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United States v. Pugh

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In the  
United States Court of Appeals  
For the Second Circuit

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August Term, 2018

No. 17-1889

UNITED STATES OF AMERICA,

*Appellee,*

*v.*

TAIROD NATHAN WEBSTER PUGH,

*Defendant-Appellant.*

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Appeal from the United States District Court  
for the Eastern District of New York.

No. 15-cr-00116 — Nicholas G. Garaufis, *Judge.*

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ARGUED: FEBRUARY 4, 2019

DECIDED: AUGUST 29, 2019

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

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

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

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

Judge Calabresi concurs in a separate opinion.

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2 NITZE, MARK E. BINI, ASSISTANT  
3 UNITED STATES ATTORNEYS, *for*  
4 Richard P. Donoghue, United States  
5 Attorney for the Eastern District of  
6 New York, Brooklyn, New York, *for*  
7 *Appellee.*

8  
9 SUSAN G. KELLMAN, SARAH  
10 KUNSTLER, Brooklyn, New York, *for*  
11 *Defendant-Appellant.*

12  
13 UNDERHILL, *District Judge:*

14 Defendant-appellant Tairod Nathan Webster Pugh appeals  
15 from a judgment of conviction entered by the United States District  
16 Court for the Eastern District of New York (Garaufis, J.), after a jury  
17 found him guilty of attempting to provide material support to a  
18 foreign terrorist organization and obstruction of justice. Pugh  
19 advances three arguments in this appeal: (1) the district court erred  
20 in denying his motion to exclude from evidence a draft letter  
21 purportedly written to his wife; (2) the evidence was insufficient to  
22 support either conviction; and (3) his sentence was procedurally

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1 and/or substantively unreasonable. We disagree with most of  
2 Pugh's arguments, but agree that the court's articulation of its  
3 reasoning for imposing the maximum permissible sentence was  
4 insufficient.

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

7 **BACKGROUND**

8 The jury could have found the following facts. Pugh is a  
9 United States citizen and Air Force Veteran who moved to the  
10 Middle East to work as a civilian contractor for different aerospace  
11 companies after he left the military. While living overseas, Pugh  
12 began researching the Islamic State of Iraq and the Levant ("ISIL" or  
13 "ISIS") and downloading propaganda materials, as well as  
14 discussing ISIS tactics and activities online via Facebook. While  
15 abroad, Pugh also met and married an Egyptian woman, referred to  
16 as "M.H.S." On January 10, 2015, Pugh flew from Cairo, Egypt to

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1 Istanbul, Turkey. Upon arrival at the Turkish airport, Pugh was  
2 denied entry into the country and apprehended by Turkish  
3 authorities. At the airport in Turkey, Pugh attempted to destroy, or  
4 succeeded in destroying, many of the electronic devices he was  
5 carrying with him, including a computer, multiple USB drives, and  
6 an iPod. Pugh was returned to Egypt where his electronic devices  
7 were given to the United States authorities. A search of his laptop  
8 revealed internet searches, videos, and pictures relating to ISIS and  
9 its presence in, *inter alia*, Turkey and Syria, as well as a letter  
10 purportedly drafted by Pugh to his wife in which he pledges his  
11 allegiance to ISIS. On January 15, 2015, Pugh was returned to the  
12 United States where he was briefly detained for questioning in  
13 Customs, and was released that day. He was arrested the next day  
14 at his father's home in New Jersey.

15 Pugh was arraigned on March 18, 2015 on a two-count  
16 indictment charging him with attempting to provide material

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

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1 sentence under each statute<sup>1</sup>, 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.

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<sup>1</sup> 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.

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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 establish  
11   and defend the Islamic State." App'x at 55. Further, the letter states,  
12   in relevant part: "I will escort you into Paradise and when you see  
13   the home paid for by my blood and your tears you will know it was  
14   all worth it"; "I defied my friends and family to become a Muslim,

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1 now I will defy Muslims to be a Mujahid<sup>2</sup>”; and “I am a Mujahid. I  
2 am a sword against the oppressor and a shield for the oppressed.”

3 *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

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

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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

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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.

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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

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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

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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...." *In*  
9 *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

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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 communication<sup>3</sup>;  
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

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<sup>3</sup> 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.

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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*

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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

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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

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

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

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

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

10  
11 Pugh argues first that there was insufficient evidence that he  
12 took a substantial step in furtherance of the intended crime, as  
13 required to sustain his conviction for attempt to provide material  
14 support to a foreign terrorist organization. We disagree.

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

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

12 Because the substantial step need not be the “last act  
13 necessary” before commission of the crime, “the finder of fact may  
14 give weight to that which has already been done as well as that  
15 which remains to be accomplished before commission of the  
16 substantive crime.” *United States v. Manley*, 632 F.2d 978, 987 (2d Cir.

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

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

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

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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.

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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

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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*

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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.”<sup>4</sup> *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

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<sup>4</sup> “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).

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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)).

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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 held in Turkey, a

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

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

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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

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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,

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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

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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 the sentence was procedurally unreasonable  
6 because the district court failed to adequately 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 In making a sentencing determination, the district court must  
11 reach "an informed and individualized judgment in each case as to  
12 what is 'sufficient, but not greater than necessary' to fulfill the  
13 purposes of sentencing." *United States v. Cavera*, 550 F.3d 180, 189  
14 (2d Cir. 2008) (en banc) (quoting 18 U.S.C. § 3553(a)). In determining  
15 the "particular sentence to be imposed," the court must consider the  
16 factors listed in 18 U.S.C. § 3553(a), which include: "the nature and

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1 circumstances of the offense and the history and characteristics of  
2 the defendant," *id.* § 3553(a)(1); "the kinds of sentences available," *id.*  
3 § 3553(a)(3); the range set out in the Sentencing Guidelines, *id.* §  
4 3553(a)(4); "any pertinent policy statement," *id.* § 3553(a)(5); "the  
5 need to avoid unwarranted sentence disparities among defendants  
6 with similar records who have been found guilty of similar  
7 conduct," *id.* § 3553(a)(6); and "the need to provide restitution to any  
8 victims of the offense." *Id.* § 3553(a)(7).

9           In addition, the court must consider the "need for the sentence  
10 imposed ... (A) to reflect the seriousness of the offense, to promote  
11 respect for the law, and to provide just punishment for the offense;  
12 (B) to afford adequate deterrence to criminal conduct; (C) to protect  
13 the public from further crimes of the defendant; and (D) to provide  
14 the defendant with needed educational or vocational training,  
15 medical care, or other correctional treatment in the most effective  
16 manner." *Id.* § 3553(a)(2). A district court has an obligation to

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1 weigh the factors listed in section 3553(a). *United States v. Fernandez*,  
2 443 F.3d 19, 28 (2d Cir. 2006); *see also United States v. Corsey*, 723 F.3d  
3 366, 375 (2d Cir. 2013) (per curiam).

4 After consideration of the section 3553(a) factors, the district  
5 court must impose a sentence that is sufficient, but not greater than  
6 necessary, to fulfill the purposes of sentencing. In doing so, if the  
7 court determines that a lower sentence will be just as effective as a  
8 higher sentence, it must choose the lower sentence. *See United States*  
9 *v. Ministro-Tapia*, 470 F.3d 137, 142 (2d Cir. 2006) (“[I]f a district court  
10 were explicitly to conclude that two sentences equally served the  
11 statutory purposes of [section] 3553, it could not, consistent with the  
12 parsimony clause, impose the higher.”).

13 A district court commits procedural sentencing error when it  
14 “does not consider the [18 U.S.C.] § 3553(a) factors ... [or] if it fails  
15 adequately to explain its chosen sentence[.]” *Cavera*, 550 F.3d at 190.  
16 The sentencing record must be sufficient for an appellate court to

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

14 At sentencing, after hearing from both sides, the district court  
15 stated that there was “ample evidence” admitted at trial for the jury  
16 to find Pugh guilty of both counts and commented on portions of

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1 the evidence, including Pugh's military service, which the court  
2 called "commendable," Pugh's time overseas in the Middle East,  
3 and ultimately Pugh's decision to attempt to join ISIS. App'x at 570-  
4 72. The court mentioned the defendant's possession of videos taken  
5 from the defendant's hard drive and maps of the border crossings  
6 into Syria. After roughly two pages of comments, the court stated  
7 that the case was about Pugh's choice between standing up for or  
8 betraying the United States, a country which had "done so much"  
9 for him. *Id.* at 572. The court addressed Pugh stating "You've made  
10 your choice, sir. I have no sympathy."

11 Most of the court's comments on the record relate to Pugh's  
12 guilt rather than to an appropriate sentence. Without further  
13 explanation for its sentencing determination, the court sentenced  
14 Pugh to two consecutive terms of incarceration: 180 months on  
15 count one and 240 months on count two, the maximum sentence

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1 under each statute at the time of the offense, for a total of 420  
2 months, the highest permissible sentence. *Id.*

3 The sentence of 420 months represents the statutory  
4 maximum, which fell within the Sentencing Guidelines range of 360  
5 months' to 420 months' imprisonment. The fact that it was a  
6 Guidelines sentence may explain the district court's spare  
7 explanation of the sentence imposed. But district courts are not  
8 permitted to assume that a Guidelines sentence is substantively  
9 reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007) ("[T]he  
10 sentencing court does not enjoy the benefit of a legal presumption  
11 that the Guidelines sentence should apply.") (citing *United States v.*  
12 *Booker*, 543 U.S. 220, 259-60 (2005)). Indeed, a sentence within the  
13 properly-calculated Guidelines range can be substantively  
14 unreasonable. *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir.  
15 2010).

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1           A lengthy explanation is not generally necessary “when a  
2 judge decides simply to apply the Guidelines to a particular case.”  
3 *Rita*, 543 U.S. at 356. But as a general rule, the “sentencing judge  
4 should set forth enough to satisfy the appellate court that he has  
5 considered the parties’ arguments and has a reasoned basis for  
6 exercising his own legal decisionmaking authority.” *Id.*

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

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1 sentences on all counts shall run concurrently, except to the extent  
2 otherwise required by law.”).

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

14 The present record does not permit meaningful appellate  
15 review of the substantive reasonableness of Pugh’s sentence.  
16 Without more, we cannot be confident that the district court

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1 appropriately exercised its discretion in crafting the sentence.  
2 Accordingly, Pugh's sentence reflects procedural error and is  
3 vacated. We remand the case for resentencing, including an  
4 articulation of the court's reasons for whatever sentence it imposes.

5 **CONCLUSION**

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

**United States Court of Appeals for the Second Circuit  
Thurgood Marshall U.S. Courthouse  
40 Foley Square  
New York, NY 10007**

**ROBERT A. KATZMANN**  
CHIEF JUDGE

Date: August 29, 2019  
Docket #: 17-1889cr  
Short Title: United States of America v. Pugh

**CATHERINE O'HAGAN WOLFE**  
CLERK OF COURT

DC Docket #: 1:15-cr-116-1  
DC Court: EDNY (BROOKLYN)  
DC Judge: Garaufis

**BILL OF COSTS INSTRUCTIONS**

The requirements for filing a bill of costs are set forth in FRAP 39. A form for filing a bill of costs is on the Court's website.

The bill of costs must:

- \* be filed within 14 days after the entry of judgment;
- \* be verified;
- \* be served on all adversaries;
- \* not include charges for postage, delivery, service, overtime and the filers edits;
- \* identify the number of copies which comprise the printer's unit;
- \* include the printer's bills, which must state the minimum charge per printer's unit for a page, a cover, foot lines by the line, and an index and table of cases by the page;
- \* state only the number of necessary copies inserted in enclosed form;
- \* state actual costs at rates not higher than those generally charged for printing services in New York, New York; excessive charges are subject to reduction;
- \* be filed via CM/ECF or if counsel is exempted with the original and two copies.

**United States Court of Appeals for the Second Circuit  
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New York, NY 10007**

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DC Judge: Garaufis

**VERIFIED ITEMIZED BILL OF COSTS**

Counsel for

\_\_\_\_\_

respectfully submits, pursuant to FRAP 39 (c) the within bill of costs and requests the Clerk to prepare an itemized statement of costs taxed against the

\_\_\_\_\_

and in favor of

\_\_\_\_\_

for insertion in the mandate.

Docketing Fee \_\_\_\_\_

Costs of printing appendix (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

Costs of printing reply brief (necessary copies \_\_\_\_\_ ) \_\_\_\_\_

**(VERIFICATION HERE)**

\_\_\_\_\_  
Signature