APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued: October 19, 2023
Decided: December 22, 2023

No. 22-3072

UNITED STATES OF AMERICA,
APPELLEE

v.

KHAN MOHAMMED,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cr-00357-1)

Reedy C. Swanson argued the cause for appellant. With him on the briefs were *Nathaniel H. Nesbitt* and *Peter S. Spivack*.

J. Benton Hurst, Trial Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief was *Kaitlin J. Sahni,* Trial Attorney. *Sonja M. Ralston,* Attorney, entered an appearance.

Before: SRINIVASAN, *Chief Judge,* HENDERSON, *Circuit Judge,* and ROGERS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: In 2008, Khan Mohammed was extradited from Afghanistan to the United States, convicted of international drug trafficking and narcoterrorism and sentenced to two concurrent life sentences. He has appealed to this Court twice before: the first panel affirmed his conviction and sentence but remanded for an evidentiary hearing on his claim of ineffective assistance of counsel and the second panel found his trial counsel was constitutionally deficient and remanded to the district court to assess prejudice regarding the narcoterrorism charge. After further proceedings, the district court vacated the narcoterrorism charge and the government declined to re-prosecute. At resentencing for the drug trafficking charge, the district court applied Section 3A1.4 of the Sentencing Guidelines, known as the terrorism enhancement, and imposed a life sentence.

Mohammed appeals his new sentence, arguing that the district court committed legal and factual errors in applying the terrorism enhancement and found facts under the wrong burden of proof. As detailed *infra,* we affirm Mohammed's sentence.

I. BACKGROUND

We have described the full history of Mohammed's prosecution in his previous appeals and assume familiarity with our earlier decisions. *See United States v. Mohammed,* 693 F.3d 192 (D.C. Cir. 2012) *(Mohammed I); United States v. Mohammed,* 863 F.3d 885 (D.C. Cir. 2017) *(Mohammed II).* We discuss here only the facts relevant to this appeal.

A jury convicted Mohammed of (1) distributing heroin intending or knowing that it would be unlawfully imported into the United States in violation of 21 U.S.C. § 959(a)(1)-(2) (2006)[1] (the drug trafficking charge); and (2) distributing opium and heroin knowing or intending to provide something of pecuniary value to a terrorist in violation of 21 U.S.C. § 960a (the narcoterrorism charge). *Mohammed I,* 693 F.3d at 197. At sentencing, the district court applied Section 3A1.4(a) of the U.S. Sentencing Guidelines (Guidelines), which increases a defendant's sentence by 12 levels if the offense is "a felony that involved, or was intended to promote, a federal crime of terrorism," U.S.S.G. § 3A1.4(a). *Mohammed I,* 693 F.3d at 197. The court sentenced Mohammed to two concurrent life sentences. *Id.*

Mohammed appealed and raised an ineffective assistance of counsel claim for failure to investigate possible bias of the government's chief witness, Jaweed. *Id.* After a remand, a second appeal and an evidentiary hearing, the district court found that Mohammed had been prejudiced by his trial counsel's constitutionally deficient performance as to the narcoterrorism charge and vacated that conviction. *United States v. Mohammed,* 2021 WL 5865455, at *12 (D.D.C. Dec. 9, 2021). The government declined to re-prosecute that charge.

The district court resentenced Mohammed on the drug trafficking charge. The court again applied Section 3A1.4(a), finding by a preponderance of the evidence that Mohammed intended to promote federal crimes of terrorism by "using drug

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[1] The statute has since been amended. We cite here to the version in force at the time of Mohammed's offense.

commissions to buy a car to transport missiles to attack the Jalalabad airport, where U.S. soldiers and others were stationed" or, alternatively, by intending to provide something of value to a terrorist in violation of the narcoterrorism statute. *United States v. Mohammed,* 2022 WL 2802353, at *5-7, *10 (D.D.C. July 18, 2022). The court relied on Mohammed's recorded statements, bolstered by testimony from Jaweed, whom the court found to be credible. *Id.* at *10; *see id.* at *6-8. The district court sentenced Mohammed to a term of life on the drug trafficking count.

II. ANALYSIS

For a properly preserved appeal of a sentencing decision, "[p]urely legal questions are reviewed *de novo;* factual findings are to be affirmed unless clearly erroneous; and we are to give due deference to the district court's application of the [sentencing] guidelines to facts." *United States v. Bikundi,* 926 F.3d 761, 796-97 (D.C. Cir. 2019) (per curiam) (alteration in original) (quoting *United States v. Vega,* 826 F.3d 514, 538 (D.C. Cir. 2016) (per curiam)).

If an argument was not raised "with sufficient precision to indicate distinctly [Mohammed's] thesis" in district court, we have discretion to notice and correct "plain error." *Al Bahlul v. United States,* 767 F.3d 1, 9 (D.C. Cir. 2014) (en banc) (quoting *Miller v. Avirom,* 384 F.2d 319, 322 (D.C. Cir. 1967)). Plain error review is "highly circumscribed" and requires (1) error (2) that is plain, (3) that affects substantial rights and (4) that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 9-10 (first quoting *United States v. Brinson–Scott,* 714

F.3d 616, 625 (D.C. Cir. 2013); then quoting *Johnson v. United States,* 520 U.S. 461, 467 (1997)).

A.

Mohammed argues that the district court erred by relying on the "intent to promote" prong of Section 3A1.4 because the language has been abrogated by statute: the terrorism enhancement, Mohammed contends, applies only to convictions of federal crimes of terrorism. His argument turns on the history of the guideline. The Congress directed the U.S. Sentencing Commission (Commission) to adopt the enhancement in 1994:

> The United States Sentencing Commission is directed to amend its sentencing guidelines to provide an appropriate enhancement for any felony, whether committed within or outside the United States, that involves or is intended to promote international terrorism, unless such involvement or intent is itself an element of the crime.

Violent Crime Control & Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022 (1994). The Commission adopted its first version of the terrorism enhancement in 1995:

> If the offense is a felony that involved, or was intended to promote, international terrorism, increase by 12 levels . . . .

U.S.S.G. § 3A1.4(a) (1995). "International terrorism" as used in the Guidelines referred to "terrorist acts occurring `primarily outside the territorial jurisdiction of the United States' or transcending `national boundaries.' *United States v. Haipe,* 769 F.3d 1189, 1192 (D.C. Cir. 2014) (quoting 18 U.S.C. § 2331(1)(C)).

The Congress issued a new directive in 1996 instructing the Commission to amend the terrorism enhancement:

> The United States Sentencing Commission shall forthwith, in accordance with the procedures set forth in section 21(a) of the Sentencing Act of 1987, as though the authority under that section had not expired, amend the sentencing guidelines so that the chapter 3 adjustment relating to international terrorism only applies to Federal crimes of terrorism, as defined in section 2332b(g) of title 18, United States Code.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303 (1996). The Commission responded by replacing the phrase "international terrorism" with "federal crime of terrorism":

> If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels . . . .

U.S.S.G. § 3A1.4(a) (1996). "Federal crime of terrorism" is defined in the Guidelines commentary by reference to 18 U.S.C. § 2332b(g)(5), which "lists acts that combine intimidation of government with violation of various criminal provisions, many of which apply inside as well as outside the United States." *Haipe,* 769 F.3d at 1192. The 1996 text remains in force today.

Mohammed argues that the Congress' use of the word "only" in its 1996 directive indicates that the scope of Section 3A1.4 should have been amended to narrow its applicability in some respect and therefore the Commission erred when it substituted "federal crime of terrorism" for "international terrorism" because the amended guideline broadened the enhancement's coverage to apply to both domestic and international crimes of terrorism. *See United States v. Garey,* 546 F.3d 1359, 1362 n.3 (11th Cir. 2008) (Section 3A1.4 applies "more broadly" after 1996 amendment); U.S.S.G. App. C, amends. 539, 565 (Nov. 1, 1997) (same). He maintains that in order to comply with the statute and give effect to the word "only," the enhancement should

have been amended to omit the "intended to promote" prong, with the result that the enhancement would apply only to convictions of federal crimes of terrorism.

Because Mohammed did not raise this argument in district court, we review for plain error only. *See Al Bahlul,* 767 F.3d at 9; *United States v. Breedlove,* 204 F.3d 267, 270 (D.C. Cir. 2000). Mohammed contests forfeiture and points us to his sentencing memorandum but that memorandum referred only to unsettled authority as to when Section 3A1.4 can be applied in the absence of a conviction of a federal crime of terrorism. Because he challenged the application rather than the validity of Section 3A1.4, he failed to put the district court on notice of the argument he now raises before us.

We find no plain error in the district court's application of Section 3A1.4 because there was no plain error in the Commission's 1996 amendment. The Commission must "bow to the specific directives of Congress" but has "'significant discretion in formulating guidelines.'" *United States v. LaBonte,* 520 U.S. 751, 757 (1997) (quoting *Mistretta v. United States,* 488 U.S. 361, 377 (1989)).

The 1996 statutory directive is admittedly ambiguous, as the Fourth Circuit recognized in considering a similar argument. *United States v. Hasson,* 26 F.4th 610, 623 (4th Cir. 2022), *cert. denied,* 143 S. Ct. 310 (2022). But the Commission could reasonably understand the directive to operate as a charter to shift Section 3A1.4's field of operation to federal crimes of terrorism from international terrorism. *Accord Hasson,* 26 F.4th at 623 (1996 directive "is reasonably read as instructing the Commission to edit the type of terrorism to which the adjustment applies by replacing

'international terrorism' with 'federal crimes of terrorism,' which the Commission did"). Under this reading, the word "only" in the congressional directive is not surplusage because it instructed the Commission to apply the guideline to one definition of terrorism rather than both "international terrorism" *and* "federal crimes of terrorism." The use of "only" in the directive cannot sustain the weight Mohammed places upon it as it does not unambiguously direct that Section 3A1.4's application requires conviction of a federal crime of terrorism.

The plain text of the statute does not give us cause to set aside Section 3A1.4. And Mohammed's preferred interpretation is not embraced by other courts, as no circuit has accepted it, the Fourth Circuit recently rejected it and the Sixth and Seventh Circuits have rejected it implicitly. *See Hasson,* 26 F.4th at 623-24; *United States v. Graham,* 275 F.3d 490, 513-19 (6th Cir. 2001) (affirming application of Section 3A1.4 over dissenting opinion arguing that enhancement is contrary to statute); *United States v. Arnaout,* 431 F.3d 994, 1001-02 (7th Cir. 2005) (reversing district court for "ignoring the plain, unambiguous text of the Guidelines" when it declined to apply terrorism enhancement on ground Congress intended enhancement to apply only to federal crimes of terrorism). Accordingly, the district court did not plainly err by applying Section 3A1.4 to Mohammed's sentence.[2]

[2] Whether Mohammed's argument would survive *de novo* review is not before us.

B.

The district court applied the terrorism enhancement after finding facts under a preponderance-of-the-evidence standard. Mohammed argues that this was legal error because the court applied the preponderance standard as an inflexible rule rather than acknowledging that a higher burden of proof may be appropriate where there are "extraordinary circumstances." *See, e.g., United States v. Long,* 328 F.3d 655, 671 (D.C. Cir. 2003) (affirming district court's application of preponderance standard at sentencing because defendant's case was not extraordinary). He contends that his case presents extraordinary circumstances because (1) the terrorism enhancement had a dramatic effect on his sentencing range, increasing the Guidelines range from 97-121 months to 360 months to life and (2) the district court applied the enhancement based on conduct that was the subject of the vacated narcoterrorism conviction, meaning the record was skewed by his constitutionally deficient counsel.

Assuming without deciding that Mohammed's case is extraordinary, the district court did not err by relying on vacated conduct proven by a preponderance of the evidence. The Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), and our *post-Booker* precedent compel this conclusion.

Before the *Booker* Court rendered the Sentencing Guidelines advisory, 543 U.S. at 244-45, we endorsed a preponderance standard at sentencing but sometimes noted in dicta that extreme cases might warrant a more exacting standard than preponderance-of-the-evidence. *See Long,* 328 F.3d at 671; *United States v. Lam*

Kwong-Wah, 966 F.2d 682, 688 (D.C. Cir. 1992). Other circuits explicitly held that a higher standard of proof was warranted in extreme cases. *See, e.g., United States v. Kikumura,* 918 F.2d 1084, 1100-02 (3d Cir. 1990). But after *Booker,* "there is no need for courts of appeals to add epicycles to an already complex set of (merely) advisory guidelines by multiplying standards of proof." *United States v. Reuter,* 463 F.3d 792, 793 (7th Cir. 2006). As other circuits have recognized (with the exception of the Ninth Circuit), due process concerns about the burden of proof in extraordinary cases "were put to rest when *Booker* rendered the Guidelines advisory," as the reasoning underlying earlier case law is no longer applicable. *United States v. Fisher,* 502 F.3d 293, 305 (3d Cir. 2007); *see also, e.g., United States v. Grubbs,* 585 F.3d 793, 801 (4th Cir. 2009); *United States v. Vaughn,* 430 F.3d 518, 525 (2d Cir. 2005). *But see United States v. Staten,* 466 F.3d 708, 717 (9th Cir. 2006) (reaffirming higher standard of proof for extraordinary circumstances).

Our *post-Booker* precedent confirms that the district court did not err by applying a preponderance standard to conduct that was the subject of Mohammed's vacated conviction. In *United States v. Dorcely,* 454 F.3d 366 (D.C. Cir. 2006), we upheld the district court's reliance on acquitted conduct at sentencing after finding facts under a preponderance standard, concluding that the sentence did not pose Fifth or Sixth Amendment concerns. *Id.* at 372-73. And in *United States v. Bras,* 483 F.3d 103 (D.C. Cir. 2007), we affirmed a sentencing court's reliance on untried conduct found by a preponderance of the evidence. *Id.* at 108. If a court may use the preponderance standard to find and rely on acquitted and untried conduct at

sentencing, it follows that the same standard applies for conduct that was the subject of a vacated conviction.

We therefore reject Mohammed's argument that the district court erred by finding facts under a preponderance standard, even if his case involved extraordinary circumstances.

C.

Finally, Mohammed argues that the district court's factual findings do not support application of the terrorism enhancement.[3] The district court's application of the terrorism enhancement rested on two alternative theories: Mohammed (1) intended to promote the federal crime of terrorism by purchasing a car with drug-trafficking proceeds to transport missiles to fire at the Jalalabad airport and (2) intended to commit the crime of providing something of value to a terrorist—himself—by trafficking the drugs. Mohammed contends that there is no record support for the first theory and that the district court failed to make findings necessary to support applying the enhancement based on the second. Because Mohammed challenges the district court's factual findings, we review for clear error.[4]

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[3] In his opening brief, Mohammed additionally argued that we should hold this case in abeyance pending the Commission's resolution of a proposed amendment regarding the use of acquitted conduct at sentencing. However, after his opening brief was filed, the Commission deferred any decision on the amendment to 2024. In light of the deferral, Mohammed abandoned his argument on reply. We need not address it here.

[4] The government claims in a footnote that it is "doubtful that Mohammed preserved" his argument contesting the car theory but goes on to assume *arguendo* that there was no forfeiture. Mohammed correctly responds that the government has forfeited any forfeiture argument. *Fox v. District of Columbia,* 83 F.3d 1491, 1496 (D.C. Cir. 1996); *see also Abdelfattah v. U.S. Dep't of Homeland Sec.,* 787 F.3d 524, 532 (D.C. Cir. 2015) ("cursory arguments made only in footnotes" are "deem[ed] forfeited" (cleaned up)). We therefore proceed to the merits of Mohammed's argument.

Turning to the district court's first theory, Mohammed argues that the record evidence shows that the car he intended to purchase with the drug proceeds was not the same vehicle that would allegedly be used to transport missiles for the attack, undermining the court's factual findings.

The court's earlier findings, incorporated by reference in the July sentencing order, were based on two lines of the recorded conversations between Mohammed and Jaweed. *Mohammed,* 2022 WL 2802353, at *5. On August 30, 2006, Mohammed stated that he and Jaweed would "tightly and firmly load it in our car and bring it." Trial Ex. 2C. The district court interpreted "it" to mean missiles for the planned attack. *United States v. Mohammed,* No. 06-cr-00357, ECF No. 224-11, at 15. On September 10, Mohammed stated: "[I]f we get some money we will buy a car [unintelligible] for business. Once we have money, then the money would keep coming." Trial Ex. 2E. The district court considered these statements in reverse order, concluding that the car to be purchased would be used to transport missiles and carry out an attack. *Mohammed,* No. 06-cr-00357, ECF No. 224-11, at 15. Mohammed contends that the record shows that the vehicle meant to be loaded with missiles was already owned or accessible but the one to be purchased with drug-trafficking money was not yet owned and, when owned, was to be used for more drug activity, not terrorist activity.

Mohammed made a similar argument in *Mohammed I.* Addressing the same recorded statements, he argued that they "cannot be read to support the conclusion of the district court that he was referring to the same car that he said earlier would

carry the missiles." *Mohammed I,* 693 F.3d at 201. The *Mohammed I* court rejected his argument, finding that, although the record could support multiple interpretations, Mohammed's reading "is far from proof that the district court's reading of these conversations is clearly erroneous." *Id.* The court concluded that the district court "drew plausible inferences" based on "specific statements in the record." *Id.* at 202.

We decline to disturb the district court's factual findings, which have already been upheld on appeal. Under the law-of-the-case doctrine, "decisions rendered on the first appeal should not be revisited on later trips to the appellate court" "in the absence of extraordinary circumstances." *LaShawn A. v. Barry,* 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc). The doctrine is appropriately applied here, as the *Mohammed I* court addressed the same core factual question now before us and upheld the findings on clear error review. Mohammed identifies no cause to set aside law-of-the-case: he urges an alternative reading of the record but fails to identify any evidence directly contradicting the district court's interpretation.

Because the district court's first theory suffices to uphold the application of Section 3A1.4, we need not reach Mohammed's arguments regarding the second.

* * *

For the foregoing reasons, we affirm Mohammed's life sentence.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

KHAN MOHAMMED

AMENDED JUDGMENT IN A CRIMINAL CASE
(Filed 10/12/22)

Case Number: 06-357 (CKK)
USM Number: 29166-016

Date of Original Judgment: 12/23/2008
(Or Date of Last Amended Judgment)

Peter S. Spivack and nathaniel H. Nesbitt
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

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

☑ was found guilty on count(s) 1s and 2s
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21 USC § 959(a)(1),(a)(2) and 960(b)(1)(A)	Distribution of One Kilogram or More of Heroin Knowing that the Substance Would be Unlawfully Imported into the United States	10/18/2006	1

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

☑ The defendant has been found not guilty on count(s) 2s remanded and vacated in an Order dated 12/9/21, ECF No. 208

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

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

9/16/2022
Date of Imposition of Judgment

Colleen Kollar-Kotelly
Signature of Judge

Colleen Kollar-Kotelly, U.S. District Judge
Name and Title of Judge

Oct 12, 2022
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

Life. See attached Memorandum Opinion and Order dated July 18, 2022 regarding application of enhancement and based on commission of an offense intended to promote a federal crime of terrorism.

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

That Defendant's sentence be served at a facilty on the East Coast.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Sixty (60) Months on Count One (1s) of the Superseding Indictment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

    ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*

4. ☐ You must make restitution in accordance with 18 U.S.C. § 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*

5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*

7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

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

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.

3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

4. You must answer truthfully the questions asked by your probation officer.

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

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

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

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not

knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

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

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

Deporation Compliance - You must surrender to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed. If you are ordered deported from the United States, you must remain outside the United. States, unless legally authorizzed to re-enter. If you re-enter the United States, you must report to the nearest probation office within 72 hours after you return.

The probation office shall release the presentence investigation report and/or Judgment and Commitment Order to the Bureau of Immigration and Customs Enforcement (ICE) to facilitate any deportation proceedings.

The Probation Office shall release the presentence investigation report to all appropriate agencies, which includes the United States Probation Office in the approved district of residence, in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the Probation Office upon the Probation Office upon the defendant's completion or termination from treatment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00	$ 0.00

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

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

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

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

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.

** Justice for Victims of Trafficking Act o12015, Pub. L. No. 1 14-22.

*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

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

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

SCHEDULE OF PAYMENTS

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

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

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

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

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

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the

payment plan based on an assessment of the defendant's ability to pay at that time; or

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

The Court finds that you do not have the ability to pay a fine and, therefore, waives impostion of a fine in this case. The financial obligation are immediately payable to the Clerk of the Court for the U.S. District Court, 333 Constitution Ave., NW, Washington, DC 20001. Within 30 days of any change of address, you shall notify the Clerk of the change until such time as the financial obligation is paid in full.

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

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

☐ Joint and Several

Case Number

Defendant and Co-Defendant Names *(including defendant number)*	Total Amount	Joint and Several Amount	Corresponding Payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

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

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

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

KHAN MOHAMMED,

Defendant.

Criminal No. 06-357 (CKK)

MEMORANDUM OPINION AND ORDER
(July 18, 2022)

In December 2021, this Court granted Defendant's motion to vacate his narcoterrorism conviction and to resentence him. *See* December 21, 2021 Order and Memorandum Opinion, ECF Nos. 208, 209. Mr. Mohammed is scheduled for resentencing by this Court on July 19, 2022, on his remaining conviction for distribution of heroin. The parties disagree as to whether a sentencing enhancement — based on commission of an offense that intended to promote a federal crime of terrorism — is applicable. Upon consideration of the record in this case and the briefing by the parties on this issue, the Court finds that this sentencing enhancement is applicable.

I. Background[1]

On May 15, 2008, Khan Mohammed ("Defendant" or "Mr. Mohammed") was convicted by a jury in this Court of one count of distributing one kilogram or more of heroin intending or knowing that it will be unlawfully imported into the United States (Count I) and one count of distributing a controlled substance knowing or intending to provide anything of pecuniary value to a person or organization that has engaged in terrorism or terrorist activity ("narcoterrorism") (Count II). *See* Verdict Form, ECF No. 62. On December 22, 2008, this Court sentenced Mr. Mohammed to concurrent terms of life imprisonment on Counts I and II. *See* Judgment in a Criminal Case, ECF No. 84, at 3.

Defendant filed a timely appeal and as part of that appeal, Mr. Mohammed argued that his trial counsel was ineffective for failing to adequately investigate certain evidence that Defendant asserts would have strengthened his defense. *See generally United States v. Mohammed,* 693 F.3d 192, 202-204 (D.C. Cir. 2012) *("Mohammed I").* On September 4, 2012, the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") upheld Mr. Mohammed's conviction and sentence but remanded the case for this Court to conduct an evidentiary hearing on Defendant's claim of ineffective assistance of counsel to determine if Defendant was prejudiced as to the narcoterrorism charge because of his counsel's deficient performance. *Id.* at 204-205.

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[1] Some of the "Background" information in this Memorandum Opinion is reiterated from this Court's [209] December 9, 2021 Memorandum Opinion.

After the matter was remanded to this Court, Mr. Mohammed filed his [118] Motion to Vacate his Conviction, or in the Alternative for Resentencing, which was premised on ineffective assistance of counsel claims, and this Court held an evidentiary hearing relating to Defendant's motion to vacate and denied subsequently that motion. Defendant appealed from that decision, and the D.C. Circuit affirmed in part, vacated in part, and remanded to this Court for "further proceedings consistent with [their] opinion." *See United States v. Mohammed,* 863 F.3d 885, 893894 (D.C. Cir. 2017) ("*Mohammed II*") ("On the current record, and without additional district court findings, we cannot assess what a reasonable investigation in 2008 could have found. . . . [and therefore,] [r]econstruction of what a reasonable investigation [by counsel] could have uncovered . . . [is a] step [that] must be taken on remand.")

More specifically, the D.C. Circuit determined that Mr. Mohammed's counsel was deficient because he had "failed to take the obligatory step of calling potential witnesses[,]" in Afghanistan, to try to impeach the credibility of the Government's witness [Jaweed, the Government informant] and demonstrate bias, *id.* at 890, and such "failure to place calls or otherwise reach out to potential witnesses [could] not be traced to any strategic decision." *Id.* at 891. The D.C. Circuit affirmed the Defendant's drug trafficking conviction, noting that Defendant was not prejudiced because he was "convicted based on [his] own words" on the drug trafficking charge. *Id.* at 892. In contrast, the D.C. Circuit indicated that "[o]n the existing record, [it] [could] not exclude the possibility of prejudice as to the narcoterrorism conviction [as]

Jaweed's testimony was the only evidence that linked Mohammed to the Taliban [and] [i]t thus provided critical support for the narcoterrorism charge." *Id.* Accordingly, the D.C. Circuit concluded that "it is reasonably probable that the jury would not have convicted Mohammed [on the narcoterrorism charge] if Jaweed's testimony could have been effectively undermined." *Id.* While this Court focused previously on the four potential impeachment witnesses named by Mr. Mohammed, the D.C. Circuit found this was "too limited" and charged this Court with "reconstruct[ing] what an adequate investigation in 2008 could have uncovered and how counsel could have used that information at trial (as fodder for cross-examination as well as direct testimony)." *Id.* at 893.

Subsequent to that remand by the D.C. Circuit, the parties explored options regarding the "reconstruction" of a reasonable investigation, and eventually, defense counsel retained the services of a company in Afghanistan to "arrange for an Afghan court to take sworn testimony of Mr. Mohammed's witnesses, transcribe the testimony and provide it to counsel." May 6, 2019 Minute Order. Because there was a dispute regarding the Government's opportunity to cross-examine the witnesses, the Court held a status conference on August 20, 2019, to try to resolve how to proceed. The Defendant was ordered to provide to the Government a copy of any affidavits obtained, and "[u]pon review of the sixteen affidavits, the [G]overnment withdr[e]w its request for formal depositions of the defense witnesses" and "consent[ed] to the admissibility of the affidavits for the limited purpose of considering the merits of Defendant's ineffective assistance of counsel claim." *See*

Joint Status Report, ECF No. 196, at 2.[2] Thereafter, the Court set a briefing schedule for the parties regarding Defendant's [200] Motion to Vacate, which was based on his claim of ineffective assistance of counsel.

Upon consideration of the briefing provided by the parties, this Court found that Mr. Mohammed was prejudiced by ineffective assistance of counsel regarding the narcoterrorism charge. "In assessing prejudice, the ultimate question is whether Mohammed has shown a reasonable probability that adequate investigation would have enabled trial counsel to sow sufficient doubt about Jaweed's credibility to sway even one juror." *Mohammed II,* 863 F.3d at 892 (internal quotation marks and citation omitted). This Court concluded that "the impact of Jaweed's testimony could have been undermined, at least partially," by evidence of his alleged bias and that evidence "may have swayed at least one member of the jury to (at least partially) discredit Jaweed's testimony." Mem. Op., ECF No. 209, at 25. Accordingly, the Court granted the Defendant's motion to vacate the narcoterrorism conviction (Count Two) and resentence Mr. Mohammed on the drug trafficking charge. *See* Order, ECF No. 208. The Court established a briefing schedule for the parties to file memoranda in aid of resentencing and, as previously noted, Defendant's resentencing is set for July 19, 2022.

On April 8, 2022, the Probation Office filed its [215] Final Presentence Investigation Report ("PSR"). On June 3, 2022, the Government filed its [224]

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[2] The Court references the page numbers assigned through the Electronic Case Filing ("ECF") system.

Memorandum in Aid of Resentencing ("Govt. Mem."), and the Defendant filed his [225] Sentencing Memorandum ("Def. Mem."). On June 17, 2022, Defendant filed his [226] Response to the Government's Sentencing Memorandum ("Def.'s Response"), and the Government filed its [227] Response to Defendant's Sentencing Memorandum ("Govt. Response"). The Court has considered the briefing by both parties as well as the PSR filed by the Probation Office.

The parties disagree on the application of a "Victim Related Adjustment" (applicable where "the offense is a felony that involved, or was intended to promote, a federal crime of terrorism") (hereinafter referred to as "terrorism enhancement"). This terrorism enhancement adds 12 levels to Defendant's base offense level of 30 on Count One (Distribution of One Kilogram or More of Heroin Knowing that the Substance Would Be Unlawfully Imported into the United States), resulting in an offense level of 42 and a Guideline sentencing range of 360 months to life. *See* PSR, ECF No. 215, at 9-10, 13.[3] Defendant explains that the "U.S. Probation Office recommends a sentence of 348 months' imprisonment and 60 months of supervised release with the special condition that [Defendant] comply with deportation proceedings [,] . . . [while] [t]he government seeks a life sentence." Def.'s Mem., ECF No. 225, at 3 (internal citations omitted). Defendant asserts however that without the 12-level terrorism enhancement, "the proper Guideline range is 97 to 121 months." *Id.* at 23.

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[3] Pursuant to the statutory provisions, "[t]he minimum term of imprisonment is 10 years and the maximum term is life for this Class A Felony. 21 USC §§§ 959(a)(1), (a)(2) and 960(b)(1)(A)." PSR, ECF No. 215, at 13.

The Government contends that the terrorism enhancement is applicable because: "[f]irst, the defendant's own admissions, recorded on audio and video and admitted into evidence at trial, support the application of the terrorism enhancement [and] [s]econd, the Court should credit Jaweed's testimony at trial to further support the application of the terrorism enhancement." Govt. Mem., ECF No. 224, at 1. In contrast, Defendant argues that:

> [F]irst, the post-conviction history of this case found that Mr. Mohammed was not afforded effective assistance of counsel in challenging Jaweed's testimony, which was central to the government's case. Second, the only link between Mr. Mohammed and a crime of terrorism was that established by Jaweed's testimony. Third, counsel for Mr. Mohammed established that an adequate investigation in 2008 would have provided numerous grounds on which to impeach Jaweed's testimony, including extensive evidence of bias and motive to lie. Because of the considerable infirmities in Mr. Mohammed's representation at trial, the only fair — and procedurally constitutional — result is to sentence Mr. Mohammed without relying on Jaweed's testimony.

Def.'s Mem., ECF No. 225, at 1. The parties' arguments relevant to application of the terrorism enhancement are addressed herein.

II. Legal Standard

A. Resentencing

This Circuit has set out procedures for courts to follow when resentencing a defendant convicted on multiple counts, following the vacating of a single count upon which the defendant was convicted. The District Court "should begin by determining whether that count affected the overall sentence and, if so, should reconsider the original sentence it imposed." *United States v. Blackson,* 709 F.3d 36, 40 (D.C. Cir. 2013). Next, the district court may also consider "such new arguments or new facts

as are made newly relevant by the [remanding court's] decision — whether by the reasoning or by the result." *Id.* (quoting *United States v. Whren,* 111 F.3d 956, 960 (D.C. Cir. 1997)). Finally, the district court may "consider facts that did not exist at the time of the original sentencing[.]" *Id.* The district court does not however generally have authority to consider other objections at resentencing unless it was expressly directed to do so by the remanding court. *Id.*

"Long-standing precedents of the Supreme Court and the D.C. Circuit establish that a sentencing judge may consider uncharged or even acquitted conduct in calculating an appropriate sentence, so long as that conduct has been proved by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction." *United States v. Edwards,* 994 F. Supp. 2d 11, 15-16 (D.C. Cir. 2014) (alterations omitted) (quoting *United States v. Settles,* 530 F. 3d 920, 923 (D.C. Cir. 2008)); *see United States v. Watts,* 519 U.S. 148 (1997) (noting that every Circuit other than the Ninth has held that a sentencing court can consider acquitted conduct that the government proves by a preponderance of the evidence and affirming that standard as appropriate); *see also United States v. Settles,* 530 F.3d at 923 (noting that uncharged and acquitted conduct can also be considered by the sentencing judge if proven by a preponderance of the evidence and the sentence does not exceed the statutory maximum for the crime of conviction).[4] This applies

[4] The Government contends that because it opted not to retry Mr. Mohammed on the narcoterrorism count, the evidence admitted at trial on that charge is now "uncharged conduct," and it may be considered by the Court if proved by a preponderance of the evidence. Govt. Mem., ECF No. 224, at 10; *see United States v. Dorcely,* 454 F.3d 366, 372 (D.C. Cir. 2006) (finding that the court may consider uncharged and acquitted conduct proved by a preponderance of the evidence).

even when the facts found at sentencing multiply "a defendant's sentence severalfold." *United States v. Jones,* 744 F.3d 1362, 1369-1370 (D.C. Cir. 2014) (rejecting the defendants' claim that the court's fact-finding at sentencing, which resulted in "severalfold" increases in their sentences, violated the Sixth Amendment on an as-applied theory of "substantive reasonableness" and concluding that such claims were foreclosed by D.C. Circuit precedent).

Applying the legal standard above, this Court determined previously that the vacating of the narcoterrorism count affects the overall sentence and accordingly, a resentencing date was set. In connection with such resentencing, this Court may consider new arguments and/or facts made newly relevant by the D.C. Circuit's decision as well as facts that did not exist at the time of the original sentencing. The Court may consider also uncharged or acquitted conduct, by the Defendant, if such conduct is proven by a preponderance of the evidence and where the sentence imposed does not exceed the statutory maximum for the crime of conviction.

B. Terrorism Enhancement

Sentencing enhancements need only be proven by a preponderance of the evidence. *See United States v. Lam Kwong-Wah,* 966 F.2d 682, 685-86 (D.C. Cir. 1992), *overruled on other grounds* ("[I]t is now well-settled that factual determinations upon which the judge bases a Guidelines sentence may normally be found by a preponderance of the evidence."); *see also United States v. Vega,* 826 F.3d 514, 538 (D.C. Cir. 2016), *cert. den.,* 137 S. Ct. 1238 (2017) ("The Government must demonstrate that a sentencing enhancement is warranted by a fair preponderance of

the evidence, . . . , though that evidence may be circumstantial.") (citations omitted); *United States v. Keleta,* 552 F.3d 861, 866 (D.C. Cir. 2009) ("[T]he government bears the burden of proof in seeking sentencing enhancements under the Guidelines, but the defendant bears the burden in seeking sentence reductions.") Defendant acknowledges that the "D.C. Circuit has to date declined to *require* more than a preponderance at sentencing" but asserts that no "categorical approach" has been adopted; instead, there is a "careful weigh[ing] whether a given case warrants a heightened standard of proof." Def.'s Mem., ECF No. 225, at 14; *see United States v. Long,* 328 F.3d 655, 670-71 (D.C. Cir. 2003) (concluding that an eight-level increase in Defendant's base offense level did not constitute extraordinary circumstances warranting a heightened standard proof). Defendant cites several cases from the Ninth Circuit applying a clear and convincing standard of proof, but those cases are not authoritative as there is contrary law from this Circuit.

Pursuant to United States Sentencing Commission Guidelines Manual, the terrorism enhancement applies "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, [and, as a result, the offense level is] increase[d] by 12 levels. . . ." United States Sentencing Guidelines (U.S.S.G.") § 3A1.4 (a). The Application Notes indicate that a "federal crime of terrorism" is defined consistent with 18 U.S.C. § 2332b (Acts of Terrorism Transcending National Boundaries), whereby a "federal crime of terrorism" is 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) . . . 1114 (relating to killing or attempted killing of

> officers and employees of the United States). . . 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), 2332f (relating to bombing of public places and facilities), . . . 2339A (relating to providing material support to terrorist organizations), . . .

18 U.S.C. Section 2332b (g)(5).

III. Analysis

The Government contends and the Court adopts the same position that the "majority of Circuits have held that application of the terrorism enhancement is appropriate even where the defendant's crime of conviction was not, itself, a federal crime of terrorism." Govt. Mem., ECF No. 224, at 11-12; *see, e.g., United States v. Aswan,* 607 F.3d 306, 315 (2d Cir. 2010) (applying the terrorism enhancement to a conviction for conspiracy to commit murder, kidnapping, or maiming outside the United States and explaining that a narrow reading of Section 3A1.4 "would defy common sense," as it would not be applicable to defendants who intended to promote crimes of terrorism that were committed by others); *United States v. Mandhai,* 375 F.3d 1243, 1247-48 (11th Cir. 2004) (applying the enhancement to a conspiracy conviction, explaining that the U.S.S.G. drafters "unambiguously cast a broader net" by including the "intended to promote" prong and not limiting the enhancement only to crimes that "involved" a crime of terrorism); *United States v. Kobito,* 994 F.3d 696, 702-703 (4th Cir. 2021) (reasoning that the "intended to promote" prong applies where a defendant acts with a purpose or goal to bring about a federal crime of terrorism, even if that defendant has not conspired or attempted to commit the

crime); *United States v. Haipe,* 769 F.3d 1189, 1193 (D.C. Cir. 2014) (upholding the application of the terrorism enhancement in a hostage taking case).

A. Proceeding under the "Intended to Promote" Prong

When the enhancement is based on the "intended to promote" prong, "several circuits require that the court identify which enumerated crime the defendant intended to promote and support its conclusions by a preponderance of the evidence based upon facts from the record." Govt. Mem., ECF No. 224, at 13; *see, e.g., United States v. Fidse,* 862 F.3d 516, 523 (5th Cir. 2017); *United States v. Arnaout,* 431 F.3d 994, 1002 (7th Cir. 2005); *United States v. Graham,* 275 F.3d 490, 517 (6th Cir. 2001). Furthermore, in addition to showing that the defendant intended to promote one of the enumerated crimes, the government must also prove that the offense being promoted was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. §2332b(g)(5). This does not require a determination that the defendant was "personally motivated by a desire to influence or affect the conduct of government," but instead, the government must demonstrate that it is more likely than not that defendant "intended to promote a crime calculated to have such an effect . . . whatever his reason for committing [the crime]." *United States v. Abu Khatallah,* 314 F. Supp. 3d 179, 199 (D.D.C. 2018) (citation omitted).

1. Evidence to be Considered by the Court

In the context of Mr. Mohammed's resentencing, the Government argues that:

> The Court should consider the evidence introduced at trial, which demonstrates that the defendant engaged in drug trafficking intending

> to promote a crime of terrorism. First, setting aside Jaweed's testimony, the defendant's own words support the application of the terrorism enhancement pursuant to U.S.S.G. § 3A1.4. Second, this Court heard Jaweed's testimony, observed him on the stand, and is in the best position to assess the credibility of his testimony. The Court can and should consider Jaweed's testimony for sentencing purposes, specifically to support the application of the terrorism enhancement.

Govt. Mem., ECF No. 224, at 9. Defendant contests any reliance by this Court on Jaweed's testimony and proffers little argument to counter Mr. Mohammed's own words. Below, this Court will discuss Defendant's own recorded statements and Jaweed's statements and testimony, but the Court begins by reviewing its prior findings relevant to the terrorism enhancement.

a. Prior Findings by this Court

During Defendant's initial sentencing, while discussing application of the terrorist enhancement, the Court noted that the jury verdict did not necessarily address whether "Defendant's specific motivation for engaging in this drug trafficking was to influence or affect conduct of government by intimidation or coercion or to retaliate against government conduct or civilian populations." Ex. 11 [December 22, 2008 Sentencing Transcript], ECF No. 224-11, at 13:16-24. Accordingly, the Court looked to recorded statements of the Defendant "where the Defendant indicate[d] specifically his inten[ded] motivation for engaging in the drug trafficking offense," and the Court credited "Jaweed's testimony and his recorded statements and the Defendant's statements[.]" Ex. 11 at 14:15-22. This Court found that Mr. Mohammed specifically intended to use the commission from the drug sale of opium to buy a car, to transport missiles in the car, to be used to attack either the

Afghani police station, which would affect the conduct of the Afghan government, or the Jalalabad airport, "[which] would affect conduct of the U.S. Government" as it "involved both U.S. soldiers and foreign military forces that were stationed at that base" and would be in "retaliate[ion] for their presence in Afghanistan." *See* Ex. 11 at 14-16 (internal citations to the record omitted).

The Court concluded that, based upon "Defendant's own statements," he (1) "specifically intend[ed] to use the commission from the drug sales to purchase a car to facilitate attacks against U.S. and foreign forces in Afghanistan and the Afghani government," and (2) "specifically intend[ed] and [was] motivated by the drugs' destructive powers on U.S. civilian populations as a means of violent jihad against Americans who have fighting forces in Afghanistan against the Taliban." *Id.* at 18:2-15; *see Mohammed I,* 693 F.3d at 201-202 & n.3 (concluding that the first basis was not clearly erroneous and declining to address the second).[5]

Because Mr. Mohammed's narcoterrorism conviction has been vacated and this case is in a different posture, Defendant challenges this Court's prior interpretation of Defendant's intent. More specifically, Defendant argues that "[t]he factual findings about Mr. Mohammed's intent are heavily —if not completely — reliant on Jaweed's flawed trial testimony and his improper interpretation of the intended meaning of

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[5] With regard to this Court's finding that Mr. Mohammed wanted to use the car he was going to buy to transport missiles, the D.C. Circuit indicated that this Court "pointed to specific statements in the record — which Mohammed does not dispute he made — from which it drew plausible inferences." *Mohammed I,* 693 F. 3d at 202. "That Mohammed may have intended the car for personal use does not mean he could not also have planned to use the car in the attack, and he identifies no evidence directly contradicting the district court's conclusion that he did." *Id.*

Mr. Mohammed's recorded statements played at trial. Def.'s Mem., ECF No. 225, at 16; *see Mohammed II,* 863 F.3d at 892 ("Jaweed's testimony was the only evidence that linked Mohammed to the Taliban. It thus provided critical support for the narcoterrorism charge.")

Defendant's argument focuses on this Court's vacating the narcoterrorism charge on the basis that at least one juror may have concluded that — without Jaweed's testimony — there was no clear link between Defendant and the Taliban. The Court accepts the Government's explanation however that Defendant's plan "to explode bombs and missiles at 'the airport' specifically targeting the American 'infidels'" supports the terrorism enhancement, regardless of whether Defendant had any "Taliban involvement or connection" and "without any reliance upon Jaweed's interpretations at trial." Govt. Mem., ECF No. 224, at 14.

b. Defendant's Own Words

In the instant case, Defendant was recorded as stating:

> We can place and explode bombs and fire missiles toward the airport. . . The Americans are infidels and Jihad is allowed against them. If we have to fire [the missiles] toward the airport, we will do it, and if not the airport, wherever they are stationed we will fire at their base too. I mean, we have to use the mines too. God willing, we and you will keep doing our Jihad.

Govt. Ex. 2 [Trial Ex. 2A, Transcript of Recorded Statements], ECF No. 224-2, at 4:26-5:30; *see also* Govt. Ex. 8 [Trial Ex. 2C, Transcript of Recorded Statements], ECF No. 224-8, at 7:48 (where Defendant stated "[t]he infidels need to be killed"). In his Sentencing Memorandum, ECF No. 225, at 17, Defendant challenges the idea that the term "infidels" would be interpreted to mean Americans without the aid of

Jaweed's testimony, but as noted above, Defendant characterized the Americans as infidels.

The Government argues and the Court accepts that these recorded admissions demonstrate that Defendant's offense "intended to promote" several crimes, including destruction of aircraft or aircraft facilities; homicide of U.S. Nationals outside the United States, with intent to retaliate against a government; using weapons of mass destruction against U.S. Nationals outside of the United States; and providing material support or resources (missiles, transportation) knowing or intending that those resources would be used to carry out a federal crime of terrorism. Govt. Mem., ECF No. 224, at 14-15; *see* 18 U.S.C. §§32, 2332, 2332a, 2339A.

Furthermore, the Government contends and the Court agrees that Defendant's admissions demonstrate that he "intended to commit the crime of providing something of value to any other person or organization that has engaged or engages in terrorist activity or terrorism, in violation of 21 U.S.C. Section 960a." Govt. Mem., ECF No. 224, at 15. The Government presents two grounds in support of this proposition, first, that upon his own admissions, Defendant was working with two or more individuals to plan a terrorist attack and second, that Defendant himself "was planning to engage in terrorist activity, which in and of itself satisfies the elements of 21 U.S.C. § 960a."[6] Govt. Mem., ECF No. 224, at 15; *see Mohammed I,* 693 F.3d

[6] The jury instructions in this case defined a terrorist organization as "a group of two or more individuals whether organized or not, which engages in or has a subgroup which engages in terrorist activity." Govt. Ex. 9 [Jury Instructions] at 107.

192, 199 (D.C. Cir. 2012) ("Mohammed need not have planned for his drug proceeds to fund terrorist ends. It is sufficient that the proceeds went to a terrorist — him.")

Finally, pursuant to U.S.S.G. § 3A1.4, and 18 U.S.C. § 2332b(g)(5), which define a federal crime of terrorism, the Government must establish also that the defendant's intent in promoting any of the aforementioned enumerated offenses was to influence or affect the conduct of government or to retaliate against government conduct. In this case, Defendant stated that he intended to "get out the infidels from [Afghanistan]" and that "[t]he infidels need[ed] to be killed" so that the country could be "take[n] back." Govt. Ex. 2 at 10:73-11:80; Ex. 8 at 7:48-50.

Instead of addressing the Government's reference to the Defendant's own words, Defendant appears to conflate the vacating of the narcoterrorism conviction with a proposed wholesale disregard by this Court of Defendant's statements because of Jaweed's role in interpreting them. The Court notes however that the issue of the possible prejudicial effect of Jaweed's unrebutted testimony has been resolved in the context of the vacating of the narcoterrorism conviction — which was based on a more stringent standard applied by the jury than the preponderance of the evidence standard applied herein. Even if this Court were to disregard Jaweed's testimony, that leaves standing Defendant's own words, which make it clear to this Court that Mr. Mohammed's drug trafficking offense was intended to promote a federal crime of terrorism *(e.g.,* bombing of public places, destruction of aircraft facilities, and attempted killing of officers of the United States or violence against nationals of the United States outside the United States). Furthermore, Defendant's own words

indicate that his offense was calculated to influence or affect the conduct or retaliate against government conduct.

c. Jaweed's Statements[7]

This Court need not rely solely on Defendant's words, as it may also look to Jaweed's testimony, as observed by this Court during trial. *See Mohammed I,* 693 F. 3d at 202 (acknowledging that the district court has a "superior vantage point to make credibility determinations and glean 'insights not conveyed by the record.") (quoting *Gall v. United States,* 552 U.S. 38, 51 (2007)). While this Court vacated the narcoterrorism conviction on grounds of ineffective assistance of counsel insofar as Jaweed's testimony should have been subject to impeachment, this does not change the fact that the Court found Jaweed to be a credible witness.

Defendant argues that, in *United States v. Abu Khatallah,* a court in this district held that it could not credit the testimony of an unreliable witness who provided inculpatory statements about the defendant's connection to terrorism. *United States v. Abu Khatallah,* 314 F. Supp. 3d 179, 198-99 (D.D.C. 2018). But because that testimony "[did] not stand alone as evidence of [the defendant's] intentions" and there was additional evidence that spoke to the defendant's terrorist connections, including his "choice of target for the attack," the court applied the

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[7] The Government notes that "[i]nformation from Haji Latif [that after he testified, the Taliban offered his friends and associates money to turn him over to them] is sufficient to support the conclusion that the defendant was acting in concert with the Taliban." Govt. Mem., ECF No. 224, at 16. The Government notes further that Jaweed was "killed by the defendant's sympathizers." Defendant argues that this information is hearsay that should not be considered by the Court. Def.'s Response, ECF No. 226, at 3-4. The Court does not rely on this information in making its determination herein.

enhancement. *Id.* Defendant asserts accurately that Jaweed's evidence in this matter is the "sole evidence connecting Mr. Mohammed to the Taliban," Def.'s Mem., ECF No. 225, at 17, *see Mohammed II,* 863 F. 3d at 892 (observing that "Jaweed's testimony provided the only unambiguous link between Mohammed and the Taliban"). But, it is not the sole evidence connecting Defendant to terrorism. Here, there is evidence of Mr. Mohammed's intentions both through his own words, as discussed above, and through the testimony of Jaweed. *See, e.g.,* Ex. 2 at 4:25-5:28 (where Jaweed indicates that the Taliban told him to "work together with Khan Mohammed" and Defendant states that "[w]e can place and explode bombs and fire missiles at the airport . . . this will be our Jihad").

This Court previously found that Defendant intended to use drug proceeds to purchase a car to transport missiles to fire at the airport. This was a plan to engage in terrorist activity, and Jaweed's testimony indicates that the plan was set in motion by the Taliban. The Government argues that "the Court can, and should, base its sentencing decision on its own factual findings made at sentencing." Govt. Mem., ECF No. 224, at 18, *see Abu Khatallah,* 314 F. Supp. 3d 179, 197 (D.D.C. 2018) (rejecting the defendant's argument that the application of the terrorism enhancement must be supported by a jury finding and stating "[s]o long as a defendant's sentence is within the range prescribed by statute, the use of judge-found facts to arrive at the sentence does not implicate the Sixth Amendment . . . [n]or does that practice violate the Due Process Clause of the Fifth Amendment." (internal quotation marks omitted) (citing *United States v. Jones,* 744 F3d 1362, 1370 (D.C. Cir. 2014) and *United States v.*

Dorcely, 454 F, 3d 366, 372-373 (D.C. Cir. 2006)). This Circuit has recognized that a trial judge makes credibility determinations and gives "the greatest deference" to such findings on a review for clear error. *United States v. Delaney,* 651 F.3d 15, 18 (D.C. Cir. 2011).

In the instant case, Jaweed's testimony provides additional context as to the Defendant's own statements, bolstering the evidence against Mr. Mohammed that his plan to fire missiles at the Jalalabad airport was an attempt to influence or affect the conduct of government and/or to 17 retaliate against government conduct. The Court has noted previously its "impression of Jaweed as a credible witness at trial." December 9, 2021 Mem. Op., ECF No. 209, at 13; *see United States v. Bell,* 795 F.3d 88, 106 (D.C. Cir. 2015) (acknowledging that a sentencing judge may credit parts of a witness's testimony, even where evidence of a witness's "disreputable character" generally undercuts his credibility); *United States v. Toms,* 136 F.3d 176, 187 (D.C. Cir. 1998) (holding that despite evidence that a cooperator who testified at trial had incentives to cooperate, had some inconsistencies in his testimony, and had lied in other contexts, the appellate court was not in a position to decide whether he was generally believable but rather, credibility could be assessed by the factfinder judging witness demeanor on the stand). Accordingly, based upon the entirety of the record in this case, the Court concludes that Defendant's drug trafficking offense was done with the intent to promote several crimes that fall within the definition of a federal crime of terrorism, based on Defendant's statements alone and as bolstered by Jaweed's statements and testimony.

d. The 18 U.S.C. Section 3553(a) Factors

In determining a sentence, the Court must consider, *inter alia,* the need for the sentence to (1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment; (2) afford adequate deterrence; (3) protect the public from future crimes of the defendant; and (4) provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. *See* 18 U.S.C. § 3553(a). As previously noted, the advisory Guideline range for Mr. Mohammed's drug trafficking offense is 97 to 121 months without the terrorism enhancement and 360 months to life, with the terrorism enhancement.

i. Nature and Circumstances of the Offense and Need for Sentence to Reflect Severity of the Offense

With regard to the nature and circumstances of the offense, the Defendant asserts that his conduct favors a sentence of 97 to 121 months because [a]t worst, Mr. Mohammed stands convicted on a drug-trafficking charge and has made violent statements." Def.'s Mem., ECF No. 225, at 19. Defendant contends further that "[t]he only reason Mr. Mohammed is before this Court is because a DEA sting operation recorded a conversation between Mr. Mohammed and Jawed discussing the drugs potentially being imported into the United States." *Id.* This Court notes that Defendant's characterization of his criminal activity discounts the quantity and value of the drugs involved and minimizes almost to the point of the absurd the extensiveness and violent nature of Defendant's statements relating to plans to engage in terrorist activity by using missiles at an airport where service members

and others were stationed.[8] Defendant identified Americans as infidels (Ex. 2); indicated an intent to use mines and fire missiles towards the airport or "wherever they're stationed" (Ex. 2); and reiterates that the infidels need to be killed (Exs. 2 & 8). Mr. Mohammed conducted meetings with Jaweed to plan an attack; namely, he said he had bullets and "rounds of rockets" as well as mines (Ex. 2 & 12 [Trial Ex. 2B, ECF No. 224-12]); he noted he had a "source" for a warhead (Ex. 12) and that he had buried a big mortar or was going to bury it at the police station (Ex. 12); and further, that he had weapons and was trying to get more weapons (Ex. 2). In light of the record in this case, this Court finds that the "nature and circumstances of the offense" disfavors Defendant.

With regard to the need for the sentence to reflect the severity of the offense, Defendant indicates that he has "served approximately 175 months, without consideration for any good conduct time earned while in the BOP," and this time served is "nearly 1.5 times the top of the guideline range for the drug-trafficking offense (97 to 121 months) [.]" Def.'s Mem., ECF No. 225, at 21 (internal citation omitted). Defendant contends further that life imprisonment sentences are "rare in the federal criminal justice system." Def.'s Mem., ECF No. 226, at 6 (citation omitted). Defendant indicates also that imposition of a shorter sentence avoids "sentence disparities among defendant with similar records who have been found guilty of

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[8] Defendant equates his statements to those being made by other Afghanis who were aggrieved by the American military after the military caused a deadly traffic accident and who engaged in anti-American rioting, *see* Def. Mem., ECF No. 225, at 19-20, but Defendant's statements and drug trafficking activities did not occur as an isolated event.

similar conduct," noting that "the median sentence in this District for drug trafficking was 25 months in 2021, and the mean sentence was 53 months." Def.'s Mem., ECF No. 225, at 22 (citations omitted). The Court finds that Defendant's focus solely on a generic drug trafficking charge provides no meaningful comparison of his drug trafficking (based on the amount and type of drugs and date of his conviction/sentence) with other defendants who have been similarly convicted of drug trafficking. Nor does Defendant address the imposition of a terrorism enhancement.

The Government highlights the number of civilian casualties in Afghanistan in 2006, when Defendant was there and the fact that Afghanistan was the "single greatest producer of opium in the world at the time of defendant's criminal conduct." Govt. Mem., ECF No. 224, at 21-22. During Defendant's original sentencing, this Court noted that Defendant was not a small time drug trafficker because of the significant amount and street value of the heroin he was trafficking, and the Court discussed the significant toll such trafficking takes on United States' communities. Ex. 11, at 50-52. Besides threatening the lives of Americans in the United States, it reflects that Defendant's conduct threatened the lives of American service members, and foreign service members, as well as Drug Enforcement Agency agents stationed at Jalalabad Airport. Accordingly, the "need for the sentence to reflect the severity of the offense" factor weighs against Defendant's argument for a shorter sentence.

ii. History and Characteristics of the Defendant

Defendant asserts that this factor favors Mr. Mohammed, as he would "quietly reintegrate into Afghan society" and because he was a former farmer, without a

criminal history, and is married with seven children as well as being a leader in his local community. Def.'s Mem., ECF No. 225, at 20 (citations to Affidavits by his fellow villagers omitted). Furthermore, Defendant notes that he has used his time productively while incarcerated insofar as he has learned English as a Second Language (3,152 hours of study) and completed 131 hours of other coursework, and he has no history of violence while incarcerated. *Id.* at 21.

In its Memorandum, the Government counters Defendant's assertion that he has no criminal history by highlighting Defendant's previous experience with "opium and heroin trafficking" as demonstrated by "his offers and promises to obtain, at various times, "50 seyrs" (kilograms) [ ] , a "thousand seyrs" [ ], or '[w]hatever quantity you want, we have the source, as much as you need.'" Govt. Mem., ECF No. 224, at 6 (referencing Ex. 3 [Trial Ex. 2E, Transcript of Recorded Statements] at 6:39; Ex. 4 [Trial Ex. 2D, Transcript of Recorded Statements] at 20:208; Ex. 5 [Trial Ex. 2H, Transcript of Recorded Statements] at 9:70). Accordingly, because of Defendant's familiarity and experience with large quantities of drugs, the Court finds that this factor stands in equipoise.

iii. Need for Adequate Deterrence and Protection of the Public

The Government argues that deterrence is warranted here because the Taliban to date "has historically played a significant role in the trafficking of illegal substances to the United States and throughout the world." Govt. Mem., ECF No. 224, at 23. The Court credits the Government's references to Agent Follis's unrebutted testimony regarding the Taliban's role in the opium/heroin drug trade.

Id. The Government concludes and the Court agrees that the "need for deterrence against drug traffickers, especially those who fund terrorism, is as real as ever" and imposing a life sentence will convey that "the punishment for sending narcotics to the United States from abroad, and using the proceeds from drug trafficking to promote terrorist activity, is significant." Govt. Mem., ECF No. 224, at 24. Furthermore, with regard to the protection of the public, the Defendant's own words indicate that he was "intent on causing as much harm to Americans and others as possible." *Id.* Additionally, the Government alleges and the Court accepts that Defendant "purposefully use[ed] his position as a village elder and a Non-Governmental Organization (NGO) employee as a cover to allay suspicion." *Id.; see* Ex. 12 at 8:66 (Defendant stating "[i]t is good for my credibility to be with NGO, I mean not to be suspected.")

Defendant contends that because Mr. Mohammed is "an excludable alien subject to immediate deportation," he will "not be remaining in the United States or ever returning" once his sentence has been served. Def.'s Mem., ECF No. 225, at 21. Defendant downplays the danger to Americans based on the fact that the Taliban is now in power in Afghanistan (as opposed to the previous government that Defendant allegedly opposed) and the "United States and its military no longer have any presence in the country." *Id.* Defendant concludes that there is "little risk that Mr. Mohammed's life in Afghanistan will impact the United States." Def.'s Mem., ECF No. 225, at 22. In contrast, the Government argues that the recent rise of the Taliban to power and its substantial involvement in the drug trade means that there is a

"significant risk that the defendant will have the opportunity and the support to resume his criminal conduct upon return to Afghanistan." Govt. Mem., ECF No. 224, at 25. Taking into account the Taliban's role in Afghanistan and the flourishing drug trade there, the Court finds that there is a need to protect the public and provide adequate deterrence, and these factors weigh against Defendant. In sum, the Court finds that the balance of Section 3553(a) factors weigh in favor of the enhancement being applied.

IV. CONCLUSION

Pursuant to U.S.S.G., the terrorism enhancement applies "[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, [and, as a result, the offense level is] increase[d] by 12 levels. . . ." United States Sentencing Guidelines (U.S.S.G.") § 3A1.4 (a). Proceeding under the "intended to promote" prong, the Government has identified several crimes *(e.g.,* bombing of public places, destruction of aircraft facilities, and attempted killing of officers of the United States or violence against nationals of the United States outside the United States) that Mr. Mohammed intended to promote through engaging in drug trafficking and using drug commissions to buy a car to transport missiles to attack the Jalalabad airport, where U.S. soldiers and others were stationed. Mr. Mohammed's offense was calculated to influence or affect the conduct or retaliate against government conduct, demonstrated in part by his choice of target (government property where foreign service members were stationed) and his statements about Jihad against Americans and getting infidels out of Afghanistan. This Court's conclusions are supported by a

preponderance of the evidence based solely upon Defendant's own statements, and they are strengthened by the testimony and statements made by Jaweed, who was deemed by this Court to be a credible witness. Furthermore, the balance of the Section 3553(a) factors — nature and circumstances of the offense, need for a sentence to reflect the severity of the offense, and need for adequate deterrence and protection of the public — weigh in favor of the enhancement being applied. Accordingly, it is this 18th day of July 2022,

ORDERED that the Court finds that the terrorism enhancement is both applicable and appropriate.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued: November 17, 2011
Decided: September 4, 2012
Reissued: September 21, 2012

No. 09-3001

UNITED STATES OF AMERICA,
APPELLEE

v.

KHAN MOHAMMED,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:06-cr-00357-1)

Shardul S. Desai argued the cause for appellant. With him on the briefs was *Peter S. Spivack,* appointed by the court.

Vijay Shanker, Attorney, U.S. Department of Justice, argued the cause for appellee. With him on the brief were *Lanny A. Breuer*, Assistant Attorney General, and *Matthew Robert Stiglitz*, Attorney, U.S. Department of Justice. *Kevin R. Gingras* and *Teresa A. Wallbaum*, Attorneys, U.S. Department of Justice, and *Roy W. McLeese III*, Assistant U.S. Attorney, entered appearances.

Before: SENTELLE, *Chief Judge,* GRIFFITH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GRIFFITH.

Opinion concurring in part and concurring in the judgment filed by *Circuit Judge* KAVANAUGH.

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GRIFFITH, *Circuit Judge*: Khan Mohammed challenges his conviction and life sentence for narcoterrorism. He also claims that his trial counsel provided ineffective assistance. We affirm Mohammed's conviction and sentence but remand for the district court to hold an evidentiary hearing on the claim of ineffective assistance.

I

While living in Pakistan in 2006, a man named Jaweed, who hailed from the village of Geratak in Afghanistan's Nangarhar province, fell in with Abdul Rahman, a former Taliban official for the Jalalabad province of Afghanistan also living in Pakistan. Rahman was plotting an attack on the Jalalabad airfield, a strategic NATO airbase in eastern Afghanistan, and instructed Jaweed to return to Geratak and contact a fellow villager, Khan Mohammed, who was also involved in the plot and needed help. Jaweed did as he was told and visited Mohammed, who brought him into the planning of the attack, directing him to obtain the missiles that would be used in the strike.

But Jaweed soon turned against Rahman and Mohammed and disclosed the plot to Afghan authorities. The Afghan police persuaded Jaweed to continue his role in the plot, but to become their informant. When primary responsibility for the investigation was turned over to agents of the U.S. Drug Enforcement Administration (DEA) deployed in Nangarhar, Jaweed worked with them as well. The DEA agents

wired Jaweed and recorded several of his conversations with Mohammed in August and September 2006.

In the first of those conversations, Mohammed discussed with Jaweed details of the attack on the airfield and claimed that he had not only the same purpose as Rahman, but the same authority. Hearing his plans and his boast, the DEA decided to arrest Mohammed soon after Jaweed had given him the missiles. Concern about losing control of the missiles once they were in Mohammed's hands, however, led to a different strategy. The DEA would arrest Mohammed for narcotics trafficking. Following this plan, Jaweed told Mohammed he had a friend looking for opium. Mohammed replied that he knew a source who could supply as much as Jaweed's friend needed. Jaweed and Mohammed met three more times to iron out details, such as the price for the opium and Mohammed's commission. These discussions also included plans for the attack on the airfield. For example, during one of the meetings Mohammed said they needed a car to secure the missiles. *See* Government Trial Ex. 2C (Mohammed, stating that they would "tightly and firmly load [the missiles] in our car"). Eleven days later, Mohammed announced at another meeting that he would use the profits from the drug sale to buy a car, which could help carry out more drug deals.

The opium deal went off without a hitch. Jaweed accompanied Mohammed to a local bazaar where Mohammed negotiated the sale with his source. The next day, Jaweed accompanied Mohammed to the seller's home and secretly videotaped Mohammed inspecting, paying for, and taking away the opium he then sold to

Jaweed. Pleased with the results, the DEA agents told Jaweed to orchestrate another sale, this time for heroin. When Jaweed raised the idea, Mohammed readily agreed and acquired almost two kilograms of heroin, which he then sold to Jaweed. Mohammed was enthused by the prospect of how much money their newly formed drug business could make. When Jaweed told Mohammed that his friend would send the opium and heroin to the United States, Mohammed declared, "Good, may God turn all the infidels to dead-corpses." Government Trial Ex. 2H. Their "common goal," Mohammed told Jaweed, was to eliminate the "infidels" either "by opium or by shooting." *Id.*

On October 29, 2006, the DEA and Afghan police arrested Mohammed at a roadside checkpoint. They blindfolded and handcuffed him and drove him to a DEA base at the Jalalabad airfield. He was briefly held in a detention cell without handcuffs or blindfold and then taken to a room to be questioned about the drug deals and the planned attack on the airfield. During his interrogation, Mohammed was neither blindfolded nor shackled. The record is unclear whether he was handcuffed. Three DEA agents conducted the questioning, one wearing a visible sidearm.

Speaking through an interpreter, DEA Special Agent Jeffrey Higgins read Mohammed the *Miranda* warnings, which were translated into Pashto, his native language. Higgins asked Mohammed if he understood the warnings. Mohammed said that he did. Thinking Mohammed illiterate, Higgins did not ask him to sign a rights card or a waiver form. Mohammed told Higgins that he was willing to answer questions, and the interview began. It lasted about two hours, including a short

break. Mohammed showed no distress during the questioning or any difficulty understanding the interpreter. He was given food and water, a prayer rug and the opportunity to pray, and was allowed to use the bathroom. Questioning took place in a conversational tone and none of the DEA agents threatened Mohammed, although one told him, falsely, that his hands had tested positive for heroin. At no time did Mohammed ask for an attorney or that the questioning stop. At the end of the interrogation, the DEA agents told Mohammed that he was being charged with drug trafficking and terrorism under U.S. law. He was later transferred to the United States for trial.

With trial scheduled for May, in January 2008 Mohammed moved to suppress the statements he made during his questioning at the airfield on the ground that his *Miranda* waiver was involuntary. On April 30, the district court denied his motion, concluding that he understood the *Miranda* rights and the consequences of giving them up. Tr. Status & Mots. Hr'g 18:12-18, Apr. 30, 2008. On May 1, with jury selection set to begin in a week, Mohammed moved for a three-month continuance of the trial. Summoned to an *ex parte* hearing the next morning, Mohammed's counsel expressed to the court his fear that he had "been ineffective in assisting [Mohammed]" by failing to follow up on his lead that witnesses in Afghanistan would rebut the government's allegation that he was part of the Taliban. Tr. *Ex Parte* Sealed Discussions 5:23-6:3, May 2, 2008. Counsel also asked for more time to prepare to examine the government's narcoterrorism expert. Hearing this, Mohammed asked the court for new counsel. The court convened a second *ex parte* hearing that

afternoon to address his request. Speaking directly to the court at that hearing, Mohammed argued that his attorney could have obtained evidence that he was not part of the Taliban and that Jaweed was a thief. The court reminded Mohammed that he had already lodged the theft allegation against Jaweed, that the court had previously decided it lacked corroboration, and that Mohammed had agreed not to pursue the allegation at trial.[1] Mohammed's counsel added that these witnesses might undermine Jaweed's credibility more generally by saying he was a liar. But under questioning by the court, he could point to no basis to believe that they would. Asked why he had not already tracked down these potential witnesses, Mohammed's counsel claimed there were "insurmountable" logistical problems with traveling to Afghanistan to locate and bring them to the United States. *Id.* at 36:13-37:5. His trial preparation had focused on other issues instead. The court then called yet another hearing that same day, this time with all the parties. Learning of Mohammed's concerns, the government announced to the court that it would not seek to link him to the Taliban. Hearing that, Mohammed, through his counsel, agreed to withdraw his motion for a continuance and proceed to trial.

The government put on its case in four days. Two of these days were taken up with Jaweed's testimony. Mohammed's counsel called no witnesses and offered no

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[1] While in custody in Afghanistan, Mohammed told his U.S. captors that Jaweed was a convicted thief set to serve an eighteen-year sentence in Afghanistan. The government filed a motion *in limine* to exclude any such impeachment evidence, arguing that Jaweed had denied this uncorroborated allegation. At Mohammed's request, the government conducted a background check that turned up no criminal history for Jaweed in the Nangarhar province. Mohammed later agreed to drop this line of argument.

evidence, and Mohammed did not take the stand. On May 15, 2008, a jury found Mohammed guilty of international drug trafficking, 21 U.S.C. §§ 959(a)(1), (2), and drug trafficking with intent to provide financial support to a terrorist, *id.* § 960a. At sentencing, Mohammed objected to the recommendation in the Presentencing Report that the court apply the terrorism enhancement of the Sentencing Guidelines. The court found no basis for the objection and applied the enhancement, but explained that it could have exercised its discretion under § 960a to impose the same sentence even without the enhancement. The district court sentenced Mohammed to two concurrent life sentences.

Mohammed does not challenge his conviction for international drug trafficking. He appeals only his conviction and sentencing for narcoterrorism. He also raises a claim of ineffective assistance of counsel. We take jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

II

We consider first Mohammed's argument that his *Miranda* waiver was invalid and that the district court erred by denying his motion to suppress the statements he made during his interrogation at the Jalalabad airfield. We need not resolve the novel question whether *Miranda* applies to the overseas custodial interrogation of a person who is not a U.S. citizen. Even if we assume it does, any alleged error by the district court was harmless because the government made no effort to use the statements at trial. *See, e.g.*, *United States v. Patane*, 542 U.S. 630, 641 (2004) (plurality opinion) ("Potential [*Miranda*] violations occur, if at all, only upon the admission of unwarned

statements into evidence at trial."); *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (noting that the Fifth Amendment prohibits using compelled statements in the prosecution's case-in-chief).

On appeal, Mohammed maintains that his statements *were* used against him because Higgins was only able to identify Mohammed's voice on the recordings at trial from having heard it first during the interrogation. But voice identification is not the type of incriminating information *Miranda* protects: "Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice, does not, without more, compel him to provide a 'testimonial' response for purposes of the [Fifth Amendment] privilege." *Pennsylvania v. Muniz*, 496 U.S. 582, 592 (1990) (citation omitted); *see also Elstad*, 470 U.S. at 317 (noting that *Miranda* ensures a suspect's unwarned *answers* may be excluded from the government's case-in-chief).

Mohammed also asserts that what he said during interrogation was used against him *indirectly*. The government's ability to rely on his statements for impeachment purposes, so his argument goes, made him hesitant to testify in his own defense. But this argument has no constitutional weight. Statements taken in violation of *Miranda* are admissible as impeachment evidence unless they are, in very fact, involuntary. *See, e.g.*, *Elstad*, 470 U.S. at 307; *Oregon v. Hass*, 420 U.S. 714, 723 (1975) (holding that unwarned statements are admissible for impeachment purposes unless an "officer's conduct amount[ed] to an abuse," in which case admissibility is governed by "the traditional standards for evaluating voluntariness and

trustworthiness"). And whatever one might conclude about the merits of Mohammed's *Miranda* claim, he certainly has not shown the egregious facts necessary to establish that the statements he made during questioning were involuntary. *See, e.g.*, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2263 (2010) (finding no coercion in a three-hour interrogation — longer than Mohammed's — without evidence "that police threatened or injured [the defendant] during the interrogation or that he was in any way fearful"); *Mincey v. Arizona*, 437 U.S. 385, 398-99 (1978) (finding a confession involuntary when the defendant had been shot and paralyzed a few hours before questioning, was in intense pain, and gave confused and incoherent responses).

We have been given no reason to disturb the district court's findings that the DEA agents did not threaten or intimidate Mohammed, that he was treated well during his relatively brief interrogation, and that he seemed eager to talk and comfortable enough to ask questions when he needed clarification. *See* Tr. Status & Mots. Hr'g 10:10-12:22. Mohammed emphasizes that he was blindfolded and handcuffed at times and perhaps even handcuffed during questioning. But no court has found that waivers made while a suspect is handcuffed are invalid for that reason alone, *see, e.g.*, *United States v. Adams*, 583 F.3d 457, 467-68 (6th Cir. 2009) (upholding an implicit *Miranda* waiver even though the defendant was handcuffed while he was read his rights and during questioning); *United States v. Doe*, 149 F.3d 634, 639 (7th Cir. 1998) (finding a *Miranda* waiver voluntary despite questioning the defendant in a remote location while handcuffed in the back of a squad car, with some

officers wearing masks), much less that statements obtained while handcuffed are themselves involuntary. And although an agent lied to Mohammed that his hands tested positive for heroin, misleading a suspect during interrogation is only one factor in the totality of the circumstances analysis that governs our inquiry into voluntariness. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). Just as telling a defendant, falsely, that his codefendant had already confessed to murder is "relevant," yet not enough to render an "otherwise voluntary confession inadmissible," *id.*, the lie here is insufficient to outweigh the rest of the evidence showing that Mohammed's statements were voluntary. Within the full context of the interrogation, we would be hard pressed to conclude that the possibility Mohammed was handcuffed combined with the agent's lie was enough to render his statements involuntary.

III

Mohammed next argues that the evidence at trial cannot sustain his conviction under 21 U.S.C. § 960a. This statute criminalizes conduct abroad that would violate domestic drug laws if "committed within the jurisdiction of the United States" when the actor "know[s] or intend[s] to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism." *Id.* Mohammed does not dispute that the evidence was sufficient to prove he engaged in a qualifying drug offense, that he met the statutory definition of a person who engages in terrorism, or that he knew the transaction would result in financial gain to himself. Instead, he urges us to graft an additional, unwritten intent

requirement onto the statutory text, which he calls a "drug-terror nexus." Appellant's Br. 46. Under this theory, it is not enough that Mohammed committed a drug offense with intent to provide pecuniary value to a terrorist or terrorist organization; the government must also show he knew that the money would support terrorist acts.

But Mohammed overlooks the straightforward terms of the statute. Section 960a requires proof that the defendant intended to support a "*person or organization* that has engaged or engages in terrorist activity," not that he intended his funds to be used for any particular *activity*. 21 U.S.C. § 960a (emphasis added). The first step in statutory interpretation considers the statute's plain language, *see United States v. Villaneuva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008), and we decline Mohammed's invitation to ignore the words Congress chose. The text is abundantly clear that Congress intended to target drug offenses the defendant knows will support a "person or organization" engaged in terrorism, with no additional requirement that the defendant intend his drug trafficking to advance specific terrorist activity. In other words, Mohammed need not have planned for his drug proceeds to fund terrorist ends. It is sufficient that the proceeds went to a terrorist — him.

Mohammed argues that we must look past this plain language because only his proposed intent requirement saves § 960a from merely duplicating the work of statutes that already criminalize drug trafficking overseas, *see* 21 U.S.C. § 959, and material support of terrorism, *see* 18 U.S.C. §§ 2332d, 2339A, 2339B, 2339C. But the premise that § 960a is redundant is suspect. Congress could have reasonably determined that international drug trafficking combined with the intent to support a

terrorist is a different crime — more blameworthy, more dangerous, or both — than drug trafficking overseas and material support of terrorism committed separately. Or Congress could have decided that the ability to charge one crime instead of two was a valuable, perhaps necessary, tool for prosecutors that warranted creating a new crime. In any event, Congress need not act with the sort of precision Mohammed's argument assumes: "Redundancies across statutes are not unusual events in drafting," and courts must give effect to overlapping statutes unless there is "positive repugnancy" between them. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842)) (internal quotation marks omitted). Mohammed emphasizes that § 960a's penalty is greater than those for drug trafficking and material support combined, but that alone does not establish "positive repugnancy." *See Wood*, 41 U.S. (16 Pet.) at 363 (defining "manifest and total repugnancy" as more than "merely affirmative, or cumulative or auxiliary" provisions, but divergence between statutes so strong as "to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former"); *see also United States v. Batchelder*, 442 U.S. 114, 123 (1979) ("So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied."). At most, Mohammed highlights some congressional overlap among statutes directed at international drug trafficking and support of terrorism. That is no reason for us to depart from the clear text of a statute.

But absurd results will follow unless we do, Mohammed argues. As an example, he offers the hypothetical of a father who sells drugs to pay a ransom to the Revolutionary Armed Forces of Columbia for his kidnapped child. Mohammed contends that this father, whose paternal love and not any support of terrorism drove him to crime, risks life imprisonment under the government's reading of § 960a. Appellant's Br. 46-47. But finding § 960a absurd based on this possibility would have broad implications for criminal law writ large. We can imagine similar problems for any sympathetic defendant forced by his circumstances to break the law. The criminal justice system deals with such unusual fact patterns through prosecutorial discretion and traditional defenses such as the duress defense, but not by rewriting criminal statutes that are uncontroversial in the overwhelming majority of their applications.

Similarly, Mohammed argues that, limited to its text, § 960a could reach an individual who donates some portion of his drug proceeds to a person or organization that engaged in terrorist acts in the past, but no longer does so.[2] Appellant's Reply Br. 21-22. Although the statute's use of the past and present tense — "has engaged or engages in . . . terrorism" — increases its potential breadth, such a result is by no means absurd. It neither defies "rationality" nor "common sense." *Landstar Express America, Inc. v. Fed. Mar. Comm'n*, 569 F.3d 493, 498 (D.C. Cir. 2009); *Suburban Transit Corp. v. I.C.C.*, 784 F.2d 1129, 1130 (D.C. Cir. 1986). Wide-reaching criminal

[2] This concern does not arise in Mohammed's case, where the government did not introduce evidence of his *past* terrorist involvement at trial, but instead relied on evidence that he was planning a terrorist attack.

statutes are common, and while reasonable minds may differ about the wisdom of § 960a's scope, "debatable policy . . . is hardly irrational," *Landstar*, 569 F.3d at 499; *cf. United States v. Ramsey*, 165 F.3d 980, 990 (D.C. Cir. 1999) (rejecting a proposed interpretation for its "obvious absurdities" of ending "a centuries-old practice" in the criminal justice system and exposing federal prosecutors and judges to liability for entering into and approving plea agreements).

Moreover, even if we were persuaded that the statute is redundant or leads to absurd results that justify a departure from its plain meaning, Mohammed's proposed solution is utterly without support. The text lends no aid, as we have already discussed, and even his resort to legislative history is unavailing. He leans on three statements from some of the statute's supporters to argue that some members of Congress believed § 960a's purpose is to punish those who use proceeds from drug sales to support terrorism. Appellant's Br. 47-48 (quoting Rep. Hyde's statement that Congress intended § 960a to "address and punish those who would use . . . illegal narcotics to promote and support terrorism," 151 CONG. REC. H6292 (daily ed. July 21, 2005), and statements from Reps. Hyde and Souder that § 960a would address the overlapping links between drug trafficking and global terrorism, *id.*; *id.* at H6293). Putting to one side the usual concerns about using legislative history, especially to avoid the plain meaning of a statute, these statements do not even contradict what the statute says. It is clear that Congress intended to punish those who support terrorism directly, as the Congressmen said, as well as indirectly, as the statute provides.

IV

If we sustain his conviction, Mohammed argues that we should remand for resentencing because the district court erred by applying the terrorism enhancement in the Sentencing Guidelines to calculate his sentencing range. We disagree.

The terrorism enhancement, found in Guidelines § 3A1.4(a), increases by twelve the base offense level for calculating a sentencing range if the defendant was convicted of a crime that "involved, or was intended to promote, a federal crime of terrorism." "Federal crime of terrorism" is defined in 18 U.S.C. § 2332b(g)(5) as an offense in violation of certain enumerated statutes that is "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." Mohammed concedes that § 960a is among the enumerated statutes, but argues that fact alone does not make his offense a "federal crime of terrorism." In his view, only the *mens rea* requirement he has urged us to read into the statute — an intent to finance terrorism — would justify including § 960a as a "federal crime of terrorism." And as Mohammed points out again, the jury was not asked whether he had that intent.

But 18 U.S.C. § 2332b(g)(5) offers no support for Mohammed's theory. The definition of "federal crime of terrorism" contains its own intent element, with an additional requirement only that the offense of conviction appear on the statutory list, as § 960a does. The only question remaining, then, is whether we can sustain the district court's finding that Mohammed had the requisite intent under § 2332b(g)(5). The district court found two alternate bases to conclude that he did: he "specifically

intend[ed] to use the commission from the drug sales to purchase a car to facilitate attacks against U.S. and foreign forces in Afghanistan," and he "specifically intend[ed] and [was] motivated by the drugs' destructive powers on U.S. civilian populations as a means of violent jihad against Americans who have fighting forces in Afghanistan against the Taliban." Sentencing Tr. 17:8-15, Dec. 22, 2008. We conclude that the first finding was sufficient to apply the terrorism enhancement.

Mohammed maintains that the evidence does not establish that he intended to use the drug proceeds to buy a car to aid in the Jalalabad attack. In one meeting with Jaweed, Mohammed stated that they would "tightly and firmly load [the missiles] in our car and bring [them]" for use in the planned attack. Government Trial Ex. 2C. Eleven days later, he told Jaweed he intended to use his portion of the proceeds of the drug sales to purchase a car. Government Trial Ex. 2D Mohammed argues that his statements about buying a car indicate nothing more than that he intended to buy the car for his personal use or to help in his drug trafficking. He claims that his statements cannot be read to support the conclusion of the district court that he was referring to the same car that he said earlier would carry the missiles.

Although Mohammed's objection may show that the record can support alternate interpretations, it is far from proof that the district court's reading of these conversations is clearly erroneous. *See United States v. Erazo*, 628 F.3d 608, 611 (D.C. Cir. 2011) (holding that we review factual findings underlying a decision to apply a sentencing enhancement for clear error, and give due deference to the district court's application of the Guidelines to the facts). Clear error review is exacting: to reverse a

district court's findings of fact "we must be 'left with the definite and firm conviction that a mistake has been committed.'" *Am. Soc'y for the Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 22 (D.C. Cir. 2011) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)). Mohammed's objection does not reach this level of certainty. The district court pointed to specific statements in the record — which Mohammed does not dispute he made — from which it drew plausible inferences. That Mohammed may have intended the car for personal use does not mean he could not also have planned to use the car in the attack, and he identifies no evidence directly contradicting the district court's conclusion that he did. Especially given the district court's superior vantage point to make credibility determinations and glean "insights not conveyed by the record," *Gall v. United States*, 552 U.S. 38, 51 (2007), we cannot conclude that its findings are clearly wrong.[3]

V

Finally, Mohammed claims that his trial counsel was ineffective because he failed to adequately explore the possibility that evidence was available that would have significantly strengthened Mohammed's defense. Prior to trial, Mohammed identified for his attorney certain witnesses from his village in Afghanistan who he claimed could bolster his character and impugn Jaweed's. Mohammed's attorney admits he did not try to locate or interview any of them. *See, e.g.*, Tr. Status Hr'g 14:1-

[3] In light of this conclusion, we need not consider the district court's second basis for applying the terrorism enhancement, nor the government's alternate argument that any error would have been harmless because the district court stated it would have imposed the same sentence without the enhancement.

7, Feb. 25, 2008. Mohammed now claims that these witnesses could have shown that Jaweed had a reputation as a liar and was biased against him. Failing to introduce their testimony prejudiced his defense, Mohammed argues, because Jaweed was the government's star witness, and his credibility was central to the prosecution.

When advancing an ineffective assistance argument on direct appeal, an appellant must present "factual allegations that, if true, would establish a violation of his [S]ixth [A]mendment right to counsel." *United States v. Poston*, 902 F.2d 90, 99 n.9 (D.C. Cir. 1990). These allegations must satisfy both prongs of *Strickland v. Washington*, 466 U.S. 668 (1984): deficient representation and prejudice. *Id.* at 687. Presented with a colorable claim, we remand for an evidentiary hearing unless the "record alone conclusively shows that the defendant either is or is not entitled to relief." *United States v. Burroughs*, 613 F.3d 233, 238 (D.C. Cir. 2010) (quoting *United States v. Rashad*, 331 F.3d 908, 910 (D.C. Cir. 2003)) (internal quotation marks omitted). We do not "reflexively remand," *United States v. Harris*, 491 F.3d 440, 443 (D.C. Cir. 2007), but neither will we hesitate to remand when a trial record is insufficient to assess the full circumstances and rationales informing the strategic decisions of trial counsel, *see Massaro v. United States*, 538 U.S. 500, 505 (2003).

To raise a colorable claim that his trial counsel was deficient, Mohammed must allege errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. Mohammed's attorney owed him a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," *id.* at 691, so an

allegation that counsel failed to contact potentially vital defense witnesses at Mohammed's request, without good cause, could rise to this level. The key to Mohammed's claim is whether his attorney's less-than-thorough pre-trial investigation was supported by "reasonable professional judgments." *Id.*; *see also Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (noting that courts use an objective standard to assess performance under prevailing professional standards).

Pointing to three hearings that took place on May 2, 2008, the government maintains there is enough in the district court record for us to determine whether it was reasonable for Mohammed's counsel not to search for these potential witnesses in Afghanistan. We disagree. At the *ex parte* hearing called to consider Mohammed's request for new counsel, the district court asked Mohammed directly what his witnesses would say at trial. He answered that they would testify that he was not part of the Taliban and that Jaweed was a thief. Tr. *Ex Parte* Sealed Discussions 23:12-24:3. According to the government, testimony on these points would have been irrelevant to Mohammed's defense in light of both the government's stipulation, made at the final hearing of the day, that it would not introduce evidence of Mohammed's Taliban involvement, as well as Mohammed's agreement, made in the face of the motion *in limine*, that he would not to try to impeach Jaweed on this account. *Cf. United States v. Moore*, 104 F.3d 377, 391 (D.C. Cir. 1997) ("Even had [counsel] located these witnesses, the testimony they allegedly would have provided was tangential at best.").

But the government misses the thrust of Mohammed's argument. Although Mohammed emphasizes his attorney's failure to contact potential witnesses, as he did before the district court, on appeal he argues that counsel should have made some effort to learn if the witnesses could undermine Jaweed's credibility in general, by testifying, for example, that he had a reputation for dishonesty or that he harbored a grudge against Mohammed. The colloquies at the May 2 hearings did not explore that possibility or consider other facts that might be developed by the district court on remand to give fuller context to the decisions counsel made, such as what Mohammed told his attorney while preparing his defense or what his attorney may have uncovered himself during trial preparation.

The government argues that Mohammed's failure to press before the district court this point about Jaweed's credibility in general shows that these witnesses would not have been able to support his allegation. We think the government infers too much from a colloquy between Mohammed and the court at a hastily convened *ex parte* hearing on the eve of trial. The question of ineffective assistance looks to the propriety of his *attorney's* decision not to follow up on Mohammed's suggestions to track down possibly helpful witnesses in Afghanistan. If anything, the fact that his attorney noted for the court the possibility that the witnesses could have undermined Jaweed's testimony more generally shows that he was aware of their potential value to Mohammed's defense. The government urges us to disregard this statement as mere speculation, but whether counsel did or should have had reason to investigate this hunch before trial is precisely the type of question an evidentiary hearing is

designed to explore. The record before us may well be sufficient to judge the reasonableness of not pursuing witnesses who could refute evidence that Mohammed was part of the Taliban or that Jaweed was a thief, but it cannot tell us whether Mohammed's attorney was justified in not finding out if they had anything else to offer his client's defense. We do not know "all the circumstances" animating counsel's strategic decisions from which we could determine whether his failure to pursue this potential line of defense was a reasonable, calculated choice or a mark of deficient performance. *See Strickland*, 466 U.S. at 691.

Even so, remand would not be needed if the record showed no prejudice to Mohammed from this alleged error. At this stage, Mohammed need not prove actual prejudice, but merely show that the record does not "conclusively establish[] that he could not do so if given the chance." *Rashad*, 331 F.3d at 912. The government argues there is no reasonable likelihood that testimony undercutting Jaweed's credibility would have altered the verdict because the vast majority of evidence against Mohammed consisted of his own words and actions caught on tape, not Jaweed's testimony. Mohammed responds that the recordings do not speak for themselves. The government put them into evidence through Jaweed, who explained the recordings and provided context for them over two days of testimony.

Mohammed has the better of this argument. The prosecutor frequently stopped the recordings at trial and asked Jaweed to explain them to the jury. For example, Jaweed testified that when Mohammed discussed blowing up mines around "Dagosar" and "the Red Castle" he was referring to government cars, Trial Tr. 46:9-

20, May 9, 2008, and that plans to "fire missiles toward the airport," referenced the Jalalabad airfield, *id.* at 48:25-49:3. Jaweed's testimony arguably shaped how the jury understood Mohammed's words. Without the additional information Jaweed provided that Mohammed was discussing *government* targets, a juror conceivably could conclude that Mohammed was violent, but not a terrorist as required to convict under § 960a. Errors that have "a pervasive effect on the inferences to be drawn from the evidence" have a greater probability of influencing the verdict, *Strickland*, 466 U.S. at 695-96, and Mohammed has raised a colorable claim that his attorney's failure to introduce evidence challenging Jaweed's credibility was such an error. The district court is best positioned to answer in the first instance whether this colorable claim rises to the level of actual prejudice. *See Massaro*, 538 U.S. at 506 (explaining that the district court has an "advantageous perspective" to assess prejudice within the full context of a trial, especially when the same judge from trial presides).

Because Mohammed has raised colorable claims under both *Strickland* prongs and the trial record does not conclusively show whether he is entitled to relief, we remand his claims to the district court to test his allegations further.[4]

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[4] We agree with our concurring colleague that precedent and sound policy mark the district court as the best forum to litigate a claim of ineffective assistance, and we express no view on the merits of Mohammed's claim. Our discussion seeks only to explain the reasons for our conclusion that the trial record is insufficient to resolve his claim on direct appeal.

In most cases, the need for an evidentiary hearing is readily apparent because the trial record contains little of the information necessary to assess trial counsel's performance. In such cases we may well "owe no special explanation when we remand." Concurring Op. at 2. But this is not the typical case, because the performance of trial counsel was an issue before the district court. In such an unusual circumstance, we see nothing amiss with explaining why the trial record is insufficient to weigh the merits of a claim of ineffective assistance on direct appeal. In order to respect our charge to avoid a

VI

For the foregoing reasons, we affirm Mohammed's judgment of conviction and sentence in all respects, but remand for an evidentiary hearing on his ineffective assistance claim.

So ordered.

"reflexive[] remand," we must "interrogate the trial record according to *Strickland*'s familiar two prongs." *Harris*, 491 F.3d at 443.

KAVANAUGH, *Circuit Judge*, concurring in part and concurring in the judgment: I concur in the judgment and in all but Part V of the Court's excellent opinion. I write separately with respect to Part V only to express my respectful view that this Court should not ordinarily delve into the merits of an ineffective-assistance claim before the district court has done so. The Supreme Court has stated that "ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S. 500, 505 (2003). The district court "may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance." *Id.*

For that reason, ineffective-assistance claims arising out of federal criminal cases are most appropriately brought in § 2255 collateral proceedings. (The Supreme Court has said that procedural default rules do not preclude a defendant from bringing an ineffective-assistance claim for the first time in a § 2255 proceeding. *See id.* at 504.) To be sure, this Court has also permitted ineffective-assistance claims to be raised on direct appeal.[1] But even so, when an ineffective-assistance argument is asserted on direct appeal, our usual practice is to remand the claim to the district

[1] Our circuit is alone in permitting this procedure. At some point, we perhaps should conform our practice to that of all of the other circuits and *require* most ineffective-assistance claims to be raised in § 2255 proceedings, not on direct appeal. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012) ("there are sound reasons for deferring consideration of ineffective-assistance-of-trial-counsel claims until the collateral-review stage"). Regardless of whether we take that logical step, however, we should still give the district court the first opportunity to consider such claims.

court without substantial analysis by this Court of the merits of the claim. *See, e.g.*, *United States v. Laureys*, 653 F.3d 27, 34 (D.C. Cir. 2011).

Whether it be in a § 2255 proceeding or on direct appeal, the key procedural principle remains the same: The district court should take the first crack at the merits of ineffective-assistance claims.

Two principles of sound appellate decisionmaking support that district-court-first practice. First, as the Supreme Court has explained, the district court is the forum "best suited to developing the facts." *Massaro*, 538 U.S. at 505. Otherwise, "appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* at 504-05. Second, by remanding to the district court as a matter of course when an ineffective-assistance claim is raised on direct appeal, we avoid wasting scarce resources as appellate counsel (and judges) fruitlessly and pointlessly squabble over ineffective-assistance claims based on an incomplete record. We have acknowledged that the court of appeals can resolve an ineffective-assistance issue in the first instance when the record "conclusively" shows that the defendant either is or is not entitled to relief. *United States v. Rashad*, 331 F.3d 908, 911 (D.C. Cir. 2003). But given the fact-bound nature of ineffective-assistance claims, that exception arises only rarely. If there is any doubt or difficulty, if it is not obvious from the face of the record whether relief is warranted, the appropriate course is simply to remand.

Applying those principles to this case, I do not see the need for the Court's detailed analysis of Mohammed's ineffective-assistance claim. We owe no special explanation when we remand an ineffective-assistance claim. We owe a special explanation only in the rare situations when we *resolve* the ineffective-assistance claim here at the appellate level. In this case, I would remand the ineffective-assistance claim to the district court without the lengthy evaluation of the claim's merits.