No. 18-1366

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMSHID MUHTOROV,
Defendant-Appellant.

UNITED STATES' RESPONSE TO PETITION FOR REHEARING EN BANC

On Appeal from the United States District Court
For the District of Colorado
The Honorable John L. Kane
D.C. No. 1:12-cr-00033-JLK

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INTRODUCTION

As it did in its companion opinion in *United States v. Jumaev*, 20 F.4th 518 (10th Cir. 2021), the panel majority denied Muhtorov's speedy trial claim in a fact-bound decision because the lengthy pretrial delay resulted from "atypical aspects of the investigation that prolonged the discovery process." *United States v. Muhtorov*, 20 F.4th 558, 634 (10th Cir. 2021). That conclusion was "record-intensive" and did not establish any new legal standard. *Id.* at 660. It was simply a recognition that "on the distinctive facts of this case"—one which presented a unique combination of voluminous discovery, national security concerns, and pervasive translation challenges—the lengthy delay was justified. *Id.*

Muhtorov joins in the petition for rehearing en banc filed by Jumaev. The government incorporates its response to that petition. Muhtorov's petition should be denied for the same reasons as Jumaev's.

The panel opinion does not conflict with any existing law. It is a fact-based *application* of existing law. It therefore does not warrant the "extraordinary procedure" of en banc review. 10th Cir. R. 35.1(A).

BACKGROUND

Jamshid Muhtorov was convicted on three counts of providing, and conspiring to provide, material support to a designated foreign terrorist organization. *Muhtorov*, 20 F.4th at 580.

The discovery process was complex and atypical. *Id.* at 634, 641-42. It was complicated by three factors in particular: (1) the volume of discovery, which included 39,000 audio files (totaling 1,862 hours) of intercepted communications; (2) the presence of classified material and the associated requirements of the Classified Information Procedures Act; and (3) the need to translate much of the material from uncommon languages, using translators with security clearances. *Id.* at 643-46.

In the face of those challenges, "the government and the district court moved diligently to bring the case to trial as quickly as possible." *Id.* at 648. The government "worked diligently and promptly" to produce discovery and "the district court actively oversaw the discovery process." *Id.* at 646. Despite those efforts, trial did not occur until more than six years after Muhtorov was charged. *Id.* at 581-82. The unusual length of the pretrial period was due to those "atypical aspects of the investigation that prolonged the discovery process." *Id.* at 634.

Muhtorov twice moved to dismiss the indictment for a violation of his constitutional right to a speedy trial. *Id.* at 637. The district court denied both motions. It found that "the government and its counsel have been dedicated, and the record shows, beyond any dispute, the due diligence, the extraordinary efforts of the [government] counsel in this case." *Id.* at 642-43. The delay, it explained, was "an understandable function of the enormous amount of electronic generated data and the complexity of the terrorism-related charges." *Id.* at 637.

On appeal, this Court agreed that there was no speedy trial violation. The majority separately considered each of the *Barker* factors. *Id.* at 638-58; *see Barker v. Wingo*, 407 U.S. 514, 530 (1972). It found that three of those factors—the length of the delay, the defendant's assertion of the speedy trial right, and the prejudice to the defendant—weighed in favor of a violation (though the latter two not heavily). *Muhtorov*, 20 F.4th at 658. But the second factor—the reason for the delay—did not weigh in favor of a violation. *Id.* The majority concluded that "discovery logistics . . . drove the pace of proceedings," and that the government had carried its burden of showing "the reasons the trial occurred when it did were valid and justified." *Id.* at 648.

In balancing the *Barker* factors, the Court noted that "[u]nder the circumstances of this case, a primary consideration is that the delay was attributable to necessities of the discovery process untainted by government bad faith or negligence." *Id.* at 658-59. Ultimately, the Court found that "on the distinctive facts of this case, . . . the second *Barker* factor tips the balance in favor of not finding a constitutional violation." *Id.* at 660. Although "[t]he pretrial period was lengthy," it did not violate Muhtorov's right to a speedy trial "given the quantity and nature of the discovery, and the overall good faith and diligence of the government and the district court in bringing this case to trial." *Id.*

ARGUMENT

The *Barker* balancing test "necessarily compels courts to approach speedy trial cases on an ad hoc basis." 407 U.S. at 530. That is what the Court did here. Its opinion was "record-intensive" and limited to "the distinctive facts of this case." *Muhtorov*, 20 F.4th at 660. It did not break any new legal ground or create any conflict with existing precedent. It simply applied that precedent to the facts of this case.

Like Jumaev, Muhtorov asserts that the majority departed from precedent by (1) requiring a defendant to forgo one constitutional right

to preserve another; and (2) deeming the absence of bad faith dispositive. But as discussed in the government's response to Jumaev's petition, the Court did neither of those things. Instead, it considered and balanced each of the *Barker* factors, ultimately concluding there was no speedy trial violation because the substantial delay was attributable to—and proportional to—the necessities of the case.

I. The panel majority did not penalize Muhtorov for exercising his right to discovery.

Muhtorov first joins in Jumaev's contention that the panel majority penalized him for asserting his constitutional right to discovery. It did not. To the contrary, the majority expressly acknowledged Muhtorov's "right to make broad discovery requests under *Brady, Giglio*, and Rule 16." *Muhtorov*, 20 F.4th at 644. And it emphasized that the delay was not Muhtorov's fault. *Id.* at 642.

But that does not mean the breadth of discovery was irrelevant. Muhtorov's broad discovery requests—and indeed, the government's own independent discovery obligations—"precipitated a vast and multi-faceted discovery production" that included nearly two thousand hours of foreign-language audio files and implicated classified material. *Id.* at 641. Muhtorov was entitled to make those requests, but the

government needed time to comply with them. *Id.* at 644. And the time it took was "proportional to the necessities of the case." *Id.* at 649.

In noting Muhtorov's broad requests, the majority did not fault Muhtorov for making those requests. Nor did it suggest that defendants must choose between their right to a speedy trial and their right to discovery. Instead, it simply recognized—as *Barker* instructs—that the speedy trial period varies according to the reason for the delay. And "[u]nder the unique circumstances of this case," the delay was "valid" and "justified." *Id.* at 648. In other words, Muhtorov did not "forgo" a speedy trial by seeking discovery. The valid reason for the delay meant that he received the speedy trial the Constitution requires.

Muhtorov also asserts that the majority placed too little weight on the government's delay in providing notice of information obtained under Section 702 of the Foreign Intelligence Surveillance Amendments Act. But, as Muhtorov acknowledges, the majority addressed this contention and found that the delay in providing the Section 702 notice "did not extend the pretrial period" because the case was already delayed by the "vast and multi-faceted discovery process." *Id.* at 649. Muhtorov adopts the dissent's disagreement with this conclusion, but

he does not explain *how* the delayed Section 702 notice caused a delay in trial when discovery was proceeding before and after that notice. In any event, the majority's resolution of this ancillary, case-specific dispute does not create any conflict that would warrant en banc review.

Muhtorov also points out that the government has an obligation to produce discovery regardless of a defendant's discovery requests. That is true. But the majority (and the district court) here found that the government "worked diligently and promptly" to fulfill that obligation. *Id.* at 646-47. In doing so, the government *did* produce the discovery "within a time frame that honor[ed] [Muhtorov's] speedy trial rights." Pet. at 9. As the majority acknowledged, that time frame was long in this case, but that was because of the unavoidable necessities of the case—not because of any failure on the part of the government. Muhtorov's belief that the government should have moved more quickly is yet another disagreement with the panel's case-bound determination. It does not present any legal conflict to be resolved by the en banc court.

II. The panel majority did not deem the absence of government bad faith dispositive.

Muhtorov also joins in Jumaev's claim that the panel majority treated the absence of government bad faith as dispositive in the *Barker*

analysis. But the majority expressly acknowledged that "good faith alone may not preclude a speedy trial violation." *Muhtorov*, 20 F.4th at 641 n.58. The presence or absence of bad faith nevertheless remains a significant consideration because "bad faith government delay can weigh 'heavily' in favor of a violation." *Id.* The majority's recognition of this principle was consistent with Supreme Court precedent. *Doggett v. United States*, 505 U.S. 647, 656 (1992); *Barker*, 407 U.S. at 531.

Moreover, it was not just the lack of government bad faith that weighed against a constitutional violation. It was the absence of bad faith *or* negligence. *Muhtorov*, 20 F.4th at 639, 658-60. The government was "dedicated" and "diligent," *id.* at 642-43, 646, but the delay was nevertheless driven by "necessities of the discovery process" that were beyond the government's control. *Id.* at 658-59. That was not a "more neutral reason" that weighs "less heavily," but for which the government bears ultimate responsibility. *Barker*, 407 U.S. at 531. It was a "valid reason" that "serve[d] to justify appropriate delay." *Id.*

The majority properly balanced that "valid reason" against the other *Barker* factors—only one of which weighed heavily—and concluded that "[o]n the distinctive facts of this case," the second factor

tipped the overall balance. *Muhtorov*, 20 F.4th at 660. The majority did not deem the government's good faith the only relevant factor. To the contrary, it acknowledged that no factor was necessary or sufficient. *Id.* at 658. But under the unique circumstances of this case, the government's diligence was a "primary consideration." *Id.* at 658-59.

CONCLUSION

Muhtorov's petition for rehearing should be denied.

DATED: March 14, 2022

Respectfully submitted,

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/s/ KARL L. SCHOCK
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 35(e) because the brief contains 1,680 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook font.

DATED: March 14, 2022

/s/ KARL L. SCHOCK
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Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2022 I electronically filed the foregoing **UNITED STATES' RESPONSE TO PETITION FOR REHEARING EN BANC** with the Clerk of the court for the United States Court of Appeals for the Tenth Circuit, using the CM/ECF system.

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/s/ Kayla Keiter
KAYLA KEITER
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