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In the
United States Court of Appeals
For the Second Circuit

August Term, 2018
No. 17-1889

UNITED STATES OF AMERICA,
Appellee,

v.

TAIROD NATHAN WEBSTER PUGH,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of New York.
No. 15-cr-00116 — Nicholas G. Garaufis, *Judge.*

ARGUED: FEBRUARY 4, 2019
DECIDED: AUGUST 29, 2019
AMENDED: DECEMBER 10, 2019

1 Before: CALABRESI and DRONEY, *Circuit Judges*, and UNDERHILL, *Chief*
2 *District Judge*.*

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4
5 Appeal from a judgment of conviction and sentence of the
6 United States District Court for the Eastern District of New York
7 (Garaufis, J.). Pugh was charged with attempting to provide
8 material support to a foreign terrorist organization (count one) and
9 obstruction of justice (count two). At trial, the government admitted
10 into evidence, over Pugh's objection, a draft letter that Pugh had
11 purportedly written to his wife which, *inter alia*, professed his
12 allegiance to the Islamic State. Pugh was convicted by a jury on both
13 counts and sentenced to 180 months of incarceration on count one,
14 and 240 months of incarceration on count two, the sentences to run
15 consecutively, for a total effective sentence of 420 months of
16 incarceration, the maximum allowable sentence. Pugh contends that
17 the letter addressed to his wife should have been excluded from
18 evidence pursuant to the marital communications privilege and,
19 therefore, he is entitled to a new trial. Pugh also contends that
20 neither of his two convictions was supported by sufficient evidence
21 and, therefore, should be vacated. Lastly, Pugh contends that his
22 sentence was procedurally and substantively unreasonable because
23 the court (1) failed to sufficiently articulate its reasoning for
24 imposing the statutory maximum sentence, and (2) failed to provide
25 Pugh sufficient opportunity to address the court. We disagree with
26 most of Pugh's arguments, but agree that further articulation of the
27 sentence determination is required.

28 Accordingly, we **AFFIRM** the district court's judgment of
29 conviction, **VACATE** the sentence, and **REMAND** for resentencing.

* Judge Stefan R. Underhill, of the United States District Court for the District of Connecticut, sitting by designation.

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Judge Calabresi concurs in a separate opinion.



JO ANN M. NAVICKAS, SAMUEL P.
NITZE, MARK E. BINI, ASSISTANT
UNITED STATES ATTORNEYS, *for*
Richard P. Donoghue, United States
Attorney for the Eastern District of
New York, Brooklyn, New York, *for*
Appellee.

SUSAN G. KELLMAN, SARAH
KUNSTLER, Brooklyn, New York, *for*
Defendant-Appellant.

UNDERHILL, *District Judge:*

Defendant-appellant Tairod Nathan Webster Pugh appeals from a judgment of conviction entered by the United States District Court for the Eastern District of New York (Garaufis, J.), after a jury found him guilty of attempting to provide material support to a foreign terrorist organization and obstruction of justice. Pugh advances three arguments in this appeal: (1) the district court erred in denying his motion to exclude from evidence a draft letter

1 purportedly written to his wife; (2) the evidence was insufficient to
2 support either conviction; and (3) his sentence was procedurally
3 and/or substantively unreasonable. We disagree with most of
4 Pugh’s arguments, but agree that the court’s articulation of its
5 reasoning for imposing the maximum permissible sentence was
6 insufficient.

7 Accordingly, the judgment of conviction is **affirmed**, the
8 sentence is **vacated**, and the case is **remanded** for resentencing.

9 **BACKGROUND**

10 The jury could have found the following facts. Pugh is a
11 United States citizen and Air Force Veteran who moved to the
12 Middle East to work as a civilian contractor for different aerospace
13 companies after he left the military. While living overseas, Pugh
14 began researching the Islamic State of Iraq and the Levant (“ISIL” or
15 “ISIS”) and downloading propaganda materials, as well as
16 discussing ISIS tactics and activities online via Facebook. While

1 abroad, Pugh also met and married an Egyptian woman, referred to
2 as "M.H.S." On January 10, 2015, Pugh flew from Cairo, Egypt to
3 Istanbul, Turkey. Upon arrival at the Turkish airport, Pugh was
4 denied entry into the country and was returned to Cairo, where
5 Egyptian and United States law enforcement officers discovered
6 several electronic media devices in his luggage. Pugh attempted to
7 destroy, or succeeded in destroying, some of the electronic devices
8 he was carrying with him, including a computer, multiple USB
9 drives, and an iPod. A search of his laptop revealed internet
10 searches, videos, and pictures relating to ISIS and its presence in,
11 *inter alia*, Turkey and Syria, as well as a letter purportedly drafted by
12 Pugh to his wife in which he pledges his allegiance to ISIS. On
13 January 15, 2015, Pugh was returned to the United States where he
14 was briefly detained for questioning in Customs, and was released
15 that day. He was arrested the next day at his father's home in New
16 Jersey.

1 Pugh was arraigned on March 18, 2015 on a two-count
2 indictment charging him with attempting to provide material
3 support to a foreign terrorist organization, in violation of 18 U.S.C. §
4 2339B(a)(1) (count one); and obstruction and attempted obstruction
5 of an official proceeding, in violation of 18 U.S.C. § 1512(c)(1) and
6 (c)(2) (count two). Pugh pleaded not guilty and elected to go to trial.
7 A seven-day jury trial was conducted, and at the close of the
8 government's case, Pugh moved for a judgment of acquittal on both
9 counts, pursuant to Federal Rule of Criminal Procedure 29. Pugh
10 renewed his motion at the close of his case. The district court denied
11 the motion on both occasions. On March 9, 2016, the jury found
12 Pugh guilty on both counts, and he once again renewed his Rule 29
13 motion post-verdict, which the court again denied. Pugh was
14 sentenced on May 31, 2017 to 180 months of incarceration on count
15 one and 240 months of incarceration on count two, the maximum

1 sentence under each statute¹, to run consecutively, for a total
2 effective sentence of 420 months. This appeal followed.

3 **DISCUSSION**

4 Pugh filed the instant appeal in which he argues: (1) the
5 district court erred in denying his motion to exclude a draft letter
6 purportedly written to his wife; (2) the evidence was insufficient to
7 support either conviction; and (3) his sentence was procedurally
8 and/or substantively unreasonable. Additional facts will be set out
9 below where necessary.

10 **I. Admission of the Letter**

11 Pugh argues first that the district court erred in denying his
12 motion in limine to exclude, pursuant to the marital
13 communications privilege, the use of a draft letter found on his
14 laptop. We disagree.

¹ At the time of the commission of the offense, the statutory maximum for count one pursuant to 18 U.S.C. § 2339B(a)(1) was 180 months. It has since been increased to 240 months.

1 The following additional facts are relevant to this claim. Pugh,
2 who speaks only English, met and married an Egyptian woman,
3 M.H.S., who speaks only Egyptian Arabic. The couple
4 communicated mostly via Facebook Messenger with the help of
5 Google Translate and/or bilingual acquaintances who would
6 translate messages between the pair. When Pugh’s laptop was
7 searched, pursuant to a search warrant, authorities found a saved
8 document which purported to be a draft letter, addressed to M.H.S.,
9 which the parties refer to as the “My Misha Letter.” In the letter,
10 Pugh expressed a desire to “use [his] talents and skills . . . to
11 establish and defend the Islamic State.” App’x at 55. Further, the
12 letter states, in relevant part: “I will escort you into Paradise and
13 when you see the home paid for by my blood and your tears you
14 will know it was all worth it”; “I defied my friends and family to

1 become a Muslim, now I will defy Muslims to be a Mujahid^[2]”; and
2 “I am a Mujahid. I am a sword against the oppressor and a shield for
3 the oppressed.” *Id.*

4 Pugh’s attorney moved to preclude the draft letter pursuant to
5 the marital communications privilege. The government, in
6 opposition, argued that Pugh failed to establish that the letter was
7 protected by the privilege because: (1) Pugh failed to establish that
8 his Egyptian marriage would be recognized by the United States; (2)
9 Pugh failed to establish that he intended the draft letter to be a
10 marital communication; and (3) because Pugh and M.H.S. needed
11 the assistance of interpreters to communicate, the letter was not
12 intended to be kept confidential, even if Pugh did intend to send it.

13 The district court issued a ruling on February 12, 2016 in
14 which it rejected the government’s argument that there was no

² Mujahid means “one who struggles” and, in the context of a jihad, “holy warrior.”
Gov’t App’x at 131.

1 marital privilege because Pugh's marriage was not valid or, even if it
2 was valid, the couple was separated, breaking the privilege.
3 Ultimately, though, the court denied Pugh's motion and found the
4 "My Misha Letter" admissible for two reasons: (1) the draft letter
5 was not intended to be a communication; and (2) even if it was, it
6 was not intended to be confidential. The court determined that
7 Pugh failed to establish that he intended to send the draft letter to
8 his wife and, therefore, it was not a communication. As support, the
9 court highlighted that Pugh and his wife routinely communicated
10 via Facebook, and that there was "no indication that Pugh even
11 once, much less regularly, typed his messages using a program on
12 his laptop and then copied them into Facebook." App'x at 87.
13 Further, the court stated that there was "no indication that Pugh had
14 sought to have the letter translated (either by a third-party or using
15 translation software), as would have been required for M.H.S. to
16 understand the document." *Id.* The court further found that "the

1 draft letter [was] inconsistent with Pugh’s professed reasons for
2 travelling to Turkey,” to find employment. *Id.*

3 Alternatively, the district court found that, even if the draft
4 letter was intended to be a communication, it was not intended to be
5 kept confidential. The court concluded that using “an ad hoc
6 network of informal translators destroys the marital communication
7 privilege” and is “inconsistent with the scope of the marital
8 communications privilege.” App’x at 95, 99. As support, the court
9 found that the letter, if sent, was likely to be translated by a
10 translator, rather than Google Translate, given its length and
11 contents, and that the couple was “unlikely to employ a trusted,
12 confidential translator” to translate the message for them. *Id.* at 90-
13 91. The court determined that “where a married couple evidences
14 an intent to disclose communications to an ad hoc network of
15 family, friends, and strangers for translation, the privilege is
16 forfeited.” *Id.* at 92.

1 On appeal, Pugh argues that the district court erred in both of
2 its determinations: that the letter was not a communication and,
3 even if it were, that the letter was not intended to be confidential.

4 The parties disagree about the standard of review we should
5 apply in reviewing the district court's ruling. The government
6 asserts that a claim of privilege should be reviewed for abuse of
7 discretion. Pugh asserts that the applicable standard of review is
8 that which applies to a denial of a suppression motion: factual
9 findings are reviewed for clear error, and legal conclusions are
10 reviewed *de novo*. We need not decide which standard applies,
11 because the tests are very similar and lead to the same result in this
12 case.

13 “A court abuses its discretion if (1) it relies on an erroneous
14 view of the law, (2) its decision rests on a clearly erroneous finding
15 of fact, or (3) its decision—though not necessarily the product of a
16 legal error or a clearly erroneous factual finding—cannot be located

1 within the range of permissible decisions.” *United States v. Yannai*,
2 791 F.3d 226, 242 (2d Cir. 2015). A review of the district court’s
3 evidentiary rulings is deferential. *United States v. Hendricks*, 921 F.3d
4 320, 326 (2d Cir. 2019). Issues of law are reviewed *de novo*. *United*
5 *States v. Sewell*, 252 F.3d 647, 650 (2d Cir. 2001). Questions of fact are
6 reviewed for “clear error,” which is “deferential” and “does not
7 entitle [a reviewing court] to overturn a finding simply because [the
8 court is] convinced that [it] would have decided the case
9 differently.” *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015) (internal
10 quotation marks omitted).

11 “[T]he applicability of a privilege is a factual question, [but]
12 determining the scope of a privilege is a question of law.” *United*
13 *States v. Mejia*, 655 F.3d 126, 131 (2d Cir. 2011) (internal quotation
14 marks omitted). The distinction, then, is “whether the district court
15 based its decision on a consideration of the application of the
16 privilege to the communication or on an understanding of the

1 privilege’s scope.” *Id.* A determination is factual when it “involves
2 the application of the . . . privilege as our case law has already
3 developed it to the novel set of facts before us . . . [rather than]
4 address[ing] the scope of the privilege itself in a novel way.” *Id.*
5 (question of whether communicating through client’s sister waived
6 attorney-client privilege was factual).

7 “The confidential communications privilege . . . [shields]
8 communications made in confidence during a valid marriage. . . .”
9 *In re Witness Before Grand Jury*, 791 F.2d 234, 237 (2d Cir. 1986). The
10 purpose of the privilege is to provide “assurance that all private
11 statements between spouses—aptly called the best solace of human
12 existence—will be forever free from public exposure.” *Id.* (internal
13 citations and quotation marks omitted). Courts have noted,
14 however, that “privileges contravene the fundamental principle that
15 the public . . . has a right to every man’s evidence. . . . As such, they
16 must be strictly construed and accepted only to the very limited

1 extent that . . . excluding relevant evidence has a public good
2 transcending the normally predominant principle of utilizing all
3 rational means for ascertaining truth.” *Trammel v. United States*, 445
4 U.S. 40, 49 (1980) (internal citation and quotation marks omitted).

5 The marital communications privilege applies when (1) the
6 parties were in a valid marriage at the time of the communication³;
7 (2) the “utterances or expressions” were “intended to convey
8 information between spouses” (communication prong); and (3) the
9 communications were intended to be confidential (confidentiality
10 prong). *In re Witness Before Grand Jury*, 791 F.3d at 237-39. “[T]he
11 party invoking a privilege bears the burden of establishing its
12 applicability to the case at hand.” *In re Grand Jury Subpoenas*, 318
13 F.3d 379, 384 (2d Cir. 2003). However, confidentiality is presumed,
14 and, therefore, the party challenging the applicability of the

³ The court determined that Pugh and M.H.S. had a valid marriage at the time of the draft letter, and neither party takes issue with that ruling.

1 privilege “[bears] the burden of defeating this presumption by
2 showing that the communication was not made privately.” *United*
3 *States v. Taylor*, 92 F.3d 1313, 1332 (2d Cir. 1996).

4 “It is well settled that the communications to which the
5 privilege applies have been limited to utterances or expressions
6 intended by one spouse to convey a message to the other.” *United*
7 *States v. Smith*, 533 F.2d 1077, 1079 (8th Cir. 1976) (citing *Pereira v.*
8 *United States*, 347 U.S. 1, 6 (1954)). The confidential communications
9 privilege applies “where the conduct was intended to convey a
10 confidential message from the actor to the observer.” *United States v.*
11 *Estes*, 793 F.2d 465, 467 (2d Cir. 1986); *see also United States v. Sykes*,
12 697 F.2d 87, 98 n.1 (2d Cir. 1983) (citing cases, including *Smith*, that
13 hold “the marital communication privilege applies only to
14 communications or acts intended to convey a message”).

15 A person seeking to invoke the marital privilege must show
16 that he actually intended to convey the message to his spouse. *See*

1 *Smith*, 533 F.2d at 1079; *United States v. Mohsen*, 587 F.3d 1028, 1032-
2 33 (9th Cir. 2009) (privilege did not apply where there was “no
3 evidence whatsoever” that an inmate intended to send a letter to his
4 wife where the letter had her name on top but no mailing address);
5 *United States v. Montgomery*, 384 F.3d 1050, 1056 (9th Cir. 2004) (letter
6 left by wife for husband on kitchen counter was communication
7 because it was left in a place where husband could find it).

8 The district court found “no evidence that Pugh intended the
9 letter to be a communication” because there was “no evidence that
10 [he] intended to send the draft.” App’x at 86. Pugh argued (as he
11 does on appeal) that it was “no great stretch to infer” that he
12 intended to send M.H.S. the letter, but the court found that to be an
13 “inference devoid of evidentiary support” that was “insufficient to
14 carry Pugh’s burden.” *Id.* at 87. Given that there was no evidence
15 that M.H.S. had access to Pugh’s computer where the letter was
16 found, there was no evidence that Pugh ever typed his messages in

1 another format before sending them via Facebook Messenger, and
2 the letter had not yet been translated, it was not error for the court to
3 determine that Pugh failed to prove that he intended the letter to be
4 a marital communication. Accordingly, the court's ruling is
5 affirmed, and we need not reach Pugh's second argument, that the
6 court's determination on the confidentiality prong was erroneous.

7 **II. Sufficiency of the Evidence**

8 Pugh claims next that there was insufficient evidence to
9 support either of his two counts of conviction, and, therefore, they
10 should be reversed.

11 This Court reviews a sufficiency of the evidence challenge
12 using the same standard utilized by the district court in ruling on a
13 Rule 29 motion. *United States v. Eppolito*, 543 F.3d 25, 45 (2d Cir.
14 2008). Rule 29(a) of the Federal Rules of Criminal Procedure
15 provides: "[T]he court on the defendant's motion must enter a
16 judgment of acquittal of any offense for which the evidence is

1 insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). “The test
2 for sufficiency . . . is whether a rational jury could conclude beyond
3 a reasonable doubt that a defendant is guilty of the crime
4 charged. . . . The court must make that determination with the
5 evidence against a particular defendant . . . viewed in [the] light . . .
6 most favorable to the government, . . . and [with] all reasonable
7 inferences . . . resolved in favor of the government.” *Eppolito*, 543
8 F.3d at 45 (internal citations and quotation marks omitted). “The
9 jury may reach its verdict based upon inferences drawn from
10 circumstantial evidence, and the evidence must be viewed in
11 conjunction, not in isolation.” *Id.* A court will “overturn a
12 conviction . . . only if, after viewing the evidence in the light most
13 favorable to the Government and drawing all reasonable inferences
14 in its favor, [it determines] that no rational trier of fact could have
15 concluded that the Government met its burden of proof.” *United*
16 *States v. Glenn*, 312 F.3d 58, 63 (2d Cir. 2002) (internal quotation

1 marks omitted). The reviewing court must “defer[] to the jury’s
2 assessment of witness credibility and its assessment of the weight of
3 the evidence.” *United States v. Baker*, 899 F.3d 123, 129 (2d Cir. 2018)
4 (internal quotation marks omitted).

5 In sum, “[a] defendant challenging the sufficiency of the
6 evidence supporting a conviction faces a ‘heavy burden.’” *Glenn*,
7 312 F.3d at 63 (quoting *United States v. Matthews*, 20 F.3d 538, 548 (2d
8 Cir. 1994)).

9 a. Count One: Attempt to Provide Material Support to a
10 Foreign Terrorist Organization

11
12 Pugh argues first that there was insufficient evidence that he
13 took a substantial step in furtherance of the intended crime, as
14 required to sustain his conviction for attempt to provide material
15 support to a foreign terrorist organization. We disagree.

16 “In order to establish that a defendant is guilty of an attempt
17 to commit a crime, the government must prove that the defendant
18 had the intent to commit the crime and engaged in conduct

1 amounting to a substantial step towards the commission of the
2 crime." *United States v. Yousef*, 327 F.3d 56, 134 (2d Cir. 2003)
3 (internal quotation marks omitted). "For a defendant to have taken
4 a 'substantial step,' he must have engaged in more than 'mere
5 preparation,' but may have stopped short of 'the last act necessary'
6 for the actual commission of the substantive crime." *Id.* (quoting
7 *United States v. Rosa*, 11 F.3d 315, 337 (2d Cir. 1993)). "A defendant
8 may be convicted of attempt even where significant steps necessary
9 to carry out the substantive crime are not completed." *Id.* A
10 substantial step "is conduct planned to culminate in the commission
11 of the substantive crime being attempted." *United States v. Farhane*,
12 634 F.3d 127, 147 (2d Cir. 2011) (internal quotation marks omitted).

13 Because the substantial step need not be the "last act
14 necessary" before commission of the crime, "the finder of fact may
15 give weight to that which has already been done as well as that
16 which remains to be accomplished before commission of the

1 substantive crime.” *United States v. Manley*, 632 F.2d 978, 987 (2d Cir.
2 1980). Further, “[i]n order for behavior to be punishable as an
3 attempt, it need not be incompatible with innocence, yet it must be
4 necessary to the consummation of the crime and be of such a nature
5 that a reasonable observer, viewing it in context could conclude
6 beyond a reasonable doubt that it was undertaken in accordance
7 with a design to violate the statute.” *Id.* at 987-88. For purposes of
8 the statute under which Pugh was charged, “a substantial step
9 towards the provision of material support need not be planned to
10 culminate in actual terrorist harm, but only in support—even benign
11 support—for an organization committed to such harm.” *Farhane*,
12 634 F.3d at 148.

13 Pugh argues that the evidence was insufficient to sustain a
14 finding that he took a substantial step toward providing material
15 support to ISIS because he only indulged in an online interest in ISIS
16 propaganda, expressed his political views, and bought a ticket to

1 Turkey from Egypt. The evidence, however, supports a different
2 conclusion, particularly when viewed in the light most favorable to
3 the government. When Pugh's electronic devices were searched,
4 authorities recovered ISIS propaganda videos and materials, as well
5 as research into ISIS' control of border crossings between Turkey
6 and Syria and its presence in both countries. Among those materials
7 were maps and articles titled "The secret jihadi smuggling route
8 through Turkey," "Where ISIS is Gaining Control in Iraq and Syria,"
9 and "Syria's border posts and who controls them." Gov't. App'x at
10 424, 446-47, 454. Further, the jury heard evidence that at the time of
11 his arrival in Turkey, Pugh was carrying with him a "tactical
12 backpack" filled with materials that would be unnecessary in a large
13 city like Istanbul, but would be beneficial in traveling through
14 Turkey to the Syrian border. Further, Pugh was not equipped with
15 materials that would be suitable for searching for work, his alleged
16 reason for traveling to Turkey, nor did he have a Turkish work visa.

1 Pugh argues that without an ISIS contact in Turkey and/or
2 Syria to help him cross the border, he could not have taken a
3 substantial step toward providing material support. The jury heard
4 testimony, however, that although most people seeking to join ISIS
5 make connections ahead of time, it is not necessary for someone to
6 secure assistance in Turkey before reaching Syria.

7 The evidence, taken together and viewed in the light most
8 favorable to the government, provides ample support for the jury's
9 conclusion that Pugh engaged in a substantial step toward
10 providing material support to ISIS. Although he was apprehended
11 by Turkish officials before he was able to complete his plan, the
12 evidence supports the finding that he was traveling to Turkey to
13 cross the Syrian border in an effort to join ISIS. Although he did not
14 have an ISIS contact, nor had he sworn a formal oath of allegiance to
15 the organization, the steps he had completed were nonetheless
16 substantial and were "planned to culminate" in his support of ISIS.

1 *Farhane*, 634 F.3d at 147. But for the interference of Turkish officials,
2 there is no indication that Pugh would not have completed his
3 journey to Syria to join ISIS. Accordingly, there was sufficient
4 evidence to sustain the jury’s conclusion that Pugh took a substantial
5 step toward providing material support to a foreign terrorist
6 organization. His conviction on count one is affirmed.

7 b. Count Two: Obstruction of Justice

8 Pugh argues next that there was insufficient evidence of a
9 nexus between his obstructive conduct and official proceedings in
10 the United States to support his conviction for obstruction of justice.
11 Specifically, Pugh argues that when he was denied entry into
12 Turkey, “there was no reason for him to believe that any judicial
13 proceeding had been initiated . . . [or] would be initiated in the
14 future.” Appellant’s Br. at 49. The government asserts that Pugh
15 destroyed, or attempted to destroy, USB thumb drives and the files
16 contained thereon in order to preclude the government from being

1 able to use the materials at a federal grand jury proceeding to indict
2 Pugh for his attempt to provide material support to ISIS.

3 Pugh was charged in count two of the indictment with
4 obstruction of justice pursuant to 18 U.S.C. § 1512(c)(1), which
5 criminalizes altering, destroying, mutilating, or concealing
6 information “with the intent to impair the object’s integrity or
7 availability for use in an official proceeding.” He was also charged
8 pursuant to 18 U.S.C. § 1512(c)(2), which criminalizes obstructing,
9 influencing, or impeding any official proceeding, or attempting to
10 do so. An “official proceeding” includes “a proceeding before a
11 judge or court of the United States ... or a Federal grand jury.” 18
12 U.S.C. § 1515(a)(1)(A). The government need not prove that a
13 defendant knew that the proceeding was or would be federal. 18
14 U.S.C. § 1512(g)(1). “[T]he government must prove that such a
15 proceeding was reasonably foreseeable to the defendant.” *United*

1 *States v. Martinez*, 862 F.3d 223, 237 (2d Cir. 2017), *vacated on other*
2 *grounds by Rodriguez v. United States*, 139 S. Ct. 2772 (2019).

3 In order to prove obstruction of justice in violation of section
4 1512(c)(2), “the government must show that there was a ‘nexus’
5 between the defendant’s conduct and the pending, or foreseeable,
6 official proceeding.”⁴ *Id.* “[T]he existence of a nexus between [a
7 defendant’s] action and the proceeding does not depend on the
8 defendant’s knowledge. . . . Rather, the existence of a nexus, for
9 obstruction-of-justice purposes, is determined by whether the
10 defendant’s acts have a relationship in time, causation, or logic with
11 the judicial proceedings.” *Id.* (internal citations and quotation marks
12 omitted). “[I]n other words, ‘the endeavor must have the natural
13 and probable effect of interfering with the due administration of

⁴ “We have previously assumed without deciding that the requirement of a nexus between the obstructive act and the official proceeding that is required under subsections (b)(2) and (c)(2) of § 1512 likewise applies to subsection (c)(1). See *United States v. Ortiz*, 220 F. App’x 13, 16 (2d Cir. 2007). Because [Pugh’s] claim fails in any event, we likewise assume here that the nexus requirement applies.” *United States v. Bunday*, 804 F.3d 558, 590 n.33 (2d Cir. 2015).

1 justice.’” *United States v. Reich*, 479 F.3d 179, 185 (2d Cir. 2007)
2 (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

3 Moreover, “[t]he actions of the defendant need not have
4 directly impeded, or attempted to impede directly, the official
5 proceeding.” *Martinez*, 862 F.3d at 238. Further, the defendant’s
6 actions need not be “successful in impeding or obstructing justice . . .
7 so long as his acts had the natural and probable consequence of
8 interfering with an official proceeding that was foreseeable even if
9 not then pending.” *Id.* (internal citations omitted). “[A]n official
10 proceeding need not be pending or about to be instituted at the time
11 of the offense[.]” 18 U.S.C. § 1512(f)(1). “Rather, we have found the
12 nexus requirement satisfied where a grand jury proceeding was
13 ‘foreseeable’ because the defendant was aware ‘that he was the
14 target of an investigation.’” *United States v. Bindow*, 804 F.3d 558, 590
15 (2d Cir. 2015) (quoting *United States v. Persico*, 645 F.3d 85, 108 (2d
16 Cir. 2011)).

1 Here, Pugh has “failed to show that the evidence was
2 insufficient to establish a nexus between his actions and obstruction
3 of the proceeding.” *Reich*, 479 F.3d at 186. The evidence supports
4 the jury’s conclusion that Pugh acted with intent to destroy his
5 devices to impair their use in a reasonably foreseeable official
6 proceeding.

7 The jury heard testimony from a number of witnesses,
8 including United States officials and experts on foreign terrorist
9 organizations, about the cultural climate in America regarding
10 terrorist organizations, including the prevalence of American
11 citizens becoming radicalized via social media and attempting to
12 join ISIS and other terrorist groups overseas, as well as the United
13 States’ response to and handling of those types of situations. On the
14 basis of the evidence presented, the jury reasonably could have
15 concluded that at the time Pugh was detained, it was or should have
16 been reasonably foreseeable to Pugh that being returned to Cairo

1 after being denied entry into Turkey, a well-known and frequently
2 utilized pathway to Syria, while attempting to travel to Syria to join
3 ISIS would subject him to official proceedings in the United States.
4 Further, the government introduced evidence of Pugh's knowledge,
5 before he was denied entry into Turkey, of at least one other
6 American citizen who was arrested at JFK Airport for attempting to
7 join ISIS in Syria and criminally charged in the United States with
8 providing material support to a foreign terrorist group (and thus
9 subjected to an official proceeding). Accordingly, the jury could
10 have reasonably concluded that a similar proceeding was
11 foreseeable to Pugh at the time he was denied entry.

12 Moreover, the evidence supports a conclusion that when Pugh
13 was denied entry into Turkey, and while still at the Turkish airport,
14 he wiped his iPod of all contents and destroyed his USB thumb
15 drives. Given the reasonable foreseeability of an official proceeding
16 against him, the jury was also free to infer that Pugh destroyed his

1 electronic devices with the intent to impair their integrity and render
2 the contents, which included ISIS propaganda and evidence of
3 Pugh's support of ISIS, unavailable for use against him in a future
4 official proceeding.

5 Viewed in the light most favorable to the government, and
6 drawing all reasonable inferences in its favor, as we must, a rational
7 trier of fact could have viewed the evidence against Pugh and found
8 that an official proceeding regarding his actions abroad was
9 reasonably foreseeable and that he destroyed his electronic devices
10 in an effort to keep them from being used against him. Accordingly,
11 Pugh's conviction on Count Two is affirmed.

12 **III. Sentencing**

13 Pugh's last argument on appeal is that his sentence was both
14 substantively and procedurally unreasonable because the court did
15 not provide him with the opportunity to give his prepared
16 sentencing remarks and did not give adequate reasoning for

1 imposing the maximum permissible sentence. We review
2 sentencing decisions under a “deferential abuse-of-discretion
3 standard of review.” *Gall v. United States*, 552 U.S. 38, 52 (2007).

4 a. Right of Allocution

5 The following additional facts are relevant here. Pugh
6 appeared for sentencing on May 31, 2017 and, after hearing from the
7 government, the court allowed Pugh to deliver his prepared
8 remarks in which he discussed the difficulty of being a black Muslim
9 man in America, set out his own version of the facts of the case, and
10 accused the government of lying and setting him up. The amount of
11 time Pugh was given to speak is unclear from the record, but after
12 over seventeen uninterrupted transcript pages of Pugh’s remarks,
13 the court interrupted him to suggest that Pugh tailor his remarks to
14 sentencing, rather than his version of the facts. The court then
15 allowed Pugh and his counsel a five-minute recess, and when they
16 returned, Pugh’s attorney continued with the sentencing argument,

1 rather than Pugh. Pugh argues that the court's decision to stop him
2 from finishing his remarks amounted to procedural
3 unreasonableness. We disagree.

4 A court is required to provide a defendant with an
5 opportunity to speak at sentencing to offer mitigating information.
6 Fed. R. Crim. P. 32(i)(4)(A)(ii). That right, the right of allocution, is
7 an "absolute right" ensuring that the defendant is "allowed a
8 meaningful right to express relevant mitigating information before
9 an attentive and receptive district judge." *United States v. Li*, 115
10 F.3d 125, 133 (2d Cir. 1997). But the right of allocution "is not
11 unlimited in terms of either time or content." *Id.* Here, Pugh was
12 provided substantial uninterrupted time to address the court. The
13 court only interrupted him when it deemed Pugh was no longer
14 providing information relevant to mitigation and simply asked Pugh
15 to refocus his statements. Further still, and very importantly, the
16 court did not tell Pugh that he could not continue with his remarks

1 after the recess; Pugh chose not to do so. Accordingly, Pugh's
2 argument that his sentence was procedurally unreasonable because
3 he was denied his right of allocution fails.

4 b. Statement of Reasons

5 Pugh also claims his sentence was procedurally unreasonable
6 because the district court failed adequately to explain the chosen
7 sentence. He claims the sentence was substantively unreasonable
8 because it cannot be located within the range of permissible
9 sentencing decisions.

10 The Supreme Court has explained that a sentencing judge
11 "should begin all sentencing proceedings by correctly calculating the
12 applicable [Sentencing] Guidelines range." *Gall*, 552 U.S. at 49
13 (citing *Rita v. United States*, 551 U.S. 338, 347-48 (2007)). In addition,
14 before imposing a sentence, the district court has an obligation to
15 weigh all the factors listed in section 3553(a). See *United States v.*
16 *Fernandez*, 443 F.3d 19, 26, 29 (2d Cir. 2006), *abrogated on other grounds*

1 *by Rita*, 551 U.S. at 346-47; *see also United States v. Corsey*, 723 F.3d
2 366, 375 (2d Cir. 2013) (per curiam).

3 In determining the “particular sentence to be imposed,” the
4 sentencing judge must consider: “the nature and circumstances of
5 the offense and the history and characteristics of the defendant,” 18
6 U.S.C. § 3553(a)(1); “the kinds of sentences available,” *id.*
7 § 3553(a)(3); the range set out in the Sentencing Guidelines, *id.*
8 § 3553(a)(4); “any pertinent policy statement,” *id.* § 3553(a)(5); “the
9 need to avoid unwarranted sentence disparities among defendants
10 with similar records who have been found guilty of similar
11 conduct,” *id.* § 3553(a)(6); and “the need to provide restitution to any
12 victims of the offense,” *id.* § 3553(a)(7).

13 Another section 3553(a) factor requires the judge to consider
14 the various purposes of sentencing, which are: (A) to reflect the
15 seriousness of the offense, to promote respect for the law, and to
16 provide just punishment for the offense; (B) to afford adequate

1 deterrence to criminal conduct; (C) to protect the public from further
2 crimes of the defendant; and (D) to provide the defendant with
3 needed educational or vocational training, medical care, or other
4 correctional treatment in the most effective manner.” *Id.*

5 § 3553(a)(2). Having considered all of the section 3553(a) factors, the
6 district court must reach “an informed and individualized judgment
7 in each case as to what is ‘sufficient, but not greater than necessary’
8 to fulfill the purposes of sentencing.” *United States v. Cavera*, 550
9 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting 18 U.S.C. § 3553(a)).

10 Section 3553 also provides that the “court, at the time of
11 sentencing, shall state in open court the reasons for its imposition of
12 the particular sentence, and, if the sentence—

13 (1) is of the kind, and within the range, [called for by the
14 Sentencing Guidelines], and that range exceeds 24 months,
15 the reason for imposing a sentence at a particular point
16 within the range; or

1 (2) is not of the kind, or is outside the range, [called for by the
2 Sentencing Guidelines], the specific reason for the
3 imposition of a sentence different from that described”
4 18 U.S.C. § 3553(c).

5 Thus, a sentencing judge must comply with at least⁵ four
6 distinct statutory duties when imposing sentence:

- 7 (1) to correctly calculate the applicable Sentencing Guidelines;
8 (2) to consider all of the section 3553(a) factors, including the
9 advisory Guidelines range and the purposes of sentencing;
10 (3) based on consideration of those factors, to impose a
11 sentence that is “sufficient, but not greater than necessary”
12 to serve the purposes of sentencing; and
13 (4) to “state in open court the reasons for its imposition of the
14 particular sentence,” including the reasons for imposing

⁵ There are, of course, other statutory duties imposed on judges when imposing sentence. One obvious example is the duty to sentence a defendant within the statutory range of punishment established for the crime of conviction.

1 sentence at a particular point in the Guidelines range when
2 that range exceeds 24 months and the specific reasons for
3 imposing any non-Guidelines sentence.

4 *See* 18 U.S.C. §§ 3553(a), (c); *Gall*, 552 U.S. at 49-50.⁶

5 Violation of the duties to correctly calculate the Guidelines, to
6 consider the section 3553(a) factors, and to state the reasons for the
7 particular sentence imposed can all give rise to an appellate
8 determination of procedural unreasonableness. Violation of the
9 duty to impose a sentence that is sufficient, but not greater than

⁶ The Supreme Court in *Gall* summarized those duties as follows:

As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. *See* 551 U.S. at 347-48, 127 S. Ct. 2456. . . . [T]he Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. . . . [T]he district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. *See id.*, at 351, 127 S. Ct. 2456. He must make an individualized assessment based on the facts presented. . . . After settling on the appropriate sentence, he must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing. *Ibid.*, 127 S. Ct. 2456.

552 U.S. at 49-50.

1 necessary, can give rise to an appellate determination of substantive
2 unreasonableness. *See Gall*, 552 U.S. at 51.

3 Although incorrect calculation of the Sentencing Guidelines
4 and the determination of the resulting Sentencing Guidelines
5 advisory range are common grounds to vacate a sentence, Pugh
6 does not argue here that the Guidelines were incorrectly calculated.
7 Judge Garaufis correctly determined the Sentencing Guidelines
8 range was 360 to 420 months of imprisonment.

9 Nor does Pugh argue that Judge Garaufis violated his duty to
10 consider the section 3553(a) factors. Successful assertions of a
11 violation of that duty are rare. Indeed, this Court will “presume, in
12 the absence of record evidence suggesting otherwise, that a
13 sentencing judge has faithfully discharged her duty to consider the
14 statutory factors.” *Fernandez*, 443 F.3d at 30 (citations omitted). The
15 district judge is not obligated to discuss each section 3553(a) factor
16 on the record or even to note that those factors were considered

1 before imposing sentence. *Id.* at 29-30 (quoting *United States v.*
2 *Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)) (“[N]o specific verbal
3 formulations should be prescribed to demonstrate the adequate
4 discharge of the duty to ‘consider’ matters relevant to sentencing.”).

5 Pugh does argue, however, that Judge Garaufis violated the
6 duty to state his reasons for the particular sentence imposed. That
7 argument has merit. The district judge was obligated, at the time of
8 sentencing, to “state in open court the reasons for its imposition of
9 the particular sentence.” 18 U.S.C. § 3553(c). In addition, because
10 the Guidelines range here, 360 to 420 months, was greater than two
11 years, the district judge had a further obligation to “state in open
12 court . . . the reason for imposing a sentence at a particular point
13 within the [Guidelines] range” *Id.* § 3553(c)(1). Those statutory
14 requirements were not met in this case.

15 The sentencing record must be sufficient for an appellate court
16 to “be confident that the sentence resulted from the district court’s

1 considered judgment as to what was necessary to address the
2 various, often conflicting, purposes of sentencing." *Cavera*, 550 F.3d
3 at 189-90. On review, "just as we do not insist upon 'robotic
4 incantations,' we require more than a few magic words." *Corsey*, 723
5 F.3d at 376. Requiring judges to articulate their reasons for a specific
6 sentence "is a precondition for 'meaningful appellate review'" and
7 allows a reviewing court to "have confidence that the district court
8 exercised its discretion and did so on the basis of reasons that
9 survive our limited review." *Cavera*, 550 F.3d at 193 (quoting *Gall*,
10 552 U.S. at 50). "Without a sufficient explanation of how the court
11 below reached the result it did, appellate review of the
12 reasonableness of that judgment may well be impossible." *Id.*

13 The necessary degree of particularity in the statement of
14 reasons provided by the district court "depends upon [the]
15 circumstances." *Rita*, 551 U.S. at 356. When the parties agree on the
16 appropriate sentence, for example, little or no explanation will be

1 necessary. *Cf.* Fed. R. Crim. P. 11(c)(1)(C). A lengthy explanation
2 also is not generally necessary “when a judge decides simply to
3 apply the Guidelines to a particular case.” *Rita*, 551 U.S. at 356.
4 Similarly, if a sentence is imposed at a statutory maximum or
5 mandatory minimum and the Guidelines range would otherwise
6 have been substantially above the statutory maximum or
7 substantially below the mandatory minimum, the sentence does not
8 necessarily reflect the exercise of discretion by the district judge, so
9 little explanation is necessary to enable review of that sentence. *Cf.*
10 U.S.S.G. §§ 5G1.1(a), (b); U.S.S.G. § 5G1.2, Application Note 3(B).

11 Greater particularity in the reasons given for a sentence is
12 necessary, however, when the sentence reflects a more fulsome
13 exercise of discretion. As a general rule, the “sentencing judge
14 should set forth enough to satisfy the appellate court that he has
15 considered the parties’ arguments and has a reasoned basis for
16 exercising his own legal decisionmaking authority.” *Rita*, 551 U.S. at

1 356 (citation omitted). Thus, where a party “presents nonfrivolous
2 reasons for imposing a different sentence” or where the judge
3 imposes a sentence outside the Guidelines, “the judge will explain
4 why he has done so.” *Id.* at 357. When a judge exercises discretion
5 within a broader sentencing range, or exercises discretion to impose
6 a longer sentence, *see United States v. Brooks*, 889 F.3d 95, 102 (2d Cir.
7 2018) (“there had to be a significant justification to support the
8 severity of that sentence”), he must do so “with a degree of care
9 appropriate to the severity of the punishment ultimately selected.”
10 *United States v. Chartier*, 933 F.2d 111, 117 (2d Cir. 1991).

11 Here, the district judge exercised sentencing discretion within
12 a very broad statutory range, zero to 420 months’ imprisonment,
13 and also within a fairly broad Guidelines range, 360 to 420 months’
14 imprisonment. The sentence of 420 months’ imprisonment
15 represents the statutory maximum, which fell at the top of the
16 Sentencing Guidelines range of 360 months’ to 420 months’

1 imprisonment. The district court, however, failed to “state in open
2 court the reasons for its imposition of the particular sentence.” 18
3 U.S.C. § 3553(c).

4 At sentencing, after hearing from both sides, the district judge
5 stated that there was “ample evidence” admitted at trial for the jury
6 to find Pugh guilty of both counts and commented on portions of
7 the evidence, including Pugh’s military service, which the court
8 called “commendable,” Pugh’s time overseas in the Middle East,
9 and ultimately Pugh’s decision to attempt to join ISIS. App’x at 570-
10 72. The court mentioned Pugh’s possession of videos taken from his
11 hard drive and maps of the border crossings into Syria. After
12 roughly two pages of comments, the court stated that the case was
13 about Pugh’s choice between standing up for or betraying the
14 United States, a country which had “done so much” for him. *Id.* at
15 572. The court addressed Pugh stating “You’ve made your choice,
16 sir. I have no sympathy.” *Id.*

1 The vast majority of the court’s comments on the record relate
2 to Pugh’s guilt rather than to an appropriate sentence. Those
3 comments do not provide a basis for understanding why the
4 particular sentence was imposed, much less for understanding why
5 a sentence at the top of the Sentencing Guideline range, which was
6 also the statutory maximum, was imposed. The Supreme Court has
7 identified as a “significant procedural error” the failure “to
8 adequately explain the chosen sentence.” *Gall*, 552 U.S. at 51; *see also*
9 *id.* at 50 (“After settling on the appropriate sentence, [the judge]
10 must adequately explain the chosen sentence to allow for
11 meaningful appellate review and to promote the perception of fair
12 sentencing.”) (citation omitted).

13 The fact that it was a Guidelines sentence may explain the
14 district court’s sparse explanation of the sentence imposed. But
15 district courts are not permitted to assume that a Guidelines
16 sentence is substantively reasonable. *Rita*, 551 U.S. at 351 (“[T]he

1 sentencing court does not enjoy the benefit of a legal presumption
2 that the Guidelines sentence should apply.”) (citing *United States v.*
3 *Booker*, 543 U.S. 220, 259-60 (2005)). Indeed, a sentence within the
4 properly-calculated Guidelines range can be substantively
5 unreasonable. *See United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir.
6 2010).

7 Moreover, when a defendant has been convicted of multiple
8 counts, the sentencing judge should set forth why a sentence equal
9 to the statutory maximum on one count will not produce a sufficient
10 sentence within the meaning of 18 U.S.C. § 3553(a). That principle is
11 reflected in the Guidelines, which provide a presumption in favor of
12 concurrent sentences except when consecutive sentences are
13 required in order to impose a total sentence reflecting just
14 punishment. *See* U.S.S.G. § 5G1.2(c) (“If the sentence imposed on the
15 count carrying the highest statutory maximum is adequate to
16 achieve the total punishment, then the sentences on all counts shall

1 run concurrently, except to the extent otherwise required by law.”).

2 A district court should explain why the total punishment
3 imposed is sufficient, but not greater than necessary, taking into
4 account the particular characteristics of the defendant and the
5 circumstances of the offense. That justification should guide the
6 determination whether to impose sentences on multiple counts
7 consecutively, partially consecutively, or concurrently. Explaining
8 why concurrent sentences would not achieve a “sufficient” sentence
9 is particularly appropriate where, as here, each statutory
10 imprisonment range is quite long, the district court imposed the
11 statutory maximum for each count, with the counts to run
12 consecutively, and, therefore, the defendant was sentenced to the
13 longest legal sentence available.

14 Ultimately, after consideration of the section 3553(a) factors,
15 the district court must impose a sentence that is sufficient, but not
16 greater than necessary, to fulfill the purposes of sentencing. In

1 doing so, if the court determines that a lower sentence will be just as
2 effective as a higher sentence, it must choose the lower sentence. *See*
3 *United States v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006) (“[I]f a
4 district court were explicitly to conclude that two sentences equally
5 served the statutory purposes of [section] 3553, it could not,
6 consistent with the parsimony clause, impose the higher.”).
7 Whether the sentence is consistent with the parsimony clause of
8 section 3553(a) is a question of substantive reasonableness.

9 The present record does not permit meaningful appellate
10 review of Pugh’s argument that his sentence is substantively
11 unreasonable. Without more, we cannot be confident that the
12 district court appropriately exercised its discretion in crafting the
13 sentence. Accordingly, Pugh’s sentence reflects procedural error and
14 is vacated. We remand the case for resentencing. At that
15 resentencing, the district court should state in open court the reasons
16 for whatever sentence it imposes.

1 **CONCLUSION**

2 For the foregoing reasons, we **AFFIRM** the judgment of
3 conviction, **VACATE** the sentence, and **REMAND** for resentencing.

1 GUIDO CALABRESI, *Circuit Judge*, concurring:

2 I agree with the majority opinion, which I join in full. I write separately to
3 emphasize the risks posed by the crime of obstruction of justice, 18 U.S.C. § 1512(c),
4 as it has evolved, and as it has been applied in this case.

5 The case before us illustrates how dangerously far 18 U.S.C. § 1512(c) now extends.
6 Defendant's main crime was to attempt to join ISIS, in violation of 18 U.S.C. §
7 2339B(a)(1). This is a most serious crime, and it carries a serious penalty. But, at
8 the time Defendant committed his acts, his crime was subject to a statutory
9 maximum of 15 years' imprisonment. Understandably, the District Court
10 sentenced Defendant to the full 15 years under that count. The District Court,
11 however, went further. It ultimately sentenced Defendant to more than twice that
12 time because of acts that seem to have been much less grave: Defendant's apparent
13 destruction of several USB drives and the deletion of the data on his iPod, in
14 violation of 18 U.S.C. § 1512(c).

15 It is ironical—more than ironical, potentially dangerous—that the government
16 was able to take what is already a very serious crime—attempting to provide
17 material support to a foreign terrorist organization—and, on the basis of some not
18 overly strong facts, bring an obstruction charge that more than doubled the
19 maximum sentence otherwise available.

20 The majority is correct that, here, the evidence was enough to support the
21 prosecutor's obstruction of justice charge and the jury's verdict. On the basis of
22 the facts presented at trial, a jury was licensed to conclude beyond a reasonable
23 doubt that the defendant corruptly altered, mutilated, or destroyed digital media
24 with the intent to impair their availability for use in a foreseeable official United
25 States proceeding, in violation of 18 U.S.C. § 1512(c)(1).

26 But is it really justifiable, because of this conduct, to turn Defendant's 15-year
27 sentence into a 35-year one? In this case, there was no evidence to suggest that the
28 destroyed USB drives or deleted iPod data contained information that was
29 valuable or significant in itself or for ISIS. Indeed, the evidence at trial established
30 that Defendant did not have a relationship with current ISIS members, did not
31 have an ISIS-affiliated handler supporting his recruitment, and did not succeed in
32 his attempt to join the organization. To cross into ISIS-controlled territory,

33 Defendant apparently planned to rely on a publicly-available map from a large-
34 circulation newspaper.

35 This is not to downplay the seriousness of Defendant's crime. For a skilled aircraft
36 mechanic like Defendant to offer his services to a barbaric terrorist organization is
37 a criminal act of the highest order. That is the gravamen of Defendant's criminal
38 conduct, and, accordingly, it should be the primary determinant of Defendant's
39 punishment, which Congress limited to 15 years maximum (now raised to 20
40 years, *see* USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268 § 704).

41 But Defendant here was sentenced to 35 years. And the additional term of 20 years
42 of imprisonment seems incongruous. Obstruction of justice can, of course, in some
43 circumstances, be a very serious crime. But we have to look at the context. And
44 here, in this specific context, the record does not establish the *seriousness* of *that*
45 crime. Indeed, it looks as though the court imposed the sentence it did based on
46 the heinousness of Defendant's attempted terrorism and simply used the
47 obstruction conviction as a means to go beyond the statutory maximum of that
48 terrorism count.

49 The majority recognizes the problems with the District Court's decision and
50 remands this case for greater explanation—a procedural ground. This is perfectly
51 proper. We have stated *en banc* that an appeals panel will not usually reach
52 questions of substantive reasonableness where there are procedural errors to be
53 corrected. *See United States v. Cavera*, 550 F.3d 180, 189-90 (2d Cir. 2008) (*en banc*).
54 But I believe that the demand for more explanation also, inevitably, implies that
55 substantive problems may underly this sentence as well.

56 My belief is reinforced by a concern with how broad obstruction of justice
57 prosecutions under 18 U.S.C. § 1512(c) have become. As construed by federal
58 courts, the crime has been applied expansively, as a tacked-on charge in
59 everything from attempted robbery and murder cases to run-of-the-mill drug
60 busts. *See, e.g., United States v. Johnson*, 655 F.3d 594, 598, 603-05 (7th Cir. 2011)
61 (destruction of cocaine base actionable under 18 U.S.C. § 1512(c)(1)); *United States*
62 *v. Ortiz*, 367 F. Supp. 2d 536, 538, 540-44 (S.D.N.Y. 2005) (attempted disposal of an
63 automobile used in connection with an attempted robbery actionable under 18
64 U.S.C. § 1512(c)(1)); *United States v. Vasquez-Soto*, No. 11 Cr. 986-02 (GBD), 2013 WL
65 1898174, at *1 (S.D.N.Y. May 2, 2013) (wiping fingerprints off an automobile used
66 in connection with an attempted murder-for-hire actionable under 18 U.S.C. §

67 1512(c)(1)); *see also* Sarah O'Rourke Schrup, *Obstruction of Justice: Unwarranted*
68 *Expansion of 18 U.S.C. § 1512(c)(1)*, 102 J. Crim. L. & Criminology 25 (2012)
69 (collecting and discussing cases).

70 It is at least arguable that this law was never intended to be used so broadly. 18
71 U.S.C. § 1512(c) was enacted as part of the Sarbanes-Oxley Act of 2002, a major
72 white-collar reform bill, largely prompted by reports of corporate accounting
73 fraud at Enron and other major blue-chip companies. *See* H. R. Rep. No. 107-414
74 at 18-19 (2002). But, as applied and interpreted, 18 U.S.C. § 1512(c) can now reach
75 everything from the smallest crime to the broadest political attack and creates
76 tremendous room for prosecutorial discretion.

77 Accordingly, as judges, we should be careful, in examining obstruction of justice
78 cases, to make our review searching and contextual. A sentence for obstruction of
79 justice under 18 U.S.C. § 1512(c) should reflect the severity of the *obstruction of*
80 *justice*, in the context of a particular underlying crime, and not prosecutorial or
81 judicial dissatisfaction with the limits Congress placed on the gravity of that
82 underlying crime. And this, ultimately, is what is called for in the case before us.