

ARTICLE: AVOIDING THE TERRORISM ENHANCEMENT

June, 2019

Reporter

43 Champion 24 *

Length: 12598 words

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Highlight

Section 3A 1.4 of the Sentencing Guidelines -- the so-called "terrorism enhancement" -- is an obstacle for defense practitioners. If applicable, the enhancement can drive a defendant's sentence upward by a large amount. Section 3A 1.4 is satisfied if the offense is felonious conduct that (1) "involved" a crime of terrorism or (2) was "intended to promote" a crime of terrorism. Unfortunately, the terrorism enhancement treats all offenders the same without considering their actual conduct or individual backgrounds. David Savitz and Todd Thompson discuss two cases and the role the facts played in the applicability of the terrorism enhancement.

Text

[*24] I. Introduction

Since 9/11, terrorism cases have been aggressively prosecuted in the United States with great success.¹ The centerpiece of the anti-terror push has been the material support statute, [18 U.S.C. § 2339B](#), which punishes knowingly providing material support or resources to a designated foreign terrorist organization ("DFTO") or attempting or conspiring to do so.²

In June 2015, Congress increased the penalty for violations of these offenses to a maximum of 20 years from the previous maximum of 15 years.³ If the offense results in the death of any person, the required prison sentence is any term of years or for life.⁴ A conviction of more than one such offense can result in consecutive sentences.⁵

The guideline for material support offenses, USSG § 2M5.3, carries a base offense level of 26.⁶ If the offense involved dangerous weapons, firearms, explosives, funds to purchase any of those items, or funds or other support believing they will be used to commit a violent act, 2 levels are added.⁷ Assuming a criminal history category ("CHC") I and an offense level of 26, the advisory guideline range is 63 to 78 months; at offense level 28, the advisory guideline range is 78 to 97 months. If the court agrees that multiple convictions of related offenses (such as conspiracy to provide material support and its substantive counterpart) are grouped together as one pursuant to

¹ In 2011, the Reiss Center on Law and Security at the New York University School of Law published its report, "Terrorist Trial Report Card: September 11, 2001-September 11, 2011" [hereinafter Reiss Report] *available at* <https://www.lawandsecurity.org/terrorist-trial-report-cards/>. Among other findings, the Reiss Report found that 310 prosecutions from 2001 to 2011 resulted in indictments related to jihadist terror or national security charges. Of the 204 resolved cases, 177 convictions resulted for an 87 percent conviction rate, roughly the same conviction rate found for all federal criminal indictments. Since 2009, nearly 50 percent of terrorism cases have involved informants. In June 2016, the Senate Judiciary Committee's subcommittee on Immigration and the National Interest reported that the Department of Justice maintained a list showing that 580 individuals had been convicted of terrorism-related activities in the United States between September 11, 2001, and December 31, 2014. See <https://www.breitbart.com/politics/2016/06/22/senate-committee-580-terror-convictions-in-us-since-911-380-terrorists-are-foreign-born>.

² The original iteration of the statute was passed in 1994 after the bombing of the World Trade Center in 1993; it was amended after the Oklahoma City bombings in 1996 and after the second World Trade Center bombings in 2001 with the U.S. Patriot Act. See <https://www.wsj.com/articles/material-support-statute-is-front-and-center-in-antiterror-push-1432719002>. In the first six years of the statute's existence, only six cases were prosecuted under the material-support provisions; in the first three years after 9/11, 92 cases were prosecuted. *Id.* David D. Cole, in his book *Terrorism and the Constitution*, stated:

After lying virtually dormant for its first six years of existence, the material support law has since 9/11 become the Justice Department's most popular charge in antiterrorism cases. The allure is easy to see: convictions under the law require no proof that the defendant engaged in terrorism, aided or abetted terrorism, or conspired to commit terrorism. But what makes the law attractive to prosecutors -- its sweeping ambit -- is precisely what makes it so dangerous to civil liberties.

³ Pub. L. 114-23, Title VII, § 704, 129 Stat. 300 (2015).

⁴ [18 U.S.C. § 2339B](#).

⁵ Although USSG § 501.2 provides for a concurrent sentence on multiple counts of conviction contained in the same indictment, [18 U.S.C. § 3584](#) allows for consecutive sentences, and it is not error or procedurally unreasonable if the trial court imposes consecutive sentences since the guidelines are merely advisory. See, e.g., *United States v. Lyman*, 905 F.3d 1149, 1152 (10th Cir. 2018) ("the guidelines do not control whether sentences run concurrently or consecutively") (quoting *United States v. Jarvis*, 606 F.3d 552, 554 (8th Cir. 2010)).

⁶ § 2M5.3(a).

⁷ § 2M5.3(b).

USSG § 3D1.2,⁸ then, without any further adjustment, the foregoing two advisory guideline ranges would be a low of 63 months to a high of 97 months.

Why are defense attorneys seeing much higher jail sentences for these types of offenses?⁹ The components of violence or death and/or the imposition of consecutive sentences are but two answers. But an equally, if not more, insidious culprit is a brutal adjustment -- the so-called "terrorism enhancement" guideline found at USSG § 3A1.4.¹⁰

Although the federal Sentencing Guidelines are "effectively advisory" rather than mandatory,¹¹ "the Guidelines, nevertheless, are the starting point and the initial benchmark" for consideration by the sentencing court.¹² Consequently, the terrorism enhancement remains a fundamental obstacle for defense practitioners.

Although § 2M5.3 does not refer specifically to this terrorism enhancement in any of its Commentary sections, § 3A1.4, nevertheless, lurks in Chapter Three, Part A of the Guidelines, which concerns "victim-related adjustments."¹³ The Introductory Commentary of this Part A states: "The following adjustments are included in this Part because they may apply to a wide variety of offenses." Although that characteristic may apply to the other victim-related adjustments in Part A, the terrorism enhancement, § , 3A1.4, earmarks only one category of offense, namely terrorism.

[*25] Section 3A1.4 is the draconian guideline that increases § 2M5.3's base offense level of 26 by 12 levels,¹⁴ i.e., to level 38, and pole vaults the violator's CHC to VI, the highest offender category, even if the accused calculates at a much lower CHC before application of the enhancement.¹⁵ Application of the enhancement results in an advisory guideline range of 360 months to life, but is reduced to a maximum of 240 months for those individuals subject to the statutory maximum of 20 years.

⁸ In the case example of Bakhtiyor Jumaev provided throughout this article, *United States v. Jumaev*, No. 12-cr-00033-JLK, 2018 WL 3490886, 2018 U.S. Dist. LEXIS (D. Colo. July 18, 2018) ("Jumaev Sentencing Order"), the sentencing judge found that the two offenses of conviction would be grouped together as one. *Id.*,*10.

⁹ See *United States vs. Ahmad*, No. 3:04-cr-301-JCH (D. Conn. June 16, 2014), Babar Ahmad's Memorandum in Aid of Sentencing, Exhibit N, ECF No. 179-14, a 115-page sentencing matrix that describes the defendants' names, case outcome, district court, case overview, offense(s) of conviction, sentencing date, length of sentence, and DFTO affiliation in terrorism cases brought in the United States from 2001-2013. See also *National Security Case Studies: Special Management Challenges*, Federal Judicial Center (Sixth Ed. 2015), which is an in-depth discussion of selected terrorism cases from 1993 to 2012 that presented specific challenges of case management to the trial judge and the judicial resolution, including the sentence imposed for those cases resulting in convictions.

¹⁰ This enhancement was enacted in 1995 and offered the opportunity for district courts to increase the penalty for activity that fell into a defined category of what was termed a federal crime of terrorism. USSG Manual § 3A1.4 (1995). Coupled with the 9/11 trend of the government's increasing use of the material support statute, § 2339B, as its main legal tool in combating terrorism, sentences for such crimes increased significantly, even in situations when there was no direct link to an act of violence. See Wadie E. Said, *Sentencing Terrorist Crimes*, 75 OHIO STATE L.J. 3(2014).

¹¹ See *United States v. Booker*, 543 U.S. 220, 245 (2005).

¹² *Gall v. United States*, 552 U.S. 38,49 (2007).

¹³ § 1B1.1(a)(3) instructs to lapply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three."

¹⁴ § 3A1.4(a).

¹⁵ g 3A1.4(b).

Rare is the instance, if at all, when the government will not seek to apply this steep enhancement in any terrorist-related offense, since the government's attitude seems to be that "one size fits all."¹⁶ That position is without merit, and this article explains why. A factual context is helpful for a fuller understanding of the arguments.

II. Factual Avoidance: A Case Example

A. The Factual Overview: Bakhtiyor Jumaev and Jamshid Muhtorov¹⁷

Bakhtiyor Jumaev was born in 1966 in Uzbekistan, a former Soviet Union satellite state. After learning various trade occupations and fulfilling his obligatory two-year service in the Soviet Army, Mr. Jumaev married in 1989. In 1991, the Soviet Union broke up, resulting in the independence of its various republics, including Uzbekistan.

A Muslim-dominated country, Uzbekistan was ruled by its president, Islam Karimov, from 1991 until his death in 2016. Uzbekistan has suffered one of the worst human rights records in the world since it became a separate sovereignty.¹⁸ Fearing that any observance of Islam beyond its very basic traditions would spawn an extremist or radical Muslim element, the totalitarian Karimov regime restricted the observance of Islam to government-owned mosques, government-controlled Imams, government-scripted sermons, and government-dictated style of dress and appearance. Those who strayed from government directives frequently were arrested, beaten, imprisoned, and even tortured. The indiscriminate massacre of hundreds of innocent Uzbeks by government authorities in the town of Andijan during May 2005 shocked freedom-loving countries throughout the globe and has been a stain on that country's history to this day.¹⁹

¹⁶ See, e.g., U.S. Sentencing Commission, 2013-2017 Datafiles, USSCFY13 -- USSCFY17 regarding convictions for offenders sentenced under USSG § 2M5.3, where no Chapter 2 specific offense characteristics applied. The total number of offenders was 16, and the total number of offenders with the § 3A1.4 adjustment was 16.

¹⁷ The case involving these two defendants is *United States v. Jamshid Muhtorov and Bakhtiyor Jumaev*, Case No. 12-cr-00033-JLK (D. Colo.). The separate trials of these two defendants began with Mr. Jumaev's on March 12, 2018, followed by Mr. Muhtorov's on May 24, 2018. Senior District Judge John L. Kane, of the District of Colorado, presided over both trials and subsequent sentencing hearings. The recitation of facts in this article is taken from trial testimony in the respective cases, and Judge Kane's sentencing orders issued during July and August 2018. Like many terrorism cases, such as the ones involving Messrs. Jumaev and Muhtorov, certain federal statutes, including the Classified Information Procedures Act (CIPA), 18 U.S.C. app. III §§ 1-16, the Foreign Intelligence Surveillance Act of 1978 (FISA), [50 U.S.C. §§ 1801-1811, 1821-1829](#), and the FISA Amendments Act of 2008 (FAA), [50 USC § 1881a](#), were involved and contain classified or secrecy provisions which, in certain instances, prevent the disclosure of certain information to defense counsel, thus requiring the authors to engage in presumptions or assumptions about certain facts. On the infrequent occasion when this occurred, the authors included words such as "presumed," "assumed," or "likely" in the factual passages.

¹⁸ Nongovernmental human rights watchdogs, such as Human Rights Watch, Amnesty International, as well as U.S. Department of State and Council of the European Union, define Uzbekistan as "an authoritarian state with limited civil rights," (see U.S. Department of State, 2008 Country Report on Human Rights Practices in Uzbekistan (<http://www.state.gov/j/drl/rls/hrrpt/2008/sca/119143.htm>) Bureau of Democracy, Human Rights, and Labour, February 25, 2009) and express profound concern about "wide-scale violation of virtually all basic human rights" [see IHF, Human Rights in OSCE Region: Europe, Central Asia and North America -- Uzbekistan, Report 2004 (events of 2003) http://web.archive.org/web/20100129175624/http://www.ihf-hr.org/documents/doc_summary.php?secid=3&djd=3860) 2004-06-23].

¹⁹ The eastern city of Andijan was the site of violent disturbances on May 12 and 13, 2005, culminating in the indiscriminate massacre by the Uzbek military of hundreds of peaceful demonstrators, who had assembled in the town square on May 13. The demonstrators were, in part, protesting the trial of 23 local Islamic businessmen who had been falsely accused of involvement in an extremist group. The Uzbek government's subsequent investigation claimed that armed individuals initiated the firing on the military, whose response resulted in the death of 187 demonstrators. Eyewitness reports, however, estimated the deaths at more than 400. No independent press coverage occurred of the event. Andijan is viewed internationally as a landmark event in the history of human rights abuse in Uzbekistan. See Robert McMahon, *Uzbekistan: Report Cites Evidence of Government 'Massacre' In Andijon -- Radio Free Europe/Radio Liberty* (June 7, 2005), (<http://www.rferl.org/content/article/1059147.html>).

In April 2000, Mr. Jumaev, like many Uzbeks before him, fled Uzbekistan because of its dire economy and persecution and beatings of Muslims like him. He traveled to the United States on a temporary tourist visa, leaving his pregnant wife and two young sons behind, hoping they would soon be able to join him in America. Although that optimism was never realized, Mr. Jumaev remained in this country under an expired visa for nearly a decade without any law enforcement contact. He lived a lawabiding life in Philadelphia, where he worked as a store clerk or janitor, resided in low-income housing, observed Islam devoutly, communicated with his family via Skype almost daily, and regularly sent them a significant portion of his wages.

During November 2009, Mr. Jumaev was introduced to a fellow Uzbek named Jamshid Muhtorov, who was one of Uzbekistan's best-known human rights activists. Upon learning of the Andijan massacre, Mr. Muhtorov sent a telegram in protest to President Karimov, which was not warmly received. The regime expressed its displeasure, causing Mr. Muhtorov to justifiably fear for his life and prompting him and his wife and two young children to flee Uzbekistan in 2006 to a neighboring country.

After seeking asylum with the assistance of the United Nations High Commissioner for Refugees ("UNHCR"),²⁰ Mr. Muhtorov immigrated to the United States as a political refugee in 2007. In November 2009, he and a friend traveled from Denver to a Philadelphia driving school in order to train and obtain a commercial driver's license ("CDL"). Based upon an introduction by a mutual acquaintance and steeped in the Uzbek culture of hospitality, Mr. Jumaev opened up his austere apartment to allow Mr. Muhtorov and his friend to stay there for several weeks while they attended driving school.

Meanwhile, the FBI's Denver office was in the throes of a "full investigation"²¹ of Mr. Muhtorov, who was evidently suspected of wanting to harm U.S. interests abroad.²² The FBI's investigation of Mr. Muhtorov naturally led the agency to investigate persons with whom he associated.

In January 2010, Mr. Muhtorov obtained his CDL and returned to Denver. Two weeks later, a joint terrorism task force obtained an immigration arrest warrant for Mr. Jumaev. The warrant's ostensible purpose was to remove Mr. Jumaev to Uzbekistan for having overstayed his 2000 visa. Such a step, however, was arguably a pretext for the task force's desire to obtain Mr. Jumaev's cooperation as an informant.²³

Mr. Jumaev eventually obtained his release from immigration detention in April 2010 on a \$ 3,500 bond.²⁴ He could not have made his bond without the financial help of family and friends, including Mr. Muhtorov, who contributed \$ 500.²⁵

²⁰ "The office of the UNHCR was created in 1950, during the aftermath of the Second World War, to help millions of Europeans who had fled or lost their homes." See <http://www.unhcr.org/en-history-of-unhcr.html>. Sixty-eight years later, the UNHCR, a two-time Nobel Peace Prize honoree, continues to protect, assist, and resettle refugees around the world.*Id.*

²¹ The term "full investigation" has a defined meaning in "The Attorney General's Guidelines for Domestic FBI Operations" dated Sept. 29, 2008, and effective Dec. 1, 2008 ("AG's 2008 Guidelines"), which replaced "The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection" effective Oct. 31, 2003 ("AG's 2003 Guidelines"), which was written in response to 9/11.

²² As explained *supra* in note 17, this is an instance in which the authors have had to engage in a presumption based on known evidence and other information disclosed in the case.

²³ One expressly listed strategy of a "full investigation" in the AG's 2003 Guidelines is "interviews and pretext interviews of the subject of an investigation and other persons." See AG's 2003 Guidelines at 21. The AG's 2008 Guidelines do not exclude pretext interviews as an authorized method of a full investigation, and special agents of the FBI still consider such interviews as an available method within their arsenal. Thus, an immigration arrest and interview of Mr. Jumaev to assist in the investigation of Mr. Muhtorov would presumably fall within that authorized method.

²⁴ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at * 6.

²⁵ *Id.*

After his release from detention, Mr. Jumaev resumed his modest lifestyle while seeking asylum and contesting immigration removal. Moreover, as a pious Muslim, Mr. Jumaev adhered to the solemn obligation of the repayment of debt, including the \$ 500 he owed Mr. Muhtorov for contributing to his bond. Ever so grateful for Mr. Muhtorov's financial assistance, Mr. Jumaev kept a long-distance friendship with him through regular phone calls and Skype conversations from approximately April 2010 to Mr. Muhtorov's arrest in January 2012.²⁶ However, unbeknownst to Mr. Jumaev, Mr. Muhtorov was also communicating during that same approximate time period with representatives of a DFTO called the Islamic Jihad Union ("IJU") and with a purported IJU sympathizer.

The IJU sought to displace the brutal Karimov regime and engaged in acts of jihad against that government and its allies, including the bombings of the Israeli and American embassies located in Uzbekistan during 2004. As a result, the State Department designated the IJU as a DFTO in 2005.²⁷

During 2010, Mr. Muhtorov communicated via email with a website called sodiglar.com, which was the website believed to be operated by the IJU.²⁸ Those communications continued through 2011 and included discussions about Mr. Muhtorov's willingness to assist the IJU in raising money, obtaining equipment, and recruiting personnel for its operations. During these communications, Mr. Muhtorov pledged an oath of loyalty, or Bay'ah, to the IJU, and pledged to give his life for their cause.

Moreover, during December 2011 and January 2012 Mr. Muhtorov was also communicating electronically with the above-mentioned supposed IJU sympathizer, purportedly located in Germany. Their communications concerned providing equipment and personnel, namely, Mr. Muhtorov himself, to the IJU. This individual was actually an FBI asset, i.e., a

[*26] Confidential Human Source ("CHS"), who was an Uzbek male and lived in the United States.²⁹ Mr. Muhtorov told the CHS he planned to first travel to Turkey before continuing on to join the IJU, presumably to Pakistan.

On Jan. 21, 2012, law enforcement authorities arrested Mr. Muhtorov as he waited, with a one-way ticket in hand, to board a flight from Chicago to Istanbul. He was in possession of \$ 2,865 in cash, two new iPhones, a new iPad, and his personal cellphone containing numerous terrorist propaganda videos.³⁰ During his post-arrest interrogation and at trial, Mr. Muhtorov claimed he had no intent to provide material support to the IJU -- financial personnel, or otherwise -- and that his communications with people at the organization were merely designed to

²⁶ Based upon defense counsel's receipt of statutory notices, the government obtained court authority under the FAA (Doc. 457), and subsequently under FISA (Doc. 12 and Doc. 68) to obtain electronic surveillance and conduct physical searches regarding both Messrs. Muhtorov and Jumaev. ("Doc." is the convention the authors use to identify the docket number assigned to a specific pleading by the court's case management and electronic case filing system (CM/ECF) system in the district court case involving these two defendants.).

²⁷ At the time of the designation, the name of this DFTO was the Islamic Jihad Group (IJG). During that same year, it changed its name to the Islamic Jihad Union (IJU). During 2008, the State Department amended its designation of the IJG to its new name, the Islamic Jihad Union, as the DFTO.

²⁸ See *supra* at note 17 regarding the factual overview, and *supra* at note 26 regarding the FAA and FISA investigations directed against Mr. Muhtorov.

²⁹ The Reiss Report, *supra* note 1, concluded that "[s]ince 2009, nearly 50 percent of terrorism cases have Involved Informants." *Id.*, Executive Director's Introduction, at 4.

³⁰ See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *7. For a fuller explication of the evidence against Mr. Muhtorov, see the trial court's Memorandum Opinion and Sentencing Order, *United States v. Muhtorov*, 329 F. Supp. 3 1289 (D. Colo. 2018) ("Muhtorov Sentencing Order").

gain their trust in order to learn more about their ideology and strategy. Neither the government nor Mr. Muhtorov's jury bought that explanation. ³¹

Conversely, Mr. Jumaev was neither a participant in, nor knowledgeable about, any of the communications among Mr. Muhtorov, the sodiqlar administrators, and the CHS. Instead, what led to Mr. Jumaev's undoing were his interactions with Mr. Muhtorov.

During several phone calls before and in March 2011, Mr. Muhtorov began hinting about his personal financial distress to Mr. Jumaev, without wanting to appear ungrateful for Mr. Jumaev's CDL hospitality or that he was pressing for repayment of the \$ 500. Mr. Muhtorov was employing the Uzbek cultural norm of avoiding any explicit reference to the debt but instead hinting about it. However, sensing the pressure for repayment, especially since the debt was now a year old, Mr. Jumaev managed to scrape \$ 300 together in early March 2011 to send Mr. Muhtorov. Learning that a payment was forthcoming, Mr. Muhtorov told Mr. Jumaev that the "brothers at the wedding sent their regards to Mr. Jumaev and thanked him for his support." Mr. Jumaev acceded to the same cultural norm so as not to embarrass Mr. Muhtorov for his earlier entreaties and responded that the "wedding gift" was on the way and there will be more to come in the future. The government considered the terms "brothers," "wedding," and "wedding gift" to be code words or terms for jihadists, jihad, and material support for that activity. This conversation, in large measure, formed the basis for the government's charges against Mr. Jumaev. ³²

After a lengthy trial, a jury convicted Mr. Jumaev of providing material support in the form of money to the IJU and conspiracy to do so. Mr. Muhtorov fared worse: he was found guilty of three of the four counts he faced. Much of the following sentencing discussion will focus on Mr. Jumaev, but it references Mr. Muhtorov when appropriate.

B. Applicability of the Guidelines

Because the two offenses of which Mr. Jumaev was convicted involved a common criminal objective and constituted part of a common scheme or plan, the court grouped the two counts together pursuant to USSG § 3D1.2, resulting in a base offense level of 26. ³³ Further, despite Mr. Jumaev's arguments to the contrary, the court applied the two-level increase under USSG § 2M5.3(b)(l)(E) for providing funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in the commission of a violent act. This brought Mr. Jumaev's adjusted offense level to 28. ³⁴

Because Mr. Jumaev's role in the offense was appreciably less than Mr. Muhtorov's, Mr. Jumaev argued that his offense level should be decreased by 2 to 4 levels. ³⁵ Although the court agreed that Mr. Jumaev's overall culpable conduct paled in comparison to Mr. Muhtorov's, it nevertheless believed Mr. Jumaev was aware of and participated in the full scope of the crime, and thus refused to grant any decrease for role in the offense." ³⁶ Because Mr. Jumaev had no criminal history, his Criminal History Category ("CHC") was calculated as I. Coupled

³¹ On June 21, 2018, Mr. Muhtorov was found guilty of three of the four counts he was facing, namely, the same two charges Mr. Jumaev was found guilty of, plus, the third offense of providing material support in the form of personnel, i.e., himself, to the IJU. Muhtorov Sentencing Order, 329 F. Supp. 3d at 1292.

³² See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *5.

³³ *Id.* at *10.

³⁴ *Id.* at *11-12.

³⁵ See USSG § 3B1.2(a) and (b). For example, pursuant to § 3B1.2, App. n. 4, a defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as a minimal participant.

³⁶ See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *21-22.

with an adjusted offense level of 28, his guideline range was then 78 to 97 months. That, however, was not the end of the guidelines calculation for him.³⁷

A defendant can reduce the guideline range by two levels under § 5K2.20, if the defendant committed a single criminal occurrence or single criminal transaction that (1) was committed without significant planning; (2) was of limited duration; and (3) represents a marked deviation by the defendant from an otherwise law-abiding life. Further, Application Note 3 to § 5K2.20 allows the court to consider "the defendant's (A) mental and emotional conditions; (B) employment record; (C) record of prior good works; (D) motivation for committing the offense; and (E) efforts to mitigate the effects of the offense." The court agreed that the two-level departure for aberrant behavior was warranted,³⁸ returning Mr. Jumaev back to adjusted offense level 26 and CHC I and an advisory range of 63 to 78 months. However, he still faced the potential of the terrorism enhancement.

Section 3A1.4, if applied, would result in an adjusted offense level of 38, a CHC VI, and advisory guideline range of 360 months to life for each count. That range would be reduced to the statutory maximum of 180 months for each offense.³⁹

C. Inapplicability of the Terrorism Enhancement Guideline

Under its terms, § 3A1.4 is satisfied if the offense is felonious conduct that (1) "involved" a crime of terrorism, or (2) was "intended to promote" a crime of terrorism.⁴⁰ Application Note 1 to § 3A1.4 states that a "federal crime of terrorism" has the meaning given that term in [18 U.S.C. § 2332b\(g\)\(5\)](#), which in turn defines a "federal crime of terrorism" as "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 [the enumerated statutes]." One of the enumerated statutes is [18 U.S.C. § 2339B](#), providing material support to a terrorist organization.

1. The 'Involved' Component of § 3A1.4

a. Legal Standard

Under the "involved" alternative of § 3A1.4, the government had to prove by a preponderance of the evidence that Mr. Jumaev's conduct was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" under [18 U.S.C. § 2332b\(g\)\(5\)\(A\)](#). In *United States v. Awan*,⁴¹ the defendant was convicted of violating 18 U.S.C. § 2229A (providing material support to terrorists) and related offenses after using bank accounts to transfer money to a terrorist organization (the "KCF," whose leader was Singh Panjwar) responsible for carrying out murders and bombings in India.⁴² After the district court [***28**]

³⁷ Although not the focus of this article, defense counsel should be mindful of the obstruction of justice enhancement under Chapter 3 of the Guidelines. If an accused testifies in his defense and is subsequently convicted, the government will likely argue for an upward adjustment of 2 levels for obstruction of justice under USSG § 3C1.1, on the basis that the verdict meant the jury's rejection of the defendant's testimony, therefore, proving the defendant lied. The authors vehemently objected to the application of the enhancement, and the court properly rejected its application in Mr. Jumaev's case. See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *19-21.

³⁸ See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *22-24.

³⁹ As previously noted, the statutory maximum after June 2015 was increased to 20 years, thus raising the statutory maximum to 240 months for each offense. See *supra* at text accompanying note 3.

⁴⁰ See *United States v. Awan*, 607 F.3d 306, 311 (2d Cir. 2010); see also *United States v. Fidse*, 862 F.3d 516, 522 (5th Cir. 2017) (stating that courts have recognized that the structure of § 3A1.4 establishes two bases for applying the enhancement).

⁴¹ 607 F.3d at 316.

⁴² *Id.* at 310.

refused to apply the § 3A1.4 terrorism enhancement at sentencing, the Second Circuit explicated the enhancement. The circuit remanded for resentencing without taking a position whether the enhancement was applicable.

Considering § 3A1.4's "involved" prong, the court in *Awan* reasoned as follows:

Whatever Awan's motive might have been in committing the crimes for which he was convicted, commission of crimes listed in § 2332b(g)(5)(B) satisfies the "involved" prong of the terrorism enhancement so long as the government shows by a preponderance of the evidence that Awan had the "specific intent" to commit an offense that was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."⁴³

The court clarified that even though "there is little doubt that Awan (1) knew that the objective of Panjwar and the KCF was to influence the Indian government through violence, and (2) knew that the money he provided to the KCF would be used toward that end," the government still had to prove by a preponderance of evidence "that Awan's offenses themselves were 'calculated to influence ... the conduct of government ...' even if he lacked a specific political motive for committing them."⁴⁴ *United States v. Fawzi Mustapha Ass*⁴⁵ held that, "The Terrorism Enhancement, § 3A1.4, only applies to violations of [18 U.S.C. § 2339B](#) where the evidence shows that the defendant provided support to a foreign terrorist organization with the intent to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." There the court recognized:

[I]t is possible to be guilty of providing material support to a foreign terrorist organization but not qualify for the Terrorism Enhancement. This scenario would arise if the material support was not intended to influence or affect a government's conduct by intimidation or coercion.⁴⁶

Further, in *United States v. Stewart*,⁴⁷ a case that involved three defendants who were convicted on charges related to conspiracies to kill persons in foreign countries and defrauding the United States, the district court explained why it declined to apply the terrorism enhancement to co-defendant Yousry:

This is a motivational requirement and focuses on the defendant's purpose. The government has conceded the lack of motivation or purpose and has failed to show that the defendant's offenses were calculated to influence or affect the conduct of government by intimidation or coercion or to retaliate against government action.⁴⁸

The Second Circuit affirmed the district court's decision.⁴⁹

Finally, in *United States v. Chandia*,⁵⁰ the court remanded for resentencing after the district court applied the § 3A1.4 adjustment without making necessary findings. The circuit court stated:

Chandia's PSR stated that the terrorism enhancement applied but gave no explanation for this conclusion. Chandia's convictions under the material support statutes clearly satisfied the first element of the enhancement. However, the PSR did not contain any factual assertions and the district court did not make any

⁴³ *Id.* at 317. (internal citation to *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009 omitted).

⁴⁴ *Id.* at 317.

⁴⁵ 428 F.App'x 570, 572 (6th Cir. 2011) (quoting [18 U.S.C. § 2332b\(g\)\(5\)\(A\)](#)).

⁴⁶ *Id.*

⁴⁷ 590 F.3d 93 (2d Cir. 2009).

⁴⁸ *Id.* at 138.

⁴⁹ *Id.* at 138-39.

⁵⁰ 514 F.3d 365 (4th Cir. 2008).

factual findings related to the intent element. Instead, both appeared to assume (erroneously) that the enhancement automatically applies to a material support conviction.⁵¹

b. Application to Jumaev and Muhtorov

While Mr. Jumaev admitted an awareness of the IJU in a very general sense, he argued his absence of knowledge that any IJU member or supporter was planning a politically motivated act of violence. He further showed the lack of evidence that he knew about any plan to commit a politically motivated crime of violence against any government. Further, the government presented no evidence that Mr. Jumaev had any affiliation with the IJU or was part of any of its decision-making structures. Because the government had failed to meet its burden, the court agreed that the "involved" prong was inapplicable to Mr. Jumaev.⁵² Conversely, the facts pertaining to Mr. Muhtorov were more damning, enabling the government to satisfy its burden against him.⁵³

2. The 'Intended to Promote' Component of § 3A1.4

a. Legal Standard

The court in *Awan* reasoned that the "intended to promote" prong "applies where the defendant's offense is intended to encourage, further, or bring about a federal crime of terrorism, even though the defendant's own crime of conviction or relevant conduct may not include a federal crime of terrorism."⁵⁴ The court in *Awan* recognized that "[t]o qualify as a federal crime of terrorism that may serve as a predicate for a § 3A1.4 enhancement, an offense must be listed in [18 U.S.C. § 2332b\(g\)\(5\)\(B\)](#) and, in addition, it must be an 'offense that ... is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,' as provided by [18 U.S.C. § 2332b\(g\)\(5\)\(A\)](#)."⁵⁵ Further, the court held: "Under the 'intended to promote' prong, however, so long as the defendant's offense was intended to encourage, further, or bring about a federal crime of terrorism as statutorily defined, the defendant himself does not have to commit an offense listed in § 2332b(g)(5)(B), and the defendant's offense need not itself be 'calculated' as described in § 2332b(g)(5)(A)."⁵⁶

Summarizing the standard for applying § 3A1.4, the Second Circuit in *Awan* stated:

[T]he application of § 3A1.4 ... does not require a finding that Awan was personally motivated by a desire to influence or affect the conduct of government. Rather, the government need only demonstrate that Awan intended to promote a crime calculated to have such an effect, i.e., that his offenses were intended to promote a federal crime of terrorism as defined in § 2332b(g)(5), whatever Awan's reason for committing them.⁵⁷

b. Application to Jumaev and Muhtorov

While there was testimony at trial that the IJU had been involved in past acts of violence, there was no credible evidence the IJU was involved in any specific acts of murder, kidnapping, maiming, or terroristic **[*30]** activities intended to influence or affect the conduct of any government by intimidation or coercion, or to retaliate against government conduct, during the time frame the operative indictment alleged Mr. Jumaev conspired and provided

⁵¹ *Id.* at 376.

⁵² See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *13-19.

⁵³ See Muhtorov Sentencing Order, 329 F. Supp. 3d at 1302-03 (stating "Muhtorov's conduct comports with that of more serious offenders than Jumaev").

⁵⁴ 607 F.3d at 314.

⁵⁵ *Id.*

⁵⁶ *Id.* (citations omitted).

⁵⁷ *Id.* at 315-316 (internal citation omitted).

material support to the IJU. Thus, Mr. Jumaev could not have promoted crimes of federal terrorism that did not exist and were not being planned by the IJU.

While there was evidence Mr. Jumaev commented on a propaganda video produced by the Islamic Movement of Uzbekistan ("IMU") during an unknown time frame and that Mr. Muhtorov told Mr. Jumaev people at the "wedding party" were thankful for a wedding gift, Mr. Jumaev never discussed any act of violence with Mr. Muhtorov. The tape-recorded conversations signified nothing more than bluster and puffery by Mr. Jumaev, without Mr. Jumaev promoting any act of violence.

In sum, the government had failed to prove by a preponderance of evidence the applicability of the § 3A1.4 enhancement under the "involved" prong or under the "intended to promote" prong. Quoting *United States v. Fidse*,⁵⁸ Mr. Jumaev noted that "[t]he sentencing enhancement provided by § 3A1.4 is 'steep,'" and that such severe enhancement should not be applied to Mr. Jumaev. The court agreed.⁵⁹ Again, conversely, Mr. Muhtorov did not fare as well.⁶⁰ But, can he, or similarly situated defendants, nevertheless avoid the application of the enhancement by another approach?

III. Avoiding § 3A1.4 by Its Deconstruction

*Kimbrough v. United States*⁶¹ allows courts to avoid a rigorous application of a particular guideline to the offense at hand and in the process to disagree with the policy considerations behind the guideline.⁶² No guideline is more apt for such a critical analysis than § 3A1.4, since its broad scope permits its application to the most violent kinds of material support and in like manner to the most benign. Thus, a person who is moved by the plight of young children living in the camp of a DFTO and elects to contribute a few hundred dollars to the DFTO in order to assist in the feeding and clothing of those children⁶³ is subject to the same enhancement under § 3A1.4 as an individual who provides explosive devices, personnel in the form of himself and/or others, and raises thousands of dollars for and travels to and trains at a DFTO. Similarly, an individual who has been convicted of contributing a small sum of money to a DFTO, whose membership has dwindled down from its heyday of more than a couple hundred members to less than a dozen members, i.e., an essentially "spent" organization, at the time of the contribution and had not carried out a terrorist activity in several years,⁶⁴ is subject to the same enhancement as the so-called "martyrs" for ISIS, which deploy soldiers throughout Europe and the international globe to wreak its horror.

One commentator noted: "When Section 3A1.4 is applied [to sentencing], the distinction between the sentences for violent and nonviolent crimes can narrow, exposing a fundamental inconsistency between the penalties Congress has promulgated and the actual sentencing levels terrorism defendants are exposed to, regardless of violent conduct."⁶⁵ The operation of the terrorism enhancement is inconsistent with the statutes that criminalize terrorist acts.⁶⁶ One source of that inconsistency is the irrelevancy to the terrorism enhancement of a defendant's

⁵⁸ 862 F.3d at 522.

⁵⁹ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *13-19.

⁶⁰ See Muhtorov Sentencing Order, 329 F.Supp. 3d at 1298-99.

⁶¹ 552 U.S. 85 (2007).

⁶² *Id.* at 101.

⁶³ For example, the evidence in Mr. Jumaev's case, based on the forensic analysis of his Opera web history and his confirmatory testimony, revealed that he had watched a video produced by the IMU that showed Uzbek refugees, including young children, living in an IMU camp in Afghanistan or Pakistan. According to Mr. Jumaev, he was heartbroken at the sight of Uzbek children living in such camps.

⁶⁴ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *6.

⁶⁵ *Said, supra* at 477, 501.

motivation for committing the offense, while the statutes themselves often distinguish between violent and financial crimes. ⁶⁷

As is the case with the offense level, there is no evidence that any empirical data was considered by the Commission to support the automatic leap to CHC VI, which is an integral part of § 3A1.4. Thus, "[t]he terrorism enhancement treats all terrorism defendants as if they are career criminals." ⁶⁸ The enhancement is antithetical to the dictate of § 3553(a)(1), which requires a court to consider a defendant's history and characteristics in making its sentencing determination. ⁶⁹

An instructive article regarding the deconstruction of § 3A1.4 is James P. McLoughlin, Jr.'s *Deconstructing United States Sentencing Guidelines Section 3A1.4: Sentencing Failure in Cases of Financial Support for Foreign Terrorist Organizations*. ⁷⁰ There, the author explains that prior to the events of Sept. 11, 2001, there were no base offense Guidelines for federal crimes of terrorism, but when Congress passed the USA PATRIOT Act in the wake of September 11, the Sentencing Commission enacted § 3A1.4. ⁷¹ That section, however, represents bad anti-terrorism policy and fails to adequately take into account the sentencing factors under § 3553(a)(2) that must be considered in order for a sentence to be deemed "sufficient but not greater than necessary." ⁷²

Section 3A1.4, enacted to punish hardcore terrorists, does not fit the kind of benign behavior committed by Mr. Jumaev. A potential sentence applying the enhancement would be disproportionate to the conduct of conviction ⁷³ if the court (1) shifted his CHC to VI, the level of the most culpable of defendants, as if he were a career criminal and (2) increased his offense level to ensure he would be sentenced as if his offenses are among the most serious offenses addressed by the sentencing guidelines -- with no empirical evidence to support either arbitrary seismic shift.

Some of the distinguishing factors that should be considered in sentencing individuals convicted of terrorism are "the 'materiality' of their support, the intent with which they gave the support, the organization to which the support was given, the quality and quantum of the support, the duration of the support, the identifiable harm caused by the support, and any identifiable victim of the support." ⁷⁴ "Deconstructing defendants and their offenses and placing both on the spectrum of similar defendants convicted of similar crimes is classic sentencing practice. It requires nuance and careful discrimination between and among defendants based on the factors enumerated in [18 U.S.C. § 3553\(a\)](#). That nuance is impossible under a Guideline that is structured as bluntly as U.S.S.G. § 3A1.4." ⁷⁵

⁶⁶ Christina Parajon-Skinner, *Punishing Crimes of Terror in Article III Courts*, 31 Yale L. & Pol'y Rev., 309, 342-44 (2013).

⁶⁷ *Id.*

⁶⁸ *United States v. Alhaggagi*, No. 17-cr-00387-CRB-1, 2019 WL 1102991, 2019 U.S. Dist. LEXIS 37889, at *24 (N.D. Cal. Mar. 8, 2019).

⁶⁹ *See also Alhaggagi*, 2019 U.S. Dist. LEXIS 37889, at *22 ("the terrorism enhancement's treatment of criminal history flies in the face of fair, individualized sentencing").

⁷⁰ 28 Law & Ineq. 51 (2010), available at <http://scholarship.law.umn.edu/lawineq/vol28/iss1/2>.

⁷¹ *Id.* at 52-53.

⁷² *Id.* at 56-57.

⁷³ *Id.* at 57-58.

⁷⁴ Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *30-31 (citing McLoughlin, *supra* at 100).

⁷⁵ *Id.* at 29 (citing McLoughlin, *supra*, at 108).

Courts have thus recognized that the policy considerations for applying the same enhancement to the disparate conduct of those convicted of terrorism are flawed and have elected to determine a sufficient and just sentence on the basis of the factors set forth in § 3553(a).⁷⁶ That is precisely **["*31"]** what the court determined for both Jumaev and Muhtorov.⁷⁷

In Mr. Jumaev's case, the court rejected the Guidelines, concluding that "this case presents circumstances not adequately taken into consideration by the Sentencing Commission" including "Mr. Jumaev's owing of a debt, his extended period of pretrial detention, his prolonged absence from his family, his immigration situation, and the lack of rehabilitation programs for him."⁷⁸

IV. Avoidance of § 3A1.4 by Departures and § 3553(a)

A. Departures

Defense lawyers have another important departure provision at their disposal in addition to the departure for aberrant behavior under § 5K2.20 (discussed above). If one's client under normal circumstances will calculate to a much lower CHC than VI, counsel should consider avoiding § 3A1.4(b)'s jump to CHC VI by arguing the departure provisions of § 4A1.3.⁷⁹

If reliable information indicates the defendant's criminal history category substantially overrepresents the seriousness of the defendant's criminal history or the likelihood the defendant will commit other crimes, a downward departure may be warranted.⁸⁰ Except for the enhancements contained in § 3A1.4, which have nothing to do with the calculations customarily attributed to an individual's criminal history category, many defendants, such as Mr. Jumaev, would fall within CHC I as a result of having no points assigned to their history.

One court succinctly explained:

The automatic assignment of a defendant to a Criminal History VI is not only too blunt an instrument to have genuine analytical value, it is fundamentally at odds with the design of the Guidelines. It can, as it does in this

⁷⁶ See *United States v. Salin*, 690 R3d 115, 126 (2d Cir. 2012) (holding that a district court is not required to reject the Terrorism Enhancement because it was not the product of empirical research but "may give a non-Guidelines sentence where she disagrees with the weight the Guidelines assign to a factor").

⁷⁷ See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *24-34; Muhtorov Sentencing Order, 329 F. Supp.3d at 1301-02.

⁷⁸ See Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at *27.

⁷⁹ "*Post-Booker*, federal courts are instructed to fashion a sentence based on a variety of statutory factors under [18 U.S.C. § 3553\(a\)](#), including "the nature and circumstances of the offense and the history and characteristics of the defendant." However, unlike with other crimes, sentencing in the terrorism context -- and the Terrorism Enhancement especially -- fails to address these factors. The Terrorism Enhancement treats all offenders the same, without taking into account their actual conduct or individual background, such as age and criminal history. Thus, the Enhancement undermines a basic principle of U.S. sentencing law and its underlying commitment to retributive justice: that punishment should be proportional to the crime." Sameer Ahmed, *Is History Repeating Itself? Sentencing Young Muslims in the War on Terror*, 126 Yale L.J. 1520, 1528-9 (2017).

⁸⁰ USSG § 4A1.3(b)(1); see also Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *24-25 ("A judge determining that [the Terrorism Enhancement] over-represents 'the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes' always has the discretion under § 4A1.1 to depart downward in sentencing.") (citing *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003) and *United States v. Benkahla*, 501 F. Supp. 2d 748, 758 (E.D.Va. 2007)).

case, import a fiction into the calculus. It would impute to a defendant, who has had no criminal history, a fictional history of the highest level of seriousness.⁸¹

Mr. Jumaev's sentencing judge agreed with the existence of this fiction and determined a departure was warranted to lower Mr. Jumaev to CHC I.⁸²

B. A Variance Under § 3553(a)

It is well established that "courts can and should engage in a holistic inquiry of the § 3553(a) factors,"⁸³ and that a "variance can be imposed without compliance with the rigorous requirements for departures."⁸⁴ In order to place the § 3553(a) sentencing factors into context in a terrorism case, consider the argument presented on behalf of Mr. Jumaev that a sentence to time served was sufficient but not greater than necessary in his individual case. As a member of the Tenth Circuit Court of Appeals, Supreme Court Justice Gorsuch observed:

So much responsibility rests on the judge's shoulders, along with the high expectation that the judge will wisely weigh things that cannot be easily weighed. How much punishment is enough to protect the public? To deter future wrongdoing? To reflect the gravity of the offense? And how much punishment suffices to accomplish all these things without verging on cold revenge or needless retribution? There's rarely a single right answer to hard questions like these. So, our system depends, as perhaps it must, on the discretion of thoughtful judges.

* * *

Of course, each defendant must be assessed on his or her own terms: courts are not machine presses and sentences are not widgets to be churned out on some criminal justice conveyor belt. But a properly calculated guidelines sentence provides useful data, a "starting point" or "initial benchmark," even as it remains the judge's duty to tailor every sentence to the case and defendant at hand.⁸⁵

For Mr. Jumaev, the § 3553(a) factors were addressed as follows:

1. Nature and Circumstances of Offense; Jumaev's History and Characteristics

The nature and circumstances of the offense and Mr. Jumaev's history and characteristics have been addressed in the factual overview of this article. The court considered these factors favorably for Mr. Jumaev.⁸⁶

2. The Need for the Sentence Imposed

a. To Reflect the Seriousness of the Offense

The government exhorted for more retribution than the time Mr. Jumaev had already served, namely 25 years. Mr. Jumaev believed the 73 months he had already served in detention were sufficient since that amount of time was tantamount to a 90-month term of imprisonment and represented real "hard time" -- harder and more punitive than if he had been sentenced to a federal prison.

⁸¹ Jumaev Sentencing Order, 2018 US Dist. LEXIS 119916, at 25, citing *United States v. Mehanna*, No. 1:09-cr-10017-GAO (D. Mass. April 12, 2012), Sentencing Tr. at 69:14-24 (Doc. 439).

⁸² Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *26.

⁸³ *United States v. Barnes*, 890 F.3d 910, 916 (10th Cir. 2018) (trial court's decision affirmed of variant sentences of 12 months and 6 months imprisonment, respectively, to two prison administrators who physically abused prisoners in a variety of ways and whose advisory guidelines range calculated to 70 to 87 months) (internal quotation marks omitted).

⁸⁴ *United States v. DeRusse*, 859 F.3d 1232, 1237 (10th Cir. 2017) (upholding variance from an advisory guidelines range of 108-135 months to 70 days already served) (quoting *United States v. Gantt*, 679 F.3d 1240, 1247 (10th Cir. 2012)).

⁸⁵ *United States v. Sabillon-Umana*, 772 F.3d 1328, 1330 (10th Cir. 2014) (Gorsuch, J.).

⁸⁶ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *35-37.

The court believed the government's request was absurd since the average sentence for such offenses was 14 years, and the government provided no basis for why Mr. Jumaev's offenses were above the average.⁸⁷ The court further *believed* the time Mr. Jumaev had already spent in pretrial detention far from family and friends and the concomitant inability to provide financially for his family during that time did not "trivialize" his actions, as [*32] the government sought to characterize such a potential sentence.⁸⁸

b. To Afford Adequate Deterrence to Criminal Conduct

Many commentators warn against unnecessarily lengthy sentences for terrorism offenses.⁸⁹ One of the reasons behind these warnings is the possibility of further "radicalization" while in prison.⁹⁰ "Prison systems throughout the world have been and continue to be breeding grounds for radicalism, recruiting grounds for extremist movements, and facilities for the planning and training of radical activities."⁹¹ Such factors weighed against a protracted additional term of imprisonment for Mr. Jumaev.⁹²

c. To Protect the Public from Further Crimes of the Defendant

Mr. Jumaev had no prior criminal history, and there was no evidence to indicate he would recidivate. The government argued, however, that his conduct of conviction reflected his pursuit of an upward trajectory of criminality, which had to be stopped. The court rejected the sheer speculative nature of that argument and instead found persuasive Judge Janet Hall's reasoning in *United States v. Ahmad*, that a sentence should not reflect an unfounded fear a defendant might do something, like commit a terrorist act, and therefore lock up that person forever.⁹³

d. To Provide Defendant with Training, Medical Care, or Treatment

The court was unable to find any relevant training or rehabilitation programs afforded by the Bureau of Prisons for Mr. Jumaev. The court further determined that the negative influences resulting from a longer period of incarceration outweighed any potential benefit Mr. Jumaev might realize from potential educational opportunities while incarcerated.⁹⁴

3. The Kinds of Sentences Available

In evaluating this factor, the Court considered the immigration consequences Mr. Jumaev was facing and the available forms of relief to him, including the provisions of the Convention Against Torture.⁹⁵ As a result of his

⁸⁷ *Id.* at *38-39.

⁸⁸ *Id.* at *39-40.

⁸⁹ *Id.* at *41 n.25 (citing Joshua L. Dratel, *The Literal Third Way in Approaching 'Material Support for Terrorism': Whatever Happened to 18 U.S.C. § 2339B(c) and the Civil Injunction Option?* 57 WAYNE L. REV. 11 (2011)).

⁹⁰ *Id.* at *41.

⁹¹ *Id.* (citing Office of the Inspector Gen., U.S. Dep't of Justice, *A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Service Providers* 6 (2004), available at <https://oig.justice.gov/special/0404/final.pdf>).

⁹² *Id.* at *42

⁹³ *Id.* at *43 (citing *United States v. Ahmad*, Sentencing Tr. at 32:8-11, (Doc. 220)).

⁹⁴ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *43.

⁹⁵ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *44, (citing Mr. Jumaev's Sentencing Statement at 27 (Doc. 1908, Exh. C at 1-4; Doc. 1908-1; and *Yusupov v. Attorney Gen. of United States*, 650 F.3d 968, 977-79, 993 (3d Cir.

convictions, Mr. Jumaev's request for asylum, which he made when the immigration removal proceedings were instituted against him in 2010, could no longer be part of his requested relief in the resumption of those proceedings.⁹⁶ He was relegated to arguing for deferred removal to Uzbekistan based on the provisions of the Convention Against Torture the range of conduct that can produce ("CAT").⁹⁷ Even if Mr. Jumaev succeeded in gaining a deferral of his removal, the Department of Homeland Security (DHS) could later seek to terminate the deferral on the basis of evidence relevant to whether Mr. Jumaev would be tortured if he were then removed to Uzbekistan.⁹⁸

If for any reason Mr. Jumaev did not succeed in his CAT claim, he would be ordered detained while DHS made arrangements for his deportation to Uzbekistan, including the acquisition of travel documents and Uzbekistan's willingness to accept Mr. Jumaev back into the country.⁹⁹ If Uzbekistan refused to accept Mr. Jumaev, he would remain detained while DHS attempted to locate a different country to remove him.¹⁰⁰ That seems unlikely based on the nature of his convictions, and therefore he may remain detained for an indefinite period of time.¹⁰¹ As Mr. Jumaev's sentencing judge explained, "Either way, his options are bleak, and continued detention separate from this case is most probably in his future."¹⁰² Further, because of the ramifications of the immigration consequences, the court understood the been designated as terrorist realities of the imposition of any term of supervised release, namely, that it would likely be unrealized.¹⁰³

Many immigrants convicted of terrorism, or for that matter any "particularly serious crime,"¹⁰⁴ and who fled their homeland because of political or religious persecution, may find themselves facing a conundrum like the dilemma Mr. Jumaev faced.

4. Sentencing Range for Similarly Situated Defendants and the Need to Avoid Unwarranted Sentence Disparities

2011) (discussing the likelihood that the petitioners, two Uzbek nationals, would be persecuted and tortured if removed to Uzbekistan because of their religious and political beliefs; and explaining the forms of relief available))).

⁹⁶ *Id.* In Exh. C, (Doc. 1908-1), the expert report of his immigration specialist, Jeff D. Joseph, Esq. [hereinafter the Joseph Report], Mr. Joseph cited the provisions of INA § 208(b)(2)(A)(ii) that render an individual ineligible for relief where "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States."

⁹⁷ The Joseph Report, at 3, further explained that there are two types of relief available under CAT -- withholding of removal under **8 C.F.R. § 208.16(c)** and deferral of removal under **8 C.F.R. § 208.17**. In both cases, the alien must show that it is more likely than not he would be tortured in the proposed country of removal. If the alien prevails in his burden, then he shall be granted withholding of removal unless the alien is subject to mandatory denial of withholding of removal. One of the grounds for mandatory denial is a conviction of a serious crime. In such event, the alien who has prevailed in his burden will only be afforded the relief of deferral or removal. That means a final order of removal will be issued for him, but its execution will be simply deferred.

⁹⁸ Joseph Report at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *45.

¹⁰³ *Id.*

¹⁰⁴ **8 U.S.C. § 1231(b)(3)(B)(ii)** requires removal of aliens when "the Attorney General decided that ... the alien, having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States." The statute does not define "particularly serious crime," instead leaving that determination to the Board of Immigration Appeals.

In addressing the kinds of sentences available and sentencing range for similarly situated defendants, a number of resources are at counsel's disposal including the Sentencing Commission's statistics for terrorism offenses, although those statistics do not separately list convictions under [18 USC § 2339B](#),¹⁰⁵ the extensive matrix of cases listed in Exhibit N in the *Ahmad* case,¹⁰⁶ and the National Judiciary Center's compendium of terrorism cases.¹⁰⁷

Mr. Jumaev pointed out that past cases like his were scarce and arguably non-existent. Moreover, as he noted in his deconstruction argument, despite a conviction for material support, the Sentencing Guidelines result in a nearly identical guideline range in each case, regardless of the underlying conduct.

Mr. Jumaev argued that his case fell within the most benign category of material support cases because his conduct caused no actual harm. And, regardless of intent, he was not motivated by fanaticism, political ideology, malevolence, or the desire to cause harm to any person or government.

In his view, a few cases were instructive regarding his position. The first was the 2017 case of *United States v. Esse*.¹⁰⁸ Amina Esse pleaded guilty to an information alleging conspiracy to provide material support to a foreign terrorist organization. The facts were described by the prosecution's sentencing statement in *Esse*:

[T]he defendant provided material support to the foreign terrorist organization al Shabaab when she delivered money repeatedly to her co-conspirators knowing that money was destined for, and received by, al Shabaab. The defendant did so knowing that al Shabaab had organization by the United States and her contributions to al Shabaab were unlawful. However, at the time she made these contributions, Ms. Esse was convinced that supporting al Shabaab was not only justifiable, but also an obligation. During the period that encompassed the defendant's criminal conduct, she participated in dozens of discussions with others about al Shabaab's activities, the success or failure of various al Shabaab violent attacks and operations, the success or failure of Somali government and AMI-SOM actions in Somalia, and the status of affairs in Somalia regarding the Somali government. The defendant was well-versed about al Shabaab and their operations in Somalia. At the time, she believed in them.¹⁰⁹

Ms. Esse was sentenced on April 27, 2017, to a five-year term of probation.¹¹⁰

That Ms. Esse received the benefit of a USSG § 5K1.1 reduction did not **[*33]** diminish the comparison to Mr. Jumaev. Unlike Ms. Esse, Mr. Jumaev had nothing to offer the government for cooperation. Not only did Mr. Jumaev have no relationship to the IJU, he never knew a single member of that organization. He neither communicated with the IJU nor succeeded in logging onto its propaganda website, [sodiqjar.com](#).

Awan, post-appeal, was also instructive. Originally, the district court calculated *Awan*'s Guidelines range without the 3A1.4 terrorism adjustment, resulting in a Guidelines range of 168 to 210 months, and sentenced *Awan* to 168 months in prison.¹¹¹ After remanding for resentencing, the district court resentenced *Awan* to the same 168-month sentence originally imposed and rejected the government's request on remand of a 45-year sentence.¹¹² The

¹⁰⁵ See *supra* note 16

¹⁰⁶ See *supra* note 9.

¹⁰⁷ *Id.*

¹⁰⁸ No. 14-cr-000369(1) (MJD) (D. Minn.).

¹⁰⁹ *Id.* (Doc. 27, at 9-10 (quoting *Esse*'s Presentence Investigation Report)).

¹¹⁰ *Id.*, Doc. 33.

¹¹¹ *Awan*, 607 F.3d at 312.

¹¹² See *Awan* Amended Judgment with transcript of sentencing order.

government stressed that the trial evidence showed Awan made international money transfers of between \$ 60,000 to \$ 70,000 to the foreign terrorist organization, recruited another person to travel to Pakistan to undergo military training, and had a criminal history that included conspiracy for credit card fraud involving over \$ 2,000,000. ¹¹³ The resentencing judge, in focusing rightfully so on Awan the individual, rebuffed the government's request for such a punitive sentence, observing:

Just as tellingly, the recounting and recordings of defendant's conversations with Harjit, which were part of the trial record, and his discussions with at least one other prison inmate, which were presented to Judge Sifton but were not part of the trial record, peg him precisely, as Judge Sifton characterized him, as "a boaster, a salesman and a ... terrorist groupie," the latter of which I understand to refer to someone who has sought to align himself with an infamous organization not because he zealously identifies with the ideology of its cause, but rather as a bizarrely misguided, albeit dangerous gesture of self-aggrandizement. Defendant's incessant name-dropping of notorious terrorists and terrorist incidents and his obviously exaggerated boasting at least in some instances of close association with powerful terrorists strongly suggest that although defendant plainly impelled himself to participate in terrorist conduct, he did so for atypical reasons unrelated to the political and religious ideology that generally drives defendants who commit crimes of terrorism.

I am not, in the case of defendant, considering an offender whose reasons to recidivate derive from political or other ideological fanaticism so strong that it is doubtful that they will ever abate regardless of the length of his incarceration. ¹¹⁴

Mr. Jumaev, who had no criminal record, did not engage in any recruiting activities and advanced only the modest sum of \$ 300. As a result, he argued for even more generous treatment than accorded Awan.

In *United States v. Benkahla*, ¹¹⁵ the district court imposed the terrorism enhancement based upon the defendant's obstruction of an investigation of a federal crime of terrorism. ¹¹⁶ The district court then found that a § 4A1.3 downward departure or variance under § 3553(a) was warranted. As described by the Fourth Circuit in affirming the sentence:

Benkahla's Guidelines range was thus 210 to 262 months. But the court thought the case called for a downward departure under § 4A1.3 or (in the alternative) a variance under [18 U.S.C. § 3553\(a\)](#). "Sabri Benkahla is not a terrorist," the court stated. [Benkahla, 501 F. Supp. 2d at 759](#). He "has not committed any other criminal acts" and his likelihood of doing so upon release is "infinitesimal." *Id.* Also, Benkahla's former co-defendants, the other 10 members of the Dar al-Arqam paintball group, had received lesser sentences for what were more dangerous and more violent offenses, a disparity the court found "staggering." [Id. at 762](#). The court thus treated Benkahla as having a Category I criminal history and sentenced him to 121 months. ¹¹⁷

In *United States v. Aaron T. Daniels*, ¹¹⁸ the defendant was charged with providing and attempting to provide material support to a DFTO, namely, ISIS, in the form of \$ 250 he sent to an ISIS recruiter. Daniels was interested in traveling to Libya in order to train and eventually join ISIS and engage in violent jihad. For his training, he purchased an airline ticket to fly from Columbus, Ohio, then to Houston, Texas, and then to Port of Spain, Trinidad and Tobago. Law enforcement officers arrested him before he boarded his flight from Columbus. He pled guilty to

¹¹³ *Id.*, Tr. at 24-27.

¹¹⁴ *Id.*, Tr. at 27-28.

¹¹⁵ 501 F. Supp. 2d 748 (E.D. Va. 2007).

¹¹⁶ *Id.* at 751-56.

¹¹⁷ *United States v. Benkahla*, 530 F.3d 300, 305-06 (4th Cir. 2008).

¹¹⁸ Case No. 2-16-cr-222-01 (S.D. Ohio).

violating [18 U.S.C. § 2339B](#). The court sentenced him to 80 months of imprisonment. ¹¹⁹ Despite Mr. Daniels' similarities to Jumaev in the amount of the material support, Mr. Jumaev's activities were much less serious than Mr. Daniels.

Mr. Jumaev's sentencing judge recognized the existence of only a few cases that bore enough resemblance to this defendant to be worthy of comparison, observing that each of the "similar" defendants "engaged in substantially more culpable conduct than Mr. Jumaev, such as participating in intricate conspiracy networks, contributing considerable sums of money, providing support on a recurrent basis, joining in recruitment efforts, plotting against the United States, and so on." ¹²⁰ After discussing many of these cases, the court concluded that, for the following reasons, Mr. Jumaev's conduct did not reach the level of any of those defendants:

- he did not attempt to purchase any weapons;
 - he had no direct contact with any members of a terrorist organization;
 - he did not associate with terrorists or try to support them while in the U.S. Armed Forces or law enforcement;
 - he did not take pictures of U.S. monuments to encourage a terrorist attack;
 - he did not buy a ticket to travel anywhere;
 - he did not serve in a leadership role of any organization;
 - he did not solicit funds from other individuals or attempt to recruit them;
 - he did not provide thousands or hundreds of thousands of dollars in support;
 - he did not provide support on multiple occasions;
- [*36]** - his funds did not result in the purchase of tactical equipment; and
- his efforts were not organized or methodical. ¹²¹

After reviewing all of the related cases, the court sympathized with Judge Hall's remarks in *Ahmad* that "[t]here's absolutely no way to rationalize the sentencing that have been imposed around the country, on persons who have given material support or committed acts of terrorism." ¹²² "The takeaway message in this case, though, is that it is clear Mr. Jumaev's conduct is the least of the least." ¹²³ A sentence of 15 years, as recommended by the government, would be disproportionate and would contribute to unwarranted sentencing disparities. ¹²⁴ The judge then crafted a sentence "based on rational thought, humanity, and compassion" and sentenced Mr. Jumaev to time served. ¹²⁵

V. Conclusion

¹¹⁹ *Id.*, Judgment in a Criminal Case (Doc. 93).

¹²⁰ See Jumaev Sentencing Order, 2018 U.S. Dist. LEXIS 119916, at *46 and cases discussed at *46-58.

¹²¹ *Id.* at 57.

¹²² *Id.* (citation omitted).

¹²³ *Id.* at * 58.

¹²⁴ *Id.*; see also *Alhaggagi*, 2019 U.S. Dist. LEXIS 37889, at *23 (citing *United States v. Jumaev*, 2018 WL 3490806, at *11).

¹²⁵ *Id.*

Messrs. Jumaev and Muhtorov both avoided the imposition of the very harsh terrorism enhancement guideline, § 3A1.4, at sentencing. Mr. Jumaev did so, in part, because the facts proven against him were deemed not to have satisfied either of the two prongs of the enhancement. If, arguably, an appellate court disagreed with the foregoing determination and believed Mr. Jumaev's conduct satisfied either or both of the prongs, the sentencing court nevertheless believed the enhancement was flawed in its policy, lacked empirical evidence to justify its harshness, and should be rejected in its application. If, arguably, an appellate court were to disagree with the foregoing deconstruction analysis, then the sentencing court also would have rejected the application of the Sentencing Guidelines and found it more appropriate to sentence Mr. Jumaev in accordance with the factors set forth in [18 U.S.C. § 3553\(a\)](#), principally because the case presented circumstances not adequately taken into consideration by the Sentencing Commission. ¹²⁶

As a result, for his two convictions Mr. Jumaev was sentenced to the time he had served in detention, from March 15, 2012, to the date of his sentencing, July 18, 2018. ¹²⁷ The next day, he was removed from BOP custody and transferred to ICE custody, where he will remain in immigration detention until his removal proceedings conclude.

Conversely, on August 30, 2018, the judge found the terrorism enhancement did apply to Mr. Muhtorov but likewise determined a non-Guideline sentence was also appropriate. ¹²⁸ As a result of the convictions on three of the charges brought against him, Mr. Muhtorov received concurrent sentences to 96 months on the conspiracy and substantive counts of providing financial support and 132 months on the charge of providing personnel support. ¹²⁹ He, too, will face removal proceedings in immigration court upon completion of his BOP sentence.

The terrorism enhancement provision is just another overreaching and prurient guideline the Sentencing Commission has enacted without measured and reasoned thinking and consideration. It should be challenged as aggressively as possible.

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¹²⁶ Both defendants have appealed their convictions. The government declined to file cross appeals in either case, thereby waiving objections to the sentences.

¹²⁷ Mr. Jumaev's pretrial detention of over six years was the subject of Speedy Trial litigation beyond the scope of this article.

¹²⁸ See Muhtorov Sentencing Order, 329 F.Supp.3d at 1298-99.

¹²⁹ *Id.* at 1311. The 132-month sentence imposed upon Mr. Muhtorov was a far cry from the 360 months recommended by the government.