

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) No. 4:10 CR00547 HEA
)
 Mohamud Abdi Yusuf,)
 a/k/a "Sheikh Hassan,")
 a/k/a "Hassan Dhunkaal,")
 a/k/a "Mohamoud Yusuf Dhunkaal")
)
 Defendant)

**UNITED STATES RESPONSE TO DEFENDANT'S
SENTENCING MEMORANDUM**

Comes now the United States of America, by and through its attorneys, Richard G. Callahan, United States Attorney for the Eastern District of Missouri, and Matthew T. Drake, Assistant United States Attorney for said District, and submits this Response to defendant's Sentencing Memorandum and in support of the application of United States Sentencing Guidelines Section 3A1.4, states as follows:

I. Overview

United States Sentencing Guidelines (hereinafter USSG) Section 3A1.4 is categorized under chapter three as a victim related adjustment for terrorism. Section 3A1.4 was amended in 1996 by the Antiterrorism and Effective Death Penalty Act.

Section 3A1.4 states, in pertinent part, that:

(a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32.

In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI.

There are currently four application notes to Section 3A1.4. Application Note 1 states that the term "federal crime of terrorism" is defined in Title 18, U.S.C. Section 2332b(g)(5). That subsection, which sets out the offense of acts of terrorism transcending national boundaries, also states that the term "federal crime of terrorism" means an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct" and is one of a series of specifically enumerated violations. USSG Section 3A1.4 cmt. n.1 (2012)

Title 18 U.S.C. Section 2332b states, in pertinent part:

- (5) the term "Federal crime of terrorism" means an offense that--
- (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and
 - (B) is a violation of . . .
 - 2339A [18 USCS Section 2339A] (relating to providing material support to terrorists), 2339B [18 USCS Section 2339B] (relating to providing material support to terrorist organizations), 2339C [18 USCS Section 2339C] (relating to financing of terrorism), 2339D [18 USCS Section 2339D] (relating to military-type training from foreign terrorist organization). . . of this title;
- a

Application Note 2 concerns harboring, concealing and obstruction of justice and is inapplicable to present case. Application Note 3, which concerns "Computation of Criminal History Category," provides that, "[u]nder subsection (b), if the defendant's criminal history

category as determined under Chapter Four (Criminal History and Criminal Livelihood) is less than Category VI, it shall be increased to Category VI." USSG Section 3A1.4 cmt. n.3 (2012). Application Note 3 serves as an addendum to Section 3A1.4's subsection (b) by clarifying that Section 3A1.4 does not require a prerequisite criminal history category VI for its application. Application Note 3 provides for the automatic increase of criminal history to category VI. The increase applies to the Section 3A1.4 application notes, except for Application Note 4.

Application Note 4 is a stand-alone provision for upward departure, rather than a Section 3A1.4 adjustment, in cases where the defendant's actions do not meet the definition of "federal crime of terrorism" as defined in 18 U.S.C. Section 2332b(g)(5). It provides that:

The adjustment provided by this guideline applies only to federal crimes of terrorism. However, there may be cases in which (A) the offense was calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct but the offense involved, or was intended to promote, an offense other than one of the offenses specifically enumerated in 18 U.S.C. Section 2332b(g)(5)(B); or (B) the offense involved, or was intended to promote, one of the offenses specifically enumerated in 18 U.S.C. Section 2332b(g)(5)(B), but the terrorist motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct. In such cases an upward departure would be warranted, except that the sentence resulting from such a departure may not exceed the top of the guideline range that would have resulted if the adjustment under this guideline had been applied. USSG Section 3A1.4 cmt. n.4 (2009).

The predetermined increases of offense level and criminal history category that are applicable to Section 3A1.4 are not applicable to Application Note 4. The Commission noted that an upward departure rather than a specific guideline adjustment was used because of the infrequency of this type of case and so that the court could assess the harm caused by these offenses on a case-by-case basis. The resulting sentence may not exceed the top of the guideline range that would have applied under a Section 3A1.4 calculation. Thus, Section 3A1.4,

Application Note 4, provides an upward departure, rather than a specified guideline adjustment for offenses that satisfy Section 2332b(g)(5)(A), but not (B), or vice versa. Viewed in the aggregate, these amendments reflect an understanding by both the Congress and the Sentencing Commission that “an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and difficulty of deterring and rehabilitating the criminal, and thus, terrorists and their supporters should be incapacitated for a longer period of time.” United States v. Meskini, 319 F.3d 88, 92 (2d Cir.2003). “We have recognized that the Sentencing Commission had a rational basis for creating a uniform criminal history category for all terrorists under [U.S.S.G.] § 3A1.4(b), because even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation.” United States v. Stewart, 590 F.3d 93, 143 (2nd Cir. 2009), citing United States v. Meskini, 319 F.3d 88, 92 (2d Cir.), cert. denied, 538 U.S. 1068, 123 S.Ct. 2240 (2003).

Elements of Section 3A1.4 Enhancement

USSG Section 3A1.4 requires proof of two elements: (1) the defendant must have been convicted of an offense that involved or was intended to promote a federal crime of terrorism; and (2) the offense must have been “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” A “federal crime of terrorism” is defined by cross-reference to Title 18, U.S.C. Section 2332b(g)(5).

1. Intent

The intent element under Section 2332b(g)(5)(A) (required to establish a Section 3A1.4 enhancement) often requires a higher level of knowledge than the level of knowledge for the offense which forms the basis for the conviction. As a result, it is not enough for the government to prove only that a listed terrorism offense was committed. For example, a conviction under

Title 18, U.S.C. Section 2339B requires the government to prove that a person knowingly provided, attempted to provide, or conspired to provide material support or resources, which then triggers USSG Section 2M5.3 (Providing Material Support or Resources to Designated Foreign Terrorists Organizations or For a Terrorist Purpose). However, in order to apply the Section 3A1.4 terrorism enhancement, the government must also demonstrate that the material support or resources were “calculated to influence or affect . . . or retaliate against government conduct.”

2. Substantive Offense

Section 3A1.4 applies “[i]f the offense is a felony that involved, or was intended to promote, a federal crime of terrorism” and the intent element is met. To meet the offense element, the defendant may have been convicted of one of the enumerated crimes listed in Title 18 U.S.C. Section 2332b(g)(5)(B). Alternatively, a defendant may receive the enhancement if his substantive offense or relevant conduct “involved, or was intended to promote” one of the enumerated crimes.

3. “Government”

The government affected must not necessarily be the United States government. The Fifth Circuit and a district court in the Sixth Circuit have found that a Colombian terrorist group's attempt to influence Colombia, and Hizballah's attempts to influence Israel, met the enhancement criteria.¹ In addition, the Second Circuit applied the enhancement to a scheme designed to influence to Egyptian government.² Further, Title 18, U.S.C. Section 2332b(g)(5) also provides that the adjustment may apply not just to governments but also when a “terrorist

¹ United States v. Puerta, 249 F. App'x 359 (5th Cir. 2007); United States v. DeAmaris, 406 F. Supp. 2d 748 (S.D. Tex. 2005); United States v. Assi, 586 F. Supp. 2d 841 (E.D. Mich. 2008). See also United States v. Aref, No. 04-CR-402, 2007 WL 804814, at 2 (N.D.N.Y. Mar. 17, 2007).

² United States v. Stewart, 590 F.3d 93 (2nd Cir. 2009).

motive was to intimidate or coerce a civilian population, rather than to influence or affect the conduct of government.” Indeed, in considering Application Note 4, which recognizes that even if the enhancement does not apply, an upward departure may be appropriate for some conduct that is close to the "federal crime of terrorism" definition, the "government" term should be interpreted broadly.³

In United States v. Mandhai, a Fourth Circuit case, the defendant contended that his activities were not violent, and that the terrorism enhancement applies only to “acts” and not to inchoate plans or schemes. Since the defendant did not commit any violent acts, he argued that the enhancement could not stand. Similarly, one defendant in an Eleventh Circuit case argued that the district court erred in applying the terrorism enhancement because: (1) his conspiratorial acts were too far removed from the actual commission of a federal crime of terrorism; and (2) there was insufficient evidence to prove that his crime was “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” since it was speculative that he would or could follow through on the conspiracy's plan to bomb electrical substations.⁴ The court found that the terrorism enhancement did not hinge upon a defendant's ability to carry out specific terrorist crimes or the degree of separation from their actual implementation. Rather, it was the defendant’s purpose that was relevant, and if that purpose was to promote a federal crime of terrorism, then the enhancement was triggered. Stated another way, the terrorism enhancement may be applied even though the record reflects

³ See, United States v. Cottrell, 312 F.App’x 979 (9th Cir. 2009); United States v. Hammond, 381 F.3d 316 (4th Cir. 2004); United States v. Tankersley, 537 F.3d 1100 (9th Cir. 2008); United States v. Tubbs, 290 F. App’x 66 (9th Cir. 2008); United States v. Garey, 546 F.3d 1359 (11th Cir. 2008); United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005).

⁴ United States v. Mandhai, 375 F.3d 1243 (11th Cir. 2004); United States v. Wells, 163 F.3d 889 (4th Cir. 1998).

that a defendant lacked both the means and the ability to carry out their defined activity.

Moreover, the federal courts have rejected the argument that Section 3A1.4 could not be applied unless the conduct “risked or caused death” or carried a “substantial risk of injury.”⁵

While there are only two elements that must be met in order for an offense to be a federal crime of terrorism, neither of those elements requires an act to be violent. In United States v. Fawzi Mustapha Assi, the defendant was accused of attempting to provide global positioning satellite modules, night vision goggles, and a thermal imaging camera to a terrorist organization, Hizballah.⁶ The Sixth Circuit held that the terrorism enhancement was not limited to acts of violence; a nonviolent offense could qualify as a “federal crime of terrorism” as defined by Title 18, U.S.C., Section 2332b(g)(5). The word “government” in Section 2332b(g)(5) included foreign governments and there was a sufficient showing that appellant's actions were a calculated effort to influence the conduct of a government by intimidation or coercion within the meaning of Section 2332b(g)(5).

As addressed in greater detail below, Yusuf argues that the Transitional Federal Government (hereinafter the “TFG”) is not a government. However, other courts have rejected such assertions. The Sixth Circuit rejected a similar argument that Israel was not a “government” under Title 18, U.S.C. Section 2332b(g)(5) because it acted in contravention of international law. The Court stated that Congress did not intend to put judges in a position to assess whether the country a foreign terrorist organization was trying to influence is acting illegally in some manner in order to determine whether the sentencing enhancement is

⁵ United States v. Dowell, 430 F.3d 1100 (10th Cir. 2005); United States v. Thurston, No. CR 06-60069-01-AA et al., 2007 WL 1500176 (D. Or. May 21, 2007)

⁶ United States v. Fawzi Mustapha Assi, 428 Fed. Appx. 570 (6th Cir. 2011).

appropriate. “Surely Congress did not intend for a United States district court judge to determine whether a foreign state is complying in full with its international obligations before determining whether a person who has pled guilty to providing support to a foreign terrorist organization is subject to § 3A1.4.” *Id.* at 577 . The definition of what constitutes a terrorist act is simple and straightforward. As the court explained in United States v. Christianson, 586 F.3d 532, 539 (7th Cir. 2009), Section 3A1.4:

looks at the crime involved and the perpetrator's motive. If the act is among the litany of crimes listed in Section 2332b(g)(5)(B), which include a bevy of the most harmful and odious acts in the criminal code, including everything from murder and torture to the destruction of government property, and it was "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct," then it is a federal crime of terrorism. And for all intents and purposes at sentencing, that person is a terrorist. *Id.*

II. Applicability of Section 3A1.4 to defendant Yusuf

In the present case, Yusuf conspired with others to provide support to a designated terrorist organization, al-Shabaab. Al-Shabaab operates largely in Somalia. It is currently, and was when Yusuf committed the federal offenses, dedicated to overthrowing the TFG, and ousting Ethiopian and African Union troops. The TFG is the internationally-recognized government of Somalia.⁷ *See, Hussein v. Attorney General of U.S.*, 273 Fed.Appx.147, 150 (3rd

⁷ “The members of the [United Nations] Security Council reiterated their full support to the Transitional Federal Government in its efforts to achieve peace, security and reconciliation through the Djibouti Peace Process, and the work of the Somali National Security Forces and the African Union Mission in Somalia (AMISOM).” United Nations Security Council Press Statement on Somalia, April 5, 2012, U.S. Department of State. *See also*, Remarks with Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed, Secretary of State Hillary Clinton, August 6, 2009, United States Department of State. “President Sheikh Sharif and I have just concluded a very thorough and productive discussion – thank you – about the challenges facing his country and the efforts of the international community to support the Transitional Federal Government as it stands up for the people of Somalia and against the threat of violent extremism. The United States pledges our continued support for President Sheikh Sharif’s government. And we have joined IGAD-the Intergovernmental Authority on

Cir. 2008), fn. 4 (Where court stated “according to the State Department's country report, there has been no central government since 1991, but the Transitional Federal Government, which operates in the south, is the internationally recognized government of Somalia.”).

The defendant knew that the al-Shabaab would commit acts in Somalia that would constitute acts of terrorism and violence and he knew al-Shabaab’s openly stated goals and objectives. Yusuf’s support included sending money to al-Shabaab in Somalia on more than one occasion; money that was ultimately intended and destined for, and received by al-Shabaab. Yusuf’s support also included participating in discussions about al-Shabaab’s activities, the success or failure of various al-Shabaab violent attacks and operations, the success and failure of Ethiopian and African Union actions in Somalia, and the status of affairs in Somalia regarding the TFG. Thus, the defendant was well versed about al-Shabaab and the governments that were operating in the region and the affect or influence that Al-Shabaab had on those governments and the civilian population.

A. Yusuf’s conduct involved an enumerated “Federal Crime of Terrorism”

On November 3, 2011, defendant Yusuf pled guilty to Counts I, II, III, and IV of the Indictment. These four counts constituted violations of Title 18, United States Code, Section 2339B (Count I, conspiracy to provide material support to a designated terrorist organization and Counts II-IV, substantive violations of providing material support to a designated terrorist organization. In each violation, the designated terrorist organization was identified as al-Shabaab.

Development, the Arab League, the Organization of the Islamic Conference, and the African Union, in endorsing the Somali-led Djibouti peace process.”

Section 3A1.4 states, in pertinent part, that: (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32. Here, all four of the offenses to which Yusuf pled guilty are clearly considered a “federal crime of terrorism.” Title 18, U.S.C. Section 2332b makes it clear that the term “[f]ederal crime of terrorism. . . (B) is a violation of . . . 2339B [18 USCS Section 2339B] (relating to providing material support to terrorist organizations).

B. Yusuf’s conduct was calculated to influence or affect the conduct of government

Yusuf’s commission of the offenses was also “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” As demonstrated by the facts stipulated to by the parties in the Plea Agreement, as well as Yusuf’s underlying conduct, his actions were certainly calculated to have such influence or affect. In the Plea Agreement the parties stipulated and Yusuf admitted and agreed that:

Beginning by at least January 2008, the defendant [Yusuf], UCCI, and others discussed their ability and desire to support forces in Somalia who were fighting Ethiopian and African Union troops in Somalia, including violent forces who were members of a terrorist organization in Somalia known as al-Shabaab. *Al-Shabaab's objectives included the violent overthrow of the Transitional Federal Government (TFG), ousting Ethiopian and African Union support, and the imposition of Shari' a law in Somalia. The defendant knew that al-Shabaab was engaged in, and used, violence, intimidation, and acts of terrorism (which included the use of explosives, firearms, and dangerous devices) in Somalia in an effort to reach their objectives.* Plea Agreement p. 4 (emphasis added).

These facts definitively demonstrate that Yusuf intended to “influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct,” through his support of al-Shabaab. Yusuf specifically admitted that he discussed his ability and desire to support forces in Somalia who were fighting Ethiopian troops, namely al-Shabaab. He further

admitted that al-Shabaab's objectives included: (1) the violent overthrow of the TFG, the government that was operating in Somalia at the time the offense was committed; (2) ousting Ethiopian support; and, (3) the use of violence and intimidation. Thus, Yusuf admitted that by supporting al-Shabaab he intended to influence or affect the conduct of not just the TFG, but also the Ethiopian government, and the civilian population at large. He admitted that he knew al-Shabaab, and by extension his support of al-Shabaab, conducted activities through intimidation, coercion, and to retaliate against government conduct. Yusuf admitted that al-Shabaab "engaged in, and used, violence, *intimidation*, and acts of terrorism (which included the use of explosives, firearms, and dangerous devices) in Somalia in an effort to reach their objectives." *Id.*

The parties also stipulated that, [t]he defendant [Yusuf] and his co-conspirators "committed overt acts in furtherance of their agreement to support al-Shabaab including those alleged in the Indictment." Plea Agreement p. 5. The Indictment specifically alleged, and Yusuf admitted, that "[i]n 2004, the Transitional Federal Government (hereinafter "TFG") was established under international auspices, and enjoyed the support of the United States and the United Nations. . . Al-Shabaab operated as a terrorist organization based in Somalia, whose objective was the violent overthrow of the TFG and ousting African Union support, and the imposition of Shari' a law in Somalia." Indictment p. 3. par. 20-21.

In the Plea Agreement the parties stipulated, and Yusuf agreed and admitted, that:

Dirie regularly spoke to the defendant and gave him information concerning al-Shabaab's activities in Somalia, including fighting and violence directed at Ethiopians and the TFG, and al-Shabaab's violent attacks, acts of terrorism, tactics, and operations. For example, on or about May 24, 2008, Dirie told the defendant that al-Shabaab insurgents planned to shoot anyone who noticed mines and improvised explosive devices that they planted and buried to discourage anyone from removing them. Plea Agreement p. 5. ⁸

⁸ A complete transcript of this conversation has been supplied to the defense as part of discovery. It is available for Court for purposes of inspection should Court wish to inspect the reference cited herein. During the call, Dirie also informed Yusuf that in addition to al-Shabaab's efforts against the TFG, al-Shabaab had also been engaging Ethiopian, Ugandan, and government troops which included the killing

The parties also agreed pursuant to Section 2M5.3(b) that 2 levels should be added to the offense level. The parties agreed and recommended this 2 level adjustment and Section 2M5.3(b) applies because “the offense involved. . .(E) funds or other material support or resources with the intent, knowledge, or reason to believe they are to be used to commit or assist in commission of a violent act.” USSG Section 2M5.3(b)(1). While the agreement on application of this offense level adjustment does not reference the affect such underlying conduct may have on a government, it does speak to defendant’s “intent [or] knowledge” concerning his commission of offenses. In other words, the defendant agreed that 2 levels should be added pursuant to Section 2M5.3(b) because his material support was provided with the intent and knowledge that the support to al-Shabaab would be used to commit or assist in commission of a violent act. Those violent acts, conducted by al-Shabaab, in part through the defendant’s support, have an affect and influence on the governments and people against whom they were committed.

Yusuf’s underlying conduct and actions during the relevant time period also demonstrated his intent. In numerous court-authorized, recorded conversations Yusuf repeatedly discussed how al-Shabaab’s actions affected the TFG, Ethiopian troops, and the region. For example, on May 18, 2008, Yusuf and an unindicted co-conspirator discussed the fact that Ethiopians had been in certain regions of Somalia and were attacked. Yusuf’s co-conspirator told him that “50 of the Ethiopians have been . . .eh. . . eh laid to waste in the forest.” Yusuf replied, “they are gone.” UCC1 replied, “well, it’s said that it was an amazing event that occurred there, it was an open field confrontation with no civilian involvement.” Yusuf replied,

of at least four government soldiers and one civilian in Mogadishu.

“[t]here have been reports of dead bodies that lay all over the place, but it is confirmed that they brought to Wanlaweyn [a city northwest of Mogadishu] three towed vehicles and other covered vehicles carrying their dead and injured, which clearly shows evidence that something bad had occurred to them.”⁹ Exhibit ___ Thus, consistent with the Plea Agreement, Yusuf knew that al-Shabaab, their operations, and the activities occurring in Somalia influenced and affected the Somali population, the Somali government, and the Ethiopian government (among other governments), and his willful support of al-Shabaab evidences his intentions.

Similarly, on May 20, 2008, Yusuf spoke with an acquaintance and discussed fighting among a variety of forces in Somali. Yusuf asked, “are those the men who used to be led by Mohamed Deere? [sic]”¹⁰ Yusuf’s acquaintance replied that “Dheere [sic] and Aydarus who used to collect taxes at the place” and that these men had been attacked a short time ago. Yusuf asked how many men had been shot and his acquaintance told him that skirmishes were continuing, with those who fled being shot. Yusuf’s acquaintance also provided reports that Ethiopians and Somalis were involved in the conflict, to which Yusuf replied, “They are the same. There is no distinction between the two.” Yusuf stated, “don’t let them sleep” and his acquaintance said that “the operations are progressing. Everyday is a new job.” Yusuf replied, “Indeed, it is very good news, very good news. . . do you mean the resistances have arrived there

⁹ A complete transcript of this conversation has been supplied to the defense as part of discovery. It is available for Court for purposes of inspection should Court wish to inspect the reference cited herein.

¹⁰ In 2006, Mohamed Dhere was part of a Somali group that opposed the Islamic Courts Union. Such groups were heavily supported by Ethiopians. In May 2007, the Transitional Federal Government named him both the governor and mayor of Banadir and Mogadishu, respectively; he was dismissed in July 2008.

[sic]?” Yusuf’s acquaintance replied affirmatively.¹¹

In sum, each of the offenses for which Yusuf was convicted, violations of Title 18, U.S.C. 2339B, are a “federal crime of terrorism.” Yusuf’s admitted role in the offense, knowledge, and underlying actions leave no ambiguity regarding his intent to support al-Shabaab in principal and in practice and were intended and calculated among other things, to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.

III. Defendant’s arguments concerning the applicability of Section 3A1.4

Yusuf offers two propositions for his argument that Section 3A1.4 is inapplicable to his conduct. First, Yusuf asserts that in sending money to the designated terrorist organization al-Shabaab he intended to aid Duane Dirie, his co-conspirator, who Yusuf claims was being extorted. Yusuf claims he did not intend to influence or affect the conduct of a government by intimidation or coercion, or to retaliate against government conduct. Rather, he only sought to come to the aid of an acquaintance. Second, Yusuf argues that because it is dysfunctional, the TFG does not qualify as a “government” for purposes of the enhancement. Neither argument is sufficiently compelling, both lack a factual basis in the evidence and record before the Court, and neither reaches the conclusion that the enhancement is inapplicable. Each will be addressed respectively.

¹¹ A complete transcript of this conversation has been supplied to the defense as part of discovery. It is available for Court for purposes of inspection should Court wish to inspect the reference cited herein.

A. Yusuf's intent with respect to his actions and Duane Dirie

Yusuf argues that “[t]he specific intent of Mr. Yusuf’s underlying offense was to provide safety for co-defendant Duane Dirie, and did not include a purpose to “influence or affect the conduct of government.” Def. Memo at 9. Nothing stipulated to by the parties supports this proposition, and there is no evidence or facts before the Court to suggest or reach this conclusion. Rather, there is ample evidence precisely to the contrary in the Plea Agreement. Yusuf does reference an interview of Duane Dirie conducted by the BBC in Somalia following the public release of the Indictment. The interview was conducted in Somalian, later translated by trained linguists, and provided in audio and transcript form to the defendant in discovery. During the interview Dirie implied that he was pressured by al-Shabaab to collect money. In his Memorandum, Yusuf asserts that Dirie’s reference during his interview to raising money is a reference to the same \$5,000.00 that Dirie asked Yusuf to collect; \$3,000.00 of which Yusuf sent to Dirie in Somalia for al-Shabaab. In the Plea Agreement, the parties stipulated, and Yusuf agreed that “Dirie regularly spoke to the defendant and gave him information concerning al-Shabaab's activities in Somalia, including fighting and violence directed at Ethiopians and the TFG, and al-Shabaab's violent attacks, acts of terrorism, tactics, and operations.” Plea Agreement p. 5. Concerning the \$5,000.00 that Yusuf sent to al-Shabaab through Dirie, the parties stipulated and Yusuf agreed that, “Dirie told the defendant [Yusuf] that al-Shabaab asked him (Dirie) to collect \$5,000.00 for the purchase of a vehicle.” Plea Agreement p.5. The parties also stipulated and agreed that:

Dirie also told the defendant that al-Shabaab would use the vehicle to transport fighters and their weapons and that the vehicle would be used to conduct tactical operations and attacks. On or about June 17, 2008, the defendant again spoke to UCCI about raising money for the vehicle. The defendant told UCCI that *he wanted to support al-Shabaab and UCCI agreed that they should support al-Shabaab because al-Shabaab could inflict the most pain.* Among other discussions concerning the vehicle, on or about June 18, 2008, Dirie told the defendant that al-Shabaab fighters jump out of the vehicle, kill their targets, get back in and flee because the vehicle could blend in with surrounding traffic. Plea Agreement, p.6.

This clearly demonstrates Yusuf's knowledge and intended purpose in sending the money, as well as a detailed understanding of what the money would ultimately be used for once Dirie tendered it to al-Shabaab. Notably, Yusuf knew the purpose for which the money would be used before he sent it to Dirie. Given al-Shabaab's stated goals and objectives, as well as Yusuf's extensive knowledge about al-Shabaab, Yusuf intended the money to be used for such goals and purposes. In fact, Yusuf admitted that he discussed supporting al-Shabaab "because they could inflict the most pain." Plea Agreement, p.6. These are unambiguous actions and intentions designed to influence or affect a government or the civilian population at large.

Yusuf's argument that Dirie was being extorted and that he [Yusuf] "was not trying to gain anything other than the protection of his friend" is misplaced given evidence and record . Def. Memo p. 9. Even if Yusuf wanted to aid Dirie, he clearly had other intentions and motivations as well; namely the support of al-Shabaab in their goals of ousting the TFG, Ethiopians, and the support of other governments. Yusuf and Dirie specifically discussed that the money Yusuf provided to Dirie would be given to al-Shabaab to be used for a vehicle in tactical operations wherein "al-Shabaab fighters jump out of the vehicle, kill their targets, get back in and flee because the vehicle could blend in with surrounding traffic." In the Plea

Agreement the parties stipulated, and Yusuf agreed and admitted, that he personally spoke with an al-Shabaab leader when “Dirie introduced him [Yusuf] to an individual identified as ‘Sheikh Saaid,’ whom Dirie described as an al-Shabaab leader. The three discussed collecting and sending money to al-Shabaab for the vehicle.” Plea Agreement p. 6. The parties also stipulated, and Yusuf admitted and agreed that:

[o]n or about July 7, 2008, the defendant [Yusuf] talked to mid-level Shabaab member Sheikh Saaid, who was described to the defendant as a ‘platoon’ leader, about raising additional money for al-Shabaab so that they could continue to fight. The defendant [Yusuf] told Sheikh Saaid *to convey his regards to the fighters and tell them that his fund-raising efforts would continue so that al-Shabaab fighters could continue their work.*” Plea Agreement p.7.

Even if Dirie’s intent was different, because he claimed that he was under some form of purported pressure, Yusuf was not. Rather, Yusuf had full knowledge of ultimate destination and intended purpose of the funds he provided. In the Plea Agreement, the parties also stipulated, and Yusuf agreed and admitted, that Dirie told him [Yusuf] that:

a top man from al-Shabaab asked Dirie to upload videos depicting wounded civilians and the destruction and damage caused by al-Shabaab shelling operations. Dirie said that al-Shabaab had many cameras to capture such moments and they wanted the video as propaganda so that they could boast. Dirie indicated that he posted the videos to a web site where others could view these images. Dirie then discussed his success in establishing a relationship with al-Shabaab, that he would be respected, and that he was a part of the team, referring to al-Shabaab. Plea Agreement, p.5.

Dirie’s statements to the BBC that he was under pressure from al-Shabaab, were made *after* Dirie had knowledge that he had been indicted in the United States. His statements amount to self-serving attestations. Nothing in the court-authorized recorded conversations between Yusuf and Dirie, or facts in the record, indicate or suggest that Dirie was actually being extorted or placed under some form of duress.

Yusuf's argument concerning the \$5,000.00 transaction with Dirie and the inapplicability of the enhancement also ignores that fact that the money Yusuf transferred to al-Shabaab through Dirie was not an isolated incident. Rather, on other occasions Yusuf sent money to al-Shabaab. Notably, and most importantly in contradiction to the "aiding a friend theory," Dirie was not involved in other material support and money transfers Yusuf made to al-Shabaab. The parties stipulated, and Yusuf agreed and admitted that "on or about July 8, 2008, the defendant [Yusuf] spoke to UCC1 and others in San Diego, California, about sending \$2,000.00 to Somalia for three purposes including: the support of insurgents in Somali, which the defendant knew included al-Shabaab fighters; displaced persons; and, wounded fighters and civilians in area hospitals." Plea Agreement p. 7. Yusuf sent \$2,000.00 to the unindicted co-conspirator (UCC1) in San Diego, California, and knew that money would be transferred to al-Shabaab. The money ultimately went to an al-Shabaab member identified as Omar Mataan in Somalia. While Yusuf may have "attempted to get at least \$2,000 to go to displaced persons and injured people in area hospitals," (Def. Memo p. 9) he was told by UCC1, and he knew, that some of the money would go to insurgent fighters which included al-Shabaab. Plea Agreement p. 7.

Yusuf's knowledge and intent are further clarified by his familiarity with and knowledge of al-Shabaab. Al-Shabaab's central objectives in Somalia were, and still remain, to overthrow the TFG, ousting Ethiopian troops and African Union support, and the establishment Sharia law. The hallmark and central focus of al-Shabaab's existence is "to influence or affect the conduct of a government by intimidation or coercion, or to retaliate against government conduct." Yusuf knew this before, during, and after, he sent money to al-Shabaab through Dirie and UCC1. It is an untenable and unsubstantiated proposition for Yusuf to now claim that he did not intend to or actually support al-Shabaab's objectives either in theory or practice.

B. Government

The defendant also argues that “the TFG does not meet the qualifications to be considered a “government,” making the terrorism enhancement inapplicable.” Def. Memo p. 14. That is simply not the case. Matthew Bryden, a member of the United Nations Somalia-Eritrea Monitoring Group and expert on Somali affairs recently testified that during the time period of the offenses in this case, the TFG and TANG were then, and still remain, the internationally recognized government of Somalia.¹² “Two years of peace talks in neighboring Kenya between the faction leaders supported by Ethiopia, the most important of whom was Abdullahi Yusuf Ahmed, who was then president of the region of Puntland, and the Transitional National Government, they were supposed to come up with a power-sharing arrangement. It didn't really happen. The TNG was replaced in October 2004 by the Transitional Federal Government, which is the government that is still in place in Mogadishu at the moment.” See, United States v. Amina Farah Ali, Cause No. CR-10-187, U.S. District Court, District of Minnesota, Oct. 2011.¹³ Exhibit 1, Transcript p. 29. Bryden continued, “[a] second reason [why Ethiopians entered Somalia] was that within the [Islamic Courts Union] the emergence of the group that became known as al-Shabaab, this group emerged as the backbone of the Courts' military strength and

¹² The United Nations Somalia-Eritrea Monitoring Group is a United Nations sanctioned monitoring team and that report to the U.N. Security Council on violations of resolutions that the Security Council established concerning Somalia, violations of the arms embargo, threats to peace and security, obstruction of humanitarian assistance, human rights violations, and the use of al-Shabaab-controlled ports.

¹³ In United States v. Amina Farah Ali et al, Cause No. CR-10-187, two defendants were charged with, and convicted of, federal terrorism charges - among them being violations of Title 18, U.S.C. Section 2339B. Bryden's testimony is particularly relevant because, in Ali, and similar to the present case, the defendants were Somali nationals residing in the United States who provided material support to al-Shabaab. Thus, the conduct and offense characteristics are very close to the present case. It is believed the defendants are awaiting sentencing in October 2012.

therefore was beginning to shape the way the Courts -- shape their political direction. And the Ethiopians, and not only the Ethiopians, a number of foreign governments were very much concerned by the influence al-Shabaab would have on the direction the Courts would take.” Id. Ex. 1, p 33.

With respect to al-Shabaab’s affect and influence, Bryden noted, “Question: Well, I understand it [al-Shabaab] has ambitions beyond the borders of Somalia, but how about, what's its position with respect to the Transitional Federal Government under Sheikh Sharif Sheikh Ahmed? Bryden Answer: To expel, dismantle that government, and to replace it with their own rule by force.” Id. Ex. 1, p. 38. Finally, Bryden also testified concerning affect al-Shabaab had on civilians at large. “Question: [n]ow, are there any types of activities that al-Shabaab is responsible for that is directed at intimidating the civilian population? Bryden Answer: They have a range of techniques to intimidate the civilian population.” Id. Ex. 1,p 46-47.

In United States v. Assi, the defendant appealed his sentence by the district court of 120 months in prison and 2 years of supervised release for providing material support to a foreign terrorist organization in violation of 18 U.S.C. Section 2339B, arguing that the district court should not have applied a sentencing enhancement. The defendant argued that Israel could not be considered a government once it invaded and remained in Lebanon. The defendant reasoned that Hezbollah's actions against Israel were not considered actions against a legitimate government. The Sixth Circuit held that Israel did qualify as a “government” and the Appellant's offense met the criteria for a sentencing enhancement. Furthermore:

[I]f [the Court] did [view Israel as no longer a country because it broke international law by occupying Lebanon], then a district court judge would be required to assess whether the country a foreign terrorist organization is trying to influence is acting illegally in some manner in order to determine whether the sentencing enhancement is appropriate. Surely Congress did not intend for a United States district court judge to determine whether a foreign state is complying in full with its international obligations before determining whether a person who has pled guilty to providing support to a foreign terrorist organization is subject to Section 3A1.4.

In this case, Yusuf agreed that he conspired, and did in fact, provide material support to a designated terrorist organization which had as its central objective overthrowing the TFG, and ousting Ethiopian troops who were assisting the TFG. As broadly held in numerous circuits, a “federal crime of terrorism” against a “government” under Title 18, U.S.C. 2332b(g)(5)(A) includes both domestic and foreign governments. Similar to cases where actors have sought to commit an offense against the Colombian, Israeli, or Egyptian governments, the Transitional Federal Government is “internationally recognized” and falls within the statute.

Supporting this proposition is the fact that the term “government” is to be interpreted broadly. USSG Section 3A1.4, Application Note 4 further clarifies that an upward variance or departure may also apply to situations where “the terrorist motive was to intimidate or coerce a *civilian population*, rather than to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.” (Emphasis added). Given Yusuf’s actions during the commission of the offenses, and the facts stipulated by the parties, there is no doubt that Yusuf’s actions in supporting al-Shabaab both affected and influenced various governments *and* the civilian population.

Even if the defendant was correct that the TFG fails to satisfy the definition of a “government” based upon its size, effectiveness, functionality, and actual authority, he still cannot prevail because there are numerous other governments that were affected or influenced by al-Shabaab’s intimidation, coercion or retaliation, and by extension, Yusuf’s support. Ethiopia is an internationally recognized government and was certainly affected, influenced, intimidated, and retaliated against by al-Shabaab. In fact, the purpose of Ethiopia’s presence, and other African Union assistance in Somalia during the time frame of the offense was to aid the TFG, quell al-Shabaab’s violence, and help stabilize the region.¹⁴

To support his proposition the defendant supplied various exhibits, largely comprised of testimony presented to Congressional panels by experts and authoritative figures concerning the social, political, and humanitarian affairs of Somalia and the Horn of Africa. A review of these exhibits reveals that they overwhelmingly address the effectiveness of United States policies in the region, persons traveling from United States to Somalia, and the effectiveness of the TFG, not the lack of existence of a government. On the contrary, most experts and authorities cited in the exhibits specifically identify the TFG as the government of Somali, however weak, disorganized, or ineffective it may be at times. For example, in defendant’s exhibit 1, the Hon. Christopher Smith stated, “While al-Shabaab appears to be more focused at this point on carrying out attacks against Somali citizens, the TFG, and African Union peacekeeping forces in Somalia has however, threatened to attack neighboring countries including Ethiopia and Kenya.” (Doc#113-1), Joint Hearing before Subcommittee on African, Global Health, and Human Rights, Serial No. 112-99, July 2011, p.2, Def. ex. 1 p. 6.

¹⁴ The African Union is a union consisting of 54 African states. See, Thabo Mbeki "Launch of the African Union" July 9, 2002, as, well we authorities cited by the defendant in his exhibits.

The defendant's characterization of the TFG and its effectiveness or status, and the reasons how and why TFG operates, are addressed in defendant's exhibits. The authorities and experts cited and supplied by the defendant propound that, if the TFG can be characterized as weak, ineffective, or disorganized, that is due in a large part to the affect and influence al-Shabaab has had, and may continue to have on the government. Stated another way, al-Shabaab's actions, including violence, intimidation, coercion, and retaliation, are largely the cause of TFG's dysfunctional status and effectiveness. If the defendant's arguments are true, that speaks to the affect and influence al-Shabaab has had on TFG and its governing functions. This is a keen instance of precisely why the enhancement should apply to Yusuf's intent in supporting al-Shabaab and the effect that support and money supplied by Yusuf and his co-conspirator's, however it may be described, has collectively had on the government and population. The Hon. Christopher Smith, cited by defendant stated, "I introduced a resolution calling for the recognition of the Transition Federal Government, the TFG, by the U.S., greater involvement, greater engagement on the political and humanitarian crisis, and for the establishment of a diplomatic presence in Mogadishu. . . As you know, the TFG remains a weak government, but despite recent shake-ups there are glimmers of hope." *Id.* p. 5, Def. Ex. 1, p. 9.

The Hon. Donald Yamaoto, Principal Deputy Assistant Secretary, Bureau of African Affairs, U.S. Department of State, cited in defendant's Exhibit 1 as an authority and expert, agreed that the TFG was the government operating in Somalia and testified that "under the agreement, the TFG recommitted itself to the Djibouti Peace Process and the Transitional Federal Charter, to completing a set of transitional tasks to be monitored by the international community, to the reform of the Parliament and to holding elections for the President and

Speaker by August 2012.” Id. p. 8, 9; Def. Ex 1, p. 12, 13. ¹⁵

The defendant also supplied Exhibit 3, and cited to hearings before the Committee on Homeland Security and Governmental Affairs before the United States Senate held on March 11, 2009 and September 30, 2009, entitled “Violent Islamist Extremism.” (Doc. # 113-3). In those proceedings authorities and experts stated, “There are ideological, tactical, financial, and also personnel links between al-Shabaab and al-Qaeda. Al-Shabaab was credited with sheltering some of those responsible for the embassy bombings in Kenya and Tanzania. Just last month al-Qaeda released a video titled ‘From Kabul to Mogadishu’ in which Al-Qaeda’s second in command, Ayman al-Zawahiri, praises al-Shabaab.”¹⁶ “Violent Islamist Extremism,” p. 3, Def. Ex. 3, p 6 . Similarly, Andrew Liepman, Deputy Director of Intelligence, National Counterterrorism Center, Office of the Director of National Intelligence, cited in defendant’s Exhibit 3 stated that “[s]ince the end of 2006, al-Shabaab - the militant wing of the council - has led a collection of clan militias in a violent insurgency, using guerilla warfare and terrorist tactics against the transitional government and the Ethiopian presence in the region.” Id. Ex. p. 5, Def. Ex. 3, p 9.

Ken Menkhaus, professor of political science at Davidson College also testified before the Committee on Homeland Security on March 11, 2009, and was cited by the defendant. (Doc.

¹⁵ Kenya, under the auspices of the Intergovernmental Authority on Development (IGAD), led a peace process through October 2004 with the election of Abdullahi YUSUF Ahmed as President of a second interim Somalia government, known as the Transitional Federal Government (TFG). The TFG included a 275-member parliamentary body, known as the Transitional Federal Parliament (TFP). President YUSUF resigned late in 2008 while United Nations-sponsored talks were underway in Djibouti. By January 2009, the creation of a TFG-ARS unity government occurred. The TFP was doubled in size to 550 seats in parliament. The expanded parliament elected Sheikh SHARIF Sheikh Ahmed, as president in January 2009. The creation of the TFG was based on the Transitional Federal Charter (TFC), which outlined a five-year mandate leading to the establishment of a new Somali constitution and a transition to a representative government following national elections. In January 2009, the TFP amended the TFC to extend TFG’s mandate until 2011. In September 2011 parties agreed to a political roadmap that aims to institute the political transition by August 2012. See, World Factbook, 2012.

¹⁶ As stated by Hon. Chairman Joseph Lieberman March 11, 2009. Def. Ex.3

113-3). During his testimony, Menkhaus stated, “Within weeks a ‘complex insurgency’ of clan militias and regrouped shabaab forces [sic] began attacking the Ethiopian forces and the Transitional Federal Government (TFG), a weak Somali government widely perceived at the time to be a puppet of Ethiopia. The insurgency and counter insurgency that ensued over the next two years devastated that capital.” Violent Islamist Extremism, p. 107, Def. ex .3 p. 111. Menkhaus continued that al-Shabaab, “has used mortars extensively to attack Ethiopian and TFG compounds as well. It has used political assassination and the treat of assassination against Somalis in the TFG and others suspected of collaborating with the US or Ethiopia. But al-Shabaab has also introduced new military technologies into Somalia, especially the use of improvised explosive devices (IEDs).” Id. at p. 109, Def. Ex. 3, p. 113. Thus, Yusuf’s own cited authorities agree that al-Shabaab, and those who support the terrorist organization, are aware of its influence and affect on a multitude of governments as well as the civilian population.

The defendant’s hundreds of pages of authorities and experts found in the three exhibits filed with his Memorandum are replete with citations and references to: (1) al-Shabaab’s objectives; (2) al-Shabaab’s violent, terrorist actions designed to achieve their objectives and influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; (3) the TFG operating as Somalia’s internationally recognized government, however weak or effective it may be; (4) Ethiopia’s involvement in the region and the influence and affect that al-Shabaab and support of the terrorist organization has had on the government; (5) the African Union and other African government’s involvement in Somalia and the influence and affect that al-Shabaab has had on those nations and governments; and, (5) the affect that al-

Shabaab has had on the civilian population in general because of its intimidation, violence, and terrorist actions. These materials alone suffice to demonstrate that the enhancement, or a variance or departure pursuant to application Note 4, should apply to the defendant's conduct.

IV. Conclusion

The base offense level in this case, concerning Yusuf's four violations of Title 18, U.S.C. Section 2339B is found in USSG Section 2M5.3. That section provides that an offense involving providing material support to a designated foreign terrorist organization has a base offense level of 26. Because the offenses involved providing funds with the intent and knowledge that such funds would be used to commit or assist in the commission of a violent act, 2 levels are added pursuant to 2M5.3(b). The parties agreed to these recommended guideline applications.

As discussed herein, the victim related adjustment of USSG Section 3A1.4(a) applies. Yusuf was convicted of four felonies, each offense constituting a "federal crime of terrorism" as defined and enumerated in Title 18, U.S.C. Section 2332b(g)(5). Yusuf's intent in committing these offenses was knowingly and intentionally "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." The same intent and resulting actions affected the civilian population. Specifically, Yusuf provided funds to al-Shabaab, a designated foreign terrorist organization, on more than one occasion, with the intent, that the funds would, among other things: assist al-Shabaab's fight to overthrow the TFG in Somalia; oust the Ethiopian government and African Union support in Somalia; aid al-Shabaab's efforts that affected other governments in the region; and, otherwise affected the civilian population at large. Therefore, 12 levels are added. With the benefit of USSG Section 3E1.1, three levels are subtracted based on the defendant's acceptance of responsibility. The

resulting total offense level is a 37. Because Section 3A1.4 applies, Yusuf's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) is a category VI.

Based upon a total offense level of 37 and a criminal history category of VI, the recommended guideline range of imprisonment is 360 months to life, for each of the four counts. However, Title 18, U.S.C. Section 2339B has a statutory maximum of 15 years imprisonment. The statutorily authorized maximum sentence, for each count, is less than the maximum of the applicable guideline range. Thus, pursuant to USSG 5G1.2(b), in order to achieve intended affect of guidelines, the recommended guideline range is 360 months to 720 months.

Respectfully submitted,

RICHARD G. CALLAHAN
United States Attorney

/s/ Matthew T. Drake

MATTHEW T. DRAKE, #46499MO
Assistant United States Attorney
111 South 10th Street, Room 20.333
St. Louis, MO 63102
(314) 539-3741

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Douglas Forsyth
Counsel for Defendant

/s/ Matthew T. Drake

MATTHEW T. DRAKE, #46499MO
Assistant United States Attorney

1 And part of the USC, the United Somali Congress,
2 also was fighting the remains of Barre's forces. They
3 fought back and forth across southwestern Somalia, which
4 created a terrible famine.

5 And the famine led first of all the United States
6 to offer troops to deliver relief supplies and then the
7 United Nations. And so between late 1992 and 1995 there
8 was a -- there were several UN missions, one after the
9 other, to first of all deliver humanitarian assistance and
10 then to stabilize -- to attempt to stabilize Somalia.

11 Unfortunately October 3, 1993 there was the famous
12 Black Hawk Down incident, American forces killed in the
13 streets of Mogadishu. U.S. forces withdrew the following
14 year and the UN, having failed to establish stability,
15 withdrew in 1995.

16 Q. Now, Mr. Bryden, after that time period, 1995, have
17 there been efforts to form a central government?

18 A. There have been several efforts, some would say that
19 we're on the 18th or 19th effort, to form a central
20 government. The two most important ones were:

21 In 2000 in the neighboring country of Djibouti a
22 conference established the Transitional National Government,
23 headed by Abdiqasim Salad Hassan, and that government
24 returned to Mogadishu, but it failed partly because of its
25 own shortcomings and partly because it was opposed by

1 neighboring Ethiopia, which supported faction leaders to
2 contain it and eventually to bring it down.

3 As a result, in 2002 the next attempt to form a
4 government started. Two years of peace talks in neighboring
5 Kenya between the faction leaders supported by Ethiopia, the
6 most important of whom was Abdullahi Yusuf Ahmed, who was
7 then president of the region of Puntland, and the
8 Transitional National Government, they were supposed to come
9 up with a power-sharing arrangement. It didn't really
10 happen.

11 The TNG was replaced in October 2004 by the
12 Transitional Federal Government, which is the government
13 that is still in place in Mogadishu at the moment.

14 Q. Okay. You mentioned the name Abdullahi Yusuf. When he
15 headed what you called the Transitional National Government,
16 did his government ever sit in Somalia?

17 A. Yes, it did. For the first year, from 2004 and '05, the
18 government actually sat in Nairobi, Kenya, outside the
19 country. In 2005 it moved back into Somalia initially to
20 the town of Jowhar, just north of Mogadishu, and then it
21 moved later the same year to Baidoa in the southwest.

22 Q. Now, initially why did it sit in Kenya?

23 A. Because Abdullahi Yusuf considered Mogadishu not safe
24 enough for his government. Many of the people in Mogadishu
25 opposed his leadership and believed that he was seeking to

1 impose a form of clan revenge and if he came back to
2 Mogadishu they would fight him. He therefore from the day
3 he was -- almost the day he was declared president he called
4 for 20,000 foreign troops to be deployed to assist him to
5 return his government to Somalia.

6 Q. Now, that didn't happen right away, I take it?

7 A. No, it didn't happen right away.

8 Q. And you indicated, then, that the latest government,
9 which is now the TFG, the Transitional Federal Government,
10 was established in --

11 A. October 2004.

12 Q. Okay. So on the timeline that we're talking about, is
13 there a mistake where it says, "August 2004"?

14 A. That's right.

15 Q. Okay. And was Mr. Yusuf also elected president of that
16 government?

17 A. Well, that's when he became president. He was not --
18 prior to 2004 there was the Transitional National Government
19 headed by Abdiqasim Salad Hassan. Abdullahi Yusuf became
20 president in October 2004.

21 Q. Now, moving forward on your timeline, if we could move
22 down to the bottom, did an organization known as the Islamic
23 Courts Union gain power in portions of Somalia?

24 A. Yes, it did.

25 Q. And can you describe for the jury who the Islamic Courts

1 Union was.

2 A. Well, the Islamic Courts Union -- I would really have to
3 go back a long way, but the Courts first really appeared as
4 courts in 1998 in several parts of Mogadishu. There were
5 three principal courts and a fourth south of Mogadishu in
6 the town of Merca and this was a -- these were, again,
7 clan-based courts, but claiming to administer Islamic law,
8 Sharia law.

9 And the most prominent figure of the Courts, the
10 leader, if you will, was Sheikh Hassan Dahir Aweys, who had
11 a history already of trying to establish Islamic law in
12 Somalia since the early 1990's.

13 And the Courts over time gained the support of
14 much of the business community and parts of the community of
15 Mogadishu because they established for the first time, after
16 many years, law and order.

17 And in 2006 the Islamic Courts eventually took
18 control in June 2006 of the city of Mogadishu and expanded
19 their control across much of southern Somalia.

20 Q. And while we are on the subject, was one of the leaders
21 of the Courts an individual named Sharif -- Sheikh Sharif
22 Ahmed?

23 A. Sheikh Sharif Sheikh Ahmed, yes.

24 Q. And what became of the Islamic Courts?

25 A. The Islamic Courts were dismantled and displaced in

1 December 2006 by Ethiopian forces, who entered Somalia and
2 occupied it for two years, and parts of the Courts went
3 underground and formed a resistance against Ethiopian
4 occupation and part of the Courts, including Sheikh Sharif
5 Sheikh Ahmed, traveled in various directions until gathering
6 again in neighboring -- almost neighboring Eritrea in
7 Asmara, the capitol city, where they formed a new movement
8 called the Alliance for the Reliberation of Somalia.

9 That movement subsequently split. One group
10 entered peace talks with the Transitional Federal Government
11 and that wing which was headed by Sheikh Sharif Sheikh Ahmed
12 became the new government of Somalia and Sheikh Sharif
13 Sheikh Ahmed is now the president of the Transitional
14 Federal Government.

15 Q. Taking you back to the time frame of December 2006,
16 where was the Transitional Federal Government sitting during
17 the time that the Islamic Courts Union held power in
18 Mogadishu?

19 A. It was based in Baidoa.

20 Q. And at that time was Abdullahi Yusuf still the
21 president?

22 A. Yes, he was.

23 Q. Okay. And so you indicated Ethiopians invaded. Can you
24 tell the jury what the circumstances were behind that.

25 A. The Islamic Courts had taken control of Mogadishu and

1 were expanding up to the borders of Somalia, towards Kenya
2 and Ethiopia.

3 The Ethiopians have long been very much opposed to
4 Islamist movements in Somalia, partly because there's a big
5 Somali population and a large Muslim population in Ethiopia
6 and they've been afraid that this would be destabilizing for
7 Ethiopia as well.

8 Also, some of the leaders of the Islamic Courts
9 had made hostile statements to Ethiopia and had even
10 threatened to invade, Sheikh Hassan Dahir Aweys among them,
11 and so they were very resistant to the Courts becoming an
12 authority.

13 A second reason was that within the Courts the
14 emergence of the group that became known as al-Shabaab, this
15 group emerged as the backbone of the Courts' military
16 strength and therefore was beginning to shape the way the
17 Courts -- shape their political direction.

18 And the Ethiopians, and not only the Ethiopians, a
19 number of foreign governments were very much concerned by
20 the influence al-Shabaab would have on the direction the
21 Courts would take.

22 And then lastly, as the Courts -- part of the
23 Courts started to consider dialogue with the Transitional
24 Government to see whether or not some agreement could be
25 reached.

1 al-Shabaab forces started to attack positions
2 outside Baidoa. And I haven't mentioned, but by then there
3 were Ethiopian forces protecting the government in Baidoa.
4 And as, in a sense, Shabaab started these provocations to
5 interrupt the peace talks, Ethiopia took the opportunity to
6 send its forces into Somalia and take control of the
7 country.

8 Q. And subsequent to the Ethiopians entering was there
9 another attempt to restructure the Transitional Federal
10 Government, known as the Djibouti Agreement?

11 A. Yes. From the end of 2006 until two thousand and --
12 late 2008 the government, the Transitional Federal
13 Government, was based in Mogadishu, headed by Abdullahi
14 Yusuf, and it was facing a very active insurgency and was
15 unable to establish its control, even with thousands of
16 Ethiopian troops.

17 The Ethiopians finally were of the opinion that
18 there needed to be a dialogue, that the government had to
19 talk to particularly some of the clans who were supporting
20 the insurgency, parts of the Hawiye clan. And they found
21 that President Yusuf was resistant. He didn't want to talk
22 to anyone. He had a reputation as a dictator and he lived
23 up to it.

24 And so finally under pressure from Ethiopia, from
25 the United States, from a number of different places he was

1 forced to resign and peace talks in Djibouti by the rest of
2 his government and part of the Islamic Courts and the group
3 from Eritrea produced a new government -- that's early
4 January 2009 -- headed by Sheikh Sharif Sheikh Ahmed and
5 that is the government that is now sitting in Mogadishu.

6 Q. Okay. And Sheikh Sharif Sheikh Ahmed was one of the
7 former leaders of the Islamic Courts; is that correct?

8 A. He was the chairman of the Islamic Courts in Mogadishu
9 in 2006.

10 Q. And as part of the Djibouti Agreement did the Ethiopian
11 forces withdraw?

12 A. Yes, they did.

13 Q. And that's shown on your timeline in January of 2009; is
14 that correct?

15 A. That's correct.

16 Q. Now, the organization known as al-Shabaab, was it part
17 of the Djibouti Agreement?

18 A. No, it wasn't. It opposed the Djibouti Agreement.

19 Q. And what response did they make?

20 A. They attacked the new government headed by Sheikh
21 Sharif. So essentially what used to be the Islamic
22 Courts -- Shabaab had been part of the Islamic Courts --
23 formally split and al-Shabaab attacked President Sharif when
24 he returned to Mogadishu.

25 Q. And are there -- are you aware of instances where

1 al-Shabaab compared the new government of Sheikh Sharif
2 Sheikh Ahmed to the former government of Abdullahi Yusuf?

3 A. Yes. They said essentially that this was no different
4 from the previous government, that Sheikh Sharif had sold
5 out, that this was now a government of apostates, and that
6 it should be opposed.

7 Q. And when you use the term "apostates," can you explain
8 to the jury what that means.

9 A. That means that they had effectively -- they were no
10 longer Muslim. They had -- I would say they had renounced
11 their religion, but, in fact, in Shabaab's ideology Shabaab
12 gives itself the authority to designate other Muslims as
13 non-Muslims. It's an act called takfir or takfirism. And
14 so they essentially denounced the new government as
15 non-Muslim and therefore it would be legal for them to
16 attack it.

17 Q. Now, I wanted to talk a little bit about al-Shabaab
18 itself. And are you aware what the formal name is of the
19 Foreign Terrorist Organization al-Shabaab?

20 A. The full name is most often Harakat al-Shabaab
21 al-Mujahideen.

22 THE COURT: All right. Let's stop here. We'll
23 take a 15-minute break, 15-minute break. All rise for the
24 jury.

25 (Recess taken at 3:30 p.m.)

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(3:55 p.m.)

IN OPEN COURT

(JURY PRESENT)

THE COURT: You may continue.

BY MR. WARD:

Q. Mr. Bryden, before we broke you had just told the jury the formal name of al-Shabaab. And how does the formal name, how does it translate into English?

A. It is the movement of the youth engaged in jihad.

Q. Okay. Also Mujahideen Youth Movement?

A. Mujahideen Youth Movement, yes.

Q. Okay. al-Shabaab, is that an Arabic term?

A. al-Shabaab is an Arabic term.

Q. Is it in use in the Somali language to refer to the foreign terrorist organization?

A. It is in use. It has recently entered use. It wasn't a word that I remember using in, say, the 1990's.

Q. And do Somalis also refer to the foreign terrorist organization by a Somali word for youth?

A. They use the term -- they may use the term "dhallinyarada." There are other terms as well.

Q. Okay. And how about the members of al-Shabaab itself, do they refer to themselves by the Somali word for youth?

A. I'm not sure how they would refer to themselves. I

1 think depending on the context they would also refer to
2 themselves as mujahideen, but when speaking in veiled
3 speeches, as it were, dhallinyarada, innamada, yaryarka.
4 Several different terms could be used to conceal the name.

5 Q. All right. Mr. Bryden, can you tell the jury what the
6 objectives are of al-Shabaab.

7 A. As far as I think anyone can say, since it's a very
8 secretive organization and there are still elements about
9 its purposes and its structure that are not fully understood
10 to outsiders, to impose their version of Islamic law on
11 Somalia.

12 And for some members of the movement, because
13 there are different ideas within the movement, some
14 apparently seek to export that version of Islamic law to
15 neighboring countries, at least to the Muslim populations in
16 those neighboring countries, and some seek to associate
17 themselves with some form of global Islamic jihad espoused
18 by other movements around the world.

19 Q. Okay. Well, I understand it has ambitions beyond the
20 borders of Somalia, but how about, what's its position with
21 respect to the Transitional Federal Government under Sheikh
22 Sharif Sheikh Ahmed?

23 A. To expel, dismantle that government, and to replace it
24 with their own rule by force.

25 Q. Okay. And when you say its brand of Sharia, does it

1 differ from other types of Sharia law?

2 A. Absolutely. In a way Somalia has been -- has
3 implemented Sharia law or had it as a component of its
4 constitution ever since it was -- they received independence
5 in 1960. Every Somali constitution, including the current
6 Transitional Federal Government constitution, the charters
7 of Somaliland and Puntland establish Islam as the state
8 religion, Sharia as the basis -- or Islamic Sharia as the
9 basis of law, and prohibit any law that contravenes the
10 Sharia. So in a sense Somalia has always been a form of
11 Islamic state.

12 Q. Okay. Why isn't that good enough for al-Shabaab?

13 A. Well, the form of Islam practiced by Somalis
14 traditionally has been a different type of Islam. It is
15 Islam of the -- it's Sunni Islam, but of the Shafi'i legal
16 school.

17 Typically Somalis have practiced Sufism, which is,
18 some would say, a mystical form of Islam. It's been very
19 moderate in character.

20 Over the last few decades there's been a growing
21 community of Salafi Muslims in Somalia, a more Puritanical
22 version of Islam.

23 And the Shabaab interpretation is the most rigid,
24 the most extreme, and includes elements of Islamic thought
25 and teachings that haven't existed in Somalia before.

1 Q. Can you give some examples of, for instance, the
2 punishments for --

3 A. Well, for example, yes, the -- everything from the
4 punishments, the amputations, and sometimes --

5 Q. What are those applied for?

6 A. For theft a thief may have his or her hand and/or foot
7 cut off; lashes, stoning of adulterers, executions.

8 Executions, I suppose, are not the exclusive property of
9 al-Shabaab, but executions and at times mutilations and this
10 aspect that I referred to earlier, takfirism, the authority
11 to declare someone else an apostate and therefore to make it
12 legal to kill them, these are all elements of Shabaab's
13 version of Islam that aren't shared by other parts of Somali
14 society.

15 Q. And when you say "stoning of adulterers," are you
16 talking about being stoned to death?

17 A. Yes.

18 Q. And with respect to the doctrine of takfir, is that
19 sometimes implemented by beheading?

20 A. Yes, it is. There are regular beheadings.

21 Q. Is there any one particular beheading that you are
22 familiar with that you could explain to the jury?

23 A. Well, there was one that was highly publicized because
24 it was a driver for a UN agency, the World Food Program, and
25 his beheading was videotaped and circulated fairly widely.

1 Q. And according to Shabaab, what was the driver's crime?

2 A. The driver's crime was to have converted to
3 Christianity.

4 Q. And was the video posted to YouTube?

5 A. I don't believe it was posted on YouTube. I don't think
6 it would have passed their filters. But it was widely
7 circulated on other sites and even on mobile phones.

8 Q. Now, let's talk a little bit about some of the tactics
9 that al-Shabaab uses as a military group. First off, is it
10 a regular army?

11 A. No, it's not a regular army. It's more of a guerrilla
12 army. It does have some form of regular units, but it's
13 mainly a guerrilla fighting force.

14 Q. Does it have uniforms?

15 A. Some of its formed units have uniforms. They have some
16 distinctive markings, like the red shawl, the red immamad,
17 which is closely identified with al-Shabaab, but not all the
18 fighters wear it, in fact, I'd say that's probably a
19 minority, especially because Shabaab go to great pains to
20 conceal their identities.

21 THE COURT: I'm sorry. I need a comparison. Go
22 back to the interpretation of Sharia law. You talked about
23 Somalia. Do you know anything about the Kingdom of Saudi
24 Arabia?

25 THE WITNESS: I know a little about the Kingdom,

1 Your Honor.

2 THE COURT: And are you able in your expert
3 capacity to do a comparison between what happens in Saudi
4 Arabia and Somalia or what they -- al-Shabaab's
5 interpretation of Sharia is?

6 THE WITNESS: Well, Your Honor, there is -- there
7 are some similarities because both are based in the Salafi
8 or the Wahhabi school of Islam.

9 THE COURT: And the Wahhabi is the most
10 conservative?

11 THE WITNESS: The most conservative. And from the
12 Salafi school there are broadly speaking two divergent
13 streams of thought. One is --

14 THE COURT: But first let's break it down. Both
15 Saudi Arabia and Somalia are Sunni Muslims?

16 THE WITNESS: That's correct. Salafism is a
17 school of Sunni Islam.

18 THE COURT: Okay. Continue.

19 THE WITNESS: Then, Your Honor, the Salafism
20 essentially breaks into what some would call the Salafi
21 Jihadiyya, the jihadist school of thought, and in Somalia
22 what's referred to as the Salafi Jadiidah, the new Salafis.
23 And Saudi Arabia currently is associated with the new
24 Salafis.

25 The new Salafis espouse the spreading of their

1 religion through example, through teaching, but essentially
2 through peaceful means; and the Salafi Jihadiyya espouse
3 imposing their rule essentially through violence. In Saudi
4 Arabia, even the government itself is engaged in containment
5 of the Salafi Jihadiyya movement through its own criminal
6 system.

7 So there are, of course, similarities, both being
8 Salafis, but that is the critical distinction, is the use of
9 violence.

10 THE COURT: Okay. You may continue.

11 BY MR. WARD:

12 Q. Mr. Bryden, back on the tactics of the al-Shabaab
13 militia, do they employ a tactic known as suicide bombings?

14 A. Yes, they do.

15 Q. Can you describe to the jury what takes place in a
16 suicide bombing.

17 A. Suicide bombings, there are basically two different
18 forms, what we would refer to as the VBIED, the
19 vehicle-borne improvised explosive device, and the PBIED,
20 the person-borne improvised explosive device.

21 The PBIED is when a person straps or has strapped
22 to him or her an explosive belt, and these belts typically
23 in Somalia have a couple of different trigger mechanisms.
24 One is that the person -- there have been both male and
25 female bombers -- detonate their own belts, but usually

1 there's also a fail-safe, which is something like a remote
2 phone or a radio-controlled alarm. In case the person
3 doesn't detonate the device, then someone else watching
4 remotely, a controller, can detonate the device to make sure
5 that the explosion goes off. We know this partly because in
6 a few cases the bombs have not gone off and we've been able
7 to analyze the devices.

8 The vehicle-borne improvised explosive device is a
9 vehicle packed with any combination of explosives, sometimes
10 incendiary, sometimes high explosive. These can be packed
11 in the back of a truck or a Land Cruiser. The Shabaab for
12 some reason like to use what's called the Surf. It's a
13 four-wheel drive vehicle and it's a sort of station wagon.
14 And sometimes the explosive is packed in the door panels or
15 under the seats. Sometimes it's just stacked in the rear.

16 And the vehicle is driven up to a facility. If
17 they get past any guards or any security, usually blow it up
18 inside the facility. Other explosions, including some
19 recently, have gone off at the gates of the facility because
20 most facilities in Mogadishu and now elsewhere in Somalia
21 are better protected precisely because this has become such
22 a common tactic.

23 Q. Do they also employ improvised explosive devices like
24 roadside bombs?

25 A. They do indeed. These get more and more sophisticated.

1 An IED in Somalia -- there are some techniques that are
2 borrowed apparently from other countries, like Iraq and
3 Afghanistan, but in Somalia we've seen a progression from
4 very crude devices.

5 Like an anti-tank mine, the pressure device for
6 the mine is removed. It's then wired to a trigger mechanism
7 and then often nuts and bolts or bullets will be welded onto
8 the outside of the mine to increase the fragmentation
9 effect.

10 Increasingly now we also see the use of gas
11 cylinders, which are then -- rebar, construction steel bars,
12 are chopped up and adhered to the outside of the gas
13 cylinder or the explosive, which also increases the
14 fragmentation effect. And these can be hidden in garbage.

15 Then the last sort of third major form of IED is
16 in, say, a jerrycan, which would normally be containing milk
17 or vegetable oil, and it's stuffed full of TNT and then
18 wired to explode. So it looks like an everyday item left by
19 the side of the road and it can be detonated when TFG troops
20 or AMISOM or whatever the target is drives by.

21 Q. Thank you, Mr. Bryden. Now, al-Shabaab has mortars, do
22 they not?

23 A. They do.

24 Q. And do they use the -- do they set the mortars up in
25 civilian population centers?

1 A. They have in the past and continue to do so. They'll
2 either take a mobile team with a small mortar into a
3 neighborhood and fire from that neighborhood. Often that
4 involves, then, retaliatory fire from government forces or
5 African Union forces. They also use pickup trucks and
6 sometimes they'll place a mortar in the back of a pickup
7 truck, drive it into a neighborhood, fire, and then drive
8 out again so they are not there when the return fire comes
9 in.

10 Q. Is there any particular purpose behind firing from a
11 civilian population center that you know of?

12 A. I mean, the main purpose is understood to be that by
13 attracting the fire of AU or government troops, which then
14 kill civilians, that these enemy forces of al-Shabaab will
15 be blamed, the government will be delegitimized and become
16 less popular, the presence of the AU forces likewise, and
17 eventually there will be such public opposition to these
18 forces that they'll either be defeated or they'll have to
19 withdraw.

20 Q. Now, are there any types of activities that al-Shabaab
21 is responsible for that is directed at intimidating the
22 civilian population?

23 A. They have a range of techniques to intimidate the
24 civilian population.

25 One is just in areas that they control they

1 have a highly authoritarian rule and, again, the use of
2 amputations or executions is exemplary. It keeps people
3 under control.

4 They also use, for example, issuing of what are
5 known as night letters, warnings, pieces of paper that can
6 be slipped under someone's door, left at their home saying
7 you are being warned. They do this particularly with junior
8 government officials, like district commissioners, municipal
9 officials. You either leave government service or you or
10 your family will be killed.

11 And, yes, SMS. Like every 21st century movement
12 now, the use of technology to send messages, sometimes phone
13 calls. Again, the same kind of message, leave government
14 service, don't do this, don't do that or you will suffer the
15 consequences.

16 Q. Do they employ any type of targeted assassinations?

17 A. Targeted assassinations are very common of both -- well,
18 government officials are routinely targeted. They have --
19 al-Shabaab in the past first became really visible through a
20 campaign of targeted assassinations. They killed aide
21 workers. They killed journalists. They killed civil
22 society Somalia leaders they disagreed with, people from
23 nongovernmental organizations. A very high-profile peace
24 activist in Somalia was assassinated by al-Shabaab. So very
25 common.