339B, 2339C, or other anti-terrorism statutes—and especially those convicted of financing offenses—are any more likely to be recidivists than any other first offenders. Nothing in the history of U.S.S.G. [§] 3A1.4 would indicate that any reliable data was used to determine if a person convicted of a material support offense is more likely to be a recidivist.

James P. McLoughlin, Jr., *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*, 28 Law & Ineq. 51, 114-15 (2010) (footnotes omitted). Furthermore, with respect to Mr. Jumaev specifically, there is no indication that he is likely to recidivate or would be difficult to rehabilitate.[11] If the Terrorism Enhancement were applicable to Mr. Jumaev's offenses, I would depart under § 4A1.3 to lower him back down to Criminal History Category I.

Final Guidelines Range

At long last, I arrive at the appropriate Guidelines range for Mr. Jumaev's offenses. The offense level is 26, after applying the enhancement in § 2M5.3(b), finding inapplicable the Terrorism and Obstruction of Justice Enhancements and the Mitigating Role Adjustment, and departing under § 5K2.20. Mr. Jumaev remains at a Criminal History Category I. The Guidelines range is, therefore, 63 to 78 months' imprisonment with one year to life of supervised release and a $12,500 to $125,000 fine.

B. Rejection of the Guidelines

I reject the Sentencing Guidelines in this case and instead find it appropriate to sentence Mr. Jumaev pursuant to the factors set forth in 18 U.S.C. § 3553(a). My reasons for doing so are multitudinous. Principally, I have concluded this case presents circumstances not adequately taken into consideration by the Sentencing Commission.[12] These points are detailed in the

[11] As I discuss later, however, no established programs exist in our criminal justice system or in the Bureau of Prisons to rehabilitate individuals charged and/or convicted of crimes related to terrorism.

[12] It seems I am not alone in my conclusion. Sentencing Commission statistics inform that, of 16 defendants from 2013 to 2017 for which § 2339B is the only count of conviction, 62.5% or 10 defendants received sentences that were below the Guidelines range that were not sponsored by

following Section, but include Mr. Jumaev's owing of a debt, his extended period of pretrial detention, his prolonged absence from his family, his immigration situation, and the lack of rehabilitation programs for him.

The Terrorism Enhancement further exemplifies this lack of consideration by the Sentencing Commission.[13] The Violent Crime Control and Law Enforcement Act of 1994 directed the U.S. Sentencing Commission to "amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime." Pub. L. No. 103–322, 108 Stat. 1796 (1994). The Sentencing Commission carried out that directive by promulgating § 3A1.4 of the Sentencing Guidelines.[14] I explained above that the Terrorism Enhancement in § 3A1.4 functions by both increasing the offense level and the defendant's Criminal History Category, moving the Guidelines range to the far right-hand corner of the prized Sentencing Table.

I have two principal objections to this operation of the Terrorism Enhancement.[15] First, it is not backed by any empirical evidence.[16] And, second, treating all "terrorists" alike is

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the government. Presentence Report Ex. B at 2, ECF No. 1915-2. The average reduction for non-government sponsored below-range sentences was 41.1% or 79 months. *Id.*

[13]This analysis may be as relevant or more so in sentencing Mr. Muhtorov, but I provide it here to illustrate the illogical and confounding approach of the Guidelines for sentencing individuals convicted of crimes related to terrorism.

[14]For descriptions of the evolution of the Guideline, see McLoughlin, *supra*, at 59-62; Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 Yale L.J. 1520, 1527-28 (2017).

[15]*See United States v. Salim*, 690 F.3d 115, 126 (2d 2012) (holding that a district court is not required to reject the Terrorism Enhancement because it was not the product of empirical research but "may give a non-Guidelines sentence where she disagrees with the weight the Guidelines assign to a factor").

[16] *See* McLoughlin, *supra*, at 112 ("[W]hen U.S.S.G. [§] 3A1.4 was adopted, the number of the anti-terrorism cases was tiny, so there could be no analysis of a statistically reliable group of defendants upon which to build a reliable Guideline.") (footnote omitted); *accord* Symposium, *Convicted Terrorists: Sentencing Considerations and Their Policy Implications*, 8 J. Nat'l

impermissible under our sentencing paradigm and has significant ripple effects. This second point I must spend some time on.

While U.S.S.G. § 2M5.3 has an ―internal enhancement mechanism to calibrate the severity of the sentence to the culpability of the conduct and the harm," McLoughlin, *supra*, at 73, that distinction is lost with the Terrorism Enhancement, which frequently results in Guidelines ranges that equal the maximum statutory sentence and fail to differentiate between various levels of conduct.[17] For example, the Terrorism Enhancement would punish an individual who collects $1,000 for al-Shabaab without having any contact with the organization, *see United States v. Moalin*, No. 3:10-cr-04246 (S.D. Cal.), Nasir Sentencing Tr. at 18:7-19:8, 25:20-21, ECF No. 468 (calculating the Guidelines range as 15 years for § 2339B count), the same as someone who maintained direct and continuing contact with a high-ranking member of al-Shabaab and offered the use of his house as a haven for the organization's fighters and to store

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Security L. & Pol'y 347, 361 (2016) (Judge Gerald Lee confirming: ―The [G]uidelines are not based on any empirical research. There has been no study to determine how much time a terrorist should have or how much time a drug offender should have; everyone should know that. There is a book that has mathematics in it, but is not based on anything other than what is in the book, and it is math. That is all it is.").

[17]This effect was artfully described by the Probation Officer in this case: ―What is clear from [my] research is despite a significant range of conduct that can produce a conviction for material support, the sentencing guidelines result in a nearly identical guideline range in each case, regardless of the underlying conduct. Material support can involve financial support, as it did in the defendant's case, or traveling with the purpose of fighting jihad personally, as it did with his codefendant. Other examples include securing and providing weapons for terrorist organizations, providing the location of military and government employees to terrorist organizations through hacking activities, and plots to attack military bases in the United States and around the world. The difficulty is that under the guidelines, there is no distinction between less and more serious offenses, those in which actual harm occurred and those where it did not." Presentence Report Ex. A at 4, ECF No. 1915-1; *accord* McLoughlin, *supra*, at 54 (―[T]he Guideline automatically and uniformly increases a defendant's offense level, ensuring a defendant will be sentenced as if his or her offenses are among the most serious offenses addressed by the Sentencing Guidelines regardless of where the offense level fits on the spectrum of ―material support.'") (footnotes omitted).

bombs and other weapons, *see id.*, Moalin Sentencing Tr. at 50:5-25, ECF No. 449 (calculating the Guidelines range as 15 years for § 2339B counts).

> –Deconstructing defendants and their offenses, and placing both on the spectrum of similar defendants convicted of similar crimes, is classic sentencing practice. It requires nuance and careful discrimination between and among cases and defendants based on the factors enumerated in 18 U.S.C. § 3553. That nuance is impossible under a Guideline that is structured as bluntly as U.S.S.G. [§] 3A1.4.

McLoughlin, *supra*, at 108 (footnotes omitted). As demonstrated by the almost universal application of the Terrorism Enhancement to crimes related to terrorism, the additional findings it requires do not remedy its lack of calibration.

The Guidelines were developed to –further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation." U.S.S.G. Ch.1, Pt. A. In enacting the Sentencing Reform Act of 1984, –Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." Additionally, it –sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity." *Id.* As countless others have commented, the Terrorism Enhancement runs contrary to these aims.[18] The circumstances of individuals convicted of crimes of terrorism (or who intended to promote crimes of terrorism) differ greatly, and sentencing them without crediting those differences

[18] As Judge O'Toole opined:

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

Mehanna, No. 1:09-cr-10017-GAO, Sentencing Tr. at 68:23-69:13.

results in disproportionate sentences and disparities in sentencing. Some of the distinguishing factors that should be considered are ―the ‗materiality' of their support, the intent with which they gave the support, the organization to which the support was given, the quality and quantum of the support, the duration of the support, the identifiable harm caused by the support, and any identifiable victim of the support." McLoughlin, *supra*, at 100. But the Terrorism Enhancement does not permit consideration of any of those aspects.[19]

In considering the Enhancement, Professor George D. Brown has posited the question: ―Is terrorism sufficiently unique (and dangerous) that it justifies a sentencing ‗rule' that goes against notions of individualized sentences that reflect the inevitable differentiation among criminals?" Brown, *supra*, 520. The answer is that it is not.[20] There is no rational basis for concluding that all individuals labeled as ―terrorists" and all crimes of ―terrorism" are equal. ―Gradation of offenses" is an important value in criminal law. George D. Brown, *Notes on A Terrorism Trial - Preventive Prosecution, "Material Support" and the Role of the Judge After United States v. Mehanna*, 4 Harv. Nat'l Sec. J. 1, 54 (2012). ―We do not treat a purse-snatcher

[19]Moreover, as James McLoughlin explains in his comprehensive article on the Terrorism Enhancement, there is an argument that Congress has endorsed the substantial increase in the length of prison sentences for crimes related to international terrorism resulting from the Terrorism Enhancement. McLoughlin, *supra*, at 60. But later enacted statutes ―have sentences far shorter than those mandated by U.S.S.G. [§] 3A1.4, and as such they are inconsistent with the view that Congress intended sentences under [that section] to be as severe as they are." *Id.* at 60-61 (footnotes omitted). Consequently, it does not seem that the Terrorism Enhancement is entitled to more deference, as some have argued. *See* Brown, *supra*, at 520 (maintaining that the enhancement is entitled to more deference because it originated with Congress and not the Sentencing Commission).

[20]*See United States v. Ressam*, 679 F.3d 1069, 1106 (9th Cir. 2012) (Schroeder, J., dissenting) (―The majority's implicit assumption that terrorism is different, and must be treated differently . . . flies in the face of the congressionally sanctioned structure of sentencing that applies to terrorism as well as all other kinds of federal criminal offenses. Our courts are well equipped to treat each offense and offender individually, and we should not create special sentencing rules and procedures for terrorists. In presiding over the many terrorism-related cases on their dockets, courts have treated other issues in terrorism cases in ways that do not differ appreciably from more broadly applicable doctrines.").

like a rapist, [yet t]he Enhancement reflects a different view: a terrorist is a terrorist." *Id.* The requirement to view any terrorist as every terrorist goes against the basic principles of sentencing and the factors set forth in 18 U.S.C. § 3553. Here, the application of the Terrorism Enhancement to Mr. Jumaev's offenses, the facts of which have proven to be unique and deserving of specific consideration, would be cruel and unreasonable.

A just sentence is an act for which a judge is morally responsible. That responsibility can neither be shunned nor relinquished based on the nature of the crime.[21] We must recognize that a human being is the focal point of the sentencing process and should not be ignored or dismissed because of the inflamed rhetoric of the ~~"~~war on terror."[22] I am reminded of Judge Learned Hand's wise comment: ~~"~~If we are to keep our democracy, there must be but one commandment: Thou Shalt Not Ration Justice."

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[21]Karen Greenberg, Director of the Center on National Security at Fordham Law, agrees:

> There needs to be some kind of formal understanding of who gets sentenced for what, and with some gradations and constancy when it comes to terrorism trials—where it doesn't all go to the far end of the sentencing spectrum because they are labeled terrorists . . . . We should consider that there are different levels of involvement in terrorism. The material support statute, a broad category that has made it easier to figure out how to use the criminal justice system to prosecute terrorists, has contributed to this problem. The breadth of the material support statute reduces the need to make the kinds of careful distinctions and comparisons that would otherwise be made in criminal sentencing contexts.

Symposium, *supra*, at 368-69.

[22]I am additionally mindful of the fears that the current practice for sentencing individuals convicted of crimes of terrorism, including application of the Terrorism Enhancement, has unintended national security consequences. *See* Christina Parajon Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 Yale L. & Pol'y Rev. 309, 381 (2013) (arguing that the current sentencing system has created a serious national security weakness—~~"~~the risk that it is "hardening' terrorist defendants against America, and contributing to the development or entrenchment of terrorist networks."); McLoughlin, *supra*, at 76 ("~~O~~ne must ask what U.S.S.G. [§] 3A1.4 adds to the equation that improves sentencing or anti-terrorism policy when it creates such draconian anomalies that (in the case of defendants who are foreign nationals) become newsworthy in the countries from which the defendants have come fostering a belief that the U.S. justice system is biased and fundamentally unfair.").

Let us then begin:

> [W]ith the simple recognition that the Sentencing Guidelines are based on a fundamental misconception about the administration of justice: the belief that just outcomes can be defined by a comprehensive code applicable in all circumstances, a code that yields a quantitative measure of justice more easily generated by a computer than a human being. We must recognize, in other words, that no system of formal rules can fully capture our intuitions about what justice requires.

Kate Stith and Judge José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 168-69 (1998).

III.

APPLICATION OF 18 U.S.C. § 3553(a) FACTORS

In rejecting and varying from the Sentencing Guidelines, I am intent on crafting a sentence for Mr. Jumaev that is ~~–~~sufficient, but not greater than necessary . . . (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). I am also concerned with the nature and circumstances of the offense and the history and characteristics of Mr. Jumaev as well as the kinds of sentences available and the need to avoid unwarranted sentencing disparities. *See id.* § 3553(a).

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

I first consider the nature and circumstances of the offense and Mr. Jumaev's history and characteristics. Although Mr. Jumaev's offense only involves a single check on a single

occasion, the surrounding events are troublesome. Mr. Jumaev not only watched and discussed videos that I find to be repulsive in many ways, but he commented on the videos, saying things like "Hey you, immoral, hypocrite infidels! Your days are over whether you like it or not. Now it is your turn. We will not let you have peace because God's promise is true." Gov't Ex. 26A at 1. I also am concerned by Mr. Jumaev's encouragement of Mr. Muhtorov on his path. *See, e.g.* Gov't Ex. 127A ("[Y]ou're my teacher. Do you know that Abumumin? . . . [L]et me tell you the truth . . . when it comes to the matter with wedding festivities, I think it is you who is really walking the walk."). Even if he believed Mr. Muhtorov to be joking, he could have disagreed with him, distanced himself from him, or simply not encouraged him.

A common recitation in the criminal law regarding a defendant's intent is that we cannot know another person's mind. But Mr. Jumaev's testimony, his recorded comments, and interactions with others give an idea of his sense of identity and self-perception.

There are reasons why Mr. Jumaev acted as he did and they are to be found in his conduct, not in some Manichaean struggle between good and evil. It is clear that Mr. Jumaev became a participant in supporting a terrorist organization because of traumatic events in his life. The extent to which he was abused and tortured by the government in Uzbekistan is problematic, but the evidence is overwhelming that he and other unfortunate citizens of that country were subjected to deprivations of basic human rights and significant diminishment of individual worth. No matter how horrible the language and circumstances of the Islamic fundamentalism he embraced, he was searching for a structure and belief system that would validate his existence. That he accepted or tacitly endorsed versions of Islam favored by militants is explained more by the social milieu in his exile from home and family than by any doctrinal epiphany.

In the most favorable terms, Mr. Jumaev sought and gained employment, worked long and arduous hours in the United States and all the while maintained communication with his wife

and family and provided them with financial support. For him, the friendship he developed with Mr. Muhtorov and the form of Islam he eventually embraced presented a promise of social justice that would right the many wrongs he had seen and experienced in his homeland of Uzbekistan, his separation from his family, and his anomie while in the United States. While the actions of jihadis stem from what many consider to be misinterpretations of the Holy Quran, Mr. Jumaev took on this cause, in a minimally supportive way, because it gave him a sense of purpose and value in the fight against social injustice and economic deprivation to which his family and he were subjected.

His sentiments and speech were clearly supportive of the IJU and therefore viewed with grave suspicion and little sympathy, yet they must be considered for sentencing purposes as reflections of his great need for identification rather than as evidence of a deliberate intention to do evil. The complete absence of violence in this case provides a window into how he saw himself and why he succumbed to the pressures he experienced. Such were the causes of his behavior. To be sure, he was influenced by others, perhaps too easily, but he did not act in any manner as an instigator or leader or conduit for others to engage in similar conduct.

B. The Need for the Sentence Imposed

The crimes with which Mr. Jumaev has been convicted are undoubtedly grave and he must be sentenced accordingly. "The material-support statute is, on its face, a preventative measure—it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010). "When it enacted [18 U.S.C.] § 2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism." *Id.* at 29. Specifically, it found: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an*

organization facilitates that conduct.'" *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), § 301(a)(7), 110 Stat. 1247, note following 18 U.S.C. § 2339B (Findings and Purpose)).

To Reflect the Seriousness of the Offense, To Promote Respect for the Law, and To Provide Just Punishment

Recognizing the seriousness of the offense, I nevertheless find the government's request for a sentence of 15 years' imprisonment to be absurd. The NYU Center on Law and Security determined that, for the 548 cases from 2001 to 2012 involving crimes inspired by jihadist ideas, the *average* sentence imposed was 14 years' imprisonment. Ctr. on Law & Sec., N.Y.U. Sch. of Law, *Terrorist Trial Report Card: September 11, 2001-September 11, 2011*, at 7 (2011) (emphasis added). The government provides no basis for why Mr. Jumaev's offenses are above average.

To arrive at the appropriate sentence, I ask: What sentence is necessary to convey that *any* support for terrorism will not be tolerated? I believe that message has been sent in this case. Mr. Jumaev has already been subjected to significant punishment. He has spent 76 months in pretrial detention in Denver, far from his friends in Pennsylvania and even farther from his family in Uzbekistan and elsewhere. During that period, he has only been able to see one of his sons via videoconference for 10 minutes. He has been unable to provide for his family, his long-standing role. Mr. Jumaev also has lived with the knowledge that his communications with his family and friends were monitored for an extended period of his life, such that his private concerns have become public. At trial, the government even took the liberty of commenting on his absence as a father in his children's lives. I have no doubt that Mr. Jumaev's time in

detention and his experience throughout the investigation and prosecution of this case do not ~~"t~~rivialize" his actions. *See* Gov't's Sentencing Statement at 14.

If I imposed a term of imprisonment over the time Mr. Jumaev has already served, additional disparate consequences are possible or even likely. Muslims frequently experience discrimination while incarcerated. The U.S. Department of Justice Office of the Inspector General Reports to Congress on Implementation of Section 1001 of the USA Patriot Act illustrate the discriminatory treatment Muslims face while incarcerated.[23] Since Mr. Jumaev has been convicted of crimes related to terrorism, it also would not be unheard of for him to be subjected to harsher conditions or restrictions while imprisoned.[24]

To Afford Adequate Deterrence to Criminal Conduct

While the message is clear that the U.S. prosecution of terrorism crimes is unrelenting and inexorable, I am not positive I would be sending an effective message of deterrence by sentencing Mr. Jumaev to a longer term of imprisonment. It is possible instead that I would be encouraging the commission of more serious crimes, given that the sentence would be the same regardless.[25]

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[23] *See, e.g.,* Mar. 19, 2018 Report at 5-9. *available at* https://oig.justice.gov/reports/2018/1803.pdf (documenting tens of civil rights and civil liberties complaints by Muslim inmates). Mr. Jumaev's disciplinary history even includes one instance in which he did not receive his food following a Ramadan fast and became angry. Presentence Report at 4.

[24] *See* Human Rights Watch and Columbia Law Sch. Human Rights Inst., *Illusions of Justice: Human Rights Abuses in U.S. Terrorism Prosecutions* 131-51 (2014), *available at* https://www.hrw.org/report/2014/07/21/illusion-justice/human-rights-abuses-us-terrorism-prosecutions.

[25] *See* Joshua L. Dratel, *The Literal Third Way in Approaching "Material Support for Terrorism": Whatever Happened to 18 U.S.C. § 2339B(c) and the Civil Injunctive Option?*, 57 Wayne L. Rev. 11, (2011) (discussing the theory of Italian philosopher and criminologist Cesare Beccaria that ~~"t~~he lack of any distinction between punishments for crimes of unequal kind or degree creates a dangerous and counterproductive equation: an offender contemplating two offenses, a greater and a lesser, that are punished alike is presented no disincentive to forego the

Many commentators warn against unnecessarily lengthy sentences for terrorism offenses.[26] One of the reasons behind those warnings is the possibility of further "radicalization" while in prison. "Prison systems throughout the world have been and continue to be breeding grounds for radicalism, recruiting grounds for extremist movements, and facilities for the planning and training of radical activities." Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers* 6 (2004), *available at* https://oig.justice.gov/special/0404/final.pdf.[27]

> [I]n recent years, policy decisions have produced shortages in Islamic leadership . . . . The lack of trained leadership . . . renders the religion at perpetual risk of being guided by inmates who can hardly deliver authoritative spiritual guidance. More critically, it allows individuals to exploit the pulpit, depart from traditional teachings, and even propagate an extremist agenda.

SpearIt, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?*, 49 Gonz. L. Rev. 37, 60-62 (2013).[28] These factors weigh against a protracted additional term of imprisonment.

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greater for the lesser. If the punishments are identical, there is no greater risk in attempting the greater.").

[26] *See, e .g.,* Ahmed, *supra*, at 1566 ("[N]ot only do lengthy sentences hinder rehabilitation, but they can also promote recidivism, especially in the terrorism context."); Parajon Skinner, *supra*, at 381 ("The risk that terrorists will harden in the U.S. prison system, or, in ordinary criminal language 'recidivate,' is at least in part a function of their experience in prison, inclusive of their perceptions of the process behind the punishment.").

[27] "Inmates can be radicalized in many ways, including through the delivery of anti-U.S. sermons, exposure to other radical inmates, or the distribution of extremist literature . . . . While radicalization does not necessarily lead inmates to join terrorist organizations, it can, upon their release, lead them to attend and serve in radical mosques or obtain religious education overseas in locations that provide further opportunities for radicalization and terrorist recruitment." Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers* 6-7 (2004), *available at* https://oig.justice.gov/special/0404/final.pdf.

[28] *Accord* Office of the Inspector Gen., *supra*, at 6-7, ("This freeze on hiring Muslim chaplains implicates prison security and presents counterterrorism concerns. Without a sufficient number of Muslim chaplains on staff, inmates are, according to the Chief of the Chaplaincy Services Branch and the ten BOP Muslim chaplains, much more likely to lead their own religious services, distort Islam, advocate Prison Islam, and espouse extremist beliefs.").

To Protect the Public from Further Crimes of the Defendant

Mr. Jumaev has no criminal history, and as I have already stated, there is no indication that he will recidivate. He is subject to deportation and may never again be out-of-custody in the U.S. The government contends that Mr. Jumaev's conduct reflects a clear upward trajectory indicating that, "if left unchecked," Mr. Jumaev would have endeavored to continue his support and expand his support." *See* Gov't Argument at 7/18/18 Sentencing Hr'g. I am not persuaded in the least bit by this argument. Mr. Jumaev wrote the $300 check in March 2011. He was not arrested in this case until March 2012. Yet, during that year period, there is no evidence that he committed any other crime or attempted to support terrorism in any other way. When Mr. Muhtorov finally told Mr. Jumaev he was leaving for Turkey, Mr. Jumaev did not write him another check to take with him or try to assist him with his travel.

As Judge Janet Hall found in *United States v. Ahmad*, No. 3:04-cr-00301-JCH (D. Conn. July 16, 2014),[29] I cannot sentence Mr. Jumaev on an unfounded fear that he might do something and extend his sentence as a result. I must look at what he actually did and determine whether it is likely that he will do something similar or greater in the future. From the facts before me, I find it is not.

[29] *Ahmad*, No. 3:04-cr-00301-JCH, Sentencing Tr. at 32:8-11, ECF No. 220 ("I don't think it's right to act on what I would call an unfounded fear that a defendant might do something, like a terrorist act, and therefore we should just lock that person up forever . . . . I think I need to be conscious of assessing the nature and circumstances of what the defendants did and not merely react to that title as ascribed to this case.").

To Provide the Defendant with Needed Training, Medical Care, or Other Treatment

To my knowledge, the Bureau of Prisons offers no relevant training or rehabilitation programs available for Mr. Jumaev and his crimes.[30] This is significant, because there is little hope that the negative influences resulting from a longer period of incarceration will be balanced with a productive program. I have considered the opportunity for Mr. Jumaev to pursue additional education opportunities while imprisoned[31] but have determined that potential benefit is outweighed by the other factors.

C. The Kinds of Sentences Available

Mr. Jumaev has now been in detention for 2,316 days. I could impose an additional term of imprisonment up to the maximum sentence under the statute—15 years for each count, or I sentence him to the time he has already served. Sentencing him to a term of less than the 2,316 days he has spent in detention would be meaningless at this point. Violations of 18 U.S.C. § 2339B can also carry a maximum fine of up to $250,000 and up to a life term of supervised release.

In evaluating the sentences available, I consider the immigration consequences and available forms of relief for Mr. Jumaev as well. I commend defense counsel for their thoroughness in presenting the related material for sentencing purposes. *See* Jumaev's Sentencing Statement at 27, ECF No. 1908; *Id.* Ex. C at 1-4, ECF No. 1908-1. Mr. Jumaev is

[30] *See* Ahmed, *supra*, at 1567 (2017) (explaining that programs focused on rehabilitating individuals convicted of terrorism offenses have not been instituted in American prisons); *United States v. Bell*, 81 F.Supp.3d 1301, 1318 (M.D. Fla. 2015) (citing testimony by a Federal Bureau of Prisons representative that ~~"~~the BOP currently has no programs for de-radicalizing prisoners convicted of crimes of terrorism").

[31] *See* Spearit, *supra*, at 78 (~~"~~The best course to successful return to society is educational training on the inside. Although, there is little empirical research on whether education reduces recidivism, education may militate against extremism directly, since groups like al-Qaeda have been known to prey on uneducated individuals to conduct their violent biddings.").

currently in immigration removal proceedings and will likely be detained by Immigration and Customs Enforcement as soon as he is released from custody in this case. Mr. Jumaev could then be removed to Uzbekistan and face an uncertain future there or could be detained here for an extended period pursuant to the Convention Against Torture. *See id.* at 4; *Yusupov v. Attorney Gen. of United States*, 650 F.3d 968, 977-79, 993 (3d Cir. 2011) (discussing the likelihood that the petitioners, two Uzbek nationals, would be persecuted and tortured if removed to Uzbekistan because of their religious and political beliefs; explaining the forms of relief available and the impact of a determination that an alien is a danger to the security of the U.S.; and holding that the government had not proved that the petitioners were a danger to the security of the U.S. so they were entitled to mandatory withholding of removal). Either way, his options are bleak, and continued detention separate from this case is most probably in his future. Additionally, as a result of his immigration status and the corresponding proceedings, any period of supervised release imposed will likely be an unrealized figment of his sentence.

D. The Need to Avoid Unwarranted Sentence Disparities

Finally, I must 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). Understanding that the Sentencing Guidelines are not useful for avoiding sentencing disparities in terrorism-related cases, I ordered the parties and the Probation Office to submit summaries of previous cases in which a defendant has been convicted under 18 U.S.C. § 2339B. I have reviewed their submissions along with the relevant cases listed in the Sentencing Compilation Matrix prepared by the defense in *United States v. Ahmad*.[32] While the material

[32] *Ahmad*, No. 3:04-cr-00301-JCH (D. Conn. June 16, 2014), Babar Ahmad's Memorandum in Aid of Sentencing Ex. N, ECF No. 179-14.

support statutes, 18 U.S.C. §§ 2339A and 2339B, have been among the most frequently prosecuted federal anti-terrorism statutes,[33] there are only a few cases that bear enough likeness to Mr. Jumaev's to be worthy of comparison, and even these are readily distinguishable.[34] The following material support cases are similar to this case in that they all involve financial contributions, but as is apparent, each of the defendants engaged in substantially more culpable conduct than Mr. Jumaev, such as participating in intricate conspiracy networks, contributing considerable sums of money, providing support on a recurrent basis, joining in recruitment efforts, plotting against the United States, and so on.

Mohamed Bailor Jalloh[35]

Mohamed Bailor Jalloh provided $340 to an ISIS official while he was in Africa with the U.S. National Guard. Upon returning to the United States, he provided $500 to an FBI confidential informant. He also researched and attempted to purchase an AK-47 assault rifle. Mr. Jalloh pleaded guilty, in *United States v. Jalloh*, No. 1:16-cr-00163 (E.D. Va. 2016), to one count of providing material support to a foreign terrorist organization. The sentencing judge noted that Mr. Jalloh was willing to take significant steps to support ISIS and knew that the ISIS official was plotting attacks in the United States. The judge sentenced him to 132 months' imprisonment with five years of supervised release.

[33]Charles Doyle, Cong. Research Serv., R41333, *Terrorist Material Support: An Overview of 18 U.S.C. §2339A and §2339B* (2016), *available at* https://fas.org/sgp/crs/natsec/R41333.pdf.
[34]A comprehensive table of cases in which a defendant was sentenced for charges under 18 U.S.C. § 2339 is attached as an Appendix to this Order.
[35]Mr. Jalloh was charged after the maximum term of imprisonment for a conviction under 18 U.S.C. § 2339B was raised from 15 years to 20 years, as were Nicholas Young, Haris Qamar, Hinda Osman Dhirane, and Muna Osman Jama.

Nicholas Young

Nicholas Young was a police officer in Washington, D.C., and while in that service, provided gift cards intended for ISIS to an FBI informant. In *United States v. Young*, No. 1:16-cr-00265 (E.D. Va. 2016), Mr. Young was found guilty by a jury of two counts of attempting to obstruct justice in violation of 18 U.S.C. § 1512(c)(2) and of one count of violating § 2339B. He was sentenced to 180 months' imprisonment with 15 years of supervised release.

Haris Qamar

At the behest of an FBI confidential informant, Haris Qamar purchased gift cards worth $80 that he believed would eventually be sent to ISIS. Mr. Qamar and the confidential informant also took pictures of monuments for a video that ISIS was purportedly making to encourage lone wolf terrorist attacks in Washington, D.C. Prior to the involvement of the FBI, Mr. Qamar bought a plane ticket with the intent of going to join ISIS, but he abandoned that plan after his parents took his passport. Mr. Qamar pleaded guilty, in *United States v. Qamar*, No.1:16-cr-00227 (E.D. Va. 2018), to one count of attempting to provide material support to a foreign terrorist organization. He was sentenced to 102 months' imprisonment with 20 years of supervised release.

Raja Lahrasib Khan

Raja Lahrasib Khan supported Kashmir independence from India, and on a trip to Pakistan, he provided the leader of the Kashmir independence movement, Ilyas Kashmiri, with approximately $200 to $250 to use for attacks against the Indian government. Upon his return to the United States, he sent funds to Pakistan and instructed that $300 go to Kashmiri. He later accepted $1,000 from an undercover law enforcement agent and agreed to provide the funds to

Kashmiri. The undercover agent claimed to be interested in sending money to Kashmiri only if he was working with al-Qaeda. Mr. Khan confirmed that Kashmiri was working with al-Qaeda and arranged for the funds to be delivered to him. In *United States v. Khan*, No. 1:10-cr-00240 (N.D. Ill. 2010), Mr. Khan pleaded guilty to one count of attempting to provide material support to a foreign terrorist organization and was sentenced to 90 months' imprisonment with lifetime supervised release.

Basaaly Saeed Moalin

Basaaly Saeed Moalin collaborated with al-Shabaab leadership and even offered to provide them with a house in Mogadishu to hide weapons and to advance their agenda. In *United States v. Moalin*, No. 3:10-cr-04246 (S.D. Cal. 2010), Mr. Moalin and his co-defendants were found guilty by a jury of conspiracy to provide material support to terrorists, conspiracy to provide material support to a foreign terrorist organization, and conspiracy to launder monetary instruments. Mr. Moalin was also found guilty of actually providing material support to terrorists and to a foreign terrorist organization. On those five counts, Mr. Moalin was sentenced to a total of 216 months' imprisonment with three years of supervised release. Observing that Mr. Moalin went so far as to counsel al-Shabaab leadership on how to bury bombs and other munitions on his property, the judge concluded that his actions "went beyond mere financial support and entered into the realm of a different type of support," deserving of three of the years on one of his counts to run consecutive to the other concurrent 15-year sentences. *Moalin*, No. 3:10-cr-04246, Sentencing Tr. at 57:18-22.

Mohammad El-Mezain

Both before and after Hamas was designated as a foreign terrorist organization in the 1990s, Mohammad El-Mezain served as one of the officers and directors of a charitable foundation that operated as its fundraising arm. The foundation supported Hamas by funneling millions of dollars to committees in Palestine, which Mr. El-Mezain knew were controlled by Hamas. In *United States v. Holy Land Foundation for Relief and Development*, No. 3:04-cr-0240 (N.D. Tex. 2004), Mr. El-Mezain was found guilty by a jury of a single count of conspiracy to provide material support to Hamas. For that crime, he was sentenced to 180 months' imprisonment with three years of supervised release.

Hinda Osman Dhirane and Muna Osman Jama

Hinda Osman Dhirane and Muna Osman Jama organized a ~~"G~~roup of Fifteen," which included women from Minnesota, Canada, Europe, and Africa, that met regularly in a chat room to organize and track payments that would fund al-Shabaab operations. In *United States v. Jama*, No. 14-cr-00230 (E.D. Va. 2014), Ms. Dhirane and Ms. Jama were found guilty of one count of conspiracy to provide material support to the terrorist organization al-Shabaab after a bench trial. The women were also found guilty of multiple counts of providing material support based on the numerous payments and transfers of funds that occurred after they joined the conspiracy. Ms. Jama was convicted of making 20 separate payments totaling $4,700, and Ms. Dhirane was convicted of making approximately $1,000 in contributions through her participation in the conspiracy when those payments were made. The sentencing judge stressed that the defendants solicited and recruited others to contribute funds, and that ~~"t~~here was a substantial level of organization, subterfuge, and concealment." *United States v. Jama*, No. 14-cr-00230 (E.D. Va. Mar. 31, 2017), Sentencing Tr. at 49, ECF No. 332. The judge concluded that the nature and

extent of their conduct transcended the relatively small amount of money that was known to have been sent in support of al-Shabaab. Ms. Jama was sentenced to 144 months' imprisonment with 10 years of supervised release, and Ms. Dhirane was sentenced to 132 months' imprisonment with 10 years of supervised release.

Amina Esse

Amina Esse was involved in the same "Group of Fifteen" conspiracy to send funds in support of al-Shabaab. She pleaded guilty, in *United States v. Esse*, No. 0:14-cr-00369-MJD (D. Minn. 2014), to one count of conspiracy to provide material support to a foreign terrorist organization. She faced up to 15 years, but prosecutors sought probation because she provided substantial assistance to the government, including providing testimony against co-conspirators. Ms. Esse was sentenced to five years' probation.

Amina Farah Ali and Hawo Mohamed Hassan

Similar to the defendants in *United States v. Esse* and *United States v. Jama*, Amina Farah Ali and Hawo Mohamed Hassan solicited funds door-to-door in Somali neighborhoods in the U.S. and Canada in order to provide financial assistance to al-Shabaab. In addition, the defendants participated in teleconferences encouraging listeners to make donations in support of al-Shabaab. Ms. Ali communicated directly with Somalia-based members of al-Shabaab who requested financial assistance, yet she often claimed the money she solicited was to help the poor. In *United States v. Ali*, No. 0:10-cr-00187 (D. Minn. 2010), a jury found Ms. Ali and Ms. Hassan guilty of one count of conspiracy to provide material support to the designated foreign terrorist organization al-Shabaab, Ms. Ali guilty of twelve counts of providing material support, and Ms. Hassan guilty of two counts of making false statements to authorities. Ms. Ali was

sentenced to 240 months' imprisonment, while Ms. Hassan was sentenced to 120. Both have lifetime terms of supervised release.

Nima Ali Yusuf

In *United States v. Yusuf*, No. 3:10-cr-04551 (S.D. Cal. 2010), Nina Ali Yusuf pleaded guilty to one count of conspiracy to provide material support to a foreign terrorist organization. She admitted to sending approximately $1,450 to men who were fighting in Somalia for al-Shabaab. She also tried to help a co-conspirator recruit a local man to go and fight for the organization. Ms. Yusuf was sentenced to 96 months' imprisonment with three years of supervised release.

Mohamud Abdi Yusuf

Mohamud Abdi Yusuf also solicited and coordinated the transfer of funds to al-Shabaab, sending the terrorist organization money on several occasions. In one instance, he sent approximately $5,000 to al-Shabaab through a co-conspirator, funds which al-Shabaab used to obtain a vehicle for tactical operations and weapons transport. Mr. Yusuf pleaded guilty, in *United States v. Yusuf*, No. 4:10-cr-00547 (E.D. Mo. 2010), to one count of conspiracy to provide material support to a designated terrorist organization and three counts of providing material support to a designated terrorist organization. Mr. Yusuf was sentenced to 140 months' imprisonment with two years of supervised release.

Hor and Amera Akl

Hor and Amera Akl planned to conceal and provide up to $500,000 to Hizballah on behalf of anonymous donors in the United States. They met several times with an individual

who, unbeknownst to them, was a confidential source working for the FBI, and they eventually agreed to send money to Hizballah leaders by secreting it inside a vehicle they intended to send to Lebanon via a container ship. The confidential source delivered $200,000 to the Akls at their home and told them he would return later in the day with more money. The Akls took steps to begin concealing the money in auto accessories. Mr. Akl and his wife pleaded guilty, in *United States v. Akl*, No. 3:10-cr-00251 (N.D. Ohio 2010), to conspiracy to provide material support to the designated foreign terrorist organization Hizballah. Mr. Akl also pleaded guilty to additional charges including perjury and bankruptcy fraud. Ms. Akl was sentenced to 40 months' imprisonment with three years of supervised release, and Mr. Akl was sentenced to 75 months' imprisonment with ten years of supervised release.

All of the above defendants share with Mr. Jumaev that their convictions involve the provision of money as the form of material support. Yet Mr. Jumaev's conduct does not reach the level of any of theirs:

- He did not attempt to purchase any weapons;
- He had no direct contact with any members of a terrorist organization;
- He did not associate with terrorists or try to support them while in the U.S. Armed Forces or law enforcement;
- He did not take pictures of U.S. monuments to encourage a terrorist attack;
- He did not buy a ticket to travel anywhere;
- He did not serve in a leadership role of an organization;
- He did not solicit funds from other individuals or attempt to recruit them;
- He did not provide thousands or hundreds of thousands of dollars in support;

- He did not provide support on multiple occasions;
- His funds did not result in the purchase of tactical equipment; and
- His efforts were not organized or methodical.

The defendants in the next set of cases exhibited less aggravating conduct than the defendants discussed above, but still more extensive than Mr. Jumaev's in this case.[36] They all received sentences of less than what Mr. Jumaev has already served.

Oytun Asyse Mihalik

Oytun Asyse Mihalik sent a total of more than $2,000 to a person in Pakistan who she believed was a member of the Taliban and al-Qaeda fighting against the U.S. military. She pleaded guilty, in *United States v. Mihalik*, No. 2:11-cr-00833 (C.D. Cal. 2011), to one count of providing material support to terrorists. She was sentenced to 60 months' imprisonment and agreed that upon the completion of her sentence she would be removed to Turkey.

Jasminka Ramic

Ms. Ramic was one of six U.S. citizens from Bosnia charged, in *United States v. Hodzic*, No. 4:15-CR-00049 (E.D. Mo. 2015), with conspiring to provide money, equipment, and other supplies to jihadists in Syria. She made three payments totaling $700 to a co-conspirator with the intent that the funds be transferred to, and used in support of, a fellow Bosnian-American who was fighting in Syria. While Ms. Ramic was initially motivated to send money and items such as

[36]I acknowledge that the sentences of these defendants was likely impacted by plea bargaining, but I nevertheless find them to be more similarly situated to Mr. Jumaev than those who organized complex funding and recruitment schemes or provided direct support for attacks and violent activities. Furthermore, as I have already explained, I refuse to employ any sort of trial ~~tax~~."

hot chocolate mix to help the children impacted by the conflict in Syria, she eventually became aware that the individual in Syria was fighting with terrorist groups including ISIS. She pleaded guilty to conspiracy to kill or maim persons in a foreign country, which carried a maximum sentence of 60 months. She was sentenced well below the Guidelines range to 36 months' imprisonment.

Ahmed Nasir Taalil Mohamud

Ahmed Nasir Taalil Mohamud (Mr. Nasir), the co-defendant of Mr. Moalin (above), was convicted by a jury of only the three conspiracy counts, in *United States v. Moalin*, No. 3:10-cr-04246 (S.D. Cal. 2010), and in contrast with Mr. Moalin, was sentenced to just 72 months' imprisonment with three years of supervised release. The sentencing judge found Mr. Nasir's limited participation to be an important mitigating factor, noting that he was involved with collecting and depositing approximately $1,000 into an account but had no direct contact with the other defendants aside from telephone conversations with Mr. Moalin. The judge further noted that Mr. Nasir generally led a law-abiding and productive life and worked to send money home to his family.

After reviewing all of the related cases, I again sympathize with Judge Hall's remarks: "[N]o matter how I looked at the cases, there's absolutely no way to rationalize the sentencings that have been imposed around the country, on persons who have given material support or committed acts of terrorism." *Ahmad*, No. 3:04-cr-00301-JCH, Sentencing Tr. at 58:9-13. The take-away message in this case, though, is that it is clear that Mr. Jumaev's conduct is the least of the least. A sentence of 15 years, as recommended by the government, would be disproportionate and would contribute to unwarranted sentencing disparities.

IV.

THE SENTENCE TO BE IMPOSED

"It is our duty to see that the force of the state, when it is brought to bear through the sentences of our courts, is exerted with the maximum we can muster of rational thought, humanity, and compassion." Marvin E. Frankel, Criminal Sentences: Law Without Order 124 (1973).[37] Despite the nature of this case or perhaps even because of it, I have endeavored with every ounce of my being to craft a sentence for Mr. Jumaev that is based on rational thought, humanity, and compassion.

After profound reflection on all of the factors discussed above, I sentence Defendant Bakhtiyor Jumaev to time served, or in effect, 76 months and three days. Mr. Jumaev shall be placed on supervised release for a term of 10 years for each count, to run concurrently. Mr. Jumaev shall immediately pay a special assessment of $200. I find he does not have the ability, prospects, or resources to pay a fine, so I waive the fine in this case.

Within 72 hours of release from the custody of the Bureau of Prisons, Mr. Jumaev shall report to the Probation Office in the District of Colorado. While on supervision, he is subject to the following conditions that may not be changed or modified without prior authorization of this Court.

1. Mr. Jumaev must not commit any other federal, state, or local crime.

2. Mr. Jumaev must not unlawfully possess a controlled substance and must refrain from any unlawful use of a controlled substance.[38]

3. Mr. Jumaev must cooperate in the collection of DNA as directed by the probation officer.

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[37]While the U.S. Sentencing Commission and its Guidelines were envisioned by Judge Frankel, Guidelines such as those applicable for offenses related to terrorism, under which defendants are punished uniformly for dissimilar conduct, exacerbate the infirmities in our justice system that he sought to redress.

[38]I waive the mandatory drug testing provision of 18 U.S.C. §§ 3563(a)(5) or 3583(d), because the Presentence Report indicates a low risk of future substance abuse by Mr. Jumaev.

4. After initially reporting to the probation office, Mr. Jumaev will receive instructions from the Court or the probation officer about how and when he must report to the probation officer, and he must report as instructed.

5. Mr. Jumaev must not knowingly leave the federal judicial district where he is authorized to reside without first getting permission from the Court or the probation officer.

6. Mr. Jumaev must answer truthfully the questions asked by his probation officer.

7. Mr. Jumaev must live at a place approved by the probation officer. If he plans to change where he lives or anything about his living arrangements (such as the people he lives with), he must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, he must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. Mr. Jumaev must allow the probation officer to visit him at any time at his home or elsewhere and must permit the probation officer to take any items that he or she observes in plain view that are prohibited by the conditions of Mr. Jumaev's supervision.

9. Mr. Jumaev must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses him from doing so. If he does not have full-time employment, he must try to find full-time employment, unless the probation officer excuses him from doing so. If he plans to change where he works or anything about his work (such as his position or job responsibilities), he must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, he must notify the probation officer within 72 hours of becoming aware of a change or expected change.

10. Mr. Jumaev must not communicate or interact with someone he knows is engaged in criminal activity. If he knows someone has been convicted of a felony, he must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

11. If Mr. Jumaev is arrested or questioned by a law enforcement officer, he must notify the probation officer within 72 hours.

12. Mr. Jumaev must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person).

13. Mr. Jumaev must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the Court.

14. If the probation officer determines that Mr. Jumaev poses a risk to another person (including an organization), the probation officer may require him to notify the person about the risk

and he must comply with that instruction. The probation officer may contact the person and confirm that he has notified the person about the risk.

15. Mr. Jumaev must follow the instructions of the probation officer related to the conditions of supervision.

I find that the Special Conditions of Supervision listed below are reasonably related to the factors enumerated in 18 U.S.C § 3553(a) and 18 U.S.C. § 3583(d) and do not constitute a greater deprivation of liberty than reasonably necessary to accomplish the goals of sentencing. Thus, Mr. Jumaev is subject to them as well while on supervision.

1. If Mr. Jumaev is deported, he must not thereafter re-enter the United States illegally. If he re-enters the United States legally, he must report to the nearest U.S. Probation Office within 72 hours of his return.

2. Mr. Jumaev must allow the probation officer to install software/hardware designed to monitor computer activities on any computer he is authorized by the probation officer to use. The software may record any and all activity on the computer, including the capture of keystrokes, application information, internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software on the computer. Mr. Jumaev must not attempt to remove, tamper with, reverse engineer, or in any way circumvent the software/hardware.

3. Mr. Jumaev must submit his person, property, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications, data storage devices, or media to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. Mr. Jumaev must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that he has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

4. Mr. Jumaev shall not possess, view, access, or otherwise use material that reflects extremist or terroristic views or is deemed to be similarly inappropriate by the U.S. Probation Office.

DATED this 18th day of July, 2018.

John L. Kane

JOHN L. KANE
SENIOR U.S. DISTRICT JUDGE

Case Appendix to Memorandum Opinion and Order on Sentencing

Case Name	Relevant Defendant(s)	District	Case No.	Initial Indictment Date	Sentence	Summary	Foreign Terrorist Organization
U.S. v. Pugh	Tairod Nathan Webster Pugh	E.D.N.Y.	1:15-cr-00116	Mar. 16, 2015	420 months' imprisonment + 5 years' supervised release (180 months for conviction under § 2339B)	Defendant was charged with violating § 1512(c)(1) and (2) in addition to one count of § 2339B. The defendant was convicted by a jury of both counts. The defendant traveled to Turkey in an effort to cross into Syria to engage in jihad.	Islamic State of Iraq and the Levant / al-Sham (ISIS)
U.S. v. Elhuzayel	Nader Elhuzayel	C.D. Cal.	8:15-cr-00060	June 03, 2015	360 months' imprisonment + lifetime supervised release (180 months for each conviction under § 2339B to be served consecutively)	Defendant was found guilty by a jury of two counts of violating § 2339B and 25 counts of violating.§ 1344. He attempted to provide personnel in the form of himself.	ISIS
	Muhanad Elfati M. A. Badawi				360 months' imprisonment + lifetime supervised release (180 months for each conviction under § 2339B to be served consecutively)	Defendant was found guilty by a jury of two counts of violating§ 2339B and one count of violating 20 U.S.C. § 1097. The defendant facilitated his co-defendant's travel to join ISI by providing his debit card to purchase a one-way airline ticket.	
U.S. v. Edmonds	Hasan R. Edmonds	N.D. Ill.	1:15-cr-00149	Apr. 02, 2015	360 months' imprisonment + 20 years' supervised release. (180 months for each conviction under § 2339B to be served consecutively)	Defendant pleaded guilty two counts of violating § 2339B. The defendant was a member of Army National Guard. The defendants discussed attacking the military base in Illinois and traveling to Syria.	ISIS

	Jonas M. Edmonds				252 months' imprisonment + 20 years' supervised release (180 month' for conviction under §2339B)	Defendant pleaded guilty to one count of violating § 2339B and one count of making a false statement to law enforcement in violation of 18 U.S.C. § 1001.	
U.S. v. Kareem	Abdul Malik Abdul Kareem	D. Ariz.	2:15-cr-00707	June 10, 2015	360 months' imprisonment + lifetime supervised release (240 months for conviction under § 2339B)	Defendant was found guilty by a jury of one count of violating § 2339B and of four additional counts involving firearms and making false statements to the Federal Bureau of Investigation. The defendant engaged in a plot to disrupt an event in Texas. Several individuals were injured and two co-conspirators were killed in the attack. Additionally, they had considered attacking military bases, the Super Bowl, and shopping malls.	ISIS
U.S. v. Kurbanov	Fazliddin Kurbanov	D. Idaho	1:13-cr-00120	May 16, 2013	300 months' imprisonment + 3years supervised release (180 months for each conviction under § 2339B to run concurrently)	Defendant was found guilty by a jury of two counts of violating § 2339B and of one count of violating 26 U.S.C. § 5861(d). The defendant attempted to provide financial support and personnel, including himself.	Islamic Movement of Uzbekistan
U.S. v. Shah	Rafiq Abdus Sabir	S.D.N.Y.	1:05-cr-00673	June 27, 2005	300 months' imprisonment + 2 years' supervised release	Defendant was convicted by a jury of two counts of violating § 2339B. The defendant attempted to provide expert advice and medical assistance to a foreign terrorist organization.	al Qaeda

U.S. v. Khan	Hafiz Muhammad Sher Ali Khan	S.D. Fla.	1:11-cr-20331	May 12, 2011	300 months' imprisonment + 5 years' supervised release (180 months for the first count of violating § 2339A and 120 months for the remaining charges to run concurrently)	Defendant was found guilty of two counts of violating § 2339A and two counts of violating § 2339B. The defendant was found guilty on all charges. The defendant solicited, collected, and transferred money to purchase weapons for the Taliban.	Pakistani Taliban
U.S. v. Elfgeeh	Mufid Elfgeeh	W.D.N.Y.	6:14-cr-06147	Sept. 16, 2014	270 months' imprisonment + 27 years, 6 months supervised release (180 months for one count and 90 months for the other to run consecutively)	Defendant was indicted for seven counts and ultimately pleaded guilty to two counts of violating § 2339B. He attempted to provide personnel to ISIS.	ISIS
U.S. v. Ali	Amina Farah Ali	D. Minn.	0:10-cr-00187	2010	240 months' imprisonment + lifetime supervised release (180 months for one count and 60 months for each remaining count)	Defendant was found guilty of thirteen counts of violating § 2339B. The defendant raised and/or provided at least $2,100 to al-Shabbab.	al-Shabbab
	Hawo Hassan				120 months' imprisonment + lifetime supervised release (120 months for violating § 2339B)	Defendant was found guilty of three counts of violating § 1001 and one count of violating § 2339B. The defendant assisted in raising the $2,100 by encouraging individuals to pledge allegiance to al-Shabbab.	
U.S. v. Ferizi	Ardit Ferizi	E.D. Va.	1:16-cr-00042	Feb. 16, 2016	240 months' imprisonment + 10 years' supervised release (180 months for violating § 2339B).	Defendant pleaded guilty to one count of violating § 2339B and one count of violating 18 U.S.C. § 1030 in relation to hacking. The defendant was a hacker living in Malaysia who obtained U.S. government and military personnel information and provided the information to ISIS.	ISIS

U.S. v. Moalin	Basaaly Saeed Moalin	S.D. Cal.	3:10-cr-04246	Oct. 22, 2010	216 months' imprisonment + 3 years' supervised release	Defendant was found guilty of two counts of violating § 2339A, two counts of violating § 2339B, and one count of conspiracy to launder money in violation of 18 U.S.C. § 1956(a)(2). The defendant coordinated with leaders of al-Shabaab.	al-Shabaab
U.S. v. Solano	Vicente Adolfo Solano	S.D. Fla.	1:17-cr-20781	Nov. 02, 2017	210 months' imprisonment + lifetime supervised release	Defendant was charged initially with violating § 2339A and later charged with also violating § 2339B. The defendant pleaded guilty to the count of violating § 2339B. The defendant attempted to use a weapon of mass destruction to destroy a mall on and wanted to join ISIS.	ISIS
U.S. v. Ahmed	Ehsanul Islam Sadequee	N.D. Ga.	1:06-cr-00147	Mar. 23, 2006	204 months' imprisonment + 30 years' supervised release (180 months for each of three counts to run concurrently plus 24 months for conspiracy to provide material support to a foreign terrorist organization to run consecutively)	Defendant was found guilty of two counts of violating § 2339A and two counts of violating § 2339B. The defendants conducted surveillance and met with others to discuss possible targets for a terrorist attack.	Lashkar-e-Taiba (LET)
	Syed Haris Ahmed				156 months' imprisonment + 30 years' supervised release	Defendant was found guilty of one count of violating §2339A.	
U.S. v. Young	Nicholas Young	E.D. Va.	1:16-cr-00265	Dec. 15, 2016	180 months' imprisonment (for each count to run concurrently) + 15 years' supervised release	Defendant was found guilty of two counts of attempting to obstruct justice in violation of 18 U.S.C. § 1512(c)(2) and of one count of violating § 2339B. The defendant was a police officer and on several occasions purchased gift cards to be used by ISIS for recruitment.	ISIS

U.S. v. Holy Land Foundation for Relief and Development	Mohammed El-Mezain	N.D. Tex.	3:04-cr-00240	July 26, 2004	180 months' imprisonment + 3 years' supervised release	Defendant was charged with twelve counts of violating § 2339B, ten counts of violating 50 U.S.C. §§ 1701-1706, and one count of violating 12 U.S.C.§ 1956. The defendant was convicted by the jury of one count of violating § 2339B. The defendant was a large scale financier for Hamas. Together with his co-conspirators, they raised over $12,000,000.	Hamas
U.S. v. Kauser Mohammed	Gufran Ahmed Kauser Mohammed	S.D. Fla.	1:13-cr-20364	May 21, 2013	180 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. He attempted to provide personnel and funds totaling approximately $26,000.	al Qaeda & al-Shababb
U.S. v. Nayyar	Patrick Nayyar	S.D.N.Y.	1:09-cr-01037	Oct. 26, 2009	180 months' imprisonment; no supervised release because subject to deportation (60 months for each violation of § 3229B to run concurrently with each other but consecutive to other counts)	Defendant was found guilty of two counts of violating § 2339B, two counts of violating 50 U.S.C. § 1705(a), and one count of violating 18 U.S.C. § 371. The defendant agreed to provide goods in the form of guns, ammunition, vehicles, bulletproof vests, and night vision goggles because he thought they would be used to support Hizballah.	Hizballah
U.S. v. Chandia	Ali Asad Chandia	E.D. Va.	1:05-cr-00401	Sept. 14, 2005	180 months' imprisonment + 3 years' supervised release (180 months for each count of violating § 2339B to be served concurrently)	Defendant was found guilty of one count of violating § 2339A and two counts of violating § 2339B. The defendant provided paint balls for training activities in the Lashkar-e-Taiba.	Lashkar-e-Taiba (LET)

U.S. v. Morgan	Donald Ray Morgan	M.D.N.C.	1:14-cr-00414	Waived indictment Oct. 30, 2014	180 months' imprisonment + 3 years' supervised release (180 months for violating § 2339B; received an additional 63 months for separate charge of felon in possession of a firearm)	Defendant pleaded guilty to one count of violating § 2339B. The defendant purchased a ticket to enter Syria and participate in jihad.	al Qaeda/ISIS
U.S. v. Davis	Leon Nathan Davis	S.D. Ga.	1:15-cr-00059	Waived indictment May 27, 2015	180 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant attempted to fly to Turkey and later Syria to join ISIS.	ISIS
U.S. v. Saadeh	Alaa Saadeh	D.N.J	2:15-cr-00558	Waived indictment Oct. 29, 2015	180 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was planning on going to Turkey to support ISIS.	ISIS
U.S. v. Dandach	Adam Dandach	C.D. Cal.	8:14-cr-00109	July 16, 2014	180 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to one count of violating § 1542 and one count of violating § 2339B. The defendant attempted to board a flight to Turkey and also received a conviction for a false passport.	al Qaeda/ISIS
U.S. v. Cordoba-Bermudez	Juanito Cordoba-Bermeduez	S.D.N.Y.	1:08-cr-01290	Feb. 05, 2009	180 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was involved in multiple conversations with co-conspirators about logistics for seizing weapons from Panamanian authorities.	Revolutionary Armed Forces of Colombia (FARC)
U.S. v. Kashmiri	Tahawwur Hussain Rana	N.D. Ill.	1:09-cr-00830	Dec. 07, 2009	168 months' imprisonment + 3 years' supervised release	Defendant was found guilty of one count of violating § 2339A and of one count of violating § 2339B. The defendant allowed his co-conspirators to use his business as a cover to conceal travel and surveillance for terrorist attacks.	Lashkar-e-Taiba (LET)

	Narseal Batiste				162 months' imprisonment + 35 years' supervised release	Defendant was found guilty of one count each of violating § 2339A, § 2339B, § 844, and § 2384. The defendants swore allegiance to al Qaeda, purchased a camera, and scouted locations for what they believed would be a domestic attack.	
	Patrick Abraham				112.5 months' imprisonment + 15 years' supervised release	Defendant was found guilty of one count each of violating § 2339A, § 2339B, and § 844.	
	Stanley Grant Phanor				96 months' imprisonment + 15 years' supervised release	Defendant was found guilty of violating one count of § 2339A and one count of §2339B.	
	Rotschild Augustine				84 months' imprisonment + 10 years' supervised release	Defendant was found guilty of violating one count of § 2339A and one count of §2339B.	
U.S. v. Batiste	Burson Augustin	S.D. Fla.	1:06-cr-20373	June 22, 2006	72 months' imprisonment + 10 years' supervised release	Defendant was found guilty of violating one count of § 2339A and one count of §2339B.	al Qaeda
U.S. v. Velasco	Mauricio Santoyo Velasco	E.D. Va.	1:12-cr-00217	May 24, 2012	156 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant accepted bribes in exchange for the information and assistance he could provide as a high-level law enforcement officer in Colombia. The information allowed AUC members to avoid detection and arrest.	United Self-Defense Forces of Colombia (AUC)
U.S. v. Jama	Muna Osman Jama	E.D. Va.	1:14-cr-00230	June 24, 2014	144 months' imprisonment (on each count) + 10 years' supervised release	Defendant was found guilty of 21 counts of violating § 2339B. The defendant provided several payments to al-Shabaab including one payment of $1,500.	al-Shabaab

	Hinda Osman Dhirane				132 months' imprisonment + 10 years' supervised release	Defendant was found guilty of one count of violating § 2339B. The defendant was involved in the transfer of approximately $1,000 in support of al-Shabaab.	
U.S. v. Teausant	Nicholas Teausant	E.D. Cal.	2:14-cr-00087	Mar. 26, 2014	144 months' imprisonment + 25 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was a college student with some involvement in the National Guard. The defendant wanted to participate in violent jihad and was arrested traveling to Canada.	ISIS
U.S. v. Yusuf	Mohamud Abdi Yusuf	E.D. Mo.	4:10-cr-00547	Oct. 21, 2010	140 months' imprisonment +2 years' supervised release	Defendant pleaded guilty to four counts of violating § 2339B. There were at least four individuals involved in the conspiracy to provide funds to al-Shabaab.	al-Shabaab
U.S. v. Aguilar Ramirez	Nancy Conde Rubio	D.D.C.	1:07-cr-00248	Sept. 25, 2007	138 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was a ranking member of the FARC. She oversaw the group's logistics and communications network and was involved in the kidnapping of American hostages.	Revolutionary Armed Forces of Colombia (FARC)
US v. Amin	Ali Shukri Amin	E.D. Va.	1:15-cr-00164	Waived indictment June 11, 2015	136 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to violating § 2339B. The defendant used Twitter and the dark web to educate others on how to use bit coin to fund terrorist organizations. He also converted a co-conspirator to radical Islam and facilitated travel of the co-conspirators to Syria.	ISIS
U.S. v. Jalloh	Mohammed Bailor Jalloh	E.D. Va.	1:16-cr-00163	Waived indictment Oct. 27, 2016	132 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant provided $340 to an ISIS official while he was in Africa and $500 to an FBI confidential informant.	ISIS
U.S. v. Mosquera-Renteria	Jorge Abel Ibarguen-Palacio	S.D.N.Y	1:09-cr-00498	May 14, 2009	130 months' imprisonment + 2 years' supervised release	Defendant pleaded guilty to count of violating § 2339B.	Revolutionary Armed Forces of Colombia (FARC)
U.S. v. Ahmed	Zacharia Yusuf Abdurahman	D. Minn.	0:15-cr-00049	Feb. 19, 2015	120 months' imprisonment + 20 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant had a plan to travel to support ISIS.	ISIS

U.S. v. Abdi	Nuradin M. Abdi	S.D. Ohio	2:04-cr-00088	June 10, 2004	120 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339A. He planned to travel to obtain military-style training in preparation for violent jihad.	al Qaeda
U.S. v. Van Haften	Joshua Van Haften	W.D. Wis.	3:15-cr-00037	Apr. 23, 2015	120 months' imprisonment + lifetime supervised relief	Defendant pleaded guilty to one count of violating § 2339B. The defendant pledged allegiance to ISIS attempted to travel to participate in violent jihad.	ISIS
U.S. v. Diaz	Miguel Moran Diaz	S.D. Fla.	1:15-cr-20264	Apr. 16, 2015	120 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to violating 18 U.S.C. § 922. The judge decided to apply an upward variance due to the defendant's support for ISIS and "lone wolf" characteristics.	
U.S. v. Ahmed	Hamza Naj Ahmed	D. Minn.	0:15-cr-00049	Feb. 19, 2015	120 months' imprisonment + 20 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B and to a § 1097 charge. The defendant flew to New York and planned to leave for Turkey with several others.	ISIS
U.S. v. Qamar	Haris Qamar	E.D. Va.	1:16-cr-00227	Oct. 7, 2016	102 months' imprisonment + 20 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant purchased $80 in gift cards for ISIS with help from an FBI confidential informant. Additionally, the defendant took several pictures for potential terrorist attack targets in Washington D.C.	ISIS
U.S. v. Yusuf	Nima Ali Yusuf	S.D. Cal.	3:10-cr-04551	Nov. 12, 2010	96 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was involved in sending funds to al-Shabaab.	al-Shabaab
U.S. v. Boyd	Dylan Boyd	E.D.N.C.	5:09-cr-00216	July 22, 2009	96 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339A. The defendant was connected to his father's home grown terrorist cell and traveled with his father and brother to Israel to engage in jihad.	North Carolina Taliban
U.S. v. Dakhalla	Muhammad Oda Dakhlalla	N.D. Miss.	15-cr-00098	Aug. 26, 2015	96 months' imprisonment + 15 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant attempted to provide himself and his co-conspirator as personnel to ISIS.	ISIS

U.S. v. Brown	Avin Marsalis Brown	E.D.N.C.	14-cr-0058	Apr. 01, 2014	92 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to one count of violating § 2339A. The defendant wanted to travel overseas to fight and was caught at airport with a ticket to Turkey.	
U.S. v. Tobias – Rodriguiez	Osman Jose Tobias-Rodriguiez	S.D. Fla.	1:10-cr-20094	Feb. 19, 2010	90 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to violating § 2339B and § 960. The defendant worked with others to assist al Quaeda in the transportation and smuggling of illegal aliens and weapons into the United States from Peru.	al Qaeda
U.S. v. Khan	Raja Lahrasib Khan	N.D. Ill.	1:10-cr-00240	Apr. 1, 2010	90 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant provided $200-$250 to the leadership of Kashmir Independence Movement and confirmed to an FBI confidential informant that the group was working with al Qaeda.	al Qaeda
U.S. v. Varela	Diego Alberto Ruiz Arroyave	S.D. Tex.	4:02-cr-00714	Dec. 04, 2002	90 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant attempted to acquire anti-aircraft missiles, grenade launchers, and other powerful weapons in exchange for $25 million worth of cocaine.	United Self-Defense Forces of Colombia (AUC)
U.S. v. Wolfe	Michael Todd Wolfe	W.D. Tex.	1:14-cr-00213	June 18, 2014	82 months' imprisonment + 5 years' supervised release	Defendant pleaded guilty to one count of violating § 2339A. The defendant planned to travel to Syria to engage in violent jihad and hoped to take his wife and two children.	
U.S. v. Akl	Hor Akl	N.D. Ohio	3:10-cr-00251	June 07, 2010	75 months' imprisonment + 10 years' supervised release	Defendant pleaded guilty to violating § 2339B, § 1956, and § 157. The defendant and his wife planned to conceal $500,000 to be sent to Hizballah.	Hizballah
	Amera Akl				40 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to violating § 2339B. She and her husband planned to conceal $500,000 for Hizballah.	
U.S. v. Salamanca	Victor Daniel Salamanca	S.D. Fla.	1:06-cr-20001	Jan. 03, 2006	70 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant was caught in an ICE sting operation while he was providing fraudulent identification to help FARC members enter the United States.	Revolutionary Armed Forces of Colombia (FARC)

U.S. v. Mihalik	Oytun Asyse Mihalik	C.D. Cal.	2:11-cr-00833	Aug. 30, 2011	60 months' imprisonment; defendant agreed to be removed to Turkey after term of imprisonment	Defendant pleaded guilty to one count of violating § 2339A. The defendant sent more than $2,000 to a person in Pakistan that she believed was a member of the Taliban and al Qaeda	Taliban and al Qaeda
U.S. v. Issa	Idriss Abdelrahman	S.D.N.Y.	1:09-cr-01244	Dec. 30, 2009	46 months' imprisonment (no supervised release conditions)	Defendant pleaded guilty to violating § 2339B. The defendant with others provided the FARC with logical assistance, secured transportation for cocaine across Africa with assistance from al Qaeda, and provided false identification documents.	Revolutionary Armed Forces of Colombia (FARC) & al Qaeda
U.S. v. Hodzic	Jasminka Ramic	E.D. Mo.	4:15-cr-00049	Feb. 05, 2015	36 months' imprisonment + 3 years' supervised release	Defendant pleaded guilty to conspiracy to kill or maim persons in a foreign country, which carried a maximum sentence of 60 months. She made three payments totaling $700 to a co-conspirator with the intent that the funds be transferred to, and used in support of, a fellow Bosnian-American who was fighting in Syria.	
U.S. v. Aguilar Ramirez	Luz Mery Gutierrez Vergara Ana Islabel Pena Arevalo	D.D.C.	1:07-cr-00248	Sept. 25, 2007	31 months' imprisonment + 3 years' supervised release	Defendants pleaded guilty to one count of violating § 2339B. The defendants worked as radio call center operators, patching through high frequency radio calls from FARC leaders.	Revolutionary Armed Forces of Colombia (FARC)
U.S. v. Warsame	Abdirizak Warsame	D. Minn.	0:16-cr-00037	Feb. 04, 2016	30 months' imprisonment + 20 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant conspired and attempted to assist his co-conspirators with traveling to Syria to fight with ISIS but the defendant had no such plans to travel. The court found the downward variance was appropriate based on the amount of assistance the defendant provided to the government.	ISIS
U.S. v. Esse	Amina Esse	D. Minn.	0:14-cr-00369	Nov. 14, 2014	5 years' Probation	Defendant pleaded guilty to violating § 2339B. The defendant delivered money to her co-conspirators upwards of $850 over six transactions. The defendant cooperated with the FBI and provided testimony against co-conspirators.	al-Shabaab

U.S. v. Yusuf	Abdullahi Yusuf	D. Minn.	0:15-cr-00046	Feb. 12, 2015	Time served (approx. 12 months) + 20 years' supervised release	Defendant pleaded guilty to one count of violating § 2339B. The defendant had planned to travel to support ISIS.	ISIS
U.S. v. Daniels	Aaron T. Daniels	S.D. Ohio	2:16-cr-00222	Nov. 10, 2016	80 months' imprisonment + lifetime supervised release	Defendant pleaded guilty to one count of violating § 2339B. He was arrested before boarding a flight to Trinidad and Tobago and later admitted his intention was to travel abroad and join ISIS.	ISIS

UNITED STATES DISTRICT COURT

District of Colorado

UNITED STATES OF AMERICA
v.
BAKHTIYOR JUMAEV

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:12-cr-00033-JLK-2

USM Number: 68105-066

Mitchell Baker & David Barry Savitz
Defendant's Attorneys

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1 and 2 of the Second Superseding Indictment. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2339B	Material Support of a Designated Foreign Terrorist Organization and Conspiracy and Attempt to do the Same	01/21/2012	1
18 U.S.C. § 2339B	Material Support of a Designated Foreign Terrorist Organization and Conspiracy and Attempt to do the Same	01/21/2012	2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 18, 2018
Date of Imposition of Judgment

John L. Kane
Signature of Judge

John L. Kane, Senior United States District Judge
Name and Title of Judge

July 18, 2018
Date

DEFENDANT: BAKHTIYOR JUMAEV
CASE NUMBER: 1:12-cr-00033-JLK-2

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: **Time Served as of sentencing, July 18, 2018,** on Counts 1 and 2, to be served concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of: **ten (10) years** on Counts 1 and 2, to be served concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: BAKHTIYOR JUMAEV
CASE NUMBER: 1:12-cr-00033-JLK-2

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: BAKHTIYOR JUMAEV
CASE NUMBER: 1:12-cr-00033-JLK-2

SPECIAL CONDITIONS OF SUPERVISION

1. If you are deported, you must not thereafter re-enter the United States illegally. If you reenter the United States legally, you must report to the nearest U.S. Probation Office within 72 hours of your return.
2. You must allow the probation officer to install software/hardware designed to monitor computer activities on any computer you are authorized by the probation officer to use. The software may record any and all activity on the computer, including the capture of keystrokes, application information, Internet use history, email correspondence, and chat conversations. A notice will be placed on the computer at the time of installation to warn others of the existence of the monitoring software on the computer. You must not attempt to remove, tamper with, reverse engineer, or in any way circumvent the software/hardware.
3. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States probation officer. Failure to submit to search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
4. You shall not possess, view, access, or otherwise use material that reflects extremist or terroristic views or is deemed to be inappropriate by the U.S. Probation Office.

DEFENDANT: BAKHTIYOR JUMAEV
CASE NUMBER: 1:12-cr-00033-JLK-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the following page.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 200.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the following page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BAKHTIYOR JUMAEV
CASE NUMBER: 1:12-cr-00033-JLK-2

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____ , or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

FILED
United States Court of Appeals
Tenth Circuit

March 24, 2022

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BAKHTIYOR JUMAEV,

Defendant - Appellant.

No. 18-1296
(D.C. No. 1:12-CR-00033-JLK-2)
(D. Colo.)

ORDER

Before **MATHESON**, Circuit Judge, **LUCERO**, Senior Circuit Judge, and **EID**, Circuit Judge.

Appellant's petition for rehearing en banc and Appellee's response were transmitted to all non-recused judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petition is denied.

Entered for the Court,

CHRISTOPHER M. WOLPERT, Clerk