United States Court of Appeals
for the Fourth Circuit
No. 22-4317

United States,
Appellee,
v.
Hysen Sherifi,
Appellant.

Appeal from the United States District Court
for the Eastern District of North Carolina
No. 5:09-cr-216-FL-2

Appellant's Opening Brief

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Introduction

A jury convicted Hysen Sherifi of various terrorism-related offenses, including a conspiracy to commit outside the United States "an act that would constitute the offense of murder, kidnapping, or maiming" if committed in U.S. jurisdiction, under 18 U.S.C. § 956(a). The penalty for that offense varies according to the object of the conspiracy: it is punishable by "imprisonment for any term of years or for life" if the defendants conspire to *murder or kidnap*, but "not more than 35 years" if they conspire to *maim*. At trial, the district court did not instruct the jury to determine whether the object of Sherifi's conspiracy was (1) murdering/kidnapping, or (2) maiming, and the jury made no such finding. Nevertheless, the court sentenced Sherifi to 516 months on the § 956(a) count—well above the statutory maximum of 420 months (35 years) for a non-murder, non-kidnapping violation of the statute. Imposition of that sentence violated *Apprendi v. New Jersey*, 530 U.S. 466, 491 (2000), which instructs that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is an element that "must be submitted to a jury, and proved beyond a reasonable doubt."

The district court's sentence was also procedurally erroneous in two respects. First, Sherifi's sentencing memorandum contended the terrorism

enhancement in U.S.S.G. § 3A1.4(a)—which adds 12 offense levels and places a defendant in the highest possible criminal history category—skews the Guidelines range by making the facts of a defendant's own case functionally irrelevant. But the district court did not acknowledge or respond to this non-frivolous argument for a downward variance, as this Court's cases require. Second, the district court applied the enhancement in U.S.S.G. § 3A1.1(a), which adds three offense levels if the defendant targets a victim because of race, ethnicity, national origin, or another protected characteristic. When a defendant goes to trial, § 3A1.1(a) requires that the finding of motivation be made by the jury, not the sentencing court. The jury in Sherifi's case, however, did not find, and was not asked to find, that he selected any victim based on a prohibited characteristic.

This Court should vacate Sherifi's sentence and remand to the district court for resentencing.

Jurisdictional Statement

The district court had jurisdiction over 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 denied Sherifi's direct appeal and affirmed his convictions and sentence by published opinion. *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014). Sherifi subsequently filed a motion to vacate his convictions, over which the district court exercised jurisdiction pursuant to 28 U.S.C. § 2255 and 28 U.S.C. § 1331. J.A.4076-85. This Court's jurisdiction arises under 28 U.S.C. § 2255(d), 28 U.S.C. § 2253(a), and 28 U.S.C. § 1291.

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[1] The Joint Appendix and Sealed Joint Appendix are cited as "J.A." and "S.J.A.," respectively, followed by the page number.

Unless otherwise indicated, case quotations in this brief omit citations, brackets, internal quotation marks, and other characters that do not affect the meaning of the cited language.

Issues Presented

I. Whether the district court committed procedural sentencing error by failing to acknowledge or respond to Sherifi's argument that the U.S.S.G. § 3A1.4 terrorism enhancement distorts the Guidelines range, rendering a defendant's individual circumstances essentially irrelevant.

II. Whether, absent a jury finding that Sherifi conspired to murder or kidnap, the district court violated *Apprendi* when it sentenced Sherifi to 516 months in prison on the 18 U.S.C. § 956(a) count—above the 35-year maximum sentence for "maiming" violations of the statute.

III. Whether the district court erred by applying the U.S.S.G. § 3A1.1(a) hate-crime enhancement, which requires a finding of improper motivation to be found by the jury at trial, not the court at sentencing.

Statement of the Case

A. Indictment and co-defendants' plea agreements

On November 23, 2010, a grand jury returned a 13-count second superseding indictment ("the indictment") charging Sherifi and seven co-defendants with various terrorism and firearm-related offenses. J.A.253-79. In general, the indictment alleged the defendants subscribed to an extremist ideology that viewed "violent *jihad* [as] a personal obligation on the part of every good [M]uslim." J.A.257. It accused the defendants of seeking to "advance violent *jihad*," both in the United States and abroad, by engaging in weapons training, propagating

Islamist extremism, funding "mujihadeen" who were fighting on the front lines, and traveling overseas to "participat[e] in terrorist activities." *See* J.A.255-57.

Count two charged Sherifi, Daniel Boyd ("Boyd"), Zakariya Boyd ("Zak"), Dylan Boyd ("Dylan"), Mohammad Omar Aly Hassan, Ziyad Yaghi, Jude Kenan Mohammad, and Anes Subasic with conspiracy "to commit outside the United States an act that would constitute murder, that is, the unlawful killing of human beings with malice aforethought, kidnapping, maiming, and injuring if committed in the special maritime and territorial jurisdiction of the United States," in violation of 18 U.S.C. § 956(a). J.A.263-64. It alleged two overt acts in furtherance of the conspiracy. First, the indictment claimed that in June 2007, Hassan and Yaghi flew from Raleigh, North Carolina, to Tel Aviv, Israel. J.A.264. Second, it alleged that on June 10, 2009, Sherifi, Boyd, and Zak "practiced military tactics and the use of weapons on private property in Caswell County, North Carolina." J.A.264.

In count one, the grand jury charged all eight defendants under 18 U.S.C. § 2339A with conspiring to provide material support and resources, knowing or intending that they would be used in preparation for, and in carrying out, the § 956(a) conspiracy in count two. J.A.255-56. A third conspiracy charge, in count eleven, alleged Sherifi and Boyd conspired to kill and attempt to kill employees of

the United States while those employees were engaged in, and on account of, the performance of their official duties, in violation of 18 U.S.C. § 1117. J.A.269-70.

Relevant here, the indictment also charged Sherifi with two counts of using and carrying firearms during and in relation to a crime of violence, under 18 U.S.C. § 924(c). The crime of violence on which both § 924(c) counts were allegedly predicated was the § 956(a) conspiracy in count two. J.A.265, 268.

In February 2011, Boyd pled guilty to the § 956(a) and § 2339A conspiracies and agreed to cooperate with the government. J.A.71, 1775. Boyd's sons, Zak and Dylan, pled guilty to the § 956(a) conspiracy in June and September of 2011, respectively. J.A.93, 121, 2691, 2863-64. Both brothers also agreed to cooperate with the government. J.A.2691, 2864.

B. Trial

Sherifi, Hassan, and Yaghi proceeded to a 17-day jury trial beginning in September 2011. *See* J.A.123.[2]

[2] The district court severed Subasic's trial from that of his co-defendants. J.A.280-93. At the time of trial, Mohammad had not been apprehended and remained at large. *Hassan*, 742 F.3d at 111 n.1.

1. The government's evidence

a. Boyd's contacts with Yaghi and Hassan

Boyd, who was born and grew up in the United States, converted to Islam after his mother remarried to a practicing Muslim. J.A.1776-79. In 1989, when he was 19 years old, Boyd traveled to Afghanistan to assist resistance fighters attempting to repel the Soviet Union's invasion of that country. J.A.80-82. During his time there, he made "probably four" trips to the front lines of the Afghan resistance, where "local people" were "engaging with the Soviet Army." J.A.1785-86. Boyd returned to the United States roughly two years later and, in 1995, settled his family in North Carolina, where he became an active member of the Muslim community. J.A.1786, 1791-92.

Because of Boyd's efforts on the Afghans' behalf, many members of the mosques in Raleigh and Durham "put [him] up on a pedestal" and sought him out for counsel. J.A.1792-93. In 2006, Yaghi, who had not previously met Boyd, approached him at the Islamic center in Durham to ask about his time in Afghanistan. J.A.1793-95. That 30-minute conversation led to future meetings between the two men, including at Boyd's house, in which they discussed "the general concepts of jihad and Islam and . . . what had happened there in Soviet-occupied Afghanistan," as well as "the things that were going on at that time, specifically the wars in Iraq and Afghanistan." J.A.1795-97. During one of those

meetings in early 2007, Yaghi introduced Boyd to Hassan, who, according to Boyd, shared their view that Muslims have an "obligation" to engage in "violent jihad" against those who oppress Muslims around the world. J.A.1815-18.

In February 2007, Boyd booked plane tickets for a trip to Palestine and Israel that summer. J.A.1819-20. When Yaghi learned of Boyd's travel plans, he asked whether he could join the trip. J.A.1820. Boyd responded that he would be traveling privately with his family, but told Yaghi he was free to make his own plans. J.A.1820-21. At Yaghi's request, Boyd then facilitated Yaghi and Hassan's purchase of tickets through a travel agent. J.A.1821-22. Boyd and Zak departed North Carolina for Israel in June 2007, and Hassan and Yaghi flew out the next day. J.A.1831-33. Both pairs were turned away at Israeli customs and eventually made their way, separately, to Jordan. J.A.1834-37. Although he could not say for sure, Boyd "assumed" Hassan and Yaghi traveled to Jordan "in furtherance of trying to get to a battlefront somewhere." J.A.1839. During the five weeks Boyd was in Jordan, both Yaghi and Hassan sent emails attempting to make contact with him, but Boyd did not receive their messages. J.A.1833, 1835-37. He did not speak with either Hassan or Yaghi while they were in Jordan. J.A.1838.

b. Sherifi's introduction to the co-defendants and trip to Kosovo

Sherifi first met Boyd in the spring of 2008, when he visited a halal grocery store Boyd operated, called Blackstone Market. J.A.1862-63. Sherifi, who had grown up in Muslim-majority Kosovo before emigrating to the United States at age 15, visited Boyd's store and his home two or three dozen times in the following months. J.A.1863-64, 3360. During those visits, Boyd testified, Sherifi talked about "violent jihad" and stated his view that "we need to go do something immediately, and we're not real Muslims if we don't." J.A.1864. Zak, who was frequently at the Blackstone Market when Sherifi visited, testified that he too had conversations about jihad with Sherifi. J.A.2749-51. According to Zak's testimony, Sherifi believed in "an indiscriminate type of warfare on anyone that really went against your beliefs in Islam." J.A.2765. Likewise, Dylan testified he surmised from his conversations with Sherifi that Sherifi believed "violence was a viable option" to fight back against "[a]nyone who was killing or fighting Muslims." J.A.2886-89.

On July 30, 2008, Sherifi left North Carolina and flew back to Kosovo, where he had grown up. J.A.821. Sherifi testified that his intent in going home was to find a woman to marry, land a job or start a business, and settle down permanently. J.A.3377-79. Abdullah Eddarkoui, an undercover informant who got to know Sherifi after the FBI asked him to infiltrate Boyd's circle, testified that Sherifi returned to

Kosovo for another reason as well—because "[h]e was looking for a way to go somewhere to make a jihad." J.A.902, 910-17, 1017-18, 1055.

During Sherifi's time abroad, Eddarkoui stayed in touch with him via phone, email, and instant message. J.A.1058. Eddarkoui testified Sherifi said that he had attempted to buy weapons in Kosovo, that he been engaging in weapons training, and that he "might join the brothers soon." J.A.1052-51, 1072-73, 1080. Eddarkoui also testified that Sherifi had been translating "jihadi stuff" from English into Albanian for people he met in Kosovo, and that Sherifi told Eddarkoui to ask Boyd to send money for the "brothers" in Kosovo. J.A.1087, 1093. In addition, Eddarkoui testified that Sherifi sent him Youtube videos about "jihad," "mujahidin fighting overseas," and "suicide bombers," among other topics. J.A.960-62.

While in Kosovo, Sherifi befriended Melvin Weeks, a staff sergeant in the U.S. Army who was stationed there at Camp Bondsteel. J.A.2189-90. The FBI approached Weeks and asked him to collect information on Sherifi, whom he had met at a local mosque. J.A.2190-91. Weeks agreed and, over the course of several months, met with Sherifi to discuss "the fundamentals of Islam," "jihad," and "fighting for the sake of Allah," among other topics. J.A.2191-92. According to Weeks' testimony, Sherifi defined jihad as "fight[ing] physically with weapons

against the enemies of Islam, wherever they are at and whoever they might be." J.A.2199. Weeks testified Sherifi shared jihad-related videos with him and referred him to the teachings of Anwar al-Awlaki, an Islamic cleric. J.A.2207-09, 2220, 2224-25. And he testified that Sherifi translated jihad-related works from English to Albanian for Muslim extremists who wanted to use the materials to spread their ideology. J.A.2230-31.

c. Sherifi's return to the United States

Sherifi returned to the United States in April 2009. J.A.1056. Eddarkoui testified that Sherifi said he came back in order to "collect some money" to give "to the brothers overseas." J.A.1025, 1094. Specifically, Eddarkoui claimed Sherifi hoped to raise funds to give to "the mujahideen" so they could buy land in Kosovo, build a farm, and use it to store weapons. J.A.1246-47; *see also* J.A.1096, 1112. Zak said he believed Sherifi wanted to use the money to buy a property that could serve as a "basing ground," i.e., a site from which he and his fellow fighters could "move . . . into these battlefields." J.A.2777.

Issam Elbaytam, who attended the same mosque as Sherifi in North Raleigh, testified that shortly after Sherifi returned to the United States, he mentioned to Elbaytam that he was trying to get a job so he could make some money to buy a piece of land in Kosovo. J.A.2299-2301. Elbaytam subsequently wrote Sherifi a

check for $15,000 on July 21, 2009, and Sherifi deposited $5,000 into his personal checking account two days later. J.A.2301-03, 802, 819-20.

After returning to the United States, Sherifi moved into an apartment that Eddarkoui rented for him with FBI funds. J.A.1056. Eddarkoui, who spent significant time at the apartment, testified that Sherifi "continued to want to travel and fight jihad." J.A.1104. Eddarkoui also said he saw Sherifi talking by computer with someone in Kosovo—later identified as Bajram Asllani, who was wanted by the U.S. government and had been tried in absentia in Serbia for "a conspiracy to blow up several buildings." J.A.1243-44, 3148-49. According to Eddarkoui, Sherifi sent Asllani $80 with which to buy a passport so the two men could travel together "to fight." J.A.1243-44; *see* J.A.828-29.

Finally, the jury heard testimony that on June 10, 2009, Boyd, Zak, Noah Boyd (another of Boyd's sons), Sherifi, Eddarkoui, and another informant (Alvis Harris) traveled to "a rural area of Caswell County, North Carolina" to engage in what FBI agents called "weapons training." J.A.791, 795, 800. At that site, the participants took three to four hours of target practice with roughly 15 guns, using a pile of wooden pallets as a backstop. J.A.796-97, 2392-93. On July 7, 2009, the same group, plus Boyd's daughter Maryam, visited the Caswell County site again for another two to three hours of target practice. J.A.795, 800, 2418-22. These two

outings served as the basis for the § 924(c) counts charged against Sherifi. J.A.265, 268.

2. Jury instructions and verdict

The district court instructed the jury on the sixteenth day of trial. As to the § 956(a) conspiracy, the court informed the jury that "Count 2 . . . charges conspiracy to murder, kidnap, maim and injure persons in a foreign country." J.A.3804. The court instructed that count two alleged Sherifi, Hassan, and Yaghi "did knowingly, willfully and unlawfully conspire with one another and others known and unknown to the grand jury to commit, outside the United States, an act that would constitute murder—that is, the unlawful killing of human beings with malice aforethought, kidnapping, maiming, and injuring, if committed in the special maritime and territorial jurisdiction of the United States." J.A.3804.

The court explained that § 956(a) prohibits "conspir[ing] with one or more persons, regardless of where those other persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, maiming, if committed in the special maritime and territorial jurisdiction of the United States." J.A.3805. And it listed four elements the government would have to prove to obtain a conviction: (1) that the defendant and one or more other people entered into a conspiracy, (2) that the defendant

"became a member of that conspiracy knowing and intending that the object of the conspiracy was to murder, kidnap or maim someone outside the United States," (3) that the defendant engaged in the conspiracy while in U.S. jurisdiction, and (4) that at least one conspirator committed an overt act in U.S. jurisdiction in furtherance of the conspiracy. J.A.3805-06.

As to the § 2339A conspiracy, the district court instructed that the government had to prove Sherifi, Hassan, and Yaghi conspired "to knowingly provide material support and resources, . . . knowing and intending that they were to be used in preparation for and in carrying out a violation or violations of Title 18 of the Code at Section 956, which is conspiracy to murder, kidnap, maim or injure persons in a foreign country." J.A.3797.

The jury found Sherifi guilty on all counts: the § 2339A conspiracy, the § 956(a) conspiracy, the § 1117 conspiracy, and the two § 924(c) counts. J.A.3866-67. For the § 956(a) conspiracy, the verdict form provided only two options—a "Not Guilty" line and a "Guilty" line. J.A.3866. It did not ask the jury to indicate which of the actions in § 956(a)—murder, kidnapping, or maiming—constituted the object of the conspiracy:

As to **Count Two** of the Second Superseding Indictment

_____ Not Guilty

__X__ Guilty

J.A.3866.

The jury convicted Hassan on the § 2339A conspiracy but acquitted him of the § 956(a) conspiracy. J.A.3868. It found Yaghi guilty of both conspiracies. J.A.3869.

C. Initial sentencing

The Probation Office prepared a presentence report (PSR) for Sherifi in advance of sentencing. The PSR grouped the three conspiracy counts together, treated the § 956(a) conspiracy as the leading count, and assigned Sherifi a base offense level of 33 under U.S.S.G. § 2A1.5. S.J.A.4222. In addition, the PSR recommended three upward adjustments: (1) a three-level enhancement under U.S.S.G. § 3A1.1(a) because Sherifi intentionally selected a victim based on actual or perceived race, color, religion, national origin, or ethnicity; (2) a three-level enhancement under U.S.S.G. § 3A1.2(a) because a victim was a current or former government officer, and the offense was motivated by that status; and (3) a 12-level enhancement under U.S.S.G. § 3A1.4(a) because the offense was a felony that involved or was intended to promote a federal crime of terrorism. S.J.A4222. With

these adjustments, Sherifi's adjusted offense level came out to 51, which the Guidelines treat as a 43, the maximum offense level. S.J.A.4223.

Other than a couple of minor traffic violations, Sherifi had no prior criminal convictions and therefore would ordinarily have fallen in criminal history category (CHC) I. S.J.A.4218-19. But the § 3A1.4 terrorism enhancement, in addition to adding 12 offense levels, automatically places a defendant in CHC VI, the highest category. S.J.A4219, 4223. The PSR therefore calculated Sherifi's advisory Guidelines range as life imprisonment for the § 956(a) and § 1117 conspiracies and 180 months, the statutory maximum, for the § 2339A conspiracy. S.J.A.4223. It also noted that, at that time, two § 924(c) convictions required a mandatory 30 years consecutive to any other term of imprisonment. S.J.A.4223-24.

Sherifi lodged objections to the hate-crime, official-victim, and terrorism enhancements. S.J.A.4228-30. In his sentencing memorandum, he asked the district court to impose a sentence less than life in prison. J.A.3870-77.

At sentencing in January 2012, the district court overruled Sherifi's objections and adopted the PSR's Guidelines calculations. J.A.3979-4000, 4015. After weighing the § 3553(a) sentencing factors, the court sentenced Sherifi to concurrent 180-month terms on the three conspiracy counts, to be followed by consecutive 60-month and 300-month terms on the § 924(c) counts, for a total of

540 months' imprisonment. J.A.4015-16. The court entered final judgment on January 13, 2012. J.A.4061.

D. Direct appeal

Sherifi challenged his convictions and sentence in this Court. J.A.4074. On appeal, he argued (1) his conviction rested on speech protected by the First Amendment, (2) the district court failed to instruct the jury properly on the scope of the First Amendment, (3) the district court should have excluded testimony from a purported government expert on Islamic extremism, (4) his convictions were not supported by sufficient evidence, and (5) the district court erroneously applied the § 3A1.4 terrorism enhancement. *Hassan*, 742 F.3d at 125-32, 139-40, 142-44, 147-50. In a published opinion issued on February 4, 2014, this Court rejected those contentions and affirmed Sherifi's convictions and sentence. *Id.*

E. § 2255 motion and resentencing

Under § 924(c), it is illegal to use or carry a firearm "during and in relation to any crime of violence" punishable in federal court. The statute defines a "crime of violence" as a felony that "(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." § 924(c)(3). The second half of this definition is known as the "residual

clause." *United States v. Simms*, 914 F.3d 229, 233 (4th Cir. 2019) (en banc). In *Johnson v. United States*, 576 U.S. 591, 606 (2015), the Supreme Court held the residual clause of the similarly worded Armed Career Criminal Act (ACCA) was void for vagueness.

On June 21, 2016, Sherifi placed in the prison mailbox a 28 U.S.C. § 2255 motion to vacate his § 924(c) convictions in light of *Johnson*. J.A.4076-86. He argued that the § 924(c) residual clause was unconstitutionally vague for the same reasons as the ACCA's, and that the § 956(a) conspiracy, which served as the predicate for his § 924(c) convictions, did not qualify as a crime of violence under the statute's still-valid elements clause. J.A.4090. Therefore, he contended, his § 924(c) convictions had to be vacated. J.A.4090.

On June 24, 2019, while Sherifi's motion was in abeyance, the Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that the § 924(c) residual clause was void for vagueness. *See* J.A.197. In a subsequent filing, the government conceded that Sherifi's § 924(c) convictions could not stand in the wake of *Davis*, as a § 956(a) conspiracy does not have as an element the use, attempted use, or threated use of physical force against the person or property of another. J.A.4110-11. The district court agreed, set aside Sherifi's § 924(c) convictions, vacated his "sentence in its entirety," and scheduled the case for a

"full resentencing" on the remaining counts of conviction. J.A.4122-23. Probation filed a letter informing the court that it believed Sherifi's Guidelines calculations on the conspiracy counts were unchanged and that his advisory Guidelines sentence therefore remained life imprisonment. J.A.4124.

Sherifi's sentencing memorandum requested a 180-month sentence based on his post-sentencing rehabilitation, his good behavior in the Bureau of Prisons, his minor role in the offense, and the significantly shorter sentences received by his co-defendants. S.J.A.4231-44. In addition, he argued the district court should vary downward because the § 3A1.4 terrorism enhancement "skews the sentencing range" by adding 12 offense levels and automatically placing a defendant in CHC VI. S.J.A.4238. As Sherifi explained, "A conviction for practically any terrorism charge ratchets [up] a defendant's range . . . and in effect, renders the Advisory Guideline Range calculation irrelevant, regardless of the defendant's role in the offense, the actual danger to the community or the government, his actual Criminal History Category, or any of the factors usually considered" when calculating the Guidelines range. S.J.A.4238. The resulting "disproportionality for terrorism convictions," he argued, "reflects the Sentencing Commission's unsound judgment, fails to foster an individualized assessment of the defendant, and does not consider Sherifi's actual characteristics in the proper way." S.J.A.4238.

At sentencing on May 17, 2022, the district court readopted the Guidelines calculations it had made at the initial sentencing in 2012. *See* J.A.4153-57. The court specifically acknowledged, and rejected, several of the bases Sherifi had urged for a downward variance, e.g., his minor role in the offense and disparities with his co-defendants' sentences. J.A.4156-59. It also credited and accepted, to a limited extent, Sherifi's argument that his rehabilitation and good conduct in the BOP warranted a sentence reduction. J.A.4160, 4175. But the court did not specifically address Sherifi's argument that the § 3A1.4 terrorism enhancement "skew[ed] the sentencing range" in a way that precluded consideration of his personal characteristics.

After "reflect[ing] on the advice of the guidelines" and weighing the § 3553(a) factors, the district court sentenced Sherifi to 180 months on the § 2339A conspiracy and 516 months on both the § 956(a) and § 1117 conspiracies, all to be served concurrently. J.A.4188, 4190. The written judgment, entered on May 17, 2022, reflected those terms. J.A.4198-4200. Sherifi filed a timely notice of appeal on May 29, 2022. J.A.4206.

Summary of the Argument

This Court should vacate Sherifi's sentence and remand for resentencing.

I. A district court procedurally errs if it fails to acknowledge and respond to a defendant's non-frivolous argument in support of a lower sentence. In this case, Sherifi urged the district court to vary downward because, among other reasons, the U.S.S.G. § 3A1.4 terrorism enhancement "skews" the Guidelines sentencing range in a way that prevents meaningful consideration of a defendant's personal circumstances. There is no doubt that such an argument is non-frivolous, as district courts frequently vary or depart down from the § 3A1.4-enhanced range in light of that guideline's extreme severity. Yet the district court did not acknowledge this argument at the resentencing hearing and, therefore, necessarily failed to explain why—or even whether—it found that argument unconvincing. This omission constitutes procedural error.

II. The Supreme Court held in *Apprendi* 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." 530 U.S. at 491. The object of a conspiracy is a fact that increases the statutory maximum penalty for an 18 U.S.C. § 956(a) violation: while a conspiracy to *maim* is punishable by no more than 35 years' imprisonment, a

conspiracy to *murder or kidnap* is punishable by any term of years or by life. Under *Apprendi*, therefore, the district court could not impose a sentence greater than 35 years on the § 956(a) offense unless the jury unanimously found, beyond a reasonable doubt, that Sherifi conspired to murder or kidnap, rather than maim. But the jury was not asked to make, and did not make, any such finding. And that plain error cannot be dismissed as harmless, since the evidence of a murder/kidnapping object was neither "overwhelming" nor "uncontested" at trial.

III. Under U.S.S.G. § 3A1.1(a), a defendant's base offense level increases by three levels if he "selected any victim" based on race, national original, ethnicity, or another protected characteristic. The finding of motivation must be made by "the finder of fact at trial," i.e., the jury; it is only "in the case of a plea of guilty or nolo contendere" that the sentencing court may make such a finding. The court in this case, however, applied the § 3A1.1(a) enhancement even though the jury made no finding of motivation as to Sherifi. By itself, this plain error did not alter the Guidelines range. But there is a reasonable probability that, when considered alongside the court's plain *Apprendi* error, it resulted in a longer sentence than Sherifi would have received otherwise. And in the aggregate, these

two errors and the district court's procedural error seriously affected the fairness, integrity, and public reputation of judicial proceedings.

A remand for resentencing is required.

Argument

I. The district court procedurally erred by failing to acknowledge and respond to Sherifi's argument about U.S.S.G. § 3A1.4's distorting effect on the Guidelines range.

A. Standard of review

This Court reviews the reasonableness of a sentence for abuse of discretion. *United States v. Zelaya*, 908 F.3d 920, 930 (4th Cir. 2018). "Pursuant to this standard, [this Court] review[s] the district court's legal conclusions de novo and factual findings for clear error." *United States v. Bolton*, 858 F.3d 905, 911 (4th Cir. 2017).

B. Analysis

This Court "review[s] all criminal sentences for reasonableness, beginning with procedural reasonableness and moving on to substantive reasonableness only if there are no procedural errors." *United States v. Webb*, 965 F.3d 262, 270 (4th Cir. 2020). Procedural errors include "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous

facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range." *United States v. Zuk*, 874 F.3d 398, 409 (4th Cir. 2017).

As part of adequately explaining its sentence, a district court "must address the parties' nonfrivolous arguments in favor of a particular sentence, and if the court rejects those arguments, it must explain why in a detailed-enough manner that this Court can meaningfully consider the procedural reasonableness of the . . . sentence imposed." *United States v. Slappy*, 872 F.3d 202, 208 (4th Cir. 2017). A sentence is procedurally unreasonable if the district court "fail[s] to address [a defendant's] specific § 3553 arguments or explain why the sentence imposed on him was warranted in light of them." *United States v. Blue*, 877 F.3d 513, 519 (4th Cir. 2017). It is not sufficient that a district court provides a "defendant with ample opportunity to present arguments." *Webb*, 965 F.3d at 271. Rather, the court "[i]s required to give specific attention to [a] nonfrivolous argument[]." *United States v. Lewis*, 958 F.3d 240, 245 (4th Cir. 2020). Forcing district courts to engage with a defendants' specific arguments "not only allows for meaningful appellate review but it also promotes the perception of fair sentencing." *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009).

The district court failed to comply with this requirement in Sherifi's case. In his sentencing memorandum, Sherifi cited five principal bases for a downward variance: his good behavior in the BOP, his post-sentencing rehabilitation, his relatively minor role in the offenses of conviction, the substantially shorter sentences imposed on his co-defendants, and the way the terrorism enhancement "skews the sentencing range." S.J.A.4233-43. As to the latter, Sherifi wrote that § 3A1.4(a) renders the Guidelines range "irrelevant" because it "ratchets [up] a defendant's range . . . regardless of the defendant's role in the offense, the actual danger to the community or the government, his actual Criminal History Category, or any of the factors usually considered" in calculating the range. S.J.A.4238. He argued the resulting "disproportionality for terrorism convictions reflects the Sentencing Commission's unsound judgment, fails to foster an individualized assessment of the defendant, and does not consider Sherifi's actual characteristics in the proper way." S.J.A.4239; *see also id.* ("[T]he Guidelines effectively treat all terrorism defendants the same regardless of their personal characteristics and roles.").

At sentencing, the district court acknowledged, however briefly, the first four of Sherifi's arguments. *E.g.*, J.A.4156 ("I very readily set to the side your attorney's argument with respect to sentencing disparities."). But "[n]owhere in

the district court's . . . explanation of its sentence . . . is there mention of [Sherifi's] argument that" § 3A1.4 throws distorts the Guidelines range by adding 12 offense levels and automatically placing defendants in CHC VI. *Webb*, 965 F.3d at 270 (holding district court's failure to acknowledge defense arguments rendered sentence procedurally unreasonable). The court "neither acknowledged this argument nor provided any explanation for rejecting it." *Id.* The court did incorporate and re-adopt the findings it had made at the original 2012 sentencing regarding why the terrorism enhancement applied. J.A.4177-78. And it noted in passing that § 3A1.4 placed Sherifi in CHC VI. J.A.4153-54. Beyond that, however, the court did not refer to the enhancement at all.

Sherifi's § 3A1.4-based argument was, at the least, non-frivolous. This Court has recognized that application of the terrorism enhancement can "'thr[o]w the guidelines into outer space'" because both of its provisions—the 12-offense-level bump and the automatic CHC VI—dramatically increase many defendants' sentencing ranges. *See United States v. Queen*, 738 F. App'x 794, 795 (4th Cir. 2018) (quoting district court). For that reason, courts that find the enhancement applicable often impose "'variant sentence[s]' well below the Guidelines range because the 'guidelines [are] way too high'" in light of the defendant's "'background'" and "'the actual things' he did." *Id.* (same); *see also, e.g.*, *id.*

(quoting district court's description of § 3A1.4-enhanced Guidelines range as "'ridiculous'").

Given § 3A1.4's severity, district courts also frequently depart down from CHC VI to whatever CHC a defendant would fall in absent the enhancement. *E.g.*, *United States v. Hasson*, 26 F.4th 610, 616 (4th Cir. 2022) ("The district court, however, agreed with Hasson that the increase overstated his criminal history and departed downward to category I."); *United States v. Alhaggagi*, 372 F. Supp. 3d 1005, 1017 (N.D. Cal. 2019); *United States v. Nayyar*, No. 09-cr-1037-RWS, 2013 WL 2436564, at *8-9 (S.D.N.Y. June 5, 2013); *United States v. Benkahla*, 501 F. Supp. 2d 748, 759 (E.D. Va. 2007); *United States v. Aref*, No. 04-CR-402, 2007 WL 804814, at *3 (N.D.N.Y. Mar. 14, 2007); *United States v. Garey*, 383 F. Supp. 2d 1374, 1379-80 (M.D. Ga. 2005); *United States v. Sihai Cheng*, No. 13-cr-10332-PBS, 2016 WL 413077, at *5 (D. Mass. Feb. 1, 2016); *United States v. Jumaev*, No. 12-CR-00033-JLK, 2018 WL 3490886, at *9. (D. Colo. July 18, 2018).

The district court "failed to address [Sherifi's] specific [§ 3A1.4] argument[] or explain why the sentence imposed on him was warranted in light of [it]." *Blue*, 877 F.3d at 519. The resulting sentence was therefore procedurally unreasonable, and this Court should vacate Sherifi's sentence and remand for resentencing. *See, e.g.*, *Lewis*, 958 F.3d at 245 (vacating and remanding for resentencing where district

court "did not address Lewis' nonfrivolous mitigation arguments"); *United States v. Perez-Paz*, 3 F.4th 120, 129 (4th Cir. 2021) (same).

II. Imposition of a 516-month sentence on count two—above the statutory maximum for a conspiracy to maim under § 956(a)—violated *Apprendi*.

A. Standard of review

Where, as here, a defendant raises on appeal a claim he did not raise below, this Court reviews for plain error. *United States v. Banks*, 29 F.4th 168, 174 (4th Cir. 2022). To show plain error, a defendant "must establish that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights." *Id.* If those "threshold requirements" are satisfied, this Court will correct the error as long as it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.*

An "error is plain if it is clear or obvious." *United States v. Miller*, 41 F.4th 302, 311 (4th Cir. 2022). And it affects substantial rights if it was "prejudicial," meaning there is "a reasonable probability that the error affected the outcome" of the district court proceeding. *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015).

B. Analysis

The Sixth Amendment guarantees a criminal defendant's right to trial by jury. *United States v. Simmons*, 11 F.4th 239, 256 (4th Cir. 2021); *see* U.S. Const.

amend. VI. Construing the Sixth Amendment 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" is an element "that must be submitted to the jury and found beyond a reasonable doubt." *United States v. Catone*, 769 F.3d 866, 873 (4th Cir. 2014). If a given fact "increase[s] the prescribed range of penalties to which a criminal defendant is exposed," it is an element of a separate offense that a jury must unanimously find beyond a reasonable doubt. *United States v. Beck*, 957 F.3d 440, 446 (4th Cir. 2020).

Here, § 956(a)(1) prohibits conspiring to commit outside the United States "an act that would constitute the offense of murder, kidnapping, or maiming" if committed in U.S. jurisdiction. Subsection (2) provides for differing penalties depending on which of the statute's three actus rei—murder, kidnapping, or maiming—is the object of the conspiracy. A § 956(a)(1) violation is punishable by "imprisonment for any term of years or for life if the offense is conspiracy to murder or kidnap," but only by "imprisonment for not more than 35 years if the offense is conspiracy to maim." § 956(a)(2). Thus an object to murder or kidnap, as opposed to maim, is a fact that "expose[s] a defendant to a punishment greater than that otherwise legally prescribed," and under *Apprendi* it is therefore an

element that a jury must unanimously find beyond a reasonable doubt. *Simmons*, 11 F.4th at 255-56.

In Sherifi's case, the record does not demonstrate the jury unanimously found beyond a reasonable doubt that he, Hassan, and Yaghi conspired to kidnap or murder, rather than maim. The district court's instructions on the § 956(a) count did not ask the jury to determine whether the object of the conspiracy was (1) murdering or kidnapping or (2) maiming. Instead, the court simply informed the jury that count two "charge[d] conspiracy to murder, kidnap, maim and injure persons in a foreign country," and that the indictment alleged the defendants conspired to commit "an act that would constitute murder—that is, the unlawful killing of human beings with malice aforethought, kidnapping, maiming, and injuring" if committed in U.S. jurisdiction. J.A.3804. When the court recited the elements of a § 956(a) offense, it instructed the jury that the government had to prove the defendants joined the conspiracy "knowing and intending that the object of the conspiracy was to murder, kidnap or maim someone" outside the United States, without specifying which actus reus the jury had to agree on. J.A.3805.

The government did the same in its closing argument. While walking the jury through count two, government counsel said the second element of a § 956(a) offense "is that the objective of that conspiracy is to murder, kidnap or maim

someone." J.A.3600. Counsel then argued the "objective" of the defendants' conspiracy was "maiming, kidnapping or killing," but did not identify which of those actions the government had supposedly proven. J.A.3601; *see also* J.A.3602 ("There were a number of options that were laid out that all of these individuals found to be potential targets. The class of person that they intend to hurt, harm, kill, murder, maim, however you want to call it, commit jihad upon, that class has been named. It is [non-Muslims]."). And in arguing the government had carried its burden of proving an overt act in furtherance of the conspiracy, the government cited a number of possible acts—e.g., purchasing plane tickets, training with firearms—but did not specify which actus reus they supposedly established. J.A.3602.

The verdict form, too, failed to differentiate between murdering or kidnapping, on one hand, and maiming, on the other. Rather than asking the jury to identify which actus reus it believed was the object of the conspiracy, the verdict offered only a binary choice—"Not Guilty" or "Guilty" of the § 956(a) offense:

As to **Count Two** of the Second Superseding Indictment

_____ Not Guilty

_X_ Guilty

J.A.3866. In short, the jury was never asked to make, and did not make, a specific finding that Sherifi conspired to commit murder or kidnapping. The record, therefore, does not establish that the jury unanimously agreed the object of Sherifi's § 956(a) conspiracy was murder or kidnapping, as opposed to maiming.

Nevertheless, the district court sentenced Sherifi to 516 months on the § 956(a) offense—above the statutory maximum of 420 months (35 years) for a "maiming" violation of the statute pursuant to § 956(a)(2)(B). Under *Apprendi*, imposing a sentence above the otherwise applicable statutory maximum—without a jury finding as to the sentence-enhancing fact—was a "clear" and "obvious" error that satisfies the first two prongs of plain-error review. *Miller*, 41 F.4th at 311.

That error also affected Sherifi's substantial rights. To decide whether an *Apprendi* error prejudiced the defendant, courts ask whether "the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error." *United States v. Legins*, 34 F.4th 304, 323 (4th Cir. 2022).[3] Unless the trial evidence on the element in

[3] *Legins* reviewed the defendant's *Apprendi* claim for harmless error, rather than plain error. But the "only" "difference" between the two standards is which party bears the burden of proof. *United States v. Hughes*, 401 F.3d 540, 548 (4th Cir. 2005). Harmless-error cases are therefore "instructive" when this Court conducts plain-error review. *United States v. Strickland*, 245 F.3d 368, 380 (4th Cir. 2001).

question was both "overwhelming *and* uncontroverted," an *Apprendi* error is prejudicial. *Id.* at 322 (emphasis added).

Here, as demonstrated by its closing argument, the government never sought to prove that Sherifi and his codefendants conspired to kidnap or murder, specifically, instead of maim. Rather, the government treated the three actus rei as essentially interchangeable, attaching no significance to which mode of liability the jury found. *See, e.g.*, J.A.3602 ("The class of person that they intend to hurt, harm, kill, murder, maim, however you want to call it, commit jihad upon, that class has been named. It is [non-Muslims]."). And although the government introduced evidence that Sherifi frequently talked about jihad, it never proved—or even really tried to prove—any specific act that Sherifi and his co-conspirators sought to accomplish. Indeed, in its closing argument the government expressly disclaimed any obligation to prove what, exactly, the defendants were conspiring to achieve. *See* J.A.3602 ("Here there's been much—much hoopla made during cross-examination of, well, which exact country, which exact person. Doesn't matter."). Thus the evidence that Sherifi conspired to murder or kidnap, instead of maim, is "far from overwhelming." *Catone*, 768 F.3d at 875.

But even assuming the evidence of a murder/kidnapping purpose was overwhelming, it certainly was not "uncontested." *Legins*, 34 F.4th at 323.

Sherifi's counsel vigorously cross-examined many of the government's witnesses about what specific actions Sherifi and his co-defendants allegedly conspired to undertake. He got Eddarkoui to admit, for instance, that Boyd, who pled guilty to the § 956(a) conspiracy, "never discussed with [him] any definite plans to actually go overseas and engage in any sort of jihad operation," and that "there never really was a specific plan of action." J.A.1165. When counsel pressed Eddarkoui on "[w]hat exactly was the plan to make jihad in Kosovo," Eddarkoui could not answer, resorting instead to speculation about other countries to which Sherifi might have traveled "to make jihad." J.A.1205.

Sherifi's counsel also used his cross-examination of Boyd to contest the object of the supposed conspiracy. He asked Boyd whether, during conversations with Sherifi while he was in Kosovo, Sherifi "ever discuss[ed] with him any specific target for any kind of violent jihad overseas" or "talk[ed] with him about any particular contact or person he should meet in order to join a violent jihad movement." J.A.1971. Boyd answered "no" to both questions. J.A.1971. Likewise, Boyd conceded that although Sherifi had alluded vaguely to "doing something" to a military base in Kosovo, "there never was a plan that [he was] ever told about with any specificity." J.A.2056. While being cross-examined by Hassan's lawyer, Boyd also admitted that when he, Hassan, and Yaghi traveled to Jordan in 2007,

"[t]here was no specific plan to kill anybody," "no specific plan . . . to maim anybody," and "no specific plan to kidnap anybody." J.A.1978-79; *see also* J.A.2269-70 (Sherifi's counsel posing same question to Weeks on cross-examination).

Similarly, Sherifi's counsel cross-examined Zak about whether he was "privy to any discussions" regarding "specific things" Sherifi might do in Kosovo. J.A.2815. (He was not. J.A.2815.) In response to counsel's questioning, Zak testified that although he "felt" Sherifi planned to "go . . . further jihad" in Kosovo, Sherifi's apparent fixation on jihad was "[j]ust talk" and "[n]o action." J.A.2816-17, 2860. Dylan, too, agreed on cross-examination that Sherifi's supposed plans "boiled down to a lot of talk about jihad with no specifics and no actions behind them"—in other words, just "blowing smoke." J.A.3028-29. Dylan, who pled guilty to the § 956(a) conspiracy, even told Sherifi's counsel that he did not "conspire with [Sherifi] to murder, maim, or kidnap people overseas." J.A.3035.

Sherifi's counsel seized on these admissions in his closing argument, emphasizing to the jury that numerous government witnesses had been unable to identify, precisely, the object of the § 956(a) conspiracy. *See* J.A.3674 ("Mr. Eddarkoui confirmed, as did a string of witnesses, that there was no specific plan to engage in any specific crimes. There was no specific overseas travel. There was no

specific victim."); J.A.3676 ("Melvin Weeks, the man in Kosovo, confirmed no specific plan, no specific victims."); J.A.3678 ("[Harris] confirmed there's no specific plan, there's no specific victims, there's no specific object of a conspiracy."); J.A.3680 ("[Boyd] agree[d] that there was no specific plan to engage in jihad, there were no specific victims."); J.A.3683-84 ("Now, Dylan confirmed that there was no specific plan, no specific criminal object, no specific victims.").

As counsel's questioning and closing argument demonstrate, the object of the § 956(a) conspiracy was by no means "uncontested" at trial. *Legins*, 34 F.4th at 323. The *Apprendi* error therefore violated Sherifi's substantial rights at the third plain-error prong. *Id.*[4]

III. The district court erred by applying the hate-crime enhancement absent a jury finding of Sherifi's motivation.

A. Standard of review

Sherifi did not object to the hate-crime enhancement below. This Court therefore reviews his claim for plain error. *Banks*, 29 F.4th at 174.

[4] Sherifi addresses the fourth plain-error prong—whether the error seriously affects the fairness, integrity, or public reputation of judicial proceedings—below, alongside the impact of the district court's error in applying the hate-crime enhancement. *See infra*, Argument, Part IV.

B. Analysis

The district court added three levels to Sherifi's base offense level pursuant to U.S.S.G. § 3A1.1(a), which provides:

> If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing 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, increase by 3 levels.

J.A.3985-86; S.J.A.4222; *see* J.A.4153-57. Application of this enhancement was plainly erroneous.

Under the unambiguous text of § 3A1.1(a), the process for applying the enhancement depends on whether a defendant is found guilty by a jury. If a defendant goes to trial, then "the finder of fact at trial" must "determine[] beyond a reasonable doubt" that the defendant targeted a victim based on a prohibited characteristic. The "finder of fact at trial" is the jury. It is only "in the case of a plea of guilty or nolo contendere" that "the court at sentencing" makes the motivation determination. Where a defendant goes to trial by jury, therefore, the district court cannot apply § 3A1.1(a) unless the jury makes the motivation finding.

The guideline's commentary confirms this straightforward interpretation by instructing courts to "[n]ote that special evidentiary requirements govern the application of this subsection." § 3A1.1 cmt. n.1. And courts interpreting

§ 3A1.1(a) have reached the same conclusion. *See, e.g.*, *United States v. Taubert*, 810 F. App'x 41, 45 (2d Cir. 2020) ("The district court relied, as the Sentencing Guidelines require, on the determination of the jury. *See* U.S.S.G. § 3A1.1(a) (requiring that hate crime motivation enhancement's applicability be determined by 'the finder of fact at trial')."); *United States v. Smith*, 365 F. App'x 781, 788 (9th Cir. 2010) ("What the background commentary to Guideline § 3A1.1(a) says is that the enhancement applies when *the factfinding jury* finds beyond a reasonable doubt that a victim's race was a primary motivation for the offense." (emphasis added)); *United States v. Allen*, 364 F. Supp. 3d 1234, 1244 (D. Kan. 2019) ("[I]n cases where criminal defendants put the government to its burden of proof, it is the prerogative of 'the finder of fact at trial' to make [the motivation] finding. The Court therefore has no role in deciding whether the Government carried its burden to prove Defendants committed a hate crime. That determination is instead left to the wisdom of the jury.").

In Sherifi's case, the district court applied the hate-crime enhancement even though the jury did not find, and was not asked to find, that he selected any victim on the basis of a characteristic enumerated in § 3A1.1(a). Under the guideline's plain text and the cases cited above, therefore, the court committed an error that was clear and obvious. *Miller*, 41 F.4th at 311.

As to the third plain-error prong, the Supreme Court has held that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Molina-Martinez v. United States*, 578 U.S. 189, 198 (2016). Sherifi recognizes that, had the district court declined to apply the hate-crime enhancement, his Guidelines range would have been unchanged. The PSR calculated his adjusted offense level as 51 before reducing it to 43, the highest level that appears on the Sentencing Table. S.J.A.4223. Without the hate-crime enhancement, Sherifi's adjusted offense level would have been 48, which also would have been reduced to 43. Standing alone, then, the district court's § 3A1.1(a) error may not have affected the outcome of sentencing.

But this Court should not view that error in isolation. *See United States v. Hager*, 721 F.3d 167, 203 (4th Cir. 2013) ("Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error."); *United States v. Lockhart*, 947 F.3d 187, 196-97 (4th Cir. 2020) (en banc) (holding two errors, "in the aggregate," were "sufficient to undermine confidence in the outcome of the proceeding"). 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. *Rangel*, 781 F.3d at 745.

The reasonable-probability test is not demanding. That "standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for [the] error things would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004) (citing *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)). To show a reasonable probability, a defendant is not required to establish that an error "more likely than not altered the outcome in the case." *Kyles*, 514 U.S. at 434. Rather, he must show only that "the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Dominguez Benitez*, 542 U.S. at 83; *accord United States v. Sanya*, 774 F.3d 812, 819-20 (4th Cir. 2014) (explaining that reasonable-probability standard is lower than more-likely-than-not standard).

As explained above, the terrorism enhancement requires a district court to both (1) add 12 offense levels, and (2) place the defendant in CHC VI. And, as also explained above, courts frequently vary or depart downward from the § 3A1.4-adjusted range because the enhancement can produce "ridiculous" results. *Queen*, 738 F. App'x at 795. If the district court in this case had properly grappled with

Sherifi's § 3A1.4 argument, it might well have joined the numerous other courts that have effectively lowered the Guidelines range to account for § 3A1.4's extreme severity. The court, for instance, might have added only 6 offense levels (rather than 12) and placed Sherifi in CHC III (rather than VI). Such a change, coupled with non-application of the hate-crime enhancement, would have put the total offense level at 42, yielding an advisory Guidelines range of 360-life, rather than life.

As the Supreme Court recognized in *Molina-Martinez*, "when a Guidelines range moves up or down, offenders' sentences tend to move with it." 578 U.S. at 199. That is because the Guidelines "are not only the starting point for most federal sentencing proceedings but also the lodestar"; they "anchor . . . the district court's discretion." *Id.* at 198- 200. Thus it is reasonably probable that, when considered in tandem, the district court's procedural-reasonableness and § 3A1.1(a) errors affected Sherifi's sentence.

IV. Taken together, the district court's *Apprendi*, § 3A1.1(a), and procedural-reasonableness errors seriously affect the fairness, integrity, and public reputation of judicial proceedings.

When a district court commits multiple errors, this Court's review at the fourth plain-error prong considers the cumulative effect of those errors. *See Lockhart*, 947 F.3d at 197 (concluding two "errors"—violation of defendant's rights "to understand [1] the nature of the offense to which he is admitting guilt

and [2] the consequences of his plea"—seriously affected fairness, integrity, or public reputation of judicial proceedings); *United States v. Promise*, 255 F.3d 150, 163, 167-68, 190 (4th Cir. 2001) (en banc) (out of eleven judges, ten concluded a combination of errors did or could warrant correction at fourth plain-error prong). The Court should therefore assess the district court's three errors—(1) failure to consider Sherifi's § 3A1.4 argument, (2) imposing a sentence in excess of § 956(a)'s statutory maximum, and (3) applying the hate-crime enhancement—in the aggregate.

Viewed together, those errors seriously affect the fairness, integrity, and public reputation of judicial proceedings. The "possibility of additional jail time . . . warrants serious consideration in a determination whether to exercise discretion" at the fourth step of plain-error review. *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018). For that reason, the Supreme Court held in *Rosales-Mireles* that "[a] plain Guidelines error that affects a defendant's substantial rights is precisely the type of error that ordinarily warrants relief." *Id.*

Rosales-Mireles' logic is not limited to the Guidelines, and it is therefore immaterial that, on its own, the Guidelines error in this case (application of the § 3A1.1(a) hate-crime enhancement) may not have affected Sherifi's substantial rights. Rather, the *Rosales-Mireles* Court reasoned more broadly, explaining that

"[t]he risk of unnecessary deprivation of liberty" undermines faith in the judicial system; that an error should generally be corrected if it forces a defendant to "spend more time in prison than the District Court otherwise would have considered necessary"; and that "[i]n broad strokes, the public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction." *Id.* at 1908-09. Indeed, the Court asked, "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?" *Id.* at 1908.

The district court's errors "threaten to require [Sherifi] to linger longer" in prison that he would otherwise. *Id.* By ignoring Sherifi's argument about the terrorism enhancement, imposing a sentence above § 956(a)'s statutory maximum, and applying the hate-crime enhancement without the necessary jury finding, the court created at least a "possibility of additional jail time." *Id.* at 1907. This Court should therefore exercise its discretion to notice the district court's errors.

Conclusion

The remedy for an *Apprendi* error is to vacate a defendant's sentence and remand for resentencing under the appropriate statutory maximum. *See United States v. Sullivan*, 455 F.3d 248, 251 (4th Cir. 2006) (per curiam). This Court orders the same remedy when a district court fails to acknowledge a defendant's non-frivolous sentencing arguments, *see, e.g.*, *Perez-Paz*, 3 F.4th at 129, or miscalculates the Guidelines range, *see, e.g.*, *United States v. Green*, 996 F.3d 176, 187 (4th Cir. 2021). Accordingly, the Court should vacate Sherifi's sentence and remand to the district court for resentencing.

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Statement Regarding Oral Argument

Counsel for Appellant respectfully requests oral argument so that the issues above can be more fully presented for the Court's consideration.

Certificate of Compliance

1. This brief has been prepared in Microsoft Word using 14-point, proportionally spaced, serif typeface.

2. Excluding the items identified in Federal Rule of Appellate Procedure 32(f), this brief contains 9,356 words.

/s/ Cullen Macbeth
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Certificate of Service

I certify that on September 22, 2022, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF user: David Bragdon, Office of the U.S. Attorney, 150 Fayetteville Street, Suite 2100, Raleigh, NC 27601.

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