IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4317

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

HYSEN SHERIFI,

Defendant –Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina
The Honorable Louise W. Flanagan, District Judge

BRIEF OF THE UNITED STATES

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Statement of Jurisdiction

The district court had jurisdiction over Hysen Sherifi's criminal case under 18 U.S.C. § 3231 and entered judgment on January 13, 2012. J.A. 4061.[1] On February 4, 2014, this Court affirmed Sherifi's convictions and sentence by published opinion under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). *United States v. Hassan*, 742 F.3d 104, 125 (4th Cir. 2014). Sherifi subsequently filed a motion to vacate, to set aside, or to correct his sentence, over which the district court exercised jurisdiction under 28 U.S.C. § 2255 and 28 U.S.C. § 1331. J.A. 4076-85. Because Sherifi appeals the relief granted, he appeals a new criminal sentence and need not obtain a certificate of appealability. *See United States v. Hadden*, 475 F.3d 652, 664 (4th Cir. 2007). This Court's jurisdiction arises under 28 U.S.C. § 2255(d), 28 U.S.C. § 2253(a), and 28 U.S.C. § 1291.

Statement of the Issues

1. Whether the district court's sentence was procedurally reasonable based on Sherifi's claim that the district court failed to adequately explain the sentence.

[1] "J.A." refers to the Joint Appendix, and "S.J.A." refers to the Sealed Joint Appendix filed by Sherifi in this case. "J.A.D.A." refers to the appendix filed in the direct appeal.

2. Whether the district court committed reversible plain error by sentencing Sherifi to a concurrent 516-month term of imprisonment for conspiracy to murder, kidnap, maim, and injure persons in a foreign country, in violation of 18 U.S.C. § 956(a), when the jury did not find beyond a reasonable doubt that the object of the conspiracy was to murder or kidnap such persons.

3. Whether the district court committed reversible plain error in applying the hate-crime enhancement under U.S.S.G. § 3A1.1(a).

Statement of the Case

Following a joint jury trial in the U.S. District Court for the Eastern District of North Carolina, Hysen Sherifi and two coconspirators were convicted on October 13, 2011, of several offenses arising from terrorism activities. *United States v. Hassan*, 742 F.3d 104, 110 (4th Cir. 2014). Five other coconspirators were also convicted, either after a separate jury trial or pursuant to guilty pleas. On January 13, 2012, the district court sentenced Sherifi to 540 months of imprisonment. *Id.* at 147. On February 4, 2014, this Court affirmed. *Id.* at 110.

On August 25, 2020, the district court granted Sherifi's 28 U.S.C. § 2255 motion to vacate two of his convictions and his sentence. *Sherifi v. United States*, No. 5:09-cr-216, 2020 WL 5026846 (E.D.N.C. Aug. 25, 2020). On May 17, 2022, the district court resentenced Sherifi on his remaining convictions to an

aggregate term of 516 months of imprisonment. J.A. 4188, 4190, 4198-4200. Sherifi appeals from that sentence.

Statement of the Facts

On July 22, 2009, a federal grand jury in the Eastern District of North Carolina returned an indictment against eight defendants: Hysen Sherifi, two defendants who were tried jointly with Sherifi (Mohammad Omar Aly Hassan and Ziyad Yaghi), and five other defendants (Daniel Boyd and his two sons Zakariya and Dylan Boyd, Anes Subasic, and Jude Kenan Mohammad). *Hassan*, 742 F.3d at 110. Later that month, all the defendants except Mohammad were arrested. Two superseding indictments followed. *Id.* Daniel, Zakariya, and Dylan Boyd pleaded guilty to certain charges pursuant to negotiated plea agreements with the government. *Id.* at 115. Sherifi, Hassan, and Yaghi were tried and convicted in a joint trial. *Id.* at 114-15. Subasic was tried separately and convicted. *Id.* at 111. Jude Mohammad was never arrested and has since died. J.A. 4172-73.

I. Indictment

Count One charged Sherifi and the seven other defendants with "conspiring to violate 18 U.S.C. § 2339A, that is, to provide material support and resources for violations of 18 U.S.C. § 956 (the 'Count One conspiracy')." *Hassan*, 742 F.3d at 111. Count Two charged Sherifi and the seven other defendants with "the

conspiracy offense of violating 18 U.S.C. § 956(a), i.e., to commit outside the United States acts that would constitute murder, kidnapping, and maiming if committed within the United States (the 'Count Two conspiracy')." *Id.* at 111. Counts Four and Eight charged Sherifi, "Daniel Boyd ('Boyd')," and Boyd's son Zakariya with "possessing firearms in furtherance of a crime of violence—particularly the Count Two conspiracy"—in violation of 18 U.S.C. § 924(c). *Id.* Count Eleven charged Sherifi and Boyd with conspiring to kill members of the U.S. uniformed services "in attacks on military personnel and installations in Virginia and elsewhere, in violation of 18 U.S.C. § 1117 (the 'Count Eleven conspiracy')." *Id.* Sherifi was not charged with any of the remaining counts.[2]

II. Trial

Sherifi, Hassan, and Yaghi were tried over a three-week period in September and October 2011. This Court detailed the trial evidence in its prior opinion

[2] "Count Three charged Boyd with receiving a firearm and ammunition in interstate commerce, with knowledge that the offenses set forth in Counts One and Two would be committed therewith," in violation of 18 U.S.C. § 924(b). *Id.* "Counts Five, Nine, and Ten charged Boyd (and in Count Five, Boyd's son Dylan) with knowingly selling firearms and ammunition to a felon, in violation of 18 U.S.C. §§ 922(d)(1) and 924." *Id.* "Counts Six and Seven charged Boyd with making false statements to the government by misrepresenting his plans to meet others," including Hassan and Yaghi, "when Boyd travelled to the Middle East in 2007," in violation of 18 U.S.C. § 1001(a)(2). *Id.* Counts Twelve and Thirteen charged Subasic with "knowingly making false statements to procure his naturalization as a citizen, in violation of 18 U.S.C. § 1425(a)." *Id.*

affirming their convictions and sentence on direct appeal. *Hassan*, 742 F.3d at 115-24. That evidence is summarized in relevant part below.

A. Daniel Boyd Becomes the Central Figure in the Conspiracy

The trial evidence "established a series of conspiratorial activities centering on" Daniel Boyd ("Boyd"). *Id.* at 115. A U.S. citizen "who converted to Islam as a child, Boyd had, as a young adult, spent time in Pakistan and Afghanistan in the 1980s and early 1990s." *Id.* "While living abroad, Boyd participated in the Afghan resistance against the Soviet occupation and received the nickname 'Saifulla,' which, in Arabic, means 'Sword of God.'" *Id.* Boyd had also "been in a training camp operated or funded by the notorious al-Qaida leader Osama bin Laden." *Id.* Boyd "returned to the United States in the early 1990s" and eventually "settled with his family near Raleigh." *Id.*

While in the United States, Boyd became "increasingly radicalized in his religious beliefs." *Id.* By 2004, he "began to espouse a violent ideology, including the view that the killing of non-Muslims was . . . a religious obligation imposed by Islam." *Id.* Boyd "began to meet and discuss his violent religious views with others at his Raleigh home" and at a grocery store he owned in nearby Garner. *Id.* Boyd's experience fighting in Afghanistan gave him special stature

within the Muslim community and attracted fellow extremists to him. *See*, *e.g.*, J.A. 1961, 2067, 3055.

Sherifi, Hassan, and Yaghi "talked with Boyd on numerous occasions during the course of the conspiratorial activities, during which they often discussed violent jihad." *Hassan*, 742 F.3d at 115. To Boyd, "jihad required 'doing something to fulfill [his] obligation in Islam,' and was 'suggestive of [men] actually involving [themselves] with going and physically helping with the resistance or fighting against . . . the NATO forces in Afghanistan or Iraq'" and elsewhere. *Id.* When Boyd referred to jihad, he specifically meant "[k]illing" people who did not share his views of Islam. J.A. 2858. The defendants, including Sherifi, agreed with this meaning of violent jihad. *See* J.A. 2858; *see also Hassan*, 742 F.3d at 115; J.A. 1034, 1243, 1258, 1260-61, 2269-70, 2350, 2572, 2592-93, 2732-33, 3625.

B. Yaghi, Hassan, and Mohammad Join the Conspiracy with Boyd

Boyd first met Yaghi in 2006. Aware of Boyd's experiences overseas and his views on violent jihad, Yaghi "asked Boyd where in Jordan he would find the 'best brothers.'" *Hassan*, 742 F.3d at 116. "This inquiry referred to Muslim men who were 'going to pray' and maintain 'the bonds of fellowship and Islam,' and those who 'understood [the] obligation of jihad' and could help Yaghi 'gain

access' to violent resistance movements." *Id.* "Boyd told Yaghi about a mosque in Jordan where he could find the 'best brothers.'" *Id.*

Acting on this information, Yaghi travelled to Jordan in October 2006. *Id.* Before he left the United States, Boyd and several others conveyed "their hope that Yaghi would make his way to the battlefield, and, if he died, find his way to heaven." *Id.* "According to Boyd, the terms 'battlefield' and 'battlefront' were used to refer to locations where Muslims were then actively waging violent jihad against the 'kuffar,'" or non-Muslims, "including wars in Afghanistan, Iraq, Kosovo, Chechnya, Somalia, Palestine, and Kashmir." *Id.* "Boyd and his coconspirators shared the view that getting to the jihadist battlefield and fighting against the kuffar was a necessary and laudable aspiration." *Id.*

While he was in the Middle East in 2006, Yaghi worked "to reach the battlefield to engage in violent jihad" and disseminated violent jihadist propaganda. *Id.* at 117. Yaghi "actively promoted the violent views and teachings of" Anwar al-Awlaki, "an al-Qaida leader who espoused violent and radical jihadist views." *Id.* at 117-18. Yaghi also stayed in touch with Hassan, who, like Yaghi, posted online numerous statements adhering "to the violent jihadist ideology." *Id.* In one post, Hassan discussed "getting high off [non-Muslims'] deaths" and "buryin[g] them." *Id.*; *accord* J.A. 2572.

Yaghi returned to North Carolina in 2007. Yaghi and Hassan maintained their friendship. They "discussed being familiar with firearms and assault weapons, as well as the need for training in their use, both with one another and with Boyd." *Hassan*, 742 F.3d at 117-18. Yaghi and Hassan "knew that Boyd maintained a large stockpile of such weapons" and "discussed the need to obtain such weapons to use in implementing their beliefs in violent jihad." *Id.* They also continued to distribute materials advocating violent jihad and attempted to recruit and indoctrinate others. On one occasion, Yaghi advocated violent jihad—killing non-believers—and the righteousness of suicide bombing to one of Hassan's co-workers. *See* J.A. 2093-95, 2113-15; *see also* J.A. 2557.

In early 2007, Boyd told Yaghi he would be travelling to Israel and Palestine with his sons and agreed to help Yaghi and Hassan travel to Israel "to 'get to a battlefront somewhere.'" *Hassan*, 742 F.3d at 118. In mid-2007, Boyd and his son Zakariya left the United States for Israel, and Yaghi and Hassan left the next day. *Id.* at 119. Boyd and Zakariya, and later Yaghi and Hassan, were denied entry to Israel and went to Jordan instead. *Id.* Hassan and Yaghi tried to contact Boyd while they were abroad but were unable to reach him. *Id.*

After returning to the United States later that year, Yaghi and Hassan remained close friends but had little contact with Boyd. *Id.* at 119-20. Boyd had

"ostracized" Yaghi and Hassan because Boyd thought they were talking too much about their travels to get to a battlefield to fight overseas. J.A. 3067-68; *accord* J.A. 1845-46. During one visit with Boyd, Yaghi introduced Boyd to Jude Mohammad. *Hassan*, 742 F.3d at 119-20. "Boyd and Mohammad became good friends, often discussing . . . their shared radical and violent religious views." *Id.* Mohammad "began to espouse Boyd's violent jihadist ideology," and, in 2008, Mohammad went to Pakistan. *Id.*

Although Yaghi and Hassan continued to have little contact with Boyd, Yaghi and Hassan continued carrying on "a 'parallel set of initiatives'" in 2008 and 2009. *Id.* at 120. Yaghi continued "promoting jihad and the corresponding moral obligation to commit violence against non-Muslims." *Id.* Yaghi and Hassan continued discussing jihadist ideology, engaging in weapons training, and disseminating jihadist propaganda. *Id.* Hassan also continued "seeking to recruit others to his violent ideology." *Id.*

C. Sherifi, Subasic, and Boyd's Sons Also Join the Conspiracy

In 2008, Sherifi met Boyd and, later that year, introduced Boyd to coconspirator Anes Subasic. *Id.* at 121. Sherifi and Boyd "became close friends" and often "discussed their shared views advocating a violent jihadist ideology." *Id.* To Sherifi, jihad meant "murderous acts against innocent soldiers and

civilians" who did not share his understanding of Islam. J.A. 2269-70, 2199-2201, 2217; *see* J.A. 1034, 1243, 1258, 2858. Like Boyd, Sherifi also "believed that dying 'shahid'—as a martyr—was an important goal for a good Muslim." *Hassan*, 742 F.3d at 121. In many of his conversations with Boyd, Subasic, and others, Sherifi discussed the righteousness of jihad and how to best accomplish this goal. *See*, *e.g.*, J.A. 1863-1938, 2039-41, 2048, 2199-2201, 2217, 2750, 2765-67, 2785, 2877-78, 2989, 3001. Sherifi also prepared for the battlefield by working to obtain the correct travel documentation, focusing on his physical fitness, training to use weapons, and helping others fight on the battlefield against non-believers. *See*, *e.g.*, *Hassan*, 742 F.3d at 121-24; J.A. 1909, 1913, 2228, 2248, 2374-75, 2473.

Sherifi, Boyd, Dylan, and Zakariya raised money to fund their own and others' travels to the battlefield to wage violent jihad abroad. *Hassan*, 742 F.3d at 121. Sherifi often spoke of the financial needs of the good brothers in Kosovo and sought assistance from Boyd and others in that regard. In June 2008, Sherifi gave Boyd $500 to "either help get somebody over there to the battlefield or get it to the people who were already there fighting." *Id.* (quotation marks omitted). That month Sherifi also expressed to Boyd his frustration that he could not get the necessary documents to travel to the battlefield. *Id.* Boyd suggested that if

Sherifi were unable to travel abroad, Sherifi should "'make jihad' in the United States." *Id.* Sherifi agreed, responding, "God willing." *Id.*

In July 2008, Sherifi finally obtained the necessary travel documents and departed for Kosovo. *Id.* Sherifi told Boyd that his ultimate plan was to get to Jerusalem and perhaps Chechnya or Syria "to aid in violent jihadist movements." *Id.* In January 2009, Sherifi told Boyd that "he had obtained travel documents to a location that, though not his planned destination, was 'a good place to seek the greatest pleasure of Allah.'" *Id.* Sherifi also told an informant ("FBI Informant One") about his "efforts to obtain weapons and participate in weapons training with likeminded persons in Kosovo." *Id.* at 122. Sherifi later indicated to FBI Informant One that Sherifi had found "a 'safe route . . . to reach a current battlefield.'" *Id.*

A second informant ("FBI Informant Two") befriended Sherifi in January 2009. *Id.* FBI Informant Two was a U.S. Army Staff Sergeant serving in Kosovo. *Id.* "Sherifi, who believed that jihad meant 'to fight physically with weapons against the enemies of Islam, wherever they are at and whoever they might be,' thereafter began to discuss his violent jihadist beliefs with" FBI Informant Two and tried to radicalize and recruit him. *Id.* at 122, 143 (internal citation omitted). FBI Informant Two explained that "jihad, to Sherifi, was not

'the jihad of the Prophet Mohammad,' but rather 'just murderous acts against innocent soldiers and civilians.'" *Id.* at 122.

Over the next few months, Sherifi bombarded FBI Informant Two with jihadist propaganda. Sherifi gave him "literature and videos, including a video of a beheading, coupled with the explanation that it was '[w]hat happens to the one who leaves [Islam].'" *Id.* Sherifi also shared with him "the teachings of al-Awlaki, providing him with an al-Awlaki writing entitled '44 Ways to Support Jihad,' in which [al-Awlaki] explained how devoted 'brothers' could assist violent jihadist causes by providing money and translating extremist texts, among other things." *Id.* According to FBI Informant Two, "Sherifi believed the 'whole point of governance' was to impose Shari'ah law, and that Sherifi did not respect any other form of government." *Id.* FBI Informant Two also testified that "Sherifi viewed everyone who did not share Sherifi's belie[fs] in violent ideology to be an enemy of Islam." *Id.* (internal quotation marks omitted).

In early 2009, Sherifi made several statements to different individuals about his effort to remain patient for an opportunity to fight, his preferred location for jihad, and his efforts to prepare himself. *See id.* at 121-22. He mentioned to FBI Informant One his attempts to secure weapons to fight with the brothers in Kosovo. *Id.* at 122; J.A. 1052-55. Sherifi indicated that he was still training, which in

context meant "training about the gun and all fighting, and stuff like that." J.A. 1073. Sherifi tried to travel to Chechnya, but was unsuccessful, apparently in part because of financial reasons. *See* J.A. 1092.

While in Kosovo, Sherifi "also spent time with some like-minded individuals who agreed with Sherifi and advocated violent jihad." *Hassan*, 742 F.3d at 122. "Sherifi spoke with Bajram Asllani, also known as Abu Hatab, who was a native of Kosovo." *Id.* At the time of trial, Asllani "was 'wanted by the United States government' on 'charges of material . . . support to terrorism and conspiracy to kill, maim and injure overseas.'" *Id.* Asllani was also wanted in Serbia, "where he had been tried and convicted in absentia for his involvement in a 'conspiracy to blow up several buildings.'" *Id.* When "Sherifi returned to the United States from Kosovo" in May 2009, Sherifi "maintained contact with Asllani" and sent him "money so that Asllani, who was still in Kosovo, could obtain travel documents." *Id.* Sherifi and Asllani were planning to travel together for jihad. J.A. 1244.

Back in the United States, Sherifi told friends that he had returned to North Carolina to save money to buy farmland in Kosovo "to be used by his jihadist 'brothers' en route to the 'battlefield.'" *Hassan*, 742 F.3d at 123. He also helped Boyd and a third FBI informant build a "weapons bunker" where Boyd planned to

conceal his "weapons arsenal." *Id.* at 143; *see id.* at 123. Throughout the conspiracy, "Boyd secured and maintained an extensive firearm and weapons arsenal" in his home and vehicles. *Id.* at 122. Boyd concentrated on "obtaining armor-piercing ammunition as well as deadly hollow-point handgun ammunition." *Id.* "The weapons bunker consisted of an entrenchment roughly six feet deep and was lined with sandbags for protection and stability." *Id.* at 123.

In spring 2009, Sherifi and Boyd "developed a scheme to attack the Quantico Marine Corps Base in eastern Virginia." *Id.* That base was an ideal target for the two men because "Boyd was already familiar with [it], having lived there as a child." *Id.* Also, "Sherifi worked delivering medical supplies to . . . the Fort Bragg Army Post in North Carolina" and "boasted to Boyd about how easy it was, as a delivery truck driver, to access such military facilities." *Id.* Boyd gathered information about Quantico and "reported to Sherifi that it was easy to access the base," as Sherifi predicted. *Id.*

In mid-2009, Sherifi, along with Boyd and two of the FBI informants, "participated in two weapons training sessions" in North Carolina on property that, unbeknownst to Sherifi and Boyd, was under FBI surveillance. *Id.* "Boyd organized the 'practice' sessions with the 'idea . . . that they would use this [training] in furtherance if they were to go to try and fight somewhere.'" *Id.*

During the training sessions, Boyd taught his trainees about "military tactics and weapons skills, showing them how to use a variety of firearms." *Id.* "Boyd also had his trainees practice their firearms skills while he fired automatic weapons, so that they would become accustomed to using weapons while being subjected to the sound of gunfire." *Id.* at 123-24. In addition to participating in the training sessions, Sherifi "sought to recruit others" to join a session. *Id.* at 124. Before they could hold more sessions, Sherifi and Boyd were arrested in July 2009. *Id.*

III. Convictions and Initial Sentencing

On October 13, 2011, the jury convicted Sherifi of the Count One, Count Two, and Count Eleven conspiracies, as well as the Counts Four and Eight firearm offenses. *Hassan*, 742 F.3d at 111, 124. Hassan was convicted of the Count One conspiracy. *Id*. Yaghi was convicted of the Count One and Count Two conspiracies. *Id.* Subasic, who was tried separately, was convicted of the four offenses alleged against him. *Id.* at 111. "Boyd pleaded guilty to the Count One and Count Two conspiracies, and, pursuant to his plea agreement with the government, Counts Three through Eleven were dismissed as to him." *Id.* "Dylan and Zakariya Boyd each pleaded guilty to the Count One conspiracy, and, in exchange, the other charges against them were dismissed." *Id.*

A. Sherifi

Sherifi was sentenced on January 13, 2012. The district court calculated an advisory Guidelines sentence under the U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2011) ("U.S.S.G."). Sherifi had a base offense level of 33 under U.S.S.G. § 2A1.5. *See Hassan*, 742 F.3d at 147. He received two 3-level victim-related enhancements: one under U.S.S.G. § 3A1.1(a) for intentionally selecting any victim or property because of the victim's actual or perceived race, religion, national origin, or ethnicity; and one under U.S.S.G. § 3A1.2(a) for intending a victim to be a government officer or employee and being motivated by that person's status. *Id.* Sherifi also received the 12-level terrorism enhancement under U.S.S.G. § 3A1.4 for committing a felony that involved, or was intended to promote, terrorism. *Id.* With these enhancements, Sherifi's adjusted offense level was 51. That level was further adjusted to a total offense level of 43 based on the Guidelines provision requiring any offense level greater than 43 to be treated as an offense level of 43. *See* U.S.S.G., ch. 5, part A, application n.2. Sherifi had a criminal history category VI because of the district court's decision to apply the terrorism enhancement. *See Hassan*, 742 F.3d at 148.

Based on these computations, the district court calculated an advisory Guidelines sentence of 180 months of imprisonment (the statutory maximum) for

the Count One conspiracy; life imprisonment for the Count Two conspiracy; the statutorily mandated sentences of 60 months of imprisonment for the Count Four Section 924(c) conviction, and 300 months of imprisonment for the Count Eight Section 924(c) conviction, both consecutive to any other sentence; and life imprisonment for the Count Eleven conspiracy. *Id.* at 147. As relevant here, Sherifi agreed that the statutory maximum sentence for the Count Two conspiracy was "life" imprisonment. Sent. Mem. at 7, *United States v. Sherifi*, No. 5:09-cr-216 (Jan. 10, 2012) (D.E. 1625).

Rather than impose a life sentence, the district court granted Sherifi's "motion for downward variance from the Guidelines range of life imprisonment as to the conspiracy counts in part due to the mandatory consecutive sentence of 360 months' imprisonment" on the Count Four and Count Eight firearms convictions. *Sherifi*, 2020 WL 5026846, at *1. The district court sentenced Sherifi to "concurrent 180-month terms [of imprisonment] on Counts One, Two, and Eleven; a consecutive 60-month term on Count Four; and a consecutive 300-month term on Count Eight." *Hassan*, 742 F.3d at 147 n.37. The aggregate term of imprisonment was 540 months.

On May 10, 2013, Sherifi was sentenced to life imprisonment in a separate federal criminal prosecution following convictions for conspiracy to commit

murder for hire and related offenses. Judgment, *United States v. Sherifi*, No. 7:12-cr-20 (E.D.N.C. May 10, 2013) (D.E. 363); J.A. 4124.

B. The Coconspirators' Sentences

Hassan was sentenced to 180 months of imprisonment.[3] *Hassan*, 742 F.3d at 111. Yaghi was sentenced to 380 months of imprisonment. *Id.* Subasic was sentenced to 360 months of imprisonment. *Id.* Boyd was sentenced to 216 months of imprisonment. *Id.* Dylan and Zakariya Boyd were sentenced to 84 months and 93 months of imprisonment, respectively. *Id.*

IV. Post-Trial Proceedings

A. Sherifi's Convictions and Sentence Are Affirmed on Direct Appeal

Sherifi, Hassan, and Yaghi appealed their convictions and sentences on several grounds. As to their convictions, they argued that the district court erred "in its handling of the argument that their speech espousing violent jihad was protected by the First Amendment." *Hassan*, 742 F.3d at 125. They also asserted various evidentiary errors and argued that the district court erred in denying their motions for judgments of acquittal when, according to the

[3] Like Sherifi's Guidelines computations, Hassan's and Yaghi's advisory Guidelines ranges on Count One were 180 months of imprisonment, and Yaghi's advisory Guidelines range on Count Two was life imprisonment. *Hassan*, 742 F.3d at 147.

defendants, the trial evidence was legally insufficient to sustain their convictions. *Id.* The defendants also argued that their sentences were procedurally unreasonable because they lacked the specific intent necessary to apply the terrorism enhancement. *Id.* at 147-48.[4] Sherifi and Yaghi also challenged the substantive reasonableness of their sentences. *Id.* at 148. This Court rejected all the defendants' arguments and affirmed. *Id.* at 151.

B. The District Court Vacates Sherifi's Section 924(c) Convictions

On August 25, 2020, the district court granted Sherifi's 28 U.S.C. § 2255 motion to vacate his firearms convictions under the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that Section 924(c)(3)(B)'s definition of a "crime of violence" is unconstitutionally vague). *Sherifi*, 2020 WL 5026846, at *3 (vacating Sherifi's Section 924(c) convictions on the ground that Counts One, Two, and Eleven were not crimes of violence under *Davis*). The district court also vacated Sherifi's sentence and granted his request for a resentencing on the remaining counts. The district court found that a "full resentencing" was appropriate because "the court departed downwardly at

[4] To apply the terrorism enhancement, the district court must find, in relevant part, that the offense "'is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.'" *Hassan*, 742 F.3d at 148 (quoting 18 U.S.C. § 2332b(g)(5)).

[Sherifi's] original sentencing due to the lengthy sentences" on the Count Four and Count Eight Section 924(c) convictions. *Id.* at *4.

V. Resentencing

Sherifi and the government agreed with the Presentence Investigation Report that the advisory Guidelines range for the remaining counts was the same as the advisory Guidelines range for those counts at the original sentencing. J.A. 4124. The Section 924(c) convictions were mandatory consecutive counts and thus "had no effect on the original guideline imprisonment calculation and range." *Id.* Consequently, the total offense level was 43, and the criminal history category was VI. Those computations yielded an advisory Guidelines range of life imprisonment on Counts Two and Eleven and 180 months of imprisonment (the statutory maximum) on Count One. *Id.* As at the initial sentencing, Sherifi also agreed that that the maximum statutory penalty for the Count Two conspiracy was life imprisonment. *See* S.J.A. 4231; J.A. 4157.

The district court held a resentencing hearing on May 17, 2022, and sentenced Sherifi to 180 months of imprisonment on Count One, concurrent with "516 months [of imprisonment] on Counts Two and Eleven for a total term of incarceration of 516 months," followed by three years of supervised release on Count One and five years on Counts Two and Eleven. J.A. 4190. The district

court reduced the prior sentence by 24 months (from 540 to 516 months of imprisonment) for Sherifi's post-conviction conduct and, as before, agreed with Sherifi that a within-Guidelines sentence was "too long" in this case. J.A. 4188-90. The district court nonetheless concluded that a lengthy sentence was necessary, given the "dangerousness" of the offense, "[t]he need to discourage this type of conduct," and "to promote respect for the law." J.A. 4188. In imposing this sentence, the district court considered, among the other 18 U.S.C. § 3553(a) factors, the advisory Guidelines range and Sherifi's objections to the reasonableness of that range. J.A. 4153-57. The district court also rejected Sherifi's arguments that the sentence created disparities with his coconspirators' sentences, J.A. 4156-57, and that applying the terrorism enhancement would violate the Eighth Amendment's prohibition on cruel and unusual punishment, J.A. 4178. The district court reaffirmed its application of the terrorism enhancement, "rely[ing] on the prior determinations with respect to that enhancement in ruling against [Sherifi's] objection based on the Eighth Amendment." J.A. 4178. Sherifi now appeals this sentence.

Summary of Argument

1. The district court's sentence was procedurally reasonable because the district court adequately explained its sentence, taking into consideration Sherifi's argument that the terrorism enhancement had a significant effect on his advisory Guidelines range, and then granted Sherifi's request for a variance. At bottom, Sherifi challenged the terrorism enhancement on the ground that the district court should vary from the Guidelines range and impose a more individualized sentence based on the Section 3553(a) factors. That is what the district court did. Even if the district court's explanation had been insufficient, any such error would have been harmless because it would not have affected the length of the sentence.

2. The district court's decision to impose a sentence above 35 years of imprisonment on Count Two, without having instructed the jury to explicitly find that the conspiracy's object was to murder or kidnap, was plain error under *Apprendi*. But this Court should affirm the sentence because the district court's error is not reversible for two independent reasons. First, Sherifi invited the error, so his *Apprendi* claim is unreviewable on appeal. Second, even if Sherifi's claim were reviewable, this Court would review that claim only for plain error because, as Sherifi acknowledges, he did not raise it below. And the error, though plain, is not reversible because it did not affect Sherifi's substantial rights (or otherwise

affect the fairness, integrity, or public reputation of the judicial proceedings) when the evidence overwhelmingly showed that the object of the conspiracy was murder.

3. Contrary to Sherifi's claim, the jury did make the motivation finding necessary to apply the hate-crime enhancement under U.S.S.G. § 3A1.1(a) because the jury's verdict on Count Eleven, in the context of all the evidence, was sufficient to establish the enhancement based on the victims' national origin. Even if the jury's verdict were not sufficient, that circumstance would not warrant reversal here, when any such alleged error did not affect Sherifi's substantial rights or otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. The evidence was overwhelming that Sherifi and his coconspirators intentionally selected victims not only because of their national origin, but also because of their religion. Also, Sherifi's adjusted offense level would have been the same, even if the district court had not applied the hate-crime enhancement, because the terrorism enhancement under U.S.S.G. § 3A1.4 applied.

Argument

I. The Sentence Is Procedurally Reasonable

A. Standard of Review

This Court generally reviews a sentence "under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007); *see United States v. Lynn*, 912 F.3d 212, 216 (4th Cir. 2019). In reviewing a sentence, this Court must ensure that the district court did not commit any "significant procedural error," such as failing to properly calculate the applicable Guidelines range, failing to consider the 18 U.S.C. § 3553(a) factors, or failing to adequately explain the sentence. *Gall*, 552 U.S. at 51.

B. Merits

1. The District Court Adequately Explained the Sentence

Sherifi argues that his sentence was procedurally unreasonable because the district court failed to respond to his argument that the district court should vary downward on the ground that the terrorism enhancement under U.S.S.G. § 3A1.4 inappropriately skewed his recommended Guidelines range. Br. 25-28. The terrorism enhancement increases a defendant's offense level by 12 levels and sets the defendant's criminal history score at VI if the offense "involved" or was "intended to promote" a "federal crime of terrorism." U.S.S.G. § 3A1.4. As

relevant here, a "federal crime of terrorism" is "an offense that . . . is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5) (cross-referenced in U.S.S.G. § 3A1.4 cmt. n.1). The district court applied the terrorism enhancement over Sherifi's objection upon affirming its finding made at the initial sentencing hearing that Sherifi committed a felony that involved, or was intended to promote, terrorism. *See* J.A. 4153-54. This Court upheld the district court's earlier decision to apply the terrorism enhancement on direct review. *Hassan*, 742 F.3d at 147-50.

Sentencing courts are required to adequately explain their sentences. *Gall*, 552 U.S. at 50. But they are not required to "robotically tick through" each of the Section 3553(a) factors in a checklist fashion; nor must their explanation be elaborate or lengthy. *United States v. Montes-Pineda*, 445 F.3d 375, 380 (4th Cir. 2006) (quotation marks omitted); *see United States v. Hernandez*, 603 F.3d 267, 271 (4th Cir. 2010); *see also United States v. Allmendinger*, 706 F.3d 330, 343 (4th Cir. 2013) (holding that the sentencing court need not issue a "comprehensive, detailed opinion"). Rather, a sentencing court's explanation must "allow for meaningful appellate review" and "promote the perception of fair sentencing." *Gall*, 552 U.S. at 50.

An explanation suffices if it gives "some indication (1) that the [sentencing] court considered the § 3553(a) factors with respect to the particular defendant . . . and (2) that it has also considered the potentially meritorious arguments raised by both parties about sentencing." *Montes-Pineda*, 445 F.3d at 380. This Court's "review of a district court's sentencing explanation is not limited to the court's statements at the moment it imposes sentence," but rather this Court "look[s] at the full context" surrounding the explanation. *United States v. Nance*, 957 F.3d 204, 213 (4th Cir. 2020). A district court's consideration of pertinent factors may be implicit in its ultimate ruling. *See United States v. Johnson*, 138 F.3d 115, 119 (4th Cir. 1998).

Sherifi's argument fails because the district court granted his request for a variance. *See* J.A. 4188-90. At bottom, Sherifi challenged the terrorism enhancement on the ground that the district court should vary from the Guidelines range and impose a more individualized sentence based on the Section 3553(a) factors. That is what the district court did. And Sherifi does not argue that the court's explanation regarding the Section 3553(a) factors and the ultimate sentence it imposed was insufficient. His procedural reasonableness argument fails for that reason alone.

Although the district court did not accord the weight to Sherifi's arguments that he desired, that decision does not render the court's analysis inadequate. In explaining its sentence, the district court considered Sherifi's argument that the terrorism enhancement had a significant effect on his advisory Guidelines range. The district court explicitly addressed Sherifi's challenges to "the reasonableness of the guideline range" and agreed with Sherifi that a within-Guidelines sentence was inappropriate here. J.A. 4157, 4188-90. The district court acknowledged that, because of the terrorism enhancement, "the guidelines slide [Sherifi] over to a [criminal history] level VI and drive a lengthy sentence in that part." J.A. 4153-54. The district court acknowledged that the offense level, which also resulted from applying the terrorism enhancement, was "[a] very serious offense level for very serious crimes that remain." J.A. 4154. The district court acknowledged that the Guidelines advised "a life sentence" and agreed with Sherifi that such a sentence was "too long" under the particular facts and circumstances of this case. J.A. 4188. And the district court ultimately imposed a below-Guidelines sentence. Although this sentence was lengthy, the district court explained that this sentence was "sufficient but not greater than necessary" to comply with the sentencing goals set forth in Section 3553(a). J.A. 4156.

The district court also addressed Sherifi's terrorism-enhancement challenge in the context of his broader Eighth Amendment challenge. At resentencing, Sherifi's counsel told the district court that Sherifi was "not objecting to the [terrorism] enhancement except in the context of [his] Eighth Amendment" challenge. J.A. 4178. Sherifi argued that reimposing a sentence of 540 months of imprisonment would violate the Eighth Amendment's prohibition on cruel and unusual punishment because such a sentence would be "disproportionate" to the offenses Sherifi committed. S.J.A. 4243. The district court expressly rejected this argument, "rely[ing] on the prior determinations with respect to [the terrorism] enhancement" at the initial sentencing. J.A. 4178, 4188-89, 4068-73.

At the initial sentencing, the district court explained that it was applying the terrorism enhancement because it found that Sherifi's offense was "'calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.'" J.A. 4070 n.5 (quoting 18 U.S.C. § 2332b(g)(5) (cross-referenced in U.S.S.G. § 3A1.4 cmt. n.1)). In particular, the district court found that Sherifi and his coconspirators' "goal was to kill non-Muslims, specifically those they believed were living unjustly in Muslim lands"; that Sherifi "traveled to Kosovo to engage in jihad" and contacted "like-minded individuals"; that Sherifi returned to the United States "with the intent to solicit

funds and personnel to support the mujahideen"; that "Sherifi received $15,000 to support the mujahideen"; that Sherifi "participated in the firearms training" with the Boyds; and that Sherifi tried "to convert" FBI Informant Two. J.A. 4070 n.5.

At the resentencing, the district court reaffirmed those findings and then varied downward from the advisory Guidelines range of life imprisonment to impose a sentence of 516 months of imprisonment. The district court determined that although Sherifi's youth and traumatic family background warranted a below-Guidelines sentence, "a substantial sentence" was nonetheless necessary given the seriousness of the offense and to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further criminal activity. J.A. 4072-73, 4188-89. The district court discussed the many ways in which Sherifi "plunged himself into a radicalism which subscribed to a view of Islam that has the goal of waging violent jihad against anyone perceived as being in Muslim lands unjustly." J.A. 4073. And the district court explained that "[t]hrough his conduct and actions over a several year period, [Sherifi] evidenced his deeply seeded belief in the necessity for this, and sought to advance violence against these groups." J.A. 4073; *see* J.A. 4189. Based on these and other considerations, the district court concluded that the sentence was sufficient, but not greater than necessary, to serve the sentencing goals set forth in Section 3553(a).

As all these statements show, the district court had considered Sherifi's argument about the terrorism enhancement's effect on the Guidelines range and found this circumstance insufficient to warrant an even lower sentence. *See Montes-Pineda*, 445 F.3d at 381 (holding that a sentencing court is not required to "spell out what the context of its explanation made patently obvious"); *see also United States v. Rivera-Santana*, 668 F.3d 95, 105 (4th Cir. 2012) (rejecting defendant's argument that the sentence would result in "unwarranted sentencing disparities" and finding that the district court adequately explained its sentence by referring to the defendant as "atypical" and an "anathema to society"). That the district court did not accord the weight to Sherifi's arguments that he desired does not render the court's analysis inadequate. *See Montes-Pineda*, 445 F.3d at 380.

2. Any Error Would Have Been Harmless

Even if the district court's explanation rejecting Sherifi's argument were insufficient, any such error would have been harmless. For this Court to find a procedural sentencing error harmless, the government must show that the error "did not have a substantial and injurious effect or influence on the result." *United States v. Boulware*, 604 F.3d 832, 838 (4th Cir. 2010) (internal quotation marks and citation omitted). The government can meet this burden by showing that it would be "unrealistic" to think that the error affected the sentence's length. *Id.* at

840. To determine whether a district court's failure to explain a sentencing decision was harmless error, this Court considers two primary factors. The first factor is the strength or weakness of a party's arguments that the district court did not address. *Id.* at 839-40. The second factor is an indication in the record that the district court considered and understood those arguments. *Id.*

Taking the second factor first, the record makes clear that the district court considered and understood Sherifi's argument. As shown above, the district court stated that it had considered Sherifi's challenges to "the reasonableness of the guideline range" and the disproportionality of the sentence. J.A. 4157, 4178-79; *see Boulware*, 604 F.3d at 840 (holding that if the government can show that the district court fully considered a party's arguments for a particular sentence, but failed to explicitly address them, that failure is harmless). Also, any alleged failure by the district court to explain its reasoning would not have influenced the sentence because the district court was convinced that the sentence it imposed was appropriate. J.A. 4178 ("I have no second thoughts about the sentence that I imposed. No second thoughts at all."); J.A. 4188-89 ("I have no reason to disturb what's rooted in the record of this case. That drives a very lengthy sentence here, just how dangerous this conduct is."). According to the district court, the only new circumstances at resentencing were (1) the fact that the Section 924(c)

convictions had been vacated and (2) Sherifi's post-conviction conduct. *See* J.A. 4190, 4154-55. Although these circumstances led the district court to reduce Sherifi's sentence by 24 months of imprisonment, the district court reaffirmed its findings as to the terrorism enhancement's applicability, which were also affirmed by this Court on direct review. *See* J.A. 4190; *Hassan*, 742 F.3d at 147-50.

As for the first factor, Sherifi's argument at resentencing that the terrorism enhancement yielded an unjustly disproportionate sentence was weak. The terrorism enhancement can dramatically increase a defendant's sentencing range, and there was good reason for it in this case. The terrorism enhancement was added in its current form at Congress's direction, *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 730, 110 Stat. 1214, 1303, because "Congress wanted to impose a harsher punishment on any individual who committed an offense that involved or [was] intended to promote one of the enumerated terrorist acts, and intended, through that offense, to influence the conduct of others." *United States v. Tankersley*, 537 F.3d 1100, 1113 (9th Cir. 2008). The terrorism enhancement and its application notes collectively reflect a determination by Congress and the Sentencing Commission that "an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and rehabilitating the criminal, and thus that

terrorists and their supporters should be incapacitated for a longer period of time." *United States v. Meskini*, 319 F.3d 88, 92 (2d Cir. 2003); *see United States v. Ressam*, 679 F.3d 1069, 1090-91 (9th Cir. 2012) (en banc) (outlining rationales supporting longer sentences for terrorism offenses). That is especially true here, where the district court, as discussed above, detailed the many ways in which the dangerousness of Sherifi's offense conduct appropriately drove "a very lengthy sentence here." J.A. 4070 n.5, 4188-89.

II. The District Court Did Not Commit Reversible *Apprendi* Error

The district court sentenced Sherifi to 516 months (43 years) of imprisonment (concurrent to the other sentences) for his conviction on Count Two of conspiracy to murder, kidnap, maim, or injure persons abroad, in violation of 18 U.S.C. § 956(a). Sherifi argues that his sentence should be vacated under the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the jury did not find beyond a reasonable doubt that the object of the conspiracy was to murder or to kidnap persons abroad. Although the government agrees that the district court plainly erred, this Court should affirm the sentence because the error did not affect Sherifi's substantial rights.

In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed

statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 490. A defendant convicted of conspiracy under 18 U.S.C. § 956(a) is subject to the penalties set forth in 18 U.S.C. § 956(a)(2). Under that provision, a defendant is subject to a maximum sentence of life imprisonment "if the offense is conspiracy to murder or kidnap" persons abroad. 18 U.S.C. § 956(a)(2)(A). If the offense "is conspiracy to maim" such persons, the defendant is subject to a maximum sentence of 35 years of imprisonment. 18 U.S.C. § 956(a)(2)(B). Sherifi's sentence thus depended upon an increase in the statutory maximum sentence by virtue of a fact (*i.e.*, that the object of the conspiracy was to murder or to kidnap) that the instructions did not expressly require the jury to find. Consequently, the district court's decision to impose a sentence above 35 years of imprisonment on Count Two, without having instructed the jury to explicitly find whether the conspiracy's object was to murder or kidnap, or just to maim, was plain error under *Apprendi*.

This Court should nonetheless affirm the sentence because the district court's error is not reversible for two independent reasons. First, Sherifi invited the error, so his *Apprendi* claim is unreviewable on appeal. Second, even if Sherifi's claim were reviewable, this Court would review that claim only for plain error because, as Sherifi acknowledges, he did not raise it below. And the error,

though plain, is not reversible because it did not affect Sherifi's substantial rights (or otherwise affect the fairness, integrity, or public reputation of the judicial proceedings) when the evidence overwhelmingly showed that the object of the Count Two conspiracy was murder.

A. Standard of Review

1. Invited Error

Unless the defendant shows a "miscarriage of justice" or doubt as to "the integrity of the judicial process," this Court refuses review in cases where the defendant invited the claim of error. *United States v. Herrera*, 23 F.3d 74, 75-76 (4th Cir. 1994); *accord United States v. Hickman*, 626 F.3d 756, 772 (4th Cir. 2010) (observing that, in the absence of "extraordinary circumstances," this Court "has never reviewed errors invited by the appellant"). The invited-error doctrine precludes review of an error that the defendant encouraged the district court to make. *Herrera*, 23 F.3d at 75-76. As relevant here, where a defendant "expressly acknowledge[s]" that the district court could impose a particular punishment, the invited-error doctrine precludes review of the defendant's challenge to the district court's imposition of that punishment. *United States v. Love*, 449 F.3d 1154, 1157 (11th Cir. 2006) (per curiam); *see United States v. Groover*, Nos. 20-12760, 20-14435, 2021 WL 3205719 (11th Cir. July 29, 2021)

(refusing to review an *Apprendi* challenge to the district court's restitution order where the defendant acknowledged at sentencing that he owed restitution); *see also United States v. Solis*, 299 F.3d 420, 451-52 (5th Cir. 2002) (applying the invited-error doctrine to an *Apprendi* claim).

Sherifi invited any error the district court committed in finding that the applicable statutory maximum penalty for the Count Two conspiracy was life imprisonment. During the resentencing proceeding, Sherifi agreed with the district court, the Presentence Investigation Report, and the government that the maximum statutory penalty and the advisory Guidelines range for the Count Two conspiracy was life imprisonment.[5] S.J.A. 4231 ("The Probation Office determined, and the parties concur, that the revised Total Offense Level for the three remaining convictions is 43 in Criminal History Category VI, which yields a guideline range of life on Counts Two and Eleven and a guideline range of 180 months on Count One."); J.A. 4157 (defense counsel agreeing with the district court that the advisory Guidelines range on the Count Two conspiracy is life

[5] Sherifi also agreed at the initial sentencing that the statutory maximum sentence for the Count Two conspiracy was "life" imprisonment. Sent. Mem. at 7, *United States v. Sherifi*, No. 5:09-cr-216 (Jan. 10, 2012) (D.E. 1625). Sherifi did not raise an *Apprendi* claim on direct appeal from the initial sentencing, nor did he raise such a claim in the collateral proceedings in district court. *See Sherifi*, 742 F.3d at 125.

imprisonment). And, as explained below, Sherifi does not show any extraordinary circumstances that would allow review of this invited error. Accordingly, Sherifi is not entitled to review of his *Apprendi* claim.

2. Plain Error

Even if Sherifi had not invited the error that led to his *Apprendi* claim, that claim would be reviewable only for plain error because, as Sherifi acknowledges (Br. 28), Sherifi never raised that claim in the district court. *See United States v. Olano*, 507 U.S. 725, 734-35 (1993); *United States v. Brown*, 202 F.3d 691, 698 n.13 (4th Cir. 2000). On plain-error review, "it is the defendant rather than the [g]overnment who bears the burden of persuasion." *United States v. Baptiste*, 596 F.3d 214, 220 (4th Cir. 2010). "[A]n appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks omitted). "Plain error review is strictly circumscribed and

meeting all four prongs is difficult, as it should be." *United States v. Byers*, 649 F.3d 197, 213 (4th Cir. 2011) (internal quotation marks omitted).

B. The District Court's Error Is Not Reversible

Even under plain-error review, the district court's error is not reversible because the error did not affect Sherifi's substantial rights or otherwise affect the fairness, integrity, or public reputation of judicial proceedings for two reasons. *See Neder v. United States*, 527 U.S. 1, 2-3 (1999) (holding that a district court's failure to instruct the jury on an element of an offense can be harmless). First, the evidence establishing that the object of the conspiracy was to murder persons abroad, not merely to maim them, was overwhelming and essentially uncontroverted. *See United States v. Cotton*, 535 U.S. 625 (2002) (holding that the failure to charge drug quantity in the indictment did not affect the fairness, integrity, or public reputation of judicial proceedings where the evidence was "overwhelming" and "essentially uncontroverted" that the offense involved the threshold drug quantity for the enhanced sentence); *United States v. Smith*, 441 F.3d 254, 272-73 (4th Cir. 2006) (holding that where the evidence is overwhelming and essentially uncontroverted, this Court will not correct an *Apprendi-Booker* error on plain-error review). Second, Sherifi would have received the same sentence regardless of the *Apprendi* error because he was convicted on two

additional counts, one for which he was also sentenced to 516 months of imprisonment. J.A. 4190.

1. The Evidence Was Overwhelming and Uncontroverted

First, the trial evidence overwhelmingly showed that the object of the conspiracy was murder. The district court found that the conspirators' "goal was to kill non-Muslims, specifically those they believed were living unjustly in Muslim lands." *See Hassan*, 742 F.3d at 149. On direct review, this Court found that, in Boyd's view, "the killing of non-Muslims was a prescribed obligation" and that, like Boyd, "Sherifi believed that jihad 'was just murderous acts against innocent soldiers and civilians.'" *Id.* at 143-44. This Court further found that "Sherifi confirmed his adherence to the violent jihadist ideology he shared with Boyd, plus the need to act in accordance therewith." *Id.* at 142. The trial evidence established these findings conclusively.

FBI Informant One testified that the conspirators were "planning to go to fight and to kill people. That's what their plan [was]." J.A. 1258-61. Indeed, Zakariya Boyd testified that his father believed in an "almost indiscriminate kind of killing jihad." J.A. 2732-33. According to Zakariya, when his father referred to jihad, his father meant "[k]illing [nonbelievers]." J.A. 2858. Daniel Boyd threatened to kill nonbelievers, *see* J.A. 4276, and taught others that "[i]t is halal to

pick up rifles and go to Fort Bragg and destroy [nonbelievers]," J.A. 1203-04. FBI Informant One was concerned that Daniel Boyd was going to kill nonbelievers but testified that Boyd was ultimately unsuccessful because "he [got] arrested before" he could carry out that plan. J.A. 1243; *see Hassan*, 742 F.3d at 145-46 (observing that "we will not be left to second-guess how a terrorist attack could have been prevented" because law enforcement intervened before the conspirators "could bring their criminal schemes to fruition").

FBI Informant Two, a U.S. servicemember whom Sherifi befriended in Kosovo, testified, "Every day that [Sherifi] used the word 'jihad' . . . [were] the times when he talked about murdering people—definitely not performing jihad, but murdering innocent people for his ideology." J.A. 2269-70. According to FBI Informant Two, Sherifi used Islam "to mask his murderous intent," J.A. 2270, and even sent FBI Informant Two a video of "an actual beheading," telling FBI Informant Two that this is "[w]hat happens to the one who leaves the [religion]," J.A. 2224-25.[6] FBI Informant One testified that he was concerned that Sherifi would kill someone. J.A. 1243, 1260-61. He explained that Sherifi told him that

[6] In one discussion about jihad, Sherifi also told FBI Informant Two that going to Congress or the White House would be best and then said, "I'd fly the plane"—an unmistakable reference to the September 11 terrorist attacks. J.A. 3440-46.

Sherifi "wanted to kill [nonbelievers]." *Id.* FBI Informant One understood from Sherifi that Sherifi was traveling abroad to achieve this purpose. *Id.*

The other conspirators shared in the plan to travel abroad to kill nonbelievers. Zakariya Boyd testified that he, his father, his brother Dylan, and Sherifi "were all on the same page" when referring to jihad as killing nonbelievers. J.A. 2858. Brandin Elmore, Dylan Boyd's friend, testified that Dylan threatened to kill him, if Dylan "ever saw [him] overseas," for Elmore's decision to join the Marines. J.A. 2336. FBI Informant One testified that Anes Subasic was also planning to "make jihad" abroad, which, to Subasic, meant "to kill people." J.A. 1033-34.

Yaghi and Hassan also "subscribed to [tenets] of violent jihad espoused by Daniel Boyd." *Hassan*, 742 F.3d at 145 (internal quotation marks and citation omitted); *id.* at 141 (Yaghi and Hassan "shared Boyd's beliefs in the necessity of violent jihad."). Their postings online confirmed their desires to kill nonbelievers and "to further the violent causes and ideology espoused by Boyd and others." *See id.* at 145. Yaghi warned nonbelievers online under the screenname "Killer Ziyad" that "if you are a Muslim welcome, but if you are a [traitor of Muslims], I'm a kill you." J.A. 2530, 2525; *see* J.A. 2557 (Yaghi posting online: "[Nonbelievers] get smoked like hickory, dickery, dock, I pull the Glock so fast the

clock don't have chance to tock or tick. Let the shots rip them."); *see also* J.A. 2093-95 (Yaghi saying that if people conquered by Muslims do not convert to Islam, they must die). Hassan disseminated extremist propaganda, praised videos depicting car bombings, and said that if he were in charge, he would kill "all Americanized [M]uslims." *See* J.A. 2115, 2592-93; *see also Hassan*, 742 F.3d at 120, 127 (finding that these online posts "advocating violent jihad, as well as [Yaghi and Hassan's] conversations with [Daniel] Boyd to that effect, serve as compelling support for the jury's finding that Hassan and Yaghi travelled abroad with the hope of acting on their beliefs by engaging in jihad").

The conspirators were at war with nonbelievers. They agreed that they had an obligation to get to a battlefield overseas to wage violent jihad, where they hoped to die and become martyrs. *See*, *e.g.*, J.A. 1241, 1806-19, 1843, 1846-48, 1923, 1937; *see also Hassan*, 742 F.3d at 115, 127, 140-45. Sherifi viewed jihad as "an indiscriminate type of warfare on anyone that really went against" his "radicalized view of jihad." J.A. 2765-66; *accord* J.A. 2989, 3001 (Sherifi viewed jihad as "violent warfare."). "According to Boyd, the terms 'battlefield' and 'battlefront' were used to refer to locations where Muslims were then actively waging violent jihad against [nonbelievers], including wars in Afghanistan, Iraq, Kosovo, Chechnya, Somalia, Palestine, and Kashmir." *Hassan*, 742 F.3d at 116.

Sherifi also agreed with Daniel and Zakariya Boyd that "Islam was justly at war with America" and that America was "the enemy." J.A. 2767. Yaghi and Jude Mohammad likewise viewed jihad as a "holy war." J.A. 2170-72. To Subasic, jihad was about waging "war" on people who prevented jihadists from traveling abroad to fight on the battlefield. J.A. 1912.

In preparing for war, the conspirators trained to kill their nonbeliever enemies on battlefields abroad. "While in Kosovo, Sherifi participated in firearms training with like-minded individuals." *Hassan*, 742 F.3d at 143. In training sessions in North Carolina, Sherifi, Daniel Boyd, and others practiced firing lethal automatic weapons, including AK-47s, sniper rifles, and a pump-shot gun. *Id.* at 123-24; J.A. 2939. During their training, Daniel Boyd simulated the type of intense firefight they expected to join overseas, firing automatic weapons with live ammunition at Sherifi and others, teaching them military maneuvers, instructing them to "march[] in formation," and running "tactical drills." J.A. 2421-28; *see Hassan*, 742 F.3d at 123-24. Although he willingly participated in the training, Sherifi thought that the ammunition would be better used "to kill" nonbelievers, J.A. 1112, and that training was not fun "if not killing" nonbelievers, J.A. 3625. Sherifi "made efforts to raise funds to purchase farmland in Kosovo from which to launch off to the battlefield in Kosovo, Syria, and elsewhere." *Hassan*, 742 F.3d

at 143 (internal quotation marks and citation omitted). Yaghi and Hassan told Daniel Boyd that they too prepared for battle, in part by training to use a rifle. J.A. 1829-31; *see Hassan*, 742 F.3d at 118.

The conspirators also sought to stockpile lethal weapons. Sherifi discussed his efforts to buy rocket-propelled grenades ("RPGs") and assault rifles, including an AK-47, that he said "can kill a thousand" nonbelievers. J.A. 1101, 1174. Sherifi was willing to detonate his own body with explosives to kill nonbelievers, telling people that he wanted to become a suicide bomber. *See*, *e.g.*, J.A. 1112-13. "Hassan and Yaghi discussed the need to obtain" weapons like an AK-47 "to use in implementing their beliefs in violent jihad" and showed Daniel Boyd a rifle they had purchased for "'training' and 'target practice.'" *Hassan*, 742 F.3d at 118-19; *see* J.A. 2531, 2534, 2541, 2543-46 (Yaghi posting online photographs of RPGs, AK-47s, and other assault and sniper rifles); J.A. 2559, 2615 (Hassan posting online photographs of assault rifles). Daniel Boyd had acquired a firearm and weapons arsenal so extensive that he, Sherifi, and others built a storage bunker for it that consisted of "an entrenchment roughly six feet deep." *Hassan*, 742 F.3d at 123. Boyd also accumulated large quantities of ammunition, including ammunition that was designed to pierce armor. J.A. 2699-2700; *see* J.A. 2405.

Finally, as this Court previously found when rejecting Sherifi's argument that the evidence was insufficient to support his convictions on Counts One and Two, Sherifi willfully participated in the conspiracy. *Hassan*, 742 F.3d at 143. This Court found that Sherifi "sought to provide money and personnel to support violent jihadist causes, in this country and abroad. Even more so than Yaghi and Hassan, Sherifi advocated his extreme and violent beliefs to [Daniel] Boyd and other members of the conspiracy, demonstrating his intention to act on those beliefs." *Id.* This Court also found that "[t]he evidentiary record shows that a multitude of overt acts were committed in furtherance of the conspiracies, including the weapons training sessions, the construction of [Daniel] Boyd's weapons bunker, travel abroad, and consistent efforts to join violent jihadist battlefields." *Id.*; *see id.* at 127.

Sherifi contends that the government's closing argument shows that the government never sought to prove a conspiracy to murder. Br. 33. But in its closing argument, the government specifically argued that the object of the conspiracy was murder. J.A. 3588 (arguing that the defendants had "a murderous intent"); J.A. 3589 (arguing that, "what [jihad] means in reality, as [FBI Informant Two] very adequately described it when he sat here on the stand, it means to kill innocent people"); J.A. 3593 (arguing that, according to the defendants, "any

[nonbeliever] fighting any Muslim anywhere is an individual that deserves to die"); *id.* (arguing that the conspirators "sum it up, in taking care of this problem, in taking care of the [nonbelievers], in taking them out and killing them, is jihad"); *id.* (arguing that "the reality here is that this is murder of innocent people, justified under their viewpoint"); *id.* (arguing that "when you join those beliefs, when you sign up for that cause, you're saying I agree with that"); J.A. 3601 ("[T]he defendants have a common purpose based off of their warped version of Islam to use violence to rid the world of non-Muslims. That's essentially the objective. That is maiming, kidnapping or killing. It's a crime, conspiring to murder someone overseas."); J.A. 3604 (arguing that Count One is "a conspiracy that is the same, essentially, as Count 2, desiring to kill people overseas"); *id.* ("Count 2 is simply you are in a conspiracy, providing material support in order to accomplish that other count, that killing of people overseas.").

Sherifi also renews his defense, which he presented at trial, that the government failed to prove "any specific act that Sherifi and his co-conspirators sought to accomplish." Br. 33-36; *see*, *e.g.*, J.A. 3669, 3674-84 (Sherifi's defense counsel arguing to the jury that there was "no specific plan and no specific objective and no specific victims"). But the jury necessarily rejected this defense in finding him guilty on the Count One and Count Two conspiracies. As the

government proved at trial, the conspirators shared in a common plan to kill a class of persons—any nonbeliever who did not agree with their extremist views of Islam—and to help others do the same anywhere such nonbelievers existed, but particularly in areas that the conspirators considered "Muslim lands." *See Hassan*, 742 F.3d at 149.[7] Zakariya Boyd explained that, in the conspirators' view, "jihad is it's okay to fight against a wide variety of individuals and it's very loose on its victims . . . . [O]ur belief was anyone that wasn't Muslim could be seen as an enemy." J.A. 2696, 2725-26. Indeed, FBI Informant Two testified that, to Sherifi, jihad "was to fight physically with weapons against the enemies of Islam, wherever they are at and whoever they might be." *See* J.A. 2199-2201, 2217 ("Definitely anyone who didn't even believe in the Prophet Mohammad was a legitimate target for jihad, according to what [Sherifi] was teaching me.").

Daniel Boyd also explained at trial that the conspirators did not refer to any one specific target or place because they were trying to get to any place where they could join the fight. J.A. 1939; *cf. Hassan*, 742 F.3d at 143 ("While in Kosovo, Sherifi discussed the possibility of targeting the American military post at Camp

[7] *See also* J.A. 1179, 1205, 1218, 1240, 1646-47, 1718-19, 1758-60, 1762, 1780-81, 1801-03, 1815, 1841, 1843, 1856-58, 1864, 1881, 1891, 2865-66, 1862-63, 1872, 1875-79, 1883, 2041, 2166-68, 2199-2200, 2217, 2248, 2334, 2416, 2526, 2528, 2562, 2568, 2726, 2887-89.

Bondsteel for violent jihad."). The conspirators did not have direct contacts with al-Qaida or other terrorist groups, so "the object was to get to a battle zone generally and then connect with the networks . . . that were fighting there." J.A. 2763-64; *see* J.A. 2043-45. As Dylan Boyd confirmed, the plan was "to travel to an area where [they] believe or know there is a war front" and then to gain the local fighters' trust and "obey whatever the orders were." J.A. 3034, 3070-71; *see Hassan*, 742 F.3d at 127. FBI Informant One also testified that although Sherifi did not tell him the conspirators' exact plan, the conspirators' agreed-upon purpose in traveling overseas was to kill nonbelievers. J.A. 1240-43, 1260-61 ("If you go to fight, that means you're going to kill somebody."); *see* J.A. 4069 n.3 (finding that "[w]hile there were no actual victims, the radical ideology espoused by [Sherifi] was grounded in a twisted version of Islam which [Sherifi] and others espoused, requiring among other things the killing of non-adherents and Americans, including those on Muslim lands and in this country").

In sum, Sherifi's conspiracy was about killing, not just maiming. The evidence established overwhelmingly that Sherifi joined a conspiracy to kill nonbelievers on the battlefield or in terrorist attacks. Sherifi has not pointed to any evidence suggesting that his intended violence was limited to maiming, rather than killing, his enemies; nor has he explained how, in the context of battlefield or

terrorist attacks, any such shoot-to-maim approach would even be possible. Given the evidence in this case, no rational jury could have convicted Sherifi of conspiring to maim but not of conspiring to kill his enemies. For that reason, the failure to specifically instruct the jury to separately find the "kill" or "kidnap" object of the conspiracy did not affect Sherifi's substantial rights.

The government's evidence presented at trial was overwhelming and uncontroverted except for Sherifi's denials, which were obviously given no credence by the jury. *See* J.A. 3393-94, 3406. When, as here, "the evidence admits of only one result, there is simply no basis for concluding that the error seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Brown*, 757 F.3d 183, 194 (4th Cir. 2014) (internal quotation marks and citation omitted). Sherifi's sentence is therefore not among those contemplated by *Cotton*, 535 U.S. at 633, as one that this Court should exercise its discretion to overturn.

2. Sherifi Would Have Received the Same Sentence Regardless of the *Apprendi* Error

This Court should also affirm because Sherifi would have received the same sentence regardless of the *Apprendi* error. Sherifi was convicted on two additional counts, one for which he was also sentenced to 516 months of

imprisonment. J.A. 4190. At the resentencing, the district court imposed concurrent sentences of 516 months on Counts Two and Eleven. Sherifi's forfeited *Apprendi* challenge applies only to Count Two. But because he was sentenced to a concurrent 516-month term on Count Eleven, his *Apprendi* challenge did not affect his substantial rights under the concurrent sentence doctrine. *See United States v. Charles*, 932 F.3d 153, 161-62 (4th Cir. 2019). For this reason as well, this Court should affirm the district court's sentence.

III. The District Court Did Not Plainly Err in Applying the Hate-Crime Enhancement

A. Standard of Review

As Sherifi acknowledges, he did not object below to the district court's decision to apply the 3-level hate-crime enhancement under U.S.S.G. § 3A1.1(a) for intentionally selecting any victim or property because of the victim's actual or perceived race, religion, national origin, or ethnicity.[8] Br. 36; *see Hassan*, 742 F.3d at 147. So this Court reviews his claim for plain error. *See Olano*, 507 U.S.

[8] Sherifi did object to this enhancement at the initial sentencing, and the district court overruled his objection, finding "beyond a reasonable doubt that [Sherifi] did intentionally select victims and in the manner that's referred to in Section 3A1.1(a)." J.A. 3985-86 ("I think there's more than enough evidence the defendants were conspiring to commit terrorist acts against the non-Muslims or nonadherents to this radical ideology that puts the defendant on the battleground and committed to killing those not of like mind."). Sherifi did not appeal the district court's decision to apply this enhancement on direct review.

at 734-35. Under plain-error review, even where a district court commits plain error, that error is not reversible unless the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings," and unless "the error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Marcus*, 560 U.S. at 262 (quotation marks omitted).

B. Merits

U.S.S.G. § 3A1.1(a) provides for a three-level increase in the offense level if the finder of fact at trial determines "beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, gender identity, disability, or sexual orientation of any person." U.S.S.G. § 3A1.1(a). The government agrees with Sherifi that because the finder of fact at trial was the jury, the jury (and not the sentencing court) was required to make the motivation finding. *See* Br. 37-38. But contrary to Sherifi's claim, the jury did make the motivation finding because its verdict on Count Eleven, in the context of all the evidence, was sufficient to establish the enhancement based on the victims' national origin. *See In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 153-54 (2d Cir. 2008) (holding that the jury's verdict that

the defendant conspired to murder "nationals of the United States" supported the hate-crime enhancement, despite his contention that the conspiracy selected its victims based on citizenship, and not national origin). Even if the jury's verdict were not sufficient, that circumstance would not warrant reversal here, where any such alleged error did not affect Sherifi's substantial rights or otherwise seriously affect "the fairness, integrity or public reputation of judicial proceedings." *See Marcus*, 560 U.S. at 262 (quotation marks omitted).

First, the evidence that Sherifi and his coconspirators intentionally selected victims not only because of their national origin, but also because of their religion, was overwhelming. *See*, *e.g.*, J.A. 1101 (showing Sherifi wanted an AK-47 to kill a thousand non-believers), 1112 (showing Sherifi thought that the ammunition they used at the weapons training would have been better used to kill non-Muslims), 1203-04 (Daniel Boyd saying it's "halal to . . . destroy [non-Muslims]"), 1241 (showing Sherifi and Daniel Boyd's purpose in traveling overseas was to fight non-Muslims), 2199-2201 ("Jihad, according to how [Sherifi] defined it, was to fight physically with weapons against the enemies of Islam, wherever they are at and whoever they might be," including non-Muslims or Muslims who did not share Sherifi's understanding of Islam.), 2201 ("Definitely anyone who didn't even believe in the Prophet Mohammad was a legitimate target for jihad, according to

what [Sherifi] was teaching me. That would include Jews, Non-Abrahamic faiths."), 2248 (showing Sherifi believed that "if the non-Muslims have entered into the Muslim land . . . then it's obligatory for the Muslims then to fight against them and repel them from the Muslim land"), 2765-66 (showing that Sherifi viewed jihad as "an indiscriminate type of warfare on anyone that really went against" his "radicalized view of jihad"), 2858 (showing that when Daniel Boyd and the other coconspirators referred to jihad, they meant "[k]illing [nonbelievers]"). Given this overwhelming evidence, any alleged error by the district court could not have affected the outcome of the court's proceedings.

Second, as Sherifi acknowledges, Sherifi's adjusted offense level would have been the same, even if the district court had not applied the hate-crime enhancement, because the terrorism enhancement applied. *See* Br. 39. Sherifi argues that the district court's alleged error is nonetheless reversible because there is a "reasonable probability that, had the district court properly considered Sherifi's argument that the terrorism enhancement skewed the Guidelines range, non-application of the hate-crime enhancement would have produced a different sentence." Br. 39-40 (internal quotation marks omitted). But this claim provides no basis for vacating the district court's sentence because, as explained above, the district court considered Sherifi's argument at the resentencing hearing and, taking

that argument and other considerations into account, imposed a below-Guidelines sentence. Although the district court's sentence was still substantial, the district court made clear that the sentence was appropriate under the particular facts and circumstances of this case. J.A. 4178 ("I have no second thoughts about the sentence that I imposed. No second thoughts at all."); J.A. 4188-89 ("I have no reason to disturb what's rooted in the record of this case. That drives a very lengthy sentence here, just how dangerous this conduct is."). Nothing in the record suggests that the district court would second-guess its decision.

IV. Sherifi's Cumulative Error Claim Fails

Finally, Sherifi argues that the combined effect of the district court's errors entitles him to another resentencing. Br. 41-43. The cumulative-error doctrine recognizes that two or more errors that are individually harmless may cumulatively warrant reversal if they "so fatally infect the trial that they violated the trial's fundamental fairness." *United States v. Basham*, 561 F.3d 302, 330 (4th Cir. 2009) (internal quotation marks omitted). But "[w]hen none of the individual rulings work[s] any cognizable harm, it necessarily follows that the cumulative error doctrine finds no foothold." *Id.* (internal quotation marks and alterations omitted). Because none of the district court's "rulings work[ed] any cognizable

harm" or otherwise "violated the trial's fundamental fairness," Sherifi's cumulative-error claim fails. *See id.*

Conclusion

For the foregoing reasons, this Court should affirm the judgment of the district court.

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Statement with Respect to Oral Argument

The United States respectfully suggests that oral argument is not necessary in this case. The legal issues are not novel, and oral argument likely would not aid the Court in reaching its decision.

Certificate of Compliance

1. This brief has been prepared using Microsoft Word, Times New Roman, 14 Point.

2. Exclusive of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations; and the certificate of service, the brief contains 12,090 words.

Certificate of Service

I hereby certify that on December 14, 2022, I electronically filed the foregoing Brief of the United States with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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