
No.

IN THE
SUPREME COURT OF THE UNITED STATES

AZIZJON RAKHMATOV
Petitioner

-against-

UNITED STATES OF AMERICA,
Respondent

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

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Questions Presented

1. Whether the unresolved conflict between the Second Circuit panels in this case, and the conflict among the circuits on whether 28 U.S.C. §46c and due process require *en banc* consideration of inter-panel conflict, merits this Court's resolution?
2. Whether due process and Rule 35 of the Federal Rules of Criminal Procedure require that a District Court, who finalizes a sentence only by post-hearing written memorandum, to entertain a post-memorandum motion and to correct a clearly erroneous sentence, based on racial, ethnic and religious bias?

LIST OF PARTIES

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

RELATED CASES

1. United States v. Abdurasul Juraboev, *Akhror Saidakhmetov, Abror Habarov, Azizon Rakhmatov, Akmal Zakirov, Dilkayat Kasimov*, defendants. 15 Cr. 95, United States District Court for the Eastern District of New York. Judgment entered against Azizjon Rakhmatov on January 15, 2021; Judgment entered against Abdurasul Juraboev on October 17, 2017; Judgment entered against Akhror Saidakhmetov on December 20, 2017; Judgments entered against Abror Habarov on December 15, 2022, Akmal Zakirov on July 27, 2022, and Dilkayat Kasimov on June 8, 2022.
2. United States v. Abdurasul Juraboev, et al., defendants, Azizjon Rakhmatov, defendant-appellant, United States Court of Appeals for the Second Circuit Dkt. 21-151,167, decided September 3, 2021.
3. Azizjon Rakhmatov v. United States, petition for writ of certiorari denied January 24, 2022, Dkt. 21-6656

4. United States v. Rakhmatov, Azizjon Rakhmatov, defendant-appellant,
United States Court of Appeals for the Second Circuit, Dkt. 21-151,167
decided November 17, 2022.

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

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

OPINIONS BELOW

The order of the Court of Appeals denying the petition for rehearing and rehearing en banc was issued on January 27, 2023. The order is attached hereto in Appendix A. The judgment and order of the Court of Appeals rendered on November 17, 2022, dismissing the appeal from the Rule 35 motion is reported at 53 F.4th 258 (Appendix B). The judgment and order of the Court of Appeals, issued September 3, 2021, preserving the appeal from the denial of the Rule 35 motion is reported at 2021 WL 6621136 (Appendix C). The Decision and Order of the District Court, issued January 25, 2021, denying the motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure is attached hereto in Appendix D. The findings of fact by the District Court for its sentence of petitioner were rendered during sentence proceedings on January 14, 2021, and in its Memorandum and Order of January 15, 2021, reported at 2021 WL 148400 (Appendix E) .

JURISDICTION OF THE COURT

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The decision of the Court of Appeals was rendered on November 17, 2022, and rehearing was denied on January 27, 2023.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and 18 U.S.C. §§ 3553(a), 3742, 2332b, 2339a, 28 U.S.C. §46c, and F.R. Crim.P. 32, 35, 51(b), 52, USSG 3A1.4, 2M5.3 are attached hereto in Appendix G.

STATEMENT OF THE CASE¹

This petition seeks review of the judgment of the United States Court of Appeals for the Second Circuit issued November 17, 2022, dismissing the appeal from the judgment of the United States District Court for the Eastern District of New York rendered on January 25, 2021, denying petitioner's motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct the sentence of 12½ years imposed for his conviction of conspiracy to provide material support to a Foreign Terrorist Organization (FTO) (18 U.S.C. §2339B).

On August 15, 2019, petitioner pleaded guilty to one count of conspiracy to provide material support to an FTO. His plea agreement did not stipulate to imposition of the Terrorist Enhancement (USSG 3A1.4(a)). He did stipulate to the following facts:

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

¹ “A.” citations refer to Petitioner’s Appendix in the Second Circuit
“AB.” citations refer to Petitioner’s Brief in the Second Circuit
“GB.” citations refer to Government’s Brief in the Second Circuit
“SuppA.” citations refer to the Supplemental Appendix in the Second Circuit
“SA.” citations refer to the Special Appendix attached to Petitioner’s Brief in the Second Circuit

- b. Rakhmatov agreed to collect money and contributed money to fund Saidakhmetov's travel to Syria to fight with ISIS. Rakhmatov sought to send Saidakhmetov to Syria to fight on behalf of ISIS against the government of Bashir al Assad and in order to protect those people who were engaged in hostilities against and were victims of that government.
- c. During a telephone call on February 19, 2015, Rakhmatov agreed with Abror Habibov's request to collect money for Saidakhmetov's travel. Habibov suggested that Rakhmatov collect up to \$2,000 and a minimum of \$1,500. Rakhmatov agreed to try to collect money and to do so by February 25, 2015, the date of Saidakhmetov's travel.
- d. During a telephone call on February 24, 2015, Habibov asked Rakhmatov to raise at least \$2,000 for Saidakhmetov, \$1,000 of which Saidakhmetov would need to purchase "a pencil," referring to a firearm.
- e. On February 24, 2015, following the telephone call set forth above, Rakhmatov transferred \$400 into Akmal Zakirov's bank account via peer-to-peer transfer. Rakhmatov made this money transfer to Zakirov's account intending to fund Saidakhmetov's travel to and expenses in Syria to fight on behalf of ISIS.
- f. In addition, Rakhmatov discussed with other individuals the idea of going to Syria. For several years prior to February 2015, Rakhmatov gave and collected money to support fighters in Syria, their families, and widows of men killed in battle.

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

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

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

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

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

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

the Probation Department claimed that petitioner “was part of a large group of conspirators whose goal was to kill non-Muslims.” (p. 11 ¶25). No evidentiary support was provided. The government ultimately did not contest that “the sentencing record may not establish that Rakhmatov himself is an ISIS terrorist or a vocal ISIS supporter.” (Gov’t “Supplemental Opposition” letter of 12-8-20 at p. 1; A. 348), but nonetheless argued that petitioner’s contribution of money to one man to travel to join ISIS to fight against Bashir Al Assad, the condemned leader of Syria who has massacred hundred of thousands, was the equivalent of a contribution to ISIS to “establish an Islamic State in their [Iraq and Syria] place.” (*Id* at 3; A. 350).

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

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

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

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

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

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

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

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

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

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

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

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

On January 17, 2021, as invited by the Court at the oral sentencing, petitioner filed written objections to the Court's sentence Memorandum and Order of January 15, and to the oral sentence statement made at the hearing on January 14. (Letter January 17, 2021; A. 443). Petitioner reiterated the objections made in his sentence submissions and at the hearing, that the sentence was based on inflammatory innuendo, and was otherwise

unsupported and unlawful, and that the sentence failed to make reasonable inquiry, and to specifically resolve, the factual and legal disputes among the parties and the Probation Department, contained no rationale, let alone one based on the unique circumstances of petitioner and the case, and was a violation of the Constitutional rights to due process and equal protection, and against cruel and unusual punishment. 18 U.S.C. §3553(a); F.R.Crim.P. 32.

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

On January 24, 2021, petitioner replied to the government's letter. He argued that the objections of January 15 were expressly permitted by the District Court, that the plea agreement appeal waiver did not apply to post oral sentence hearing objections so invited, nor to objections to the Court's failure to delete racially biased language from the PSR, that the waiver was unenforceable for the reasons that the sentence was unlawful, and that F.R. Crim.P. 35(a) "other clear error" did apply. (A. 448).

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

Petitioner filed notices of appeal from the sentence and from the denial of his written objections to the sentence. The government moved to dismiss the appeals on the grounds of the guilty plea agreement waiver of appeal. Petitioner filed a brief in opposition to the motion, which consisted in essence of the brief on the unconstitutionality of the biased sentence and the validity of the post-hearing written objections, as reasons that the waiver should not be enforced. The government filed a “merits” brief defending the sentence. Petitioner, on his motion, was granted additional time to file a Reply to the government’s merits brief, and, prior to that deadline, filed a motion to file an oversized Reply brief. Prior to decision on the motion a panel of the Court of Appeals issued its order of September 3, 2021 (2021 WL 6621136), dismissing the direct appeal, but holding that the appeal from the post-hearing written objections could proceed as a F.R.C.P. 35 appeal not covered by the appeal waiver. Petitioner moved for reconsideration of the decision dismissing the direct appeal, arguing that the Court had not considered his Reply brief before its decision and asking it to do so on reconsideration and to deny the government’s motion to dismiss. On October 13, 2021, the panel issued its order denying reconsideration.

The appeal from the denial of the post-hearing written objections as a F.R.C.P. 35 motion was orally argued before a different panel of the Court of

Appeals. The second panel, contrary to the prior panel, held that the Rule 35 motion was covered by the appeal waiver and dismissed the appeal (54 F.4th 258 November 17, 2022). Petition for Rehearing and Rehearing en banc was denied on January 27, 2023.

REASONS FOR GRANTING THE WRIT

I

THE UNRESOLVED CONFLICT BETWEEN THE SECOND CIRCUIT PANELS IN THIS CASE, AND THE CONFLICT AMONG THE CIRCUITS ON WHETHER 28 U.S.C. §46c AND DUE PROCESS REQUIRE EN BANC CONSIDERATION OF INTER-PANEL CONFLICT, MERITS THIS COURT'S RESOLUTION.

Two separate panels of the Second Circuit reviewed this case and issued conflicting decisions.³ The second panel (United States v. Rakhmatov, 53 F.4th 258 (11-17-22)) effectively overruled the first panel (United States v. Rakhmatov, 2021 WL 6621136 (9-3-21)) which had held that petitioner's Rule 35 motion in the District Court was not covered by his plea agreement appeal waiver and that the appeal from its denial could proceed. It is submitted that the second panel's contradictory holding misconstrued 28 U.S.C. §46c⁴ and

³ Appendices B and C hereto.

⁴ "Cases and controversies shall be heard and determined by a court or panel of not more than three judges ... unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges"

the rules of this Court and the Second Circuit which require en banc consideration before one panel can overrule another and did not address, and apparently overlooked, the “clear” and obvious substantial constitutional error, the racially and religiously biased innuendo on which the District Court doubled petitioner’s sentence under the Terrorist Enhancement provision of the Guidelines (USSG 3A1.4), and the District Court’s use of a sentence procedure necessitating post-sentence written objections.

This Court holds:

[28 U.S.C. §46cl], it will be recalled, commits to a ‘court or division of * * * three judges the power to hear and determine the cases and controversies assigned to it. Obviously its determination of any such case or controversy is a decision of the Court of Appeals, and as such is a final decision, subject to review only as prescribed by 28 U.S.C.A. §1254. Circuit judges other than those designated to sit on such court or division are not members of it, and officially they play, and are entitled to play, no part in its deliberations at any stage. That this is so is made clear by subdivision (a) of §46 * * * providing that ‘Circuit judges shall sit on the court and its divisions in such order and at such times as the court directs.’ if regard be had for this mandate circuit judges may not intrude themselves, or be compelled on petition of a losing party to intrude, upon a court or division on which they have not by order of the court been directed to sit.

Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 264-65 (1953).

This Court reversed a Circuit which had held conflicting panel opinions and remanded suggesting en banc determination. United States ex. rel. Robinson

v. Johnston, 316 U.S. 649 (1942). The Second Circuit, as recently as May of this year, reaffirmed that one panel binds the Court unless overruled en banc or by this Court. United States v. Pequero, 34 F.4th 143 (2d Cir. 2022).

The second panel, nonetheless, overruled the first panel. In a footnote, it mischaracterized the latter decision as merely “permitting the appeal [of the Rule 35 motion] to proceed”, criticized the first panel for failing to discuss “whether Rakhmatov had brought a valid Rule 35(a) motion”, and invoked a presumed general “authority to reconsider issues decided by a motions panel.” 53 F.4th *supra*, at 263 n.18. Petitioner submits that the second panel’s decision should be reviewed, because it conflicts with the first panel, and changes the established rules of its own and other circuits, and this Court, and contravenes 28 U.S.C. §46c, mischaracterizes the decision of the first panel, and fails to address the racial bias in the decision of the District Court.

The first panel did not merely permit the Rule 35 appeal to proceed; it held that “Petitioner’s challenge . . . to the denial of his Federal Rules of Criminal Procedure 35(a) motion is [not] covered by his appeal waiver.” 21 WL 6621136, *supra*, (emphasis added). Thus, the first panel referred specifically to the Rule 35 motion filed and denied in the District Court. That motion was the subject of the appeal before it, and the panel rendered a decision on the law that an appeal from that Rule 35 motion is not barred by

the waiver. The first panel had the same full briefing on the issues including the arguments that the errors raised below, including the racial bias in sentencing and bifurcated procedure, were properly cognizable by Rule 35 in this case, and it had the same full appellate record before it as did the second panel.

The decision in its plain meaning thus included the holding that the denial of the motion by the District Court was an appealable issue. The second panel, therefore, could not dismiss the appeal without contravening its own court, the statute and the rules of this Court that the mere disagreement with the first panel did not entitle the second panel to overrule it. *New York Pet Welfare Association, Inc. v. City of New York*, 850 F.3d 79, 83n.3 (2d Cir. 2017). The decision of a motions panel will not be revisited when it had the full record and there is no compelling reason to do so. *Shomo v. City of New York*, 579 F.3d 176 (2d Cir. 2009). Finality does not depend on the equities of the original decision. *Arizona v. California*, 460 U.S. 605 (1983); *In Re Jaylaw Drug, Inc.*, 621 F.2d 524, 626 (2d Cir. 1980).

Nor was the second panel correct that it could reconsider the first panel's decision simply because it was a motions panel. *New York Pet Welfare Association, Inv. v. City of New York*, supra. The case cited by the second panel, *Rezzonico v. H&R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999)

does not support that general proposition. The reconsideration in that case was justified because the prior panel did not have the full record and briefing and because appellate jurisdiction was at issue. These were “cogent and compelling” reasons for the reconsideration which are not present in this case. The other case cited by the panel, *United States v. Brown*, 623 F.3d 104 (2d Cir. 2010), was a decision on a direct appeal which had been preceded by an attempted pre-sentencing interlocutory appeal which by its nature did not have full briefing and finality.

The Second Circuit decision in *Rezzonico v. H & R Block*, *supra*, conflicts with the same Court’s decisions in *Shomo v. City of New York*, *supra*, and *New York Pet Welfare Assoc*, *supra*, which hold that decisions of a motions panel may not be contradicted without en banc consideration. There is also a conflict between *Rezzonico* and the decision of the D.C. Court of Appeals which also holds in accord with *Shomo* and *New York Pet Welfare*. *Taylor v. F.D.I.C.*, 132 F.3d 753 (1997). Other Circuits conflict with *Shomo* and *New York Pet Welfare*, and hold in accord with *Rezzonico*.⁵ This Court

⁵See, e.g., *CNF Constructors, Inc. v. Donohoe Constr. Co.*, 57 F.3d 395, 397-98n. 1 (4th Cir. 1995); *EEOC v. Naches Butane Prods. Co.*, 704 F.2d 144, 147 (5th Cir. 1983); *American Fed’n of Grain Millers, Local 24 v. Cargill Inc.*, 15 F.3d 726, 727 (7th Cir. 1994); *McCuen v. Cas. Co.*, 946 F.2d 1401, 1403 (8th Cir. 1991); *United States v. Houser*, 804 F.2d 565, 568 (9th Cir.); *Stifel, Nicolaus & Co. v. Woolsey*, 81 F.3d 1540, 1544 (10th Cir.).

should resolve the conflicts and clarify its holdings in Western Pacific R. Corp v. Western Pacific Co, *supra* and United States ex. rel. Robinson v. Johnston, *supra*.

II

DUE PROCESS AND RULE 35 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE REQUIRE THAT A DISTRICT COURT, WHO FINALIZES A SENTENCE ONLY BY POST-HEARING WRITTEN MEMORANDUM, TO ENTERTAIN A POST-MEMORANDUM MOTION AND TO CORRECT A CLEARLY ERRONEOUS SENTENCE, BASED ON RACIAL, ETHNIC AND RELIGIOUS BIAS

The second panel addressed only a part of the merits while dismissing the Rule 35 appeal as unmeritorious (Appendix B hereto). Nowhere in the second panel's decision is reference to petitioner's Rule 35 assignment of error that the sentence was the result of bias: the District Court's finding without evidence, based on government prejudicial innuendo, that petitioner intended to kill non-Muslim people in a war for jihad. (PSR Addendum, p.11 ¶25, PSR ¶25, Gov't.Mem. at App. 349-50). Nor did the second panel address the assignment of error that Rule 35 was the only way petitioner could object to

the final sentence because the District Court had postponed the final sentence to a written memorandum.

A conviction for material support to a terrorist organization is based only on “knowledge about the organization’s connection to terrorism, not specific intent to further the organization’s terrorist activities.” Holder v. Humanitarian Law Project, 561 U.S. 1, 16-17 (2010) (emphasis added). “A conviction for material support of a terrorist organization does not necessarily imply that the defendant committed an offense of terrorism.” United States v. Banal-Ramos, 516 Fed. Appx. 43, 47 (2d Cir. 2013). Nonetheless, without more than the conviction, the District Court applied the Terrorist Enhancement Guideline, which doubled petitioner’s sentence for making a \$400 contribution to ISIS at the behest of his employer to aid in the defense of Muslims being massacred by the Assad regime in Syria. That application was tainted by the racial and religious bias apparent in the District Court’s adoption as fact of the government’s unsupported innuendo that he intended to kill non-Muslims in a war for jihad. Accordingly, any Muslim convicted of making a contribution to ISIS for any reason is presumed, contrary to law and facts, to intend to kill non-Muslims in a war of jihad, and the Terrorist “Enhancement” becomes the base penalty for the material support offense contrary to Congressional intent. Petitioner argued that such a racially,

religiously biased sentence was the “clear error” cognizable by the text of Rule 35 (Petitioner’s Opposition Brief to Gov’t. Motion to Dismiss at 18-53; Reply Brief at 1-38; Rule 35 motion, App.443). The second panel overlooked this issue, and mischaracterized petitioner’s claim as merely an objection to the District Court’s “analysis” of the sentence factors (53 F.4th at 262).

Also omitted from the second panel’s opinion is the fact that the Rule 35 motion was invited by, and necessitated by, the District Court’s unusual bifurcation of the sentencing procedure. The Court did not respond to all of the objections at the sentence hearing. Instead, it announced that it would issue, later that day or the next, a written memorandum, and it invited objections to be addressed to that memorandum (Petitioner’s Brief in Opposition to Dismissal at pp. 50-51; App. 435). Hence, the District Court’s about-face denial of the Rule 35 motion it had invited is an extraordinary aspect of the case which apparently played a part in the first panel’s decision, but not in the second.

The District Court erroneously avoided consideration of those objections, ruling that Rule 35 could not correct such errors and that petitioner had waived the right to make such a motion by his plea agreement waiver of appeal. (Decision and Order, January 25, 2021, Appendix D hereto).

Given that the Court had announced at the sentence hearing that his sentence practice was to complete this process in a written Memorandum and Order which the parties could “have at” on the same day as the hearings or the next day, petitioner’s due process right to participate in that process included the opportunity to make objections to the written order. No law “force[s] a district court to finalize a sentence in a single day - even if the defendant raised at the hearing a post-sentencing objection that required additional research and contemplation by the district court.” United States v. Luna-Acosta, 715 F.3d 860, 867 (10th Cir. 2013). The only procedure available for post-sentence hearing objection is Rule 35.

Thus, the requirement that a defendant first give the District Court notice of objections to the sentence before raising them on appeal, “would be meaningless if a district court could not - even if it or one of the parties caught a mistake seconds after it was made - correct its initial announcement except for the limited circumstances listed in Rule 35.” Id at 866. Those circumstances should include the Rule 35 “clear error” of bias, particularly when the Court does not finalize the sentence until proceedings in writing after the sentence hearing.

Furthermore, the District Court’s ability to modify the sentence under Rule 35(a) was jurisdictional. (See United States v. McGauhy, 670 F.3d 1149,

1158 (10th Cir. 2012), thus, “the appellate waiver did not waive the District Court’s failure to recognize and exercise its jurisdiction to consider the motion to correct. Petitioner filed a separate notice of appeal from the denial of his objections which the Court styled a Rule 35 motion.

Rule 35 did permit the District Court to correct “errors which would almost certainly result in a remand of the case to the trial court for further action” (United States v. Abreu-Cabrera, *supra* at 72, quoting Rule 35 Advisory Committee Notes) as, appellant submits, they would in this case. The Rule was traditionally “broadly available to correct an injustice in a conviction or a sentence.” United States v. Thompson, 261 F.2d 809, 810 (2d Cir. 1958). The great jurist and scholar of sentencing, Marvin Frankel of the Southern District of New York, once lowered a sentence for an attempted failure to file income taxes after President Nixon was granted a full pardon for far more egregious criminal conduct. United States v. Braun, 382 F.Supp. 214 (S.D.N.Y. 1974).

More recently, the Second Circuit has held that the Rule applies to correct the failure of the sentencing court to consider Guideline policy. United States v. Waters, 84 F.3d 86 (2d Cir. 1996). In this case, the District Court failed to actually consider and apply the statutory factors and Constitutional due process. Courts have used the Rule to correct the prosecutor’s breach of a

plea agreement (United States v. Bronstein, 623 F.2d 1327 (9th Cir. 1980)), a Rule 35 “other error” which involved illegal action or inaction by a party to a sentencing, as is involved in this case with the Court’s apparent use of the sentence to bar appeal. And, The District Court’s failure to explain its sentence, which implies that unlawful purpose, is a grounds for correction under Rule 35. United States v. Himsel, 951 F.2d 144 (7th Cir, 1991); Benson v. United States 332 F.2d 288 (5th Cir. 1964); United States v. Petroleum Corporation of Michigan, 703 F.2d 94 (5th Cir. 1982).

Petitioner did not argue, that the District Court made a faulty analysis of the Guidelines; he argued that the Court made no analysis. Its mere quotation of the Guidelines followed by the statement that the sentence complies is not analysis; it is an abdication of judicial responsibility, particularly given the adoption of the PSR invective as fact and when the application of the draconian Terrorist Enhancement Guideline was factually and legally contested. United States v. Waters, 84 F.3d 86 (2d Cir. 1996) holds that Rule 35 reaches such errors. The District Court record contains only the Court’s biased conclusion that petitioner must have intended to kill non-Muslims. The second panel acknowledges that Rule 35 allows correction of “obvious error or mistake”, and the Rule itself refers to “clear error.” The Circuit’s second panel decision in this case should be reviewed by this Court,

lest overt judicial bias be rendered out of reach of Rule 35's obvious or clear error.

The second panel's concern that permitting Rule 35 correction of judicial bias and abdication of responsibility would allow an "end run" around guilty plea waivers of appeal (53 F.4th at 261) is unfounded. The waiver in this case did not specifically include Rule 35 appeals. Judicial bias will be rare, especially if this Court reverses it, and as this Court and the Second Circuit have held before, appeal waivers are, and should be, unenforceable when a sentence is based on bias or other constitutionally impermissible factors. *Garza v. Idaho*, 139 S.Ct. 738 (2019); *Class v. United States*, 138 S.Ct. 798 (2018); *United States v. Ruiz*, 536 US 622 (2002); *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE WRIT
SHOULD ISSUE TO REVIEW THE SECOND
CIRCUIT PANEL DECISION, UNITED STATES V.
RAKHMATOV, 53 F.4th 258 (2d Cir. 11-17-22); AND
UPON REVIEW, THE DECISION SHOULD BE

REVERSED, AND THE CASE SHOULD BE
REMANDED TO A DIFFERENT JUDGE OF THE
DISTRICT COURT, OR THE CASE SHOULD BE
REMANDED TO THE SECOND CIRCUIT FOR
CONSIDERATION EN BANC.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of January, two thousand twenty-three.

United States of America,

Appellee,

v.

Abdurasul Hasanovich Juraboev, AKA Abdulloh Ibn
Hasan, Akhror Saidakhmetov, Abror Habibov, Dilkhayot
Kasimov, Akmal Zakirov,

Defendants,

Azizjon Rakhmatov,

Defendant - Appellant.

ORDER

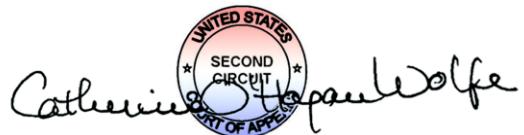
Docket Nos: 21-151 (L)
21-167 (Con)

Appellant, Azizjon Rakhmatov, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

UNITED STATES
SECOND CIRCUIT
COURT OF APPEALS

APPENDIX B

In the

United States Court of Appeals
For the Second Circuit

AUGUST TERM 2021

ARGUED: FEBRUARY 24, 2022
DECIDED: NOVEMBER 17, 2022

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

UNITED STATES OF AMERICA,
Appellee,

70.

AZIZJON RAKHMATOV,
Defendant-Appellant,

ABDURASUL HASANOVICH JURABOEV, AKA ABDULLOH IBN HASAN,
AKHROR SAIDAKHMETOV, ABROR HABIBOV, DILKHAYOT KASIMOV,
AKMAL ZAKIROV,
Defendants.

Appeal from the United States District Court
for the Eastern District of New York.

Before: LIVINGSTON, *Chief Judge*, KEARSE and WALKER, *Circuit Judges*.

In these appeals, Azizjon Rakhmatov challenges the sentence imposed following his guilty plea for conspiring to support a terrorist

1 group (No. 21-151) and the denial of his Federal Rule of Criminal
2 Procedure 35(a) motion to correct the sentence (No. 21-167). In this
3 opinion, we address whether the Rule 35(a) motion is barred by the
4 appeal waiver in his plea agreement. Rakhmatov argues that the
5 district court erred in denying his motion to correct its alleged
6 sentencing errors. We disagree, and **DISMISS** the appeal in No. 21-
7 167. We address Rakhmatov’s remaining arguments in a summary
8 order filed concurrently with this opinion.

9
10

13 DAVID K. KESSLER, Assistant United States
14 Attorney (Susan Corkery, Douglas M. Pravda, J.
15 Matthew Haggans, Assistant United States
16 Attorneys, *on the brief*), for Jacquelyn M. Kasulis,
17 Acting United States Attorney for the Eastern
18 District of New York, Brooklyn, New York, *for*
19 *Appellee United States of America.*

20

21 JOHN M. WALKER, JR., *Circuit Judge:*

22 In these appeals, Azizjon Rakhmatov challenges the sentence
23 imposed following his guilty plea for conspiring to support a terrorist
24 group (No. 21-151) and the denial of his Federal Rule of Criminal
25 Procedure 35(a) motion to correct the sentence (No. 21-167). In this
26 opinion, we address whether the Rule 35(a) motion is barred by the
27 appeal waiver in his plea agreement. Rakhmatov argues that the
28 district court erred in denying his motion to correct its alleged
29 sentencing errors. We disagree, and **DISMISS** the appeal in No. 21-
30 167. We address Rakhmatov's remaining arguments in a summary
31 order filed concurrently with this opinion.

1

BACKGROUND

2 In 2019, Appellant Rakhmatov pleaded guilty in the Eastern
3 District of New York (Kuntz, J.) to conspiring to provide material
4 support to the terrorist group ISIS in violation of 18 U.S.C. § 2339B.
5 He pleaded pursuant to a plea agreement in which he agreed not to
6 “file an appeal or otherwise challenge” his sentence so long as he was
7 sentenced to 150 months or less of imprisonment.¹ We will refer to
8 this provision in the plea agreement as the “appeal waiver.”

9 In January 2021, the district court sentenced Rakhmatov to 150
10 months’ imprisonment and lifetime supervised release, accompanied
11 by several special conditions. Three days later, Rakhmatov filed a
12 letter objecting to his term of imprisonment. He urged the district
13 court to “correct the sentence” or resentence him within 14 days,
14 citing Federal Rule of Criminal Procedure 35(a).² The district court
15 “denied” the motion. Rakhmatov then appealed his sentence (No. 21-
16 151) and the denial of his Rule 35(a) motion (No. 21-167).

17 On appeal, a motions panel of this court granted in part the
18 government’s motion to dismiss, holding that Rakhmatov’s appeal of
19 his term of imprisonment was barred by his plea agreement. The
20 panel permitted the challenge to proceed, however, as to his
21 supervised release, the special conditions, and the district court’s
22 denial of his Rule 35(a) motion, on the basis that they were not
23 covered by the appeal waiver.

¹ App. 151.

² *Id.* at 444. Rule 35(a) states that “[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.”

1

DISCUSSION

2 At issue in this opinion is the letter Rakhmatov filed three days
3 after his sentencing. This letter was not styled as a motion but rather
4 “stat[ed] Mr. Rakhmatov’s objections to the sentence imposed.”³ It
5 argued that the district court had failed to properly apply the 18
6 U.S.C. § 3553(a) sentencing factors and improperly issued a “blanket
7 rejection” of his objections to the presentence report.⁴ The letter
8 concluded by urging the district court to correct Rakhmatov’s
9 sentence or resentence him, citing Rule 35(a).

10 The district court construed the letter as a motion brought
11 under Rule 35(a). It “denied” the motion on two grounds: (1) the
12 letter’s objections could not be raised under Rule 35(a), and (2)
13 Rakhmatov’s appeal waiver, which stated that he would not “file an
14 appeal or *otherwise challenge*” his sentence,⁵ barred him from bringing
15 a Rule 35(a) motion.⁶ On appeal, Rakhmatov argues that the letter
16 was a Rule 35(a) motion that was improperly denied.⁷ The
17 government responds that his appeal waiver barred him from making
18 a Rule 35(a) motion and that the letter’s objections were not

³ App. at 443.

⁴ *Id.*

⁵ *Id.* at 151 (emphasis added).

⁶ Special App. 13. The district court characterizes its disposition as a denial, but it is more properly a dismissal. *See, e.g., United States v. Borden*, 16 F.4th 351, 356 (2d Cir. 2021) (dismissing a challenge to a sentence that is barred by an appeal waiver).

⁷ In his opening brief, Rakhmatov suggests, in the alternative, that his post-sentencing letter was not a Rule 35(a) motion but an objection at sentencing. We need not address this argument because, as the motions panel held, any challenge to the term of imprisonment itself is barred by his appeal waiver.

1 redressable through Rule 35(a). Consistent with the district court and
2 the litigants on appeal, we treat Rakhmatov's post-sentencing letter
3 as a Rule 35(a) motion. Therefore, we must decide whether the appeal
4 waiver prohibits his Rule 35(a) motion.

5 Rule 35(a) allows the district court to correct a sentence that
6 contains an "arithmetical, technical, or other clear error."⁸ We have
7 repeatedly stated, quoting the rule's advisory committee notes, that it
8 "is intended to be very narrow and to extend only to those cases in
9 which an obvious error or mistake has occurred in the sentence."⁹ It
10 is not "meant to allow the district court to reopen issues previously
11 resolved at the sentencing hearing through the exercise of the court's
12 discretion with regard to the application of the sentencing guidelines,
13 or to reconsider the application or interpretation of the sentencing
14 guidelines."¹⁰ District courts have invoked Rule 35(a) to, for example,
15 correct a restitution award that was initially calculated incorrectly.¹¹
16 On the other hand, disputes about the application of the sentencing
17 guidelines fall "outside the very narrow scope of the rule."¹²

18 In this case, Rakhmatov's motion did not identify any
19 arithmetical, technical, or similar errors with the sentence. Instead,
20 he alleged that the district court failed to properly apply the
21 sentencing factors and failed to adequately consider his objections,

⁸ Fed. R. Crim. P. 35(a).

⁹ *United States v. Donoso*, 521 F.3d 144, 146 (2d Cir. 2008) (per curiam) (quoting *United States v. Abreu-Cabrera*, 64 F.3d 67, 72 (2d Cir. 1995), itself quoting Fed. R. Crim. P. 35, 1991 advisory committee's note) (abrogated on different grounds).

¹⁰ *United States v. DeMartino*, 112 F.3d 75, 79 (2d Cir. 1997) (quotation marks omitted).

¹¹ See *United States v. Spallone*, 399 F.3d 415, 419 (2d Cir. 2005).

¹² *Califano v. United States*, 2000 WL 730398, at *2 (2d Cir. 2000).

1 resulting in a prison term that was “unreasonable, cruel and unusual,
2 . . . and greater than necessary to accomplish [its] purpose.”¹³ The
3 motion’s arguments thus plainly fall outside of Rule 35(a)’s “very
4 narrow” scope.¹⁴ Instead of filing a genuine Rule 35(a) motion,
5 Rakhmatov simply stated his objections to the district court’s
6 sentence.

7 We have not yet decided, and need not decide today, whether
8 an appeal waiver can bar a motion to correct a “technical,
9 arithmetical, or other clear error,” as specified in Rule 35(a).¹⁵ Simply
10 citing Rule 35(a), however, cannot allow a defendant to obtain
11 substantive review that would otherwise be barred by an appeal
12 waiver. If Rule 35(a) were to permit such end-runs, it would
13 functionally deprive the government of the benefit of the waiver. As
14 a result, appeal waivers “would cease to have value as a bargaining
15 chip in the hands of defendants.”¹⁶ Accordingly, we hold that when
16 a challenge to a prison sentence purportedly under Rule 35(a) does
17 not fall within the narrow scope of Rule 35(a), an appeal waiver can
18 bar consideration of the motion.

19 The terms of this appeal waiver plainly bar consideration of the
20 motion. As part of his plea agreement, Rakhmatov agreed not to “file
21 an appeal or *otherwise challenge*, by petition pursuant to 28 U.S.C.
22 § 2255 or *any other provision*, the conviction or sentence” provided he

¹³ App. 444.

¹⁴ *Donoso*, 521 F.3d at 146; *see also United States v. Escobar*, 542 F. App’x 38, 41 (2d Cir. 2013) (suggesting that arguments related to a sentence’s procedural and substantive reasonability are not appropriately raised in a Rule 35(a) motion).

¹⁵ Fed. R. Crim. P. 35(a).

¹⁶ *United States v. Arevalo*, 628 F.3d 93, 98 (2d Cir. 2010) (quotation marks omitted).

1 was sentenced to 150 months' imprisonment or less.¹⁷ The district
2 court sentenced him to 150 months in prison. Although he disagrees
3 with this sentence, he cannot use Rule 35(a) to overcome his waiver.
4 His appeal from the decision on the motion must be dismissed.¹⁸

5 Rakhmatov tries to avoid this outcome by insisting that his
6 motion falls within the parameters of Rule 35(a). This argument is
7 without merit. First, he cites precedent suggesting that the rule is
8 "broadly available" to correct unjust or unlawful sentences.¹⁹ All of
9 the cases he cites, however, are either out of circuit or analyze
10 previous versions of Rule 35 that allowed courts to correct any
11 "illegal" sentence.²⁰ As discussed, our precedent and the advisory
12 committee's comments make clear that the current Rule 35(a) is far
13 narrower in scope.

14 Next, Rakhmatov points to *United States v. Waters*, which held
15 that Rule 35(a) permitted a district court to correct a sentence when it
16 had failed to consider a Sentencing Guidelines policy statement in
17 setting its original sentence.²¹ Rakhmatov equates this to the district

¹⁷ App. 151 (emphasis added).

¹⁸ A motions panel previously declined to dismiss Rakhmatov's appeal as to this issue. In permitting the appeal to proceed, however, the panel did not discuss whether Rakhmatov had brought a valid Rule 35(a) motion. In any case, our authority to reconsider issues decided by a motions panel is well established. *See, e.g., United States v. Brown*, 623 F.3d 104, 111–12 (2d Cir. 2010); *Rezzonico v. H & R Block, Inc.*, 182 F.3d 144, 149 (2d Cir. 1999).

¹⁹ *United States v. Thompson*, 261 F.2d 809, 810 (2d Cir. 1958); *see also United States v. Braun*, 382 F. Supp. 214 (S.D.N.Y. 1974); *United States v. Himsel*, 951 F.2d 144 (7th Cir. 1991); *Benson v. United States*, 332 F.2d 288 (5th Cir. 1964); *United States v. Patrick Petroleum Corp. of Michigan*, 703 F.2d 94 (5th Cir. 1982).

²⁰ *See Himsel*, 951 F.2d at 146 (quoting the previous rule).

²¹ 84 F.3d 86, 90 (2d Cir. 1996) (per curiam).

1 court’s alleged failure to properly apply the sentencing factors in his
2 case. In *Waters*, however, we emphasized that the “district court [had]
3 neglected to consider the policy statement *at all*,” contrary to the law’s
4 requirements, because it was unaware “of the policy statement’s
5 existence.”²² Indeed, the district court stated on the record that it had
6 not taken the statement into account when imposing the original
7 sentence.²³ In this case, the district court explicitly invoked and
8 applied the § 3553(a) sentencing factors when arriving at
9 Rakhmatov’s sentence. Rakhmatov asserts that the district court did
10 not “actually” apply the factors,²⁴ but this amounts to an objection to
11 its analysis, not an unmistakable error as in *Waters*. Rakhmatov’s
12 arguments are plainly beyond the scope of Rule 35(a) and thus are
13 barred by his appeal waiver.

14

CONCLUSION

15 For the foregoing reasons, we **DISMISS** Rakhmatov’s appeal
16 from the denial of his Rule 35(a) motion (No. 21-167). We address his
17 appeal in No. 21-151 in the concurrently filed summary order.

²² *Id.* at 90–91.

²³ *Id.* at 91.

²⁴ Appellant’s Brief at 53.

APPENDIX C

United States Court of Appeals
FOR THE
SECOND CIRCUIT

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

Present:

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

United States of America,

Appellee,
v.
21-151 (L),
21-167 (Con)

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

Defendants,
Azizjon Rakhmatov,
Defendant-Appellant.

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

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

APPENDIX B

Catherine O'Hagan Wolfe


APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
: **DECISION & ORDER**
v. : 15-CR-95-6 (WFK)
:
AZIZJON RAKHMATOV, :
:
Defendant. :
-----X

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

BACKGROUND

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

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

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

DISCUSSION

I. Rule 35 is Inapplicable to Defendant’s Request

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

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

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

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

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

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

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

Accordingly, Defendant’s Rule 35 motion is denied.

SO ORDERED.

s/ WFK

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

Dated: January 25, 2021
Brooklyn, New York

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
: **MEMORANDUM & ORDER**
v. : 15-CR-95-6 (WFK)
: AZIZJON RAKHMATOV, :
: Defendant. :
-----X

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

BACKGROUND

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

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

DISCUSSION

I. Legal Standard

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

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

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

II. Analysis

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

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

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

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

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

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

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

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

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

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

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

B. The Need for the Sentence Imposed

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

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

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

C. The Kinds of Sentences Available

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

F. The Need to Avoid Unwarranted Sentence Disparities

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

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

G. The Need to Provide Restitution

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

CONCLUSION

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

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

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

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

SO ORDERED.

s/ WFK

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

Dated: January 15, 2021
Brooklyn, New York

APPENDIX F

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

-----x 15-CR-95 (WFK)

3 UNITED STATES OF AMERICA,

4 Plaintiff,

United States Courthouse
Brooklyn, New York

5 -against-

January 14, 2021
12:00 p.m.

6 AZIZJON RAKHMATOV,

7 Defendant.

8 -----x
9 TRANSCRIPT OF CRIMINAL CAUSE FOR SENTENCING
10 ALL PRESENT VIA VIDEOCONFERENCE
BEFORE THE HONORABLE WILLIAM F. KUNTZ, II
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES

13 For the Government: UNITED STATES ATTORNEY'S OFFICE
14 Eastern District of New York
271 Cadman Plaza East
15 Brooklyn, New York 11201
BY: DOUGLAS M. PRAVDA, ESQ.
16 DAVID K. KESSLER, ESQ.
Assistant United States Attorneys

17 For the Defendant: LAWRENCE MARK STERN
18 100 Hudson Street, #6A
New York, New York 10013
19 BY: LAWRENCE MARK STERN, ESQ.

20 Also Present: SANJAR BABADJANOV, INTERPRETER
21 SHAYNA BRYANT, USPO

22 Court Reporter: LINDA D. DANIELCZYK, RPR, CSR, CCR
Phone: 718-613-2330
23 Fax: 718-804-2712
Email: LindaDan226@gmail.com

24
25 Proceedings recorded by mechanical stenography. Transcript
produced by computer-aided transcription.

1 (In open court; All present via videoconference.)

2 THE COURT: All right. Ms. Love, you may start the
3 proceeding, start the recording, and call the case.

4 THE COURTROOM DEPUTY: Thank you, Judge.

5 The conference is now recorded.

6 Criminal cause for a sentencing, Docket Number
7 15-CR-00095-6, United States of America versus Azizjon
8 Rakhmatov.

9 Would each counsel please identify him or herself,
10 state the names of your respective clients, and spell each
11 name for the reporter, beginning with the government.

12 MR. PRAVDA: Good afternoon, Your Honor. For the
13 United States, Douglas Pravda and David Kessler.

14 For the court reporter, I'll spell them both.
15 Douglas, D-O-U-G-L-A-S, Pravda, P-R-A-V-D-A. And David
16 Kessler, David, D-A-V-I-D, Kessler, K-E-S-S-L-E-R.

17 MR. STERN: For the defendant, Azizjon Rakhmatov,
18 Lawrence Mark Stern. L-A-W-R-E-N-C-E, M-A-R-K, S-T-E-R-N.

19 Azizjon Rakhmatov is A-Z-I-Z-J-O-N,
20 R-A-K-H-M-A-T-O-V.

21 THE COURT: Good afternoon. And the record should
22 reflect that Mr. Rakhmatov is present.

23 Can you hear us, Mr. Rakhmatov?

24 THE DEFENDANT: Yes.

25 THE COURT: Thank you, sir.

1 Who else needs to note their appearance for the
2 record?

3 THE PROBATION OFFICER: Good afternoon, Your Honor.
4 Shayna Bryant from United States Probation. S-H-A-Y-N-A,
5 B-R-Y-A-N-T.

6 THE COURT: Good afternoon, Miss Bryant.

7 I'm now going to ask the interpreter to identify
8 himself and to spell his name, first and last for the record.
9 And then I will have the court reporter spell her name, first
10 and last.

11 So the interpreter, please.

12 THE INTERPRETER: Good morning, Judge. Sanjar
13 Babadjanov, court interpreter. Sanjar, S-A-N-J-A-R.
14 Babadjanov, B-A-B-A-D-J-A-N-O-V. Thank you.

15 THE COURT: Good afternoon, sir. Have you
16 previously been sworn by this court in this proceeding?

17 THE INTERPRETER: Yes, sir.

18 THE COURT: All right. Is that acceptable to
19 defense counsel?

20 MR. STERN: Yes.

21 THE COURT: And to the prosecution?

22 I couldn't hear you, I'm sorry. Is that acceptable
23 to the prosecution?

24 MR. PRAVDA: Yes, Your Honor.

25 THE COURT: All right. Thank you.

1 And the court reporter, please.

2 THE COURT REPORTER: Linda Danelczyk, official court
3 reporter. L-I-N-D-A, D-A-N-E-L-C-Z-Y-K.

4 THE COURT: Welcome, and Happy New Year to you as
5 well, and to everyone on the call.

6 Is there anyone else who needs to note an appearance
7 on the record?

8 (No audible response heard.)

9 THE COURT: Very well.

10 Good afternoon, again, Mr. Rakhmatov.

11 THE DEFENDANT: Good afternoon, Judge.

12 THE COURT: Now, Mr. Rakhmatov, as you know, a
13 defendant has the right to be present in person in open court
14 for sentencing. And you may have this proceeding, just the
15 sentencing, adjourned until it is safe for us to hold it
16 physically together in a place in the courthouse.

17 Mr. Rakhmatov, do you understand that?

18 THE DEFENDANT: I do understand.

19 THE COURT: Now, Mr. Rakhmatov, have you had an
20 opportunity to discuss your options with your counsel?

21 THE DEFENDANT: Yes.

22 THE COURT: Mr. Stern, as defense counsel, would you
23 please state the reason or reasons for proceeding remotely via
24 this videoconference today, sir?

25 MR. STERN: Because Mr. Rakhmatov has -- his health

1 has been deteriorating at the MCC and he's has had conditions
2 at the MCC, including the COVID surge, and he's been waiting a
3 long time for sentencing, and he doesn't -- and really can't
4 wait until it's all clear from COVID, from the pandemic to be
5 sentenced.

6 THE COURT: Are there any other reasons that he's
7 agreed to proceed remotely by videoconference today, other
8 than the ones you've articulated?

9 I'm not suggesting there should be, I just wanted to
10 have a complete record.

11 MR. STERN: I think that's it.

12 THE COURT: Okay. Thank you, sir.

13 For the prosecution, is that acceptable as the basis
14 for proceeding remotely by videoconference today pursuant to
15 the Administrative Orders of Chief Judge Mauskopf for the
16 Eastern District?

17 MR. PRAVDA: Yes, Your Honor. Thank you.

18 THE COURT: Thank you.

19 Now, Mr. Rakhmatov, I ask you directly, sir: Do you
20 waive your right to an in-person hearing, and do you consent
21 to this videoconference hearing, sir?

22 THE DEFENDANT: Yes.

23 THE COURT: Mr. Rakhmatov, is your consent knowing,
24 intelligent and voluntary, sir?

25 THE DEFENDANT: Yes.

1 THE COURT: Defense counsel, Mr. Stern, do you agree
2 that your client Mr. Rakhmatov's consent is knowing,
3 intelligent and voluntary?

4 MR. STERN: Yes.

5 THE COURT: Mr. Rakhmatov, have you had an
6 opportunity to review carefully your presentence investigation
7 report, which was filed on February the 6th of 2020?

8 THE DEFENDANT: Sorry, can you repeat that?

9 THE COURT: Yes, sir.

10 There was a presentence investigation report in your
11 case, which was filed on February 6th of 2020, last year.

12 THE DEFENDANT: Yes.

13 THE COURT: Have you had a chance to read that?

14 THE DEFENDANT: Yes. Yes.

15 THE COURT: And have you had a chance and have you,
16 in fact, discussed it with your counsel?

17 THE DEFENDANT: Yes.

18 THE COURT: Have you also had an opportunity to read
19 and to discuss with counsel the following documents:

20 Your defense counsel's objection to the presentence
21 investigation report, which was filed on October 11th of 2020?

22 THE DEFENDANT: Yes.

23 THE COURT: The government's sentencing memorandum
24 filed on October 16th of 2020?

25 THE DEFENDANT: Yes.

1 THE COURT: The addendum to your presentence
2 investigation report, which was filed on October 30 of 2020?

3 THE DEFENDANT: Yes.

4 THE COURT: Your defense counsel's second objection
5 to the presentence investigation report filed on November 27th
6 of 2020?

7 THE DEFENDANT: Yes.

8 THE COURT: The United States of America's response
9 to your defense counsel's second objection to the presentence
10 investigation report filed on December 8th of 2020?

11 THE DEFENDANT: Yes.

12 THE COURT: Now in addition to those materials and
13 all the materials on the docket, my files reflect copies in
14 particular of the following documents:

15 The superseding indictment filed on May 9th of 2016.
16 The plea agreement, which was filed and entered in this case
17 on August 15 of 2019, signed by the defendant and acknowledged
18 by defendant's counsel. And letters from defense counsel
19 filed on December 8 of 2020, and December 17 of 2020.

20 Now, counsel, beginning with the government and then
21 defense counsel, are there any other documents that either
22 counsel would like to specifically call to the Court's
23 attention at this time?

24 The government?

25 MR. PRAVDA: No, Your Honor. Thank you.

1 THE COURT: Defense counsel?

2 MR. STERN: I have a question, Judge. You said that
3 presentence report was filed on February 6th, 2020. And the
4 presentence report that I have is April 15th of 2020.

5 I'm not sure what the presentence report of
6 February 6th is. Maybe Miss Bryant could help us?

7 THE COURT: Well, hang on a minute.

8 (Pause in the proceedings.)

9 MR. PRAVDA: I could help, Your Honor.

10 THE COURT: Yes, please, Mr. Pravda.

11 MR. PRAVDA: Mr. Stern, on the very bottom of the
12 presentence report, it says "date report prepared,
13 February 2nd, 2020."

14 MR. STERN: Got it. Got it. Thank you. Sorry.

15 THE COURT: Okay. So just so the record is clear,
16 this is a document you have received, Mr. Stern, and reviewed
17 with your client?

18 MR. STERN: Yes, sir.

19 THE COURT: Okay.

20 So, again, are there any other documents either
21 counsel would like to mention at this time?

22 Mr. Pravda?

23 MR. PRAVDA: No, Your Honor.

24 THE COURT: Mr. Stern?

25 MR. STERN: Did you mention the letter of

1 September 10th, 2020, that I mailed to you enclosing various
2 videos prepared by his family and translations thereof?

3 THE COURT: I have reviewed that document.

4 MR. STERN: Thank you.

5 THE COURT: Thank you.

6 Anything else?

7 MR. STERN: That's it.

8 THE COURT: Mr. Rakhmatov, do you feel prepared to
9 go forward with your sentencing today?

10 THE DEFENDANT: Yes.

11 THE COURT: Mr. Rakhmatov, you have a right to
12 address this Court before I pronounce sentence in your case.
13 I will give you the opportunity to do so in a few minutes, and
14 you should feel free at that time to say anything you think is
15 appropriate at that time before I finalize my judgment in your
16 case.

17 Do you understand, sir?

18 THE DEFENDANT: Yes, sir.

19 THE COURT: Sir, are you satisfied with your
20 counsel's representation of you to date?

21 THE DEFENDANT: Yes.

22 THE COURT: Sir, have you received the effective
23 assistance of counsel in your case to date?

24 THE DEFENDANT: Yes.

25 THE COURT: If you do not believe you have received

1 the effective assistance of counsel, you may raise a claim of
2 ineffective assistance of counsel at an appropriate time and
3 in an appropriate forum.

4 Do you understand?

5 THE DEFENDANT: Yes.

6 THE COURT: Now the United States Code sets the
7 following sentencing parameters for a violation of Count One
8 of the superseding indictment at the time of offense.

9 For Count One of the indictment, conspiracy to
10 provide material support to a foreign terrorist organization:
11 A statutory maximum imprisonment term of 15 years. No
12 statutory minimum term of imprisonment. A statutory maximum
13 supervised release term of life. No statutory minimum
14 supervised release term. A maximum fine of \$250,000. And a
15 mandatory special assessment of \$100.

16 This Court must also consider the sentencing
17 parameters set by the United States Sentencing Guidelines
18 Commission. The applicable offense guideline is Section 2M,
19 as in Mary, 5.2.

20 According to the United States Sentence Guidelines,
21 the base offense level of the instant offense is 26.

22 As the instant offense involves provision of
23 material support with the intent, knowledge or reason to
24 believe such support was to be used to assist in the
25 commission of a violent act, the offense level is increased by

1 2 levels, pursuant to guideline section 2M, as in Mary,
2 5.3(b), as in boy, (1) (E).

3 Further, as the offense is a felony intended to
4 promote a crime of terrorism, the offense level is increased
5 by 12 levels, pursuant to guideline Section 3A1.4(b), as in
6 boy.

7 Lastly, because the defendant demonstrated
8 acceptance of responsibility in a timely manner, a reduction
9 of 3 levels is appropriate, pursuant to guideline
10 Sections 3E1.1(a) and (b).

11 This calculation yields a total adjusted offense
12 level of 37.

13 The government and probation agree with this
14 calculation.

15 The defendant does not, and the defendant argues the
16 Court should disregard guideline Sections 2M5.3(b) (1) (E) and
17 3A1.4(b) and argues they are unconstitutional, inapplicable
18 and argues that to use them would be a double counting against
19 this defendant. The defendant argues the Court should apply
20 only the base offense level of 26.

21 Pursuant to the guideline Section 3A1.4(b),
22 defendant's Criminal History Category is VI.

23 The government and probation agree.

24 However, the defendant disagrees. The defendant
25 argues guideline Section 3A1.4(b) would over represent the

1 defendant's criminal history category and states his criminal
2 history category should be I.

3 An adjusted offense level calculation of 37, with a
4 Criminal History Category of VI, yields a guidelines
5 imprisonment range of 360 months to life, but it's capped at
6 the statutory maximum of 180 months.

7 In addition, the guidelines further suggest a term
8 of supervised release of two years to life, a fine of between
9 \$40,000 and \$250,000. And the guidelines suggests the
10 defendant is ineligible for probation.

11 An adjusted offense level calculation of 26, with a
12 Criminal History Category of I, yields a guidelines
13 imprisonment range of 63 to 78 months.

14 In addition, the guideline further suggests a term
15 of supervised release of two years to life, a fine of between
16 \$25,000 and \$250,000. And the guidelines suggests the
17 defendant is ineligible for probation.

18 Counsel, beginning with the government, am I missing
19 anything pertinent to today's proceedings?

20 MR. PRAVDA: You're not, Your Honor.

21 Would you like to hear the government's argument
22 now?

23 THE COURT: Not now. Not now. We'll get there.

24 Defense, am I missing anything pertinent from
25 today's proceedings?

1 MR. STERN: No, Your Honor.

2 THE COURT: Beginning with the government, are there
3 any objections that the government wishes to raise to what
4 you've heard so far?

5 MR. PRAVDA: No, Your Honor.

6 THE COURT: Defense counsel, are there any
7 objections that you wish to raise to what you've heard so far?

8 MR. STERN: Yes, Your Honor. I wish to object to
9 the guideline calculation that includes the 3A1.4 enhancement,
10 as well as the 2M violence enhancement.

11 THE COURT: All right, that is the same objection
12 that you previously submitted in writing; is that correct,
13 counsel?

14 MR. STERN: That's correct.

15 THE COURT: Is there anything else?

16 MR. STERN: Also I had some other -- I also had some
17 other factual objections to the presentence report.

18 THE COURT: Okay, well hang on one second.

19 What I'm going to do is I'm going to turn it over to
20 you in one second. I just wanted to know what your objections
21 were before I turn it over to hear from the defense and then
22 we'll hear from the government.

23 So other than what you submitted in writing, is
24 there anything upfront now that you want to call to my
25 attention before I turn it over to you to make your

1 presentation?

2 MR. STERN: No.

3 THE COURT: Okay. That being the case, I will now
4 turn it over to defense counsel.

5 MR. STERN: Thank you, Your Honor.

6 And on behalf of my client, also I want to thank you
7 for allowing us to have this proceeding by video and for
8 advancing the sentence.

9 As I said, Mr. Rakhmatov's health and the conditions
10 at MCC have been deteriorating, and I'm thankful that you
11 granted us this opportunity for the videoconference and to
12 move the sentence up.

13 The government finally concedes, Your Honor, that it
14 has no evidence that Mr. Rakhmatov is an ISIS supporter or
15 sympathizer; that he is a jihadi warrior; that he seeks a
16 caliphate or some kind of ISIS state; or that he wants to kill
17 non-Muslims.

18 Despite the fact that language like that is peppered
19 throughout their brief and appears in the presentence report
20 and the addendum, they now admit that they don't have evidence
21 of this.

22 It is, as Judge Vitaliano said in a case called *U.S.*
23 *against Shehadeh*, this is language that inflames the passions,
24 but fails in law. That's his quote.

25 I will address how Mr. Rakhmatov is not only none of

1 these things, but he is a good, kind, law-abiding man who has
2 spent his life serving others, raising a family, making his
3 family in Uzbekistan proud of him. Getting a university
4 degree. Becoming a fine artist and jewelry maker. That's the
5 man he is. And I'll get into that a little later in more
6 detail.

7 But he did give in to the importunement of a mentor,
8 Judge, and make a money contribution, which he thought was
9 going towards saving lives in Syria. It was also related to
10 the ISIS terrorist organization. And on that ground alone,
11 the government argues his guidelines should be increased from
12 the 63 to 78 years (sic) that is the basic guideline for the
13 crime of which he was convicted, giving material support to a
14 terrorist organization, increase it from five to
15 six-and-a-half years to 15 years, essentially doubling it.

16 But his guidelines under this so-called terrorist
17 enhancement, 3A1.4, should not and cannot be raised for
18 providing material support to ISIS alone. That's the offense
19 of conviction. And that's all the government is offering.

20 Giving material support, whatever it may be, goods,
21 money, helping someone join, for a specific purpose, is not
22 the specific intent to embrace any and all right to the use of
23 ISIS.

24 So the government's argument to you, and I'm quoting
25 them: He can't sever what he wanted to do or what he did from

1 all of ISIS' horrendous activities around the world. Can't
2 sever, says the government.

3 But, in fact, the case law is different, Judge. In
4 United States against Holder -- or rather against Holder --
5 I'm sorry, the case is *Holder against Humanitarian Law*
6 *Project*. The Supreme Court says: Congress plainly spoke to
7 the necessary mental state for a violation of the material
8 support statute, and it chose knowledge about the
9 organization, which Mr. Rakhmatov has admitted; connection
10 to -- knowledge about the organization's connection to
11 terrorism, not -- and this is the Supreme Court -- not
12 specific intent to further the organization's terrorist
13 activities.

14 There's no evidence in this record that
15 Mr. Rakhmatov had any specific intent to further the
16 organization's terrorist activities, and certainly not by
17 virtue of his plea of guilty to providing \$400, knowing that
18 it was going to go eventually to ISIS, even though his goal
19 was different and separate.

20 There must be, say the cases, including the one
21 relied on by the government, *Awan* in the Second Circuit.
22 Specific intent to commit specific acts, the objective of
23 which is to affect the conduct of the government. That's what
24 the statute says -- I mean that's what the guideline says, and
25 that's what the cases hold.

1 That he had the general intent that he gives money
2 should help someone fight against the government of Assad in
3 Syria, only narrows his purpose. It doesn't expand it to
4 specific acts of terrorism. There's no evidence that he
5 planned to promoting, had any intention to do any of that.

6 The government points to other contributions that
7 he's made, they say, to ISIS. But there's no evidence of
8 that. He belonged to a group of Uzbekis who regularly
9 contributed to charity, and who have, the report of
10 Dr. Khalid, that this is cultural organization within the
11 Uzbeki community, that there's no inference in Mr. Rakhmatov's
12 claims that he made these contributions with no knowledge that
13 they were going to ISIS. And there's no evidence that they
14 did go to ISIS.

15 In fact, the government informant, the government
16 cooperator, who testified at the trial of codefendant Kasimov
17 said there were people within this group called the
18 "Choyhana", or the "tea party" as it is known culturally, some
19 people contributed without knowing that the money was going to
20 ISIS.

21 The decision in Awan relied on by the government
22 says this about the kind of specific intent that is necessary
23 to raise a normal contribution material support to a terrorist
24 organization to the draconian sentence that the guideline
25 would permit under the terrorist enhancement, it says this:

1 And in this case by the way, the defendant in this
2 case had contributed to a known terrorist organization that he
3 knew was trying to overthrow the Indian government through
4 violence. He knew that. And he knew that the money he was
5 giving to that organization would be used for that purpose.

6 But the Circuit didn't say, okay, that's enough,
7 that's enough for the terrorist enhancement. Here's what they
8 said: There was a lacking of any political evidence of
9 political motivation, and in particular, any motivation by
10 this defendant having to do with India.

11 What the government failed to show in *Awan*, as it
12 fails to show here, is evidence that *Awan* engaged in criminal
13 conduct with knowledge that confederates solicited his actions
14 to effectuate politically-motivated bombings in India or
15 homicidal attacks on that country's security forces or its
16 political leaders. Such proof could demonstrate that *Awan*'s
17 crimes were calculated to influence the conduct of the
18 government.

19 There's nothing like that in this case, Judge.
20 There's just the contribution, which the defendant admits he
21 thought was going to help fight against the killing that was
22 going on in Syria by the Assad government. That's all. No
23 plan for specific acts. No specific intent to have any kind
24 of a plan to affect the conduct of the government of Syria.

25 Dr. Marc Sageman, a psychiatrist, an expert, a CIA

1 consultant, long history of studying jihadi terrorism -- uh
2 oh -- oh, yeah -- has written a report to Your Honor in which
3 he says:

4 There's no evidence in Mr. Rakhmatov's background,
5 no evidence in the case of any jihadi associations, jihadi
6 ideology, jihadi (videoconference interference). There's no
7 mention, even in the three conversations, and there's three or
8 maybe four telephone conversations, on which the government's
9 case rests, there's nothing in there about praise for jihad
10 and praise for a caliphate, anything about ISIS at all in
11 these conversations.

12 And certainly he says: Mr. Rakhmatov does not dress
13 like a jihadi. He doesn't talk like a jihadi. There's no
14 evidence that he follows propaganda. There's none on his cell
15 phone. There's none anywhere in this case.

16 Even in the conversations themselves that are the
17 crux of the government's case, he resists raising money. He
18 says, and I refer to the conversations in my briefs, but he
19 says -- he questions it. He's reluctant. He asks Habibov,
20 the mentor, that importuned him: You go ask people. Why
21 don't you do that? And according to Dr. Sageman,
22 Mr. Rakhmatov condemns terrorism and has always done so.

23 So what is this terrorist enhancement doing? Why is
24 it being applied to him? This terrorist enhancement requires,
25 as its active verb, a calculation, calculation is the verb, to

1 calculate, of the defendant, which the *Awan* decides -- defines
2 as his objective. That calculation has to include
3 intimidation and coercion and specific acts to affect the
4 conduct of government.

5 But I've read to you the kinds of things that *Awan*
6 says are necessary for this draconian enhancement to be
7 applied. Not he gave money. He gave money to ISIS. That's
8 not enough.

9 And so the cases say, in the case of *United States*
10 *against Banol-Ramos*, the defendant -- I'm sorry, I've been
11 distracted by that noise. In the Second Circuit case of
12 *Banol-Ramos*, the defendant knew he was giving -- supporting a
13 foreign terrorist organization. And he even participated in a
14 hostage taking with that organization. But the Circuit said,
15 not enough because there's no evidence of his motivation to
16 participate in the foreign terrorist organization for the
17 purpose of overthrowing the government or affecting the
18 conduct of the government.

19 In *Jumaev* -- these are all cases cited to the
20 Court -- no evidence of promotion of a plan by ISIS to commit
21 a politically-motivated crime of terrorism. So here, nothing
22 like that.

23 In the *Sihai Cheng*, a case in which the defendant
24 gave nuclear weapons parts, supplied nuclear weapons parts to
25 Iran, the Court said there was no evidence, aside from that,

1 of a specific intent to affect the government's conduct. No
2 specific evidence to attack the government infrastructure or
3 targets. There's none of that in this case.

4 In the case of *Shehadeh*, which was Judge Vitaliano's
5 case in which he made that statement of explaining the
6 passion. A man attempted to join the Army so that he could
7 subvert it from the inside.

8 And Judge Vitaliano would not apply the terrorist
9 enhancement because this was too remote. His plan to -- this
10 plan to join the Army was not sufficient enough and specific
11 enough, it was too remote from anything that is the kind of
12 specific act required for application of the terrorism
13 enhancement.

14 In *United States against Chandia*, a Fourth Circuit
15 case, supplying terrorist training material, which it
16 describes -- the Circuit described as a nonviolent act, just
17 as here, the supplying of a weapon, even though no weapon was
18 supplied but money was provided, and there was talk of a
19 weapon being obtained by the man who was going to travel to
20 Syria, that is a nonviolent act. And other cases say that
21 possession even of a weapon is a nonviolent act.

22 This kind of nonviolent act, including working as an
23 assistant with respect to the FTO, according to *Chandia* in the
24 Fourth Circuit was insufficient.

25 I also cite other cases where possession of a weapon

1 is not considered a violent act. They're cited in my brief.

2 There's no coercion. There's no intimidation that
3 is required for application of the terrorist enhancement.

4 Now the Second Circuit in *United States against*
5 *Stewart* for the defendant Yousry where the conspiracy -- the
6 conspiracy was to affect the conduct of the Egyptian
7 government, basically to overthrow the Egyptian government,
8 but not for Yousry. Yousry was involved. Yousry did some
9 translating for the coconspirator, but Yousry himself had no
10 motivation to overthrow the Egyptian government.

11 Mr. Rakhmatov has no such motivation in this case,
12 even though the government alleges that his coconspirators
13 did. The two people that Your Honor has already sentenced.
14 For example, Juraboev, Saidakhmetov, maybe even Habibov
15 himself. But that doesn't make Mr. Rakhmatov guilty of the --
16 of the necessary facts and circumstances for application of
17 the terrorist enhancement.

18 Even as a conspirator, he's only responsible for his
19 own acts, not the acts of these others. He didn't know
20 Saidakhmetov. He didn't know Zakirov. He didn't know any of
21 these people. Nobody told him their plans or what their
22 purposes was. Habibov just said, Please contribute. He owed
23 Habibov for years of help that Habibov had given him, and he
24 gave the contribution, and he knew that it was going to ISIS
25 but for one specific purpose, to save lives against Assad.

1 In all of these things that I've described to you,
2 in all of the above, the guilt of providing material support
3 is not enough for the application of the terrorist
4 enhancement. If it were, then everybody convicted of material
5 support would get the terrorism enhancement, and that is not
6 the law.

7 Conduct. There must be specific intent to influence
8 the conduct of a government. Well, is murdering the civilian
9 population of a country the conduct of a government that the
10 terrorist enhancement was (videoconference interference)
11 punish or prevent? I don't think so. There are no cases on
12 this. This is the first one, really, where this issue has
13 been presented.

14 The Assad government is not a government either.
15 It's a state sponsor of terrorism. The U.S. holds it as such.
16 The U.S. regards it as a terrorist nation.

17 Was the terrorist enhancement designed to punish
18 someone for fighting against a terrorist nation? As the
19 United States itself has done by bombing its -- a storage
20 facility, a chemical storage facility. By striking an air
21 base. The U.S. has also done that.

22 Bob Woodward reports that President Trump was
23 planning an assassination against Assad. 500,000 Muslim
24 people have been killed, according to the reports by the Assad
25 government. Sanctions have been imposed under the Caesar Act

1 against the Assad government.

2 The Physicians for Human Rights reports that 600
3 hostages have been bombed, and medical personnel have been in
4 prison for trying to help people.

5 The government has used sarin gas and chlorine gas
6 against the people, three quarters of them are Muslim in
7 Syria. Four federal judges have held the regime responsible
8 for these acts. And Assad is condemned worldwide.

9 Are we to punish, in a draconian way with 15 years,
10 twice the basic guideline level for someone who only had a
11 vague general intent that Assad's regime should be resisted,
12 that there should be fighting against to stop this kind of
13 murder?

14 I submit to you, and I at length I've described in
15 my brief the legislative history of the terrorist enhancement
16 to show Your Honor that it was not designed to punish these
17 kinds of acts. It was not intended to punish people with the
18 general intent to resist a terrorist state. This was not its
19 purpose.

20 Its purpose actually, if you read the legislative
21 history, was to protect foreign delegates -- foreign
22 governments or foreign citizens attacking or hurting United
23 States citizens. It was not even meant to protect foreign
24 governments against terrorist attacks against their
25 governments. It was meant to protect United States citizens,

1 and I set that out in great detail in my brief.

2 In fact, *Holder* himself says this. And it's so
3 interesting that *Holder*, the case I read to you before, says
4 this about the material support statute:

5 Providing foreign terrorist groups with material
6 support in any form also furthers terrorism by straining the
7 United States relationship with its allies, with its allies,
8 not with its enemies, and undermines cooperative efforts
9 between nations to prevent terrorist attacks. Cooperative
10 efforts between nations. Assad is not cooperating with
11 anybody against terrorism, he's doing terrorism.

12 We see no reason to question Congress finding that
13 international cooperation is required for an effective
14 response to terrorism as demonstrated by the numerous
15 multilateral conventions enforce.

16 The material support statute furthers the
17 international effort by prohibiting aid for foreign terrorist
18 groups that harm the United States partners abroad. Assad is
19 not a United States partner.

20 A number of foreign, domestic or -- foreign
21 terrorist organizations have attacked moderate governments,
22 which the United States has vigorously endeavored to maintain
23 close and friendly relation. Assad is not one of those.

24 The terrorist enhancement, the material support for
25 terrorism was not meant to punish a man who gave a few hundred

1 dollars on one occasion, in an otherwise law-abiding life,
2 because his mentor importuned him to do so and he wanted to go
3 to help in a general way for the defense of Muslim people in
4 Syria. That was his only goal. He had no thinking, no
5 purpose to further any terrorist activities at all. And
6 there's no evidence that he did.

7 Now, even if Your Honor were to conclude that the
8 terrorist enhancement does apply to Mr. Rakhmatov, it has the
9 discretion, the complete discretion not to do so, even if it
10 thinks that -- even if the Court thinks it technically
11 applies.

12 And *Gall*, and *Kimbrough*, and other cases I cite to
13 the Court say that. That if you disagree with the application
14 of this enhancement, because it's a guideline enhancement and
15 only suggests, you don't have to do it. And there are many
16 reasons for that even if you think it's otherwise applicable.

17 There's no empirical support for this enhancement.
18 There's nothing that says anything about, well, anyone who
19 gives material support to a terrorist organization is a
20 terrorist and needs to be punished as a terrorist. There's no
21 empirical support for that. The Sentencing Commission just
22 decided, well, why don't we do that because terrorism is such
23 a bad thing.

24 Dr. Sageman in his reports tells you that in his
25 long history of interviewing jihadis, actual jihadis, it turns

1 out that their recidivism rates are much lower than normal
2 criminals.

3 The judge in the *Jumaev* case said that this
4 terrorist enhancement is too much of a, quote, blunt
5 instrument. It can be applied to anybody. To someone like
6 Mr. Rakhmatov at the lowest level who does no violence, who
7 has no violence, who's not intending any violence to somebody
8 who's murdered people and set off bombs. In fact, that's the
9 way the government wants you to treat Mr. Rakhmatov, and
10 there's no basis for it.

11 To save lives by giving \$400 is -- is not equal to
12 murder. It simply isn't, and Your Honor could say I'm not
13 going to apply an enhancement that is fashioned in that way.

14 The Second Circuit in the case of *Dorvee* reversed
15 the sentence because it was against the empirical evidence,
16 and the defendant was punished as if it would commit crimes
17 that he didn't commit. As if he would have committed the most
18 heinous crime when he didn't. And that's exactly what the
19 government is asking you to do here, and I hope you won't do
20 it.

21 And then we're going to see, as I argue a little bit
22 further, the case of *Rabbani* in which, at the government's
23 request, at man who had participated in the building of a
24 pressure cooker bomb, and who had attacked federal agents with
25 a knife, the government in that case asked for -- asked the

1 court for a three-year sentence.

2 The idea that this kind of range of sentencing is
3 available and therefore you should apply, just automatically
4 give the terrorist enhancement to Mr. Rakhmatov, is anathema,
5 it's a violation of due process, a violation of equal
6 protection, a violation of notice requirements, and every
7 other constitutional due process that you can -- process that
8 you can think of.

9 Even though the guidelines themselves are not
10 subject to constitutional attack because they are only
11 suggestive, certainly a sentence that relies on this kind of
12 enhancement would be subject to constitutional attack.

13 And the court has said that the Rule of Lenity, the
14 Rule of Lenity requires the court to refrain from doing this.
15 I mean there's vagary in the kind of standards by which a
16 criminal statute should be applied.

17 Now I'd like to move on to the 3553(a) factors,
18 unless you want me to deal with the other objections that I
19 made to the probation -- to the presentence report, Your
20 Honor.

21 THE COURT: You may proceed to the 3553(a) factors,
22 counsel. I have your argument.

23 MR. STERN: Okay.

24 There are several factors under 3553(a), Your Honor.
25 The government argues only one of them, the seriousness of the

1 offense. But there are seven or eight others, and to sentence
2 him based on only that one factor would be a violation of the
3 statute, and as well as the Constitution, and I don't think
4 Your Honor would ignore the other factors.

5 I would concentrate on three others or rather two
6 others. One is the history and characteristics of this
7 defendant. And the other is the necessary correctional and
8 educational treatment, as well as medical, that should be
9 considered in imposing the sentence, and imposing it in the
10 most effective manner.

11 As far as the seriousness is concerned, the
12 government again believes all that inflammatory language for
13 which there is no evidence to say this is the most serious of
14 crimes. Of course, it's a serious offense. Nobody would
15 argue that it's not a serious offense. Most offenses in the
16 criminal courts are serious.

17 Well, what does "serious" mean? It means how much
18 punishment do you need to mete out against the defendant. How
19 do you gauge that?

20 Well, Mr. Rakhmatov has spent four years already in
21 jail, known for its filth, its overcrowdedness. He's not been
22 provided with a pillow most of the time. His property has
23 been taken, lost, including all his legal stuff. He's been
24 waiting for glasses for a year. He has a gaping wound in his
25 teeth that despite Your Honor's order that it should be

1 repaired, has not been repaired.

2 He has an inability to breathe because of rhinitises
3 and allergy in his nose, which Your Honor also ordered a year
4 ago that he should be (videoconference interference).

5 He's lost the ability to grow up with his two
6 children. He's lost the ability to stay in his country. He
7 would be deported probably and tortured in Uzbekistan.

8 His wife has been ill and he's been unable to
9 provide for her. She's impoverished. He's \$20,000 in debt
10 that he's incurred in Uzbekistan. How much more punishment
11 does he need?

12 He's been in jail. And if Your Honor sentences him
13 to more jail, he will be in the life-threatening situation of
14 COVID, which is surging in the jails. How much more time?

15 Well, how do you gauge that? Well, you look at the
16 *Rabbani* case, Your Honor, and I've cited it to you in my
17 brief.

18 The very same prosecutor in this case who wants
19 Mr. Rakhmatov to be sentenced to 15 years for giving his \$400
20 for someone to travel to Syria to the fight against Assad --
21 excuse me, that same prosecutor was willing and asked the
22 sentencing judge to give *Rabbani* three years, and he got 18
23 months.

24 And by the government's own admission, he agreed
25 to -- he actually participated in the making of a pressure

1 cooker bomb, attacked federal agents, and there was all kinds
2 of documented evidence of his adherence to jihadi ideology.

3 And here's what the government said about this man.
4 Here's what the government said, Your Honor, in their sentence
5 memorandum to the judge where they asked for three years for
6 this man.

7 He exhibited a pattern of conduct indicating an
8 increased interest in physical violence coupled with jihadist
9 ideology. He failed to engage in truly catastrophic action
10 only because of continued government intervention.

11 These are the words of the prosecutor who's asking
12 that Mr. Rakhmatov, who did nothing but give a \$400
13 contribution, the same prosecutor is saying, Well, this truly
14 catastrophic action that was averted merits only a three-year
15 sentence.

16 So what does this seriousness, how does -- when the
17 government argues to you seriousness, what are they saying?
18 What do they mean? They mean whatever is useful to the
19 government.

20 Now Mr. Rabbani cooperated. So that's why he's
21 getting this break. So the government's idea of seriousness
22 depends on its use. It's the use of this defendant to them.

23 Why does Mr. Rakhmatov deserve five more years,
24 that's five times -- I'm sorry, five times the sentence that
25 was asked for by the government in Rabbani.

1 The reason? He can't cooperate. He's so little,
2 he's so minor in this whole scheme of things that he has
3 nothing to give them. So he gets five times, 15 years instead
4 of three. Actually the judge in Rabbani sentenced the
5 defendant there to less than three years, a year and a half or
6 something like that.

7 So the seriousness aspect that the government argues
8 to you is not one that means very much when you decide how are
9 you going to sentence a man for what he actually did and who
10 he actually is.

11 Now let's get to the "who he actually is." This man
12 grew up in a strong, strong, supportive family circumstance in
13 Uzbekistan. Middle class people. And if you took a look at
14 those videos, you will see, even though they're speaking
15 Uzbeki, we've given you translations, you can see the warmth
16 and the energy that they put into supporting Mr. Rakhmatov.

17 He got a university education. This is not a
18 down-and-out guy who needs jihadi to bolster his esteem or to
19 bolster anything at all. He's not that kind of person. He's
20 got his own life. He's a brilliant artist.

21 Now here, I enclosed in my brief, to try to show
22 what he makes in jail, on his own, with the minimal materials
23 that they give him. I hope you can see this. This is a
24 pop-up card. I'm going to try to open it so you can see.

25 I took pictures of this and put it in the brief.

1 But he fashions this all by hand.

2 Opens here. (Indicating). I don't know if you
3 can...

4 THE COURT: Yes, the Court can see it.

5 MR. STERN: If you look behind the workmanship
6 behind here, you can see the way the structure is so that it
7 pops up. All that structure is done by hand, Judge, with
8 construction paper and drawing.

9 This is a man who only wants to do his art and only
10 wants to be with his family. He never needed this. He didn't
11 want this.

12 Look at this one. (Indicating.) Here's another
13 one. See how it pops up?

14 THE COURT: Yes, the Court can see it.

15 MR. STERN: Thank you.

16 There's nothing, nothing in his life that's
17 criminal. He's completely law abiding. His family were
18 nonpracticing Muslims. He is what Dr. Sageman called a
19 "moderate practitioner".

20 Nothing jihadi in his family. Not in his
21 background. And his parents tell stories about how he would
22 literally give the jacket off his back to his friends when
23 they asked. His mother was very upset with him when he did
24 that. But -- and remonstrated with him about giving away his
25 jacket when his friends asked. But that's the kind of guy he

1 was and still is.

2 A friend writes about the thousands of dollars in
3 loans that Mr. Rakhmatov gave him to help him get along in his
4 business. The family writes about a girl with a tumor that
5 Mr. Rakhmatov took care of for several months while they were
6 staying in his family's home waiting for surgery.

7 He was very close to his father, who's a truck
8 driver, and whose work educated him about cars, which he has
9 used in this country to buy and sell used cars in his
10 business. He's following in his father's footsteps.

11 His mother is an accountant and was an accountant
12 for the Uzbeki government. Educated people. Good people.
13 Warm people.

14 And he worked in this country under Habibov, who
15 helped him earn money by selling iPhones and other
16 equipment, and something called splat balls where you take a
17 ball and you throw it against the wall and it sticks. I think
18 at these kiosks in malls. Habibov had the leases for these
19 kiosks. He let Rakhmatov use them to sell things there.

20 This is the man you're sentencing. This is -- this
21 is the other 3553(a) factors which you have to consider when
22 you are sentencing him.

23 What do people --

24 (Interruption.)

25 THE COURT: Excuse me. We're going to take a

1 five-minute break, and then you can continue. All right?

2 Just five minutes.

3 MR. STERN: Thank you, Judge, I don't have that much
4 more.

5 THE COURT: That's okay. We'll just take five
6 minutes, and put you on mute.

7 (A recess was taken at 1:25 p.m.)

8 THE COURTROOM DEPUTY: Good afternoon, Judge, this
9 is Miss Love speaking. You are currently on mute. I wasn't
10 able to hear you.

11 THE COURT: Are we back everyone?

12 Ms. Love, is everyone back on the record?

13 MR. PRAVDA: No, Judge, it doesn't look like AUSA
14 Pravda has returned.

15 THE COURT: Okay, we'll wait for his return.

16 (Pause in the proceedings.)

17 THE COURTROOM DEPUTY: Judge, this is Ms. Love
18 speaking. We currently have all the parties.

19 THE COURT: All right, are we prepared to resume?
20 Are all the parties here? Why don't we just take another roll
21 call, given the technology.

22 Beginning with the government?

23 MR. PRAVDA: Your Honor, Douglas Pravda and David
24 Kessler on behalf of the government.

25 MR. STERN: Lawrence Mark Stern for Azizjon

1 Rakhmatov.

2 THE COURT: Thank you.

3 THE PROBATION OFFICER: Shayna Bryant, United States
4 Probation.

5 THE COURT: Thank you.

6 MR. STERN: Mr. Rakhmatov, can you hear us?

7 THE DEFENDANT: Yes.

8 MR. STERN: Okay.

9 THE COURT: All right. So we have all the parties
10 here. And the interpreter as well?

11 THE INTERPRETER: Yes, Your Honor, I'm here.

12 THE COURT: All right. Thank you. Okay, we had
13 take at that break, but you may continue.

14 MR. STERN: Thank you, Your Honor.

15 All this about the good life that Mr. Rakhmatov led
16 before he made this contribution seems to emphasize that he
17 didn't look -- he didn't look to make this contribution. He
18 wasn't asking to get involved with the fight in Syria other
19 than other contributions that he made to them.

20 But he wasn't asking to get -- to make contributions
21 to ISIS. It wasn't until Habibov, the man that had helped him
22 so much in the United States importuned him for this that he
23 felt he had -- he had to do it.

24 But during the break, Mr. Rakhmatov also showed me a
25 new one of these cards that he made and he'd like to show you.

1 Is that okay, Judge?

2 THE COURT: Of course. And you can mark them and
3 put them as part of the record as well.

4 MR. STERN: Okay.

5 THE DEFENDANT: (Indicating).

6 MR. STERN: Watch this, Judge. Watch this.

7 THE DEFENDANT: This is the name of my daughter
8 (indicating), Aziza. I made it for her. So I didn't get a
9 chance to send it to her yet.

10 MR. STERN: Hold it up a little higher. Higher.
11 And slowly close it and open it again.

12 (Indicating.)

13 MR. STERN: Ah, good. Good.

14 The time and the meticulous detail that that takes,
15 Judge, it's amazing.

16 THE DEFENDANT: I made it with the hand everything.
17 We don't have scalpel. I did this make this also for
18 somebody, a birthday card. (Indicating).

19 I have portraits here of people ask me. So I'm
20 trying.

21 MR. STERN: Unfortunately, he hasn't done a portrait
22 of me yet, but I hope that some day I will have that honor.

23 But anyway, it's not only his family, Judge, that is
24 (videoconference interference). Listen to what correctional
25 people have said. The people in the jail who have worked with

1 him and counseled him and worked alongside him in the jail say
2 about him.

3 Mr. Rakhmatov worked as an inmate companion from
4 12/16/18 to 4/4/19. During the time working as an inmate
5 companion, he was responsible for maintaining constant
6 monitoring of inmates on suicide watch and/or psychological
7 observation. Openly communicating with the staff about the
8 observations and any related concerns and keeping appropriate
9 documentation. He maintained a pleasant attitude throughout
10 his period, was communicative about any problems or issues
11 related to his participation in the program. He was a helpful
12 member of the inmate companion program. And this is from
13 Dr. J. Avena, the psychologist in that suicide watch program.

14 Here's another one. Mr. Rakhmatov has been selected
15 as the unit orderly maintenance detail. In his position, he's
16 contributed a positive spin on the unit orderly team with his
17 consistent display of superior work ethics, great
18 communication skills, and he's a great team player. He is
19 proactive and he faces his challenges of his environment with
20 grace and dignity. This is L. MacPherson Anderson,
21 correctional counseling.

22 Another one. Inmate Rakhmatov is an outstanding
23 worker. He keeps his work area clean and sanitized and
24 organized at all times, as well as volunteering to help out
25 where in the kitchen as needed without any questions asked. I

1 recommend a \$9.60 day bonus. And that comes from the work
2 performance rating of the food service supervisor. Her
3 signature is illegible.

4 Then counselor Dion Rivera writes directly to the
5 Court. Please be advised that Mr. Rakhmatov has been at the
6 Metropolitan Correctional Center for approximately three years
7 and five months. During his time here at MCC, he's been a
8 model inmate and has no incident report history. He works in
9 the food service department and suicide watch with a work
10 performance history of outstanding. Mr. Rakhmatov has
11 completed courses from drug program, (videoconference
12 interference) a commercial driver license, so on and so forth.
13 He has shown a commitment to utilizing his incarceration for a
14 positive future (videoconference interference).

15 The focus forward project, a long letter talking
16 about how -- again, how Mr. Rakhmatov has contributed to their
17 program. Is an active participant who does his homework,
18 helps other people in the focus forward program, and has
19 learned to speak in front of other people. He's completed 14
20 educational programs in prison.

21 Two chaplains in the prison have written on his
22 behalf. Chaplain Steve Mun writes --

23 THE COURT: I going to ask you to slow down. You're
24 reading just a little bit for the court reporter. I know we
25 have audio recordings and we'll be able to recapture most of

1 it, just a little bit slower, Mr. Stern.

2 MR. STERN: Two chaplains have written on
3 Mr. Rakhmatov's behalf.

4 MCC Chaplain Steve Mun writes: Mr. Rakhmatov was
5 the inmate speaker selected among 800 for the MCC New York
6 Volunteer Banquet in 2018. And there's actually a photograph
7 in my brief showing him speaking to the inmates and
8 correctional officers in this program.

9 The supervisory chaplain at MCC writes that:
10 Mr. Rakhmatov is very patient, consistent, respectful and
11 ready to assist. He discharges commendably leadership of the
12 Muslim Friday (videoconference interference) services.

13 And there are even letters from fellow inmates about
14 how he gave his new sneakers to another inmate who didn't have
15 any.

16 Another inmate writes how, as far as he's concerned,
17 Mr. Rakhmatov saved him from suicide.

18 His wife writes that initially she refused his
19 proposal for marriage, quote, because he's too nice. I didn't
20 want -- I didn't want to get married to someone who's soft
21 hearted with everyone. And even people are mean to him, for
22 he doesn't see it, unquote.

23 He writes that her mother talked her into it, and
24 (videoconference interference) and they had two children.

25 Just recently the educational director at MCC

1 (videoconference interference) has asked if Mr. Rakhmatov
2 would join and be a unit orderly to teach art at the MCC.

3 What about the third -- the third 3553(a) factor:
4 Needing correctional treatment in the most effective manner.

5 Again, how much time does he need for correctional
6 treatment? He knows he did wrong. He admitted it right away.
7 He did whatever he could to make up for it. And he's tried
8 over the four years in jail to do that. And he's sorry. Has
9 he been punished enough? I submit, yes. And at most, a
10 regular guideline sentence is the most that he should be
11 sentenced to. More prison time will only endanger his health
12 more. His loss of health. His motivation.

13 The possibility, as Judge Payne posited, that
14 imprisoning these guys or people who get caught up in this
15 kind of thing for longer than necessary could lead to
16 politicalization.

17 Dr. Sageman writes to you that this man is not a
18 danger of recidivism. That there's no even danger of criminal
19 conduct of any kind from him, let alone jihadi-type conduct.

20 Finally, Judge, I want to deal with his health. As
21 I said a year ago in October of 2019, Your Honor ordered that
22 he receive ameliorative therapy for his teeth, which are
23 hurting him.

24 During that time, notwithstanding, Your Honor, he
25 has not received that. The medical records acknowledge that

1 he needs root canal therapy in the same tooth that a year ago
2 was hurting him, but they won't give it to him. They won't
3 allow him to have it. They can't, they said. They could send
4 him out, but they won't do that.

5 Now there are two additional teeth which need
6 repair. But he's not getting it.

7 He suffers from rhinitis allergy. I have seen
8 myself when I visit him, he cannot breathe.

9 Sorry, my battery is getting low.

10 THE COURT: Do you need to charge it? Should we
11 take a few minutes?

12 MR. STERN: I'm just going to plug it in, Judge.

13 THE COURT: Okay, go ahead.

14 MR. STERN: Okay. He often can't breath. He has to
15 breathe through his mouth because his nose is so stuffed up.
16 That was part of your October 2019 order as well.

17 Now they determined he needs an allergist because he
18 suffers from red bumps on his face, which I've seen, from his
19 allergies. He has (videoconference interference). He
20 sneezes. And a lot of times he simply can't breathe. And
21 he's been suffering this before your order in October of 2019,
22 and since, and there's been no action on this.

23 I submitted, attach to my papers, a new order that I
24 ask you to issue again to the MCC to have these problems dealt
25 with. And I hope that you'll take them into consideration

1 with whatever sentence you give him because his -- it is four
2 years have been -- four years of suffering.

3 I'm also asking that inflammatory language at
4 page 11, paragraph 25 of the PSR, and the language in the
5 addendum accusing Mr. Rakhmatov of killing -- of intending to
6 kill non-Muslim people in a (inaudible) jihadi and joining a
7 war for a jihadi state, none of which is true, none of which
8 is documented.

9 I'd ask that you order the Probation Department to
10 delete those things in those reports, because those reports,
11 if he has to be confined somewhere, go with him to the jails.
12 I would not want him to be characterized that way by the jail
13 officials or inmates who get to see that. There's no evidence
14 of it, it's unfounded, and it would be unfair if that remained
15 in the document.

16 Finally, I would ask -- or finally just two brief
17 things. His wife and kids live in Connecticut. If you're
18 going to give him more time, I would ask you to recommend
19 Danbury so they can see him and be close to him when the
20 pandemic clears.

21 And I would also like to order the minutes of these
22 proceedings.

23 Thank you, Your Honor, and I really thank you for
24 your patience.

25 THE COURT: Of course. Thank you, sir.

1 All right, I will now hear from the government.

2 Mr. Pravda?

3 MR. PRAVDA: Yes, Your Honor, thank you very much.

4 I would like to begin --

5 (Court reporter interruption.)

6 MR. PRAVDA: Your Honor, I would just like to begin
7 by reminding the Court what this case is about. It's not
8 about a guy, who as Mr. Stern describes him, gave nothing but
9 give a \$400 contribution. This is about a defendant who
10 provided an armed fighter to fight on behalf of ISIS.

11 THE COURT: Mr. Pravda, I'm going to ask everyone,
12 other than Mr. Pravda, for the moment to put their respective
13 microphones on mute. They'll able to hear everything, but we
14 will cut down the background noise that I think is problematic
15 for the reporter at this point.

16 If everyone would be good enough to put their
17 microphone on mute that will probably help, and that includes
18 obviously Mr. Rakhmatov as well, but he will be able to hear
19 everything as well.

20 So everyone else go on mute while Mr. Pravda is
21 speaking, and then when other persons who are speaking, we
22 will obviously take them off mute. Okay?

23 And if we don't have the people doing that, I'll
24 have you do it, Miss Love, as the coordinator, if you're able
25 to do that. But everyone should mute their respective

1 microphones.

2 Go ahead, Mr. Pravda. Sorry to interrupt you, sir.

3 MR. PRAVDA: Would you like me to begin again, Your
4 Honor?

5 THE COURT: Yes, you might as well do that. And,
6 again, everyone should be on mute, except Mr. Pravda.

7 Go ahead.

8 MR. PRAVDA: Thank you, Your Honor.

9 I just want to begin my argument by reminding the
10 Court of what this case is about. Mr. Stern describes
11 Mr. Rakhmatov as somebody who did nothing but give a \$400
12 contribution, not significantly (videoconference interference)
13 the conduct in which Mr. Rakhmatov was engaged and how serious
14 that conduct was. This was not somebody which involved a \$400
15 check to Syria. This is a defendant who provided an armed
16 fighter going to Syria to fight on behalf of ISIS. That's not
17 in dispute.

18 As part of the defendant's plea agreement, he
19 stipulated to certain facts about his conduct. And one of
20 those facts, and this is in paragraph 3 of the parties' plea
21 agreement, paragraph e, it's stipulated that when he made a
22 money transfer to his codefendant, Akmal Zakirov, prior to
23 Saidakhmetov's handoff, he did so intending to fund
24 Saidakhmetov's travel expenses in Syria to fight on behalf of
25 ISIS.

1 Now Mr. Stern describes the conduct as contributing
2 money towards saving lives in Syria. That's not what the
3 undisputed facts show. Sending a fighter armed with a gun,
4 who would receive a firearm there, which firearm Rakhmatov
5 specifically raised money for, is not about saving lives in
6 Syria.

7 In fact, Your Honor, the undisputed fact is clearly
8 shown (videoconference interference) supplied (videoconference
9 interference) supply --

10 THE COURT: Mr. Pravda, I'm sorry, the court
11 reporter is waiving her hand with respect to the document. I
12 believe what you just said, I believe you were referring to
13 paragraph 3 of the plea agreement, and in particular paragraph
14 3b. Is that correct, sir?

15 MR. PRAVDA: I'm sorry, if I said 3b, that was in
16 error. It's 3e, as in echo.

17 THE COURT: All right, let me look at paragraph 3e,
18 just so we're on the same page. Paragraph 3e reads, if I'm
19 quoting it correctly:

20 On February 24 of 2015, following the telephone call
21 set forth above, Rakhmatov transferred \$400 to Akmal
22 Zakirov's, A-K-M-A-L, Z-A-D-I-R-O-V's, bank account via
23 peer-to-peer transfer. Rakhmatov made this money transfer to
24 Zakirov's account intending to fund Saidakhmetov's,
25 S-A-I-D-A-K-H-M-E-T-O-V's, travel to and expenses in Syria to

1 fight on behalf of ISIS.

2 Is that the paragraph you were just reading, sir?

3 MR. PRAVDA: Yes, it is. Thank you, Your Honor.

4 THE COURT: Please continue.

5 And, again, we have these documents that are part of
6 the record. They are in evidence, but you may continue, sir.

7 MR. PRAVDA: So, Your Honor, the parties have
8 stipulated that in the other facts in the plea agreement that
9 Mr. Rakhmatov's intent in giving this money was to fund
10 Saidakhmetov's travel and expenses in Syria to fight on behalf
11 of ISIS.

12 This is not saving lives in Syria, which Mr. Stern
13 just stated that Rakhmatov's money contribution were going to.
14 This was about an armed fighter who would be fighting in Syria
15 on behalf of ISIS.

16 And, of course, as the Court is aware, ISIS had a
17 long (videoconference interference) of attacking U.S.
18 embassies in the Middle East and elsewhere, including here in
19 the United States.

20 And it is for this reason, Your Honor, among others,
21 that the terrorist enhancement is appropriate and applicable.
22 It is this conduct (videoconference interference) independent
23 basis under which Your Honor can and should apply the
24 terrorism enhancement here. One is that Rakhmatov was
25 involved, his offense involved the crime calculated

1 (videoconference interference) for the conduct of the American
2 government by intimation or coercion.

3 The U.S. obviously was the target of ISIS' attack,
4 and was itself seeking against ISIS at the (videoconference
5 interference) of the defendant's conduct here. And so
6 supplying an armed fighter to a terrorist (videoconference
7 interference) is itself targeting the United States, is
8 intended to influence or affect the conduct of the U.S.
9 government.

10 Now, Mr. Stern quoted from the *Awan* case in the
11 Second Circuit. And just to be clear, the *Awan* case makes it
12 clear that the motivation for the crime does not matter, the
13 motivation for the conduct (videoconference interference) to
14 affect government doesn't matter.

15 And *Awan* says that the terrorism, and did not focus
16 on the defendant but on his offense, and it imposes the test
17 underlying the felony, meaning Rakhmatov's crime, was
18 calculated to form his conduct. And that a person can do
19 that, even if influencing or retaliating against government,
20 not for personal (videoconference interference) .

21 Now the second reason, Your Honor, that the
22 terrorism enhancement applies is that Rakhmatov's offense was
23 intending to promote Saidakhmetov's fighting on behalf of
24 ISIS, which itself was calculated to inform or affect the
25 conduct of the U.S. government for the same reasons.

1 And in his sentencing submission, Mr. Stern was
2 talking about the *Jumaev* case as a reason why the terrorism
3 enhancement shouldn't apply here.

4 And there's a difference between those cases of the
5 *Jumaev* providing \$300 to terrorist organizations, albeit
6 Islamic jihad, and the Court found that he absolutely no plans
7 (videoconference interference) IJU and no intent disclosure
8 (videoconference interference) for a plan by the IJU.

9 But here Rakhmatov was supplying an armed fighter to
10 fight on behalf of ISIS, which he acknowledged, when he pled
11 guilty before this Court, that he knew at the time that ISIS
12 was a designated terrorist organization.

13 And then the third point I want to make, Your Honor,
14 is that in any (videoconference interference), putting aside
15 the American government for a minute, his offense involved a
16 crime calculated to inform or affect the conduct of the Assad
17 government in Syria.

18 There's no dispute Mr. Rakhmatov conceded that that
19 was, in fact, Rakhmatov's intent, and he was expecting, let's
20 focus in on this argument, that that's true, the terrorism
21 enhancement still applies on those facts.

22 Mr. Stern argued that the terrorism -- the terrorism
23 offense (videoconference interference) the definition of
24 government does not apply to foreign government. But he has
25 given Your Honor no case law to support that argument. And we

1 have cited cases out of the Fifth and Sixth Circuits applying
2 the terrorism enhancement, the conduct directed at foreign
3 government.

4 And in addition to that, the *Awan* case, which
5 Mr. Stern quoted to Your Honor earlier this afternoon, wasn't
6 a case involving material support to a foreign government,
7 specifically it was a case involving a contribution to a
8 terrorist group for supplying to affect the conduct of the
9 government of India.

10 And that is a case outside -- I'm sorry, that is a
11 case in the Second Circuit. And in that case the Second
12 Circuit could say: Wait a minute (videoconference
13 interference) because this is the government of India and not
14 the United States. And that didn't happen. It specifically
15 said that if the district found appropriate facts that the
16 terrorism enhancement should apply, then there was nothing
17 about the fact that the government of India was the target,
18 that would mean that the court should not apply the terrorist
19 enhancement.

20 Now, the defendant also argued that the Assad
21 government is not actually a government. And it's certainly
22 true that the Assad government committed many atrocities.
23 We're not disputing that. We don't have to agree with
24 anything that the Assad government did, but it is still a
25 government. It is still a government for purposes of the

1 application of the terrorism enhancement. There's no
2 mechanism to distinguish between one government and another.

3 Finally, in enacting the terrorism enhancement
4 exception (videoconference interference) where different
5 judges in different cases could decide whether a government
6 was a government for purposes of the terrorism enhancement.

7 Now, Mr. Stern also argues that the terrorism
8 enhancement isn't appropriate here because this would apply to
9 all forms of material support to ISIS and not merely to
10 Mr. Rakhmatov's own conduct.

11 I don't think that's accurate, Your Honor. I think
12 the point here is that Mr. Rakhmatov contributed a fighter to
13 fight on behalf of ISIS. That is conduct that is intended to
14 inform or affect the conduct of government. This is not mere
15 sending of a contribution.

16 The other cases (videoconference interference) that
17 the government provides evidence of the defendant's intent,
18 those cases are not this case, because in this case, there's
19 no question that Rakhmatov's intent was to send Saidakhmetov
20 to fight for ISIS in Syria. That's a fact that we stipulated
21 to in Rakhmatov's plea agreement. That he gave the money
22 intending to fund (videoconference interference) and expenses
23 in Syria on behalf of ISIS.

24 Your Honor, unless you have questions on the
25 terrorism enhancement, I'm actually going move on to the

1 3553(a) factors.

2 THE COURT: You may proceed. I have your argument,
3 counsel.

4 MR. PRAVDA: Thank you, Your Honor.

5 And to the extent I didn't respond to anything that
6 Mr. Stern said, I will rely on our briefs, because it
7 addresses all of these issues, and we've extensively addressed
8 them, and I know Your Honor has read our briefs carefully and
9 is familiar with our arguments.

10 THE COURT: Yes, I've read all the submissions from
11 all sides.

12 MR. PRAVDA: Thank you, Your Honor.

13 So with respect to the 3553(a) factors, Mr. Stern
14 said that we focus only on the seriousness of the offense.
15 That is certainly a significant factor, it's not the only one.

16 We believe the Court should sentence the defendant
17 to the statutory maximum of 15 years' imprisonment, which as
18 the Court said at the beginning, is also the guideline range
19 that's recommended in the PSR, not only because of the
20 seriousness of the offense, which I'll talk about a little bit
21 more before we adjourn, but also specific and general
22 deterrence; also the need to provide just punishment; also the
23 need to avoid sentencing disparities, simply is a
24 characteristic of the offender.

25 So, Your Honor, you have conduct here in which the

1 defendant Rakhmatov agreed to collect money from other people,
2 and agreed to give his own money knowing at the time that the
3 purpose of doing that was to send Saidakhmetov to fight for
4 ISIS in Syria.

5 In the conversation that you see that we quoted in
6 our sentencing submission, it was Rakhmatov who called on his
7 codefendant that Saidakhmetov should have at least a thousand
8 dollars to cover his expenses.

9 When Habibov, the other person, the other party in
10 that conversation, said that he specifically wanted to raise
11 money for the Saidakhmetov's weapon, for the firearm,
12 Rakhmatov responded: There's already \$200 in cash, and I'll
13 try to raise more from others.

14 And the \$400 contribution that he made to Zakirov
15 immediately followed that particular contribution. Rakhmatov
16 clearly understood at the time he was sending a fighter to
17 ISIS.

18 In that conversation, he revealed his knowledge
19 about factors relating to people fighting for ISIS in Syria,
20 including the ISIS fighters, including that ISIS would provide
21 firearms to people who showed without them, including that the
22 real challenge that Saidakhmetov faced was actually getting to
23 Syria in the first place.

24 When he talked with Habibov, he talked in code.
25 They never mentioned Saidakhmetov. They refer to him as "he"

1 or the "brother". They never mentioned Syria. They just said
2 "there" or "over there". They never mentioned ISIS. They
3 just talked about joining them. And they never say "weapon"
4 or "gun," they refer to a weapon or gun as "toys" or "pencil".

5 If, in fact, Rakhmatov's intent was solely to oppose
6 Assad, which would also bump into the U.S. Government
7 (videoconference interference), he didn't have to be so
8 secretive about it. But he was, and that tells you something
9 about what his motivation was.

10 And when Habibov in that conversation mentioned
11 Turkey, specifically mentioning whether they should send money
12 to Saidakhmetov after he had already arrived in Turkey, it was
13 Rakhmatov who stopped him and scolded him for saying "Turkey"
14 and for being too specific, and Rakhmatov told him: Don't
15 talk too much now.

16 And when Habibov was talking about the firearm, it
17 was Rakhmatov who stopped him from saying anything more and
18 said: Please be more conscious. Please be more accurate.

19 And all of this happened in the context of Rakhmatov
20 making deals and giving money to support fighters in Syria.

21 Now Mr. Stern says we haven't offered evidence that
22 that was for ISIS. But there's no dispute that for several
23 years prior to February 2015, and prior, Rakhmatov gave and
24 collected money to support fighters in Syria, to their
25 families and widows of men killed in battle fighting Syria.

1 And that's paragraph f of the stipulation of the plea
2 agreement. So he was giving money to fighters, whom he knew
3 were dying in battle.

4 So when you consider the nature and the
5 circumstances of the offense of the history and the
6 characteristics of the offender, we know that this is somebody
7 who had a history of giving money to support fighting in
8 Syria, and specifically with respect to Saidakhmetov fighting
9 on behalf of ISIS, which he knew was a terrorist organization.

10 Now the Second Circuit has explained, in a case like
11 this, why a significant sentence is appropriate with specific
12 and general deterrence. And the Second Circuit said in case
13 involving *Mumuni* --

14 THE COURT: Would you spell that? Would you spell
15 that for the reporter, please?

16 MR. PRAVDA: *Mumuni* is M-U-M-U-N-I, which was
17 decided in 2019. Let me just make sure I'm getting the quote
18 accurately. Well, Your Honor, I don't have it in front of me,
19 so I'll just paraphrase it.

20 The Second Circuit said that Congress and the
21 Sentencing Commission had a rational basis for concluding that
22 an act of terrorism represented a particularly grave crime and
23 a particularly grave threat because the dangerousness of the
24 crime and the difficulty of deterring and rehabilitating the
25 offender (inaudible) that terrorists and their supporters be

1 incapacitated for a significant and serious offense. And that
2 is something that is appropriate in this case when you are
3 confronted with somebody who provided an armed fighter to join
4 ISIS.

5 This Court has already sentenced two other
6 defendants in the case, Juraboev and Saidakhmetov, who were
7 the travelers who wanted to go to Syria and fight there, and
8 this Court sentenced them to 15 years in custody. Rakhmatov's
9 conduct was intended to facilitate their crimes.

10 And one thing that the Court knows from the factual
11 background is that Saidakhmetov did not actually by himself
12 have the means to get to Syria to fight for ISIS.

13 He didn't have the money to pay for the plane
14 ticket. He didn't have the money to pay for any expenses. It
15 was the financial support network. It was Habibov. It was
16 Zakirov. It was other defendants in front of Your Honor, and
17 it was this defendant, Rakhmatov, who made that travel
18 possible by providing the money for Saidakhmetov to go to
19 Syria to fight for ISIS. And so to deter (videoconference
20 interference), we believe that a sentence at the statutory
21 maximum is appropriate.

22 Now Mr. Stern also mentioned a number of medical
23 issues. And certainly it's unfortunate that Mr. Rakhmatov is
24 not getting the medical care that he needs at MCC. And
25 possibly this is something that should have been brought to

1 the Court's attention earlier so the Court could have done
2 something about it. But it's not something that warrants a
3 reduction in the defendant's sentence.

4 So I think, in conclusion, Your Honor, we would just
5 ask that the Court adopt the facts in the PSR. That the Court
6 apply the terrorism enhancement. That in considering the
7 3553(a) factors, that the Court sentence the defendant to a
8 guideline sentence of 15 years.

9 THE COURT: Thank you.

10 I will hear from the Probation Department, if they
11 wish to make a statement. And then from the defendant, if he
12 wishes to make a statement.

13 THE PROBATION OFFICER: Your Honor, the Probation
14 Department wishes to rely on their record as submitted in the
15 original presentence report and the addendum to the
16 presentence report. Thank you.

17 THE COURT: Thank you.

18 The Court will now hear from Mr. Rakhmatov, if he
19 wishes to make a statement.

20 I'm sorry, sir, you have to unmute your phone, sir.
21 We can't hear you. Mr. Rakhmatov?

22 MR. STERN: May I have an opportunity to reply to
23 the government's argument, Judge?

24 THE COURT: You may.

25 MR. STERN: Should I do that now or after?

1 THE COURT: I would suggest you do it now so that
2 your client will have the benefit of your response. And then
3 we'll hear from your client.

4 MR. STERN: Thank you, Judge.

5 Mr. Pravda selected one paragraph from the plea
6 agreement to try to argue that Mr. Rakhmatov was only giving
7 to ISIS, was only supplying a fighter for ISIS.

8 That is not an accurate characterization of what he
9 stipulated to. His stipulation included six paragraphs, in
10 several of which he said that he gave money for fighters in
11 Syria.

12 THE COURT: Right. Mr. Stern, I assure you, not
13 only do I recall accepting this plea on August 15th of 2019, I
14 have the entire plea agreement in front of me. I have read
15 it. And I read it prior to today's proceedings as well. And
16 I have a strong sense of the context of the entire agreement.

17 So you're perfectly free to call to the Court's
18 attention a particular portion, and then Mr. Pravda would
19 respond, but you should understand that I have the agreement,
20 which was Court Exhibit 2 in evidence. And that's one reason,
21 not to criticize any of my colleagues, that I always take
22 pleas in my cases rather than have the magistrate judge take
23 the plea and then later enter it, because I want to hear from
24 the parties, and I want to become familiar with the plea
25 agreement as part of this entire process.

1 So feel free to point out anything, but I have it,
2 I've read it, and I've read it as recently as today.

3 MR. STERN: Just to point out that the contribution
4 that was made as the offense of conviction in this case was a
5 contribution to ISIS. It was going to a man who was going to
6 travel there to join ISIS. But the purpose of it was to fight
7 against the massacrers of the government of Assad. And that's
8 made clear I think in all the rest of the paragraphs.

9 The government makes the point that, Oh, well, this
10 is different than other material support cases because it
11 wasn't just money, it was money to help a fighter go to Syria.

12 Well, all money contributions to ISIS are used for
13 some -- some usually terrorist activity. So if you can give
14 money to ISIS, you're giving it for sending a fighter, for
15 arming a terrorist, for helping in the activities of a
16 terrorist organization. And that includes a fighter, guns,
17 whatever.

18 So the fact that he knew that a fighter was going
19 there doesn't take this out of the realm of the usual material
20 support case and make it one worthy, therefore, of the
21 terrorist enhancement. All money contributions to ISIS, or
22 any other terrorist organization, go to things that Congress
23 didn't want a terrorist organization to have.

24 And in this case, the motivation for giving that
25 money to help this man was because there was a state-sponsored

1 terrorist massacre and a killing going on in Syria that needed
2 a defense.

3 And the fact that the Assad government is so
4 universally condemned around the world takes it out of the
5 realm of, Oh, it's -- we can't make distinctions among
6 governments. That distinction has already been made with
7 Assad. The world does not regard Assad as a legitimate
8 government. The world regards it as a terrorist organization.

9 So it is not the kind of government that the
10 terrorist enhancement was meant to punish, was meant to
11 protect by punishing people with the terrorist enhancement.

12 Regarding his prior contributions to fighters in
13 Syria, Dr. Sageman's report explains that there are lots of
14 different kinds of organizations.

15 (Interruption.)

16 THE COURT: Go ahead.

17 MR. STERN: Oh. That there are all kinds of
18 organizations fighting against Assad in Syria. And ISIS is
19 only one of them.

20 So the fact that Mr. Rakhmatov contributed to
21 fighters in Syria in the past doesn't -- by no means means
22 that he was, therefore, supporting terrorism. He was
23 supporting people who were trying to protect others. He
24 was -- and were trying to save lives against the assault of
25 the terrorist state.

1 Mr. Pravda tries to associate Mr. Rakhmatov with
2 Juraboev and Saidakhmetov, who Your Honor has already
3 sentenced. He didn't know either of them. There's no
4 indication in the record that anybody told him about the
5 jihadist purposes of Saidakhmetov and Juraboev.

6 Those names were never mentioned. That's why they
7 weren't mentioned in the conversation because he didn't know
8 them. And there was no talk of what they planned to do or
9 what was going on. All he knew is this was going to be a
10 contribution to a guy to go there and fight against Assad.

11 Although the issue of whether or not the terrorist
12 enhancement was meant to apply to terrorist acts against
13 foreign governments, that's basically a side issue here. The
14 main thing is that the Assad government is not one of them.

15 (Videconference interference) it cites a case in
16 which Alwan -- Awan, in which the Circuit said that obviously
17 terrorists acts against India would be covered by the
18 terrorist enhancement.

19 Well, Indian is an ally. And so as I read to you
20 from the passage in *Holder*, which says that these laws are
21 meant to protect United States, and its allies, not to protect
22 terrorist governments.

23 That's it, Judge. Thank you.

24 THE COURT: Okay.

25 MR. STERN: I'm sorry. With the regard to the

1 health issues, I have been working -- I have written to the
2 MCC following your order when I've learned from Mr. Rakhmatov
3 that they weren't doing anything for him, and waited for some
4 time to go by. And by at that time the sentencing was coming
5 up. That's why I bring it up now, and --

6 THE COURT: That's fine. Mr. Stern, you should feel
7 free at this point to submit whatever supplemental orders or
8 new orders for that matter dealing with his health on ECF on
9 notice to the government, and I will certainly consider them
10 and actually make them part of any judgment that I render in
11 this case.

12 So you're not out of time, and it's important that
13 we always maintain the best we can the health of those in the
14 system. So don't worry about it being an untimely
15 application, it's always timely.

16 MR. STERN: Thank you, Judge. It is -- it has been
17 submitted to the government. It's attached to my original
18 sentencing memo or maybe the reply memo. So it's already
19 there for Your Honor.

20 And also I want to reiterate the plea for deletion
21 of the inflammatory language. I think that's so important,
22 given that there's no evidence of Mr. Rakhmatov's connection
23 to any of that stuff. Thank you.

24 THE COURT: Thank you. I will address both the
25 health and the requested deletion in my order to be submitted

1 in this case, order of judgment.

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

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

6 (Pause in the proceedings.)

7 THE COURT: We still cannot hear you, sir.

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

10 THE DEFENDANT: Hello?

11 THE COURT: Yes, we can hear you now.

12 THE DEFENDANT: Is that good?

13 MR. STERN: Yes.

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

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

19 THE COURT: Thank you, sir.

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

25 This case impacts your family. The case impacts the

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

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

15 On August the 15th of 2019, the defendant pled
16 guilty to Count One of the indictment, ECF Numbers 367 through
17 368.

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

22 I begin the discussion with consideration for legal
23 standard.

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

1 case. The starting point and the initial benchmark in
2 evaluating a criminal sentencing is the guidelines sentencing
3 range as stated in *Gall*, G-A-L-L, *versus United States*,
4 552 U.S. 38 at page 49, decided in 2007.

5 If and when a district court decides and chooses to
6 impose a sentence outside of the sentence guidelines range,
7 the court, quote, shall state in open court the reasons for
8 its imposition of a particular sentence, and the specific
9 reason for the imposition of a sentence different from that
10 described in guidelines, pursuant to 18 U.S.C., Section
11 3553(c) (2). The court must also state with specificity its
12 reason for so departing or varying in a statement of reasons
13 form.

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

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

25 The analysis is as follows:

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

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

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

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

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

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

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

1 and conviction and remains supportive of him.

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

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

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

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

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

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

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

17 Beginning in 2013, the defendant worked as a
18 self-employed car salesman in Connecticut, earning \$4,000 in
19 gross profits each month. In 2012 to 2013, the defendant was
20 a salesperson in a mall kiosk in Syracuse, New York. From
21 2004 until 2012, the defendant operated a jewelry store in
22 Uzbekistan. The defendant appears unable at this time,
23 however, to pay any fine.

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

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

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

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

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

1 activity.

2 Next, C, the kinds of sentences available.

3 The third 3553(a) factor requires a Court to detail
4 the kinds of sentences available for the defendant pursuant to
5 18 U.S.C., Section 3553(a)(3).

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

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

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

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

1 Manual, Section 2M5.3(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 Therefore, the Court imposes a sentence as follows:

15 The sentence is 150 months of incarceration,
16 followed by a lifetime of supervised release. No fine. And a
17 \$100 mandatory special assessment is appropriate and comports
18 with the dictates of Section 3553(a). This sentence is
19 consistent with and is sufficient but not greater than
20 necessary to accomplish the purposes of Section 3553(a).

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

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

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

1 referred in paragraphs 1 and 6(a), he is not a, quote/unquote,
2 prevailing party within the meaning of the "Hyde Amendment,"
3 18 U.S.C., Section 3006A note, and will not file any claim
4 under that law. The defendant agrees to pay the special
5 assessment by check, payable to the clerk of court at or
6 before sentencing. The defendant understands that he may be
7 subject to removal as set forth in paragraph 7 below.
8 Nonetheless, the defendant affirms that he wants to plead
9 guilty and to waive his right to appeal as set forth at the
10 beginning of this paragraph, even if the consequence is the
11 defendant's automatic removal from the United States, close
12 quote.

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

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

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

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

25 THE COURT: Do you have any recommendations? You

1 made a sentence recommendation --

2 THE PROBATION OFFICER: Oh, the recommendation.

3 Yes, yes. Sorry.

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

6 THE PROBATION OFFICER: Okay.

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

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

14 Do you have it in front of you or not?

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

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

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

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

22 (Court reporter interruption.)

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

24 THE PROBATION OFFICER: It's not my background.

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

1 on. Would everyone, including the defendant, now please mute
2 their speaker so that we can have the court reporter hear the
3 conditions. All right, everyone please mute.

4 Go ahead. Start again.

5 THE PROBATION OFFICER: Okay, the special conditions
6 of supervised release are as follows:

7 The defendant shall submit to a mental health
8 treatment evaluation, and if deemed necessary, participate in
9 a mental health treatment program as selected by the Probation
10 Department.

11 The defendant shall contribute to the cost of such
12 services rendered and/or any psychotropic medications
13 prescribed to the degree he is reasonably able, and shall
14 cooperate in securing any applicable third-party payment.

15 The defendant shall disclose all financial
16 information and documents to the Probation Department to
17 assess his ability to pay.

18 The defendant shall comply with the medication
19 regiment prescribed by a licensed psychiatrist approved by the
20 Probation Department.

21 The defendant shall contribute to the cost of such
22 services rendered, and any psychotropic medications prescribed
23 via copayment or full payment in an amount to be determined by
24 the Probation Department based upon the defendant's ability to
25 pay and/or the availability of third-party payment.

1 The defendant shall not associate in person, through
2 mail, electronic mail, internet, social networking or
3 telephone, with any individual with an affiliation to any
4 terrorist organization, organized crime groups, gangs, or any
5 criminal enterprise or terrorist enterprise; nor shall he
6 frequent any establishment or other locale where these groups
7 may meet.

8 The defendant shall not access any websites that
9 affiliates with a radical extremist group, terrorist
10 organization, organized crime groups, gangs, or any criminal
11 enterprise or terrorist enterprise.

12 The defendant shall participant in a polygraph exam
13 or polygraph examinations to obtain information necessary for
14 risk management and correctional treatment.

15 The defendant shall cooperate with the United States
16 Probation Department's computer and internet monitoring
17 program. Cooperation shall include, but not be limited to,
18 identifying computer systems, internet capable devices, and/or
19 similar electronic devices the defendant has access to, and
20 allowing the installation of monitoring software, slash,
21 hardware on said devices at the defendant's expense.

22 The defendant may be limited to possessing only one
23 personal internet-capable device to facilitate the Probation
24 Department's ability to effectively monitor his
25 internet-related activities.

1 The defendant shall also permit random examinations
2 of said computer systems, internet-capable devices and similar
3 electronic devices and related-computer peripherals, such as
4 compact discs under his control.

5 The defendant shall report to the Probation
6 Department any and all electronic communications service
7 accounts as defined in Title 18 of the United States Code,
8 Section 2510, subsection 15, used for use of communications,
9 dissemination and/or storage of digital media files, such as
10 audio/video images. This includes, but is not limited to,
11 email accounts, social media accounts and cloud storage
12 accounts.

13 The defendant shall provide each account identifier
14 and password, and shall report the creation of new accounts,
15 changes in identifiers and/or passwords, transfers,
16 suspension, and/or deletion of any account within five days of
17 such action. Failure to provide accurate account information
18 may be grounds for revocation of release.

19 The defendant shall permit the Probation Department
20 to access and search any accounts using the defendant's
21 credential pursuant to this condition only when reasonable
22 suspicion exists that the defendant has violated a condition
23 of his supervision, and that the account to be searched
24 contains evidence of this violation. Failure to submit to
25 such a search may be grounds for revocation of release.

1 The defendant agrees that the United States
2 Probation Department may, in its discretion, share information
3 obtained during its monitoring of the defendant's phone,
4 electronic internet-capable and/or computer systems,
5 communication accounts and devices with the Federal Bureau of
6 Investigations, FBI, in order for the FBI to assist the
7 Probation Department in evaluating such information as part of
8 assessing the defendant's compliance with the terms of his
9 supervision.

10 The defendant agrees to monitoring by the Probation
11 Department by location monitoring and/or global positioning
12 systems, GPS, hereinafter collectively referred to as,
13 quote/unquote, monitoring. Such monitoring may include home
14 detention and/or a curfew.

15 The defendant agrees to abide by all technology
16 requirements in all location and/or GPS policies and
17 procedures.

18 The defendant must pay the cost of monitoring to the
19 degree he is reasonable able.

20 The defendant must disclose all financial
21 information and documents to the Probation Department to
22 assess his ability to pay.

23 A search condition.

24 The defendant shall submit his person, property,
25 house, residence, vehicle, papers, computers, as defined in

1 Title 18 of the United States, Code 1030, subsection E1, other
2 electronic communications or data storage devices or media or
3 office to a search conducted by a United States Probation
4 Officer. Failure to submit to a search may be grounds for
5 revocation of release.

6 The defendant shall warn any other occupants that
7 the premises may be subject to searches pursuant to this
8 condition. An officer may conduct a search pursuant to this
9 condition only when reasonable suspicion exists that the
10 defendant has violated a condition of his supervision, and
11 that the areas to be searched contain evidence of this
12 violation. Any search must be conducted at a reasonable time
13 and in a reasonable manner.

14 If removed, the defendant may not reenter the United
15 States illegally. The defendant shall cooperate with and
16 abide by all instructions of immigration authorities.

17 And that conclude the special conditions of
18 supervised release.

19 THE COURT: Thank you. As I previously stated, the
20 Court hereby expressly adopts the factual findings of the
21 presentence investigation report as read into the record in
22 its entirety and any addendum thereto barring any errors
23 contained therein to the extent they are not inconsistent with
24 this opinion.

25 Now, is there a motion to dismiss any other counts

1 in the case from the defendant?

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

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

5 THE COURT: We can hear you now.

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

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

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

12 MR. STERN: Yes. Yes.

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

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

16 THE COURT: Any objection, Mr. Pravda?

17 Did we lose Mr. Pravda?

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

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

22 MR. STERN: Right.

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

25 MR. STERN: Yes.

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

3 MR. STERN: Mr. Pravda?

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

6 THE COURT: Yes.

7 Any objections from the defense?

8 MR. STERN: No.

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

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

13 THE COURT: Any objection to that motion?

14 MR. STERN: No.

15 THE COURT: That motion is granted. Okay.

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

18 Anything else?

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

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

25 MR. STERN: Okay, thank you.

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

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

6 THE COURT: Correct.

7 MR. PRAVDA: Thank you, Your Honor.

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

15 Anything else?

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

19 THE COURT: Yes. So ordered.

20 MR. STERN: Thank you.

21 THE COURT: Anything else?

22 From the government, anything else?

23 MR. PRAVDA: No, Your Honor.

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

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

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

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

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

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

13 THE COURT: Consider the defendant so advised.

14 MR. PRAVDA: Thank you, Your Honor.

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

16 THE COURT: Yes, of course.

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

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

23 MR. STERN: Thank you, Judge.

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

1 previously in writing and the ones you've identified orally
2 today, be addressed by the Bureau of Prisons and Board of
3 Prisons people.

4 MR. STERN: Judge, rather than a recommendation, I
5 would ask for an order, that you order that.

6 THE COURT: You know, it's sort of like the order
7 that General Sherman and General Grant and President Grant
8 gave about my 40 acres and a mule. I mean I could order it,
9 but the reality is they are not bound, as a matter of law, to
10 follow those orders. So I use the term "recommend" rather
11 than just order that I don't have the power to give.

12 If I had the power to give it, I would give it, but
13 in all candor, while I can order some things and I can use the
14 words order --

15 MR. STERN: Will you do that?

16 THE COURT: -- I cannot order them to do that.

17 MR. STERN: Yes, you can order them, Judge, and you
18 did before. You issued the order before. And an order
19 certainly carries more weight than a recommendation.

20 THE COURT: Let me put it this way to you,
21 Mr. Stern. I can't order them to put him in Danbury, for
22 example.

23 MR. STERN: No, that you can't. That's a
24 recommendation, correct.

25 THE COURT: That's what I'm talking about.

1 Certainly as it goes to his health care, I can give
2 orders with respect to that. But I cannot order -- I cannot
3 order them to put him in a given prison --

4 MR. STERN: Thank you.

5 THE COURT: -- and it would be foolish of me to do
6 it. So we understand each other?

7 MR. STERN: Yes, sir. Thank you.

8 THE COURT: Well, you know, only some people think
9 I'm as dumb as dirt.

10 Okay, anything else?

11 MR. STERN: That was my misunderstanding, Judge.

12 THE COURT: No, I understand. I understand.

13 Anything else I can help you with?

14 MR. PRAVDA: Nothing from the government. Thank
15 you, Your Honor.

16 THE COURT: Okay, thank you.

17 Anything else from the defendant?

18 MR. STERN: No, Your Honor.

19 THE COURT: Anything else from probation?

20 THE PROBATION OFFICER: Nothing, Your Honor. Thank
21 you.

22 THE COURT: Okay, thank you. We are adjourned.

23 Stay safe everyone, and we will be submitting both
24 the order and the memorandum and order that I talked about on
25 ECF. Thank you.

1 MR. STERN: Thank you.

2 MR. PRAVDA: Thank you.

3

4 (Whereupon, the matter was concluded.)

5

6 * * * * *

7

8

9 I certify that the foregoing is a correct transcript from the
record of proceedings in the above-entitled matter.

10

11 s/ Linda D. Danelczyk

January 21, 2021

12 LINDA D. DANELCZYK

DATE

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APPENDIX G

United States Code Annotated
Constitution of the United States
Annotated

Amendment V. Grand Jury; Double Jeopardy; Self-Incrimination; Due Process; Takings

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

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

Currentness

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

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

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

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

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

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

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

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

U.S.C.A. Const. Amend. V, USCA CONST Amend. V

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

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APPENDIX G

United States Code Annotated
Constitution of the United States
Annotated

Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

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

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

Currentness

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

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

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials

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

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

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

Amendment VIII. Excessive Bail, Fines, Punishments

Currentness

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

U.S.C.A. Const. Amend. VIII, USCA CONST Amend. VIII

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

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United States Code Annotated
Constitution of the United States
Annotated

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection;
Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

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

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

Currentness

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

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

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

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

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

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

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

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 113B. Terrorism (Refs & Annos)

18 U.S.C.A. § 2332b

§ 2332b. Acts of terrorism transcending national boundaries

Effective: June 2, 2015

Currentness

(a) Prohibited acts.--

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

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

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

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

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

(b) Jurisdictional bases.--

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

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

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

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

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

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

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

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

(c) Penalties.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) is a violation of--

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

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

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

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

CREDIT(S)

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

Footnotes

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

18 U.S.C.A. § 2332b, 18 USCA § 2332b

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

WESTLAW CLASSIC

NOTES OF DECISIONS (1)

Pleadings

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

§ 2339. Harboring or concealing terrorists

18 USCA § 2339 United States Code Annotated Title 18. Crimes and Criminal Procedure Effective: November 2, 2002 (Approx. 2 pages)

Effective: November 2, 2002

18 U.S.C.A. § 2339

§ 2339. Harboring or concealing terrorists

Currentness

(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

(b) A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

CREDIT(S)

(Added Pub.L. 107-56, Title VIII, § 803(a), Oct. 26, 2001, 115 Stat. 376; amended Pub.L. 107-273, Div. B, Title IV, § 4005(d)(2), Nov. 2, 2002, 116 Stat. 1813.)

Notes of Decisions (1)

18 U.S.C.A. § 2339, 18 USCA § 2339

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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WESTLAW CLASSIC

NOTES OF DECISIONS (58)

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)

§ 2339A. Providing material support to terrorists

18 USCA § 2339A - United States Code Annotated Title 18. Crimes and Criminal Procedure Effective: December 22, 2009 (Approx. 3 pages)

Unconstitutional or Preempted Prior Version Held Unconstitutional by Humanitarian Law Project v.

Mukasey 9th Cir.(Cal.) Dec. 10, 2007

Proposed Legislation**Effective: December 22, 2009**

18 U.S.C.A. § 2339A

§ 2339A. Providing material support to terrorists

Currentness

(a) Offense.--Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

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

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

CREDIT(S)

(Added Pub.L. 103-322, Title XII, § 120005(a), Sept. 13, 1994, 108 Stat. 2022; amended Pub.L. 104-132, Title III, § 323, Apr. 24, 1996, 110 Stat. 1255; Pub.L. 104-294, Title VI, §§ 601(b)(2), (s)(2), (3), 604(b)(5), Oct. 11, 1996, 110 Stat. 3498, 3502, 3506; Pub.L. 107-56, Title VIII, §§ 805(a), 810(c), 811(f), Oct. 26, 2001, 115 Stat. 377, 380, 381; Pub.L. 107-197, Title III, § 301(c), June 25, 2002, 116 Stat. 728; Pub.L. 107-273, Div. B, Title IV, § 4002(a)

Admissibility of evidence
Comments or conduct of counsel
Conspiracy
Constitutionality
Construction with other laws
Defenses
Extraterritorial application
Indictment
Instructions
Jurisdiction
Knowledge and intent
Offense
Overbreadth
Personnel
Persons liable
Pleading
Pleas
Sentence and punishment
Vagueness
Weight and sufficiency of evidence

United States Code Annotated

Title 18. Crimes and Criminal Procedure (Refs & Annos)

Part I. Crimes (Refs & Annos)

Chapter 113B. Terrorism (Refs & Annos)

18 U.S.C.A. § 2339B

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

Effective: June 2, 2015

Currentness

(a) Prohibited activities.--

(1) Unlawful conduct.--Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).

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

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

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

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

(A) \$50,000 per violation; or

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

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

(d) Extraterritorial jurisdiction.--

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

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

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

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

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

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

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

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

(e) Investigations.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) Taking of trial testimony.--

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

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

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

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

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

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

(5) Interlocutory appeal.--

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

(i) authorizing the disclosure of classified information;

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

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

(B) Expedited consideration.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(5) the term “Secretary” means the Secretary of the Treasury; and

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

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

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

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

CREDIT(S)

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

18 U.S.C.A. § 2339B, 18 USCA § 2339B

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

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

18 U.S.C.A. § 3553

§ 3553. Imposition of a sentence

Effective: December 21, 2018
Currentness

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement--

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

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

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

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

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

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

(2) Child crimes and sexual offenses.--

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the defendant does not have--

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

Footnotes

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

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

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

18 U.S.C.A. § 3553, 18 USCA § 3553

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

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

18 U.S.C.A. § 3742

§ 3742. Review of a sentence

Effective: April 30, 2003
Currentness

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

(1) was imposed in violation of law;

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

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

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

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

(1) was imposed in violation of law;

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

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

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

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

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

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

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

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

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

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

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

(1) was imposed in violation of law;

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

(3) is outside the applicable guideline range, and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CREDIT(S)

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

18 U.S.C.A. § 3742, 18 USCA § 3742

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

WESTLAW CLASSIC

NOTES OF DECISIONS (65)

GENERALLY
IN BANC HEARING

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)

§ 46. Assignment of judges; panels; hearings; quorum
28 USCA § 46 United States Code Annotated Title 28. Judiciary and Judicial Procedure Effective: August 6, 1996 (Approx. 2 pages)

Effective: August 6, 1996

28 U.S.C.A. § 46

§ 46. Assignment of judges; panels; hearings; quorum

Currentness

(a) Circuit judges shall sit on the court and its panels in such order and at such times as the court directs.

(b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentence of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judge of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

(d) A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 871; Pub.L. 88-176, § 1(b), Nov. 13, 1963, 77 Stat. 331; Pub.L. 95-486, § 5(a), (b), Oct. 20, 1978, 92 Stat. 1633; Pub.L. 97-164, Title I, § 103, Title II, § 205, Apr. 2, 1982, 96 Stat. 25, 53; Pub.L. 104-175, § 1, Aug. 6, 1996, 110 Stat. 1556.)

**CHIEF CIRCUIT JUDGE (FIFTH CIRCUIT): ORDER DECLARING AN EMERGENCY
UNDER 28 U.S.C. § 46(B)**

By order of the United States Court of Appeals for the Fifth Circuit dated January 8, 2007 and entitled "Order Vacating a Declaration of a Judicial Emergency under 28 U.S. Code,

United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)

Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 32

Rule 32. Sentencing and Judgment

Currentness

(a) [Reserved.]

(b) Time of Sentencing.

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

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

(c) Presentence Investigation.

(1) Required Investigation.

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

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

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

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

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

(d) Presentence Report.

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

- (A) identify all applicable guidelines and policy statements of the Sentencing Commission;
- (B) calculate the defendant's offense level and criminal history category;
- (C) state the resulting sentencing range and kinds of sentences available;
- (D) identify any factor relevant to:
 - (i) the appropriate kind of sentence, or
 - (ii) the appropriate sentence within the applicable sentencing range; and
- (E) identify any basis for departing from the applicable sentencing range.

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

- (A) the defendant's history and characteristics, including:
 - (i) any prior criminal record;
 - (ii) the defendant's financial condition; and
 - (iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;
- (B) information that assesses any financial, social, psychological, and medical impact on any victim;
- (C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;
- (D) when the law provides for restitution, information sufficient for a restitution order;
- (E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation;
- (F) a statement of whether the government seeks forfeiture under Rule 32.2 and any other law; and

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

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

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

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

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

(e) Disclosing the Report and Recommendation.

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

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

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

(f) Objecting to the Report.

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

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

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

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

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

(i) Sentencing.

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

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

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

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

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

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

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

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

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

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

(4) Opportunity to Speak.

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

- (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
- (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and
- (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

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

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

(j) Defendant's Right to Appeal.

(1) Advice of a Right to Appeal.

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

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

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

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

(k) Judgment.

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

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

CREDIT(S)

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

Fed. Rules Cr. Proc. Rule 32, 18 U.S.C.A., FRCRP Rule 32

Including Amendments Received Through 12-1-21

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United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)

Title VII. Post-Conviction Procedures

Federal Rules of Criminal Procedure, Rule 35

Rule 35. Correcting or Reducing a Sentence

Currentness

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

(b) Reducing a Sentence for Substantial Assistance.

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

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

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

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

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

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

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

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

CREDIT(S)

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

Fed. Rules Cr. Proc. Rule 35, 18 U.S.C.A., FRCRP Rule 35

Including Amendments Received Through 12-1-21

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United States Code Annotated

Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)

Title IX. General Provisions

Federal Rules of Criminal Procedure, Rule 51

Rule 51. Preserving Claimed Error

Currentness

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

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

CREDIT(S)

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

Fed. Rules Cr. Proc. Rule 51, 18 U.S.C.A., FRCRP Rule 51

Including Amendments Received Through 12-1-21

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NOTES OF DECISIONS (4830)

United States Code Annotated
Federal Rules of Criminal Procedure for the United States District Courts (Refs & Annos)

Rule 52. Harmless and Plain Error

FRCRP Rule 52 United States Code Annotated Federal Rules of Criminal Procedure for the United States District Courts (Approx. 7 pages)

Federal Rules of Criminal Procedure, Rule 52

Rule 52. Harmless and Plain Error

Currentness

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

CREDIT(S)

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

ADVISORY COMMITTEE NOTES

1944 Adoption

Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C. former § 391 (second sentence): "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties"; 18 U.S.C. former § 556; "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *." A similar provision is found in rule 61 of the Federal Rules of Civil Procedure, 28 U.S.C., Appendix.

Note to Subdivision (b). This rule is a restatement of existing law, *Wiborg v. United States*, 16 S.Ct. 1127, 1197, 2 cases, 163 U.S. 632, 658, 41 L.Ed. 289; *Hemphill v. United States*, 112 F.2d 505, C.C.A.9th, reversed 312 U.S. 657, 85 L.Ed. 1106, 61 S.Ct. 729, conformed to 120 F.2d 115, certiorari denied 62 S.Ct. 111, 314 U.S. 627, 86 L.Ed. 503. Rule 27 of the Rules of the Supreme Court, 28 U.S.C., formerly following § 354, provides that errors not specified will be disregarded, "save as the court, at its option, may notice a plain error not assigned or specified." Similar provisions are found in the rules of several circuit courts of appeals.

2002 Amendments

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52(b) has been amended by deleting the words "or defect" after the words "plain error." The change is intended to remove any ambiguity in the rule. As noted by the Supreme Court, the language "plain error or defect" was misleading to the extent that it might be read in the disjunctive. See *United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(b) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n. 12 (1985) (use of disjunctive in Rule 52(b) is misleading).

United States Code Annotated

Federal Sentencing Guidelines (Refs & Annos)

Chapter Two. Offense Conduct (Refs & Annos)

Part M. Offenses Involving National Defense and Weapons of Mass Destruction (Refs & Annos)

5. Prohibited Financial Transactions and Exports, and Providing Material Support to Designated Foreign Terrorist Organizations (Refs & Annos)

USSG, § 2M5.3, 18 U.S.C.A.

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

Currentness

(a) Base Offense Level: 26

(b) Specific Offense Characteristic

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

(c) Cross References

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

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

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

CREDIT(S)

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

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

United States Code Annotated
Federal Sentencing Guidelines (Refs & Annos)
Chapter Three. Adjustments (Refs & Annos)
Part A. Victim-Related Adjustments (Refs & Annos)

USSG, § 3A1.4, 18 U.S.C.A.

§ 3A1.4. Terrorism

Currentness

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

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

CREDIT(S)

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

Federal Sentencing Guidelines, § 3A1.4, 18 U.S.C.A., FSG § 3A1.4
As amended to 11-1-21.

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