UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
	)	**CASE No: 1:13-cr-10238-DPW**
v.	)	
AZAMAT TAZHAYAKOV,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF JUDGEMENT OF ACQUITTAL OR IN THE ALTERANTIVE FOR A NEW TRIAL UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 29 AND 33

This Memorandum of Law is submitted on behalf of defendant, Azamat Tazhayakov, in support of his motion for an order setting aside the jury verdict pursuant to Rule 29 (c) of the Federal Rules of Criminal Procedure and/or in the alternative an order granting a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds that:

(a) As to the Conspiracy Count, the evidence adduced at trial was insufficient to support the count of Conspiracy to Obstruct Justice charged in the indictment with respect to the elements of "agreement" and "willfully" in violation of Title 18, United States Code Section 371;

(b) As to the Substantive Count, the evidence adduced at trial was insufficient to support the count of Obstruction of Justice charged in the indictment with respect to the elements of "willfully" in violation of Title 18, United States Code Sections 1519.

(c) There was insufficient evidence adduced at trial that Azamat knew the backpack contained a thumb drive.

(d) There was insufficient evidence adduced at trial to convict Azamat as Agent Azad, Wood, and Wiroll's testimony were incredible.

(e) There was insufficient evidence adduced at trial as Dias Statement to Agent Azad was Improperly Elicited During Agent Azad's Direct Examination in Violation of *Crawford,* and then Improperly Highlighted by the Government in its Closing Argument.

As detailed more fully below, these grounds, either independently or collectively, compel acquittal for Mr. Tazhayakov on each conviction, or at the very least, a new trial on each count.

Accordingly, it is with the utmost respect and *urgency* that Mr. Tazhaykov submits that his motion for a judgment of acquittal,or in the alternative a new trial be granted in its entirety.

Statement of the Facts

On or about May 1, 2014, Azamat Tazhayakov (hereinafter referred to Azamat), a 19-year old college student, along with his roommate, Dias Kadrybayev, were arrested after a twelve-day investigation by the United States Department of Justice and other law enforcement agencies. Azamat was friends with Boston Marathon Bombing suspect Dzhokhar Tsarnaev for a short period of time. Azamat met Dzhokhar while attending UMass Dartmouth his freshman year, in the Fall Semester of 2011. The Government charged under a two count indictment that Azamat Tazhaykov along with Dias Kadrybayev conspired to obstruct justice by agreeing to knowingly alter, destroy, conceal, or cover up a laptop computer belonging to Dzhokhar Tsarnaev and a backpack containing fireworks, a jar of Vaseline, and thumb drive with the intent to impede, obstruct, and influence an investigation, in violation of 18 USC Section 371. The Government also charged Azamat with the substantive count of Obstruction of Justice in violation of 18 USC Section 1519, as well as aiding and abetting the obstruction of justice in in violation of 18 U.S.C. Section 2.

On July 1, 2014, Azamat went to trial before Your Honor, under the two counts set forth in the indictment (hereinafter "instant case"). The indictment charged one count of Conspiracy to Obstruct Justice, and one count of Obstruction of Justice and Aiding and Abetting the Obstruction of Justice. See Superseding Indictment 13 CR 10238 (DPW). [1]

[1] In the interests of brevity no exhibits are attached. Notwithstanding, should the Court require such exhibit, defense counsel will provide upon request.

I. The Government's Evidence

Even when the Government's evidence is viewed as a whole, in the most favorable light, and with all reasonable inferences drawn in its favor, the proof still fails to establish that a rational trier of fact could have fairly concluded that the Government met its burden of proof, *beyond a reasonable doubt,* on the counts upon which Azamat was convicted.

The heart of the Government's case consisted primarily of the testimony of five federal agents. These agents, none of which were present on the night and morning in question, testified to the substance of unrecorded interviews with Azamat on separate occasions that occurred well over a year before they testified. At least two of these Agents were impeached. Additionally, when Agents were present together during an interview their accounts of the interview were inconsistent. The Government also submitted the testimony of lay witnesses, Bayan Kumiskali and Andrew Dwinells, who were actually present during the events in questions. Both of these lay witnesses testified as to Azamat's involvement in the Government's obstruction case, and were only able to establish Azamat's presence.

Bayan Kumiskali, Dias' girlfriend and an immunized Government witness, testified as to what occurred when Dias communicated with Dzhokhar via text message on April 18, 2013. According to Bayan she and Dias were in his bedroom, alone, at 69A Carriage Drive when Dias received a phone call from a person Bayan believed to be Robel Phillipos.[2] According to Bayan, Robel informed Dias that someone Robel and

[2] Counsel is unable to refer to the trial transcript, as the video taped deposition was not transcribed.

Dias knew was on the news being identified as one of the Boston Bombers. Dias and Bayan then searched the internet and looked at the news story and the accompanying images. Dias then began a text exchange with Dzhokhar Tsarnaev wherein Dias asked Dzhokhar if it was Dzhokhar on the news. Dzhokhar never admitted to being the Boston Bomber, but texted Dias that if Dias wanted he could come to Dzhokhar's room and take what's there.

During Dias' text exchange with Dzhokhar, Azamat was at the Gymnasium exercising. While at the Gym and prior to Robel informing Dias of Dzhokhar being a Boston Bombing suspect, Azamat exchanged text messages with Robel about getting together later that evening. See Government Trial Exhibits 46 & 48. Azamat informed Robel, that Azamat would later come and get Robel from campus when Azamat finished the Gym. Id. Later, Azamat received a text message from Dias requesting that Azamat come to the apartment and pick up Dias. See Government's Trial Exhibits 46 & 47. The Government presented evidence that Azamat and Dias shared a vehicle.

When Azamat arrived at the apartment, Azamat and Bayan never discussed Dzhokhar. According to Bayan, Azamat never actually entered the apartment. Dias and Azamat left together. Before leaving, Dias informed Bayan that he was going to go pick up Robel Phillipos.

According to Bayan, Dias left 69A Carriage Drive from 9:21 p.m, and returned at approximately 10:47 p.m. on April 18, 2013. She further testified that the UMass Campus and the dorms were approximately 5 minutes from 69A Carriage Drive. When Dias returned he was with Azamat and Robel. Bayan noticed that Dias had on a red and

blue hat, and Bayan questioned Dias as to who's hat Dias was wearing. Dias informed Bayan it was Dzhokhar's. Bayan further testified that she, Robel, and Azamat sat on the couch while Dias went to the kitchen table to prepare a "bowl" of marijuana to smoke.[3] After Dias completed the "bowl", Dias, Robel and Bayan smoked marijuana, and everyone watched a movie "The Pursuit of Happiness".

After the movie was over Bayan and Dias went into Dias' room together, and while in the bedroom, alone, Bayan and Dias discussed the backpack Dias took from Dzhokhar's dorm room. Once in the room Bayan recounted how Dias informed her that "I" Dias took a backpack and the backpack contained empty fireworks. Upon hearing this information Bayan told Dias to get rid of it, and to get it out of the apartment, because it may be evidence. Bayan testified Dias had not even considered that the backpack could be evidence. At this point Dias left the bedroom and returned approximately fifteen minutes later, and informed Bayan, "no more backpack." During Bayan and Dias conversation, Azamat was not present in the room, nor did Bayan ever hear Dias discuss discarding the backpack that evening with anyone, but her. Additionally, Bayan testified she never discussed the subject of the backpack with Azamat or its potential evidentiary value.

While Bayan testified that the next morning, after Tamerlan and Dzhokhar were identified as the Boston Bombers, Dias or Azamat discussed how they were going to explain their actions about the backpack, she was equivocal concerning what was said, who said it, and further stated whatever was said was "not concrete." In part, Bayan's

[3] This same kitchen table is where FBI Agents later recovered both the red and blue hat Dias was wearing as well as Dzkhar's laptop computer.

testimony squares with Agent Wood's testimony that the following morning after the brothers were identified, Azamat told Dias "remember where Dias put it, just in case." Trial Tr. Day 6, page 33 and 92, lines 2-4 and lines 4-8.

THE AGENTS:

Agent Walker testified that he was the first Agents to have contact with Azamat on April 19, 2013 at approximately 5:00 p.m. As part of Special Agent Walker's initial conversation with Azamat he informed Azamat that,

> "Jahar Tsarnaev, he's dead. Whether he's still living or whether he's going to go away, his life is over. Your life [Azamat's] doesn't have to be over." Trial Tr. Day 10, page 57, lines 5-7.

After further discussion, Agent Walker "invited" Azamat to come to the Police Barracks to be questioned further by the F.B.I.

Azamat arrived, shirtless, at the Police Barracks at approximately 7:00 p.m., and was escorted into a Police interview room a half hour later by Special Agents Azad and Wood. Wood was the first interviewing Federal Agent to testify at the trial. During her testimony she testified about the voluntariness of the interview. To highlight the voluntariness, Agent Wood previously submitted an affidavit to the Court wherein she swore under oath how she and Agent Azad permitted Azamat to use the restroom prior to being presented with an advice of rights form.[4] Presumably, such a scenario would demonstrate that Azamat was not under any duress and was clear headed when he was presented with and subsequently signed the Miranda form, 7:41 and 7:46 respectively.

[4] Notably, Azamat in his affidavit to the Court in support of his motion to suppress statements made at the Barracks set forth his strong need to urinate at the time of his arrival to the Police Barracks.

Agent Wood testified that after Azamat entered the interview room, his handcuffs were removed, and then he asked to use the restroom. Trial Tr. Day 6, page 94-95 lines 25, 1-2. With the only actual record of the events of April 19, 2013, the surveillance video, Agent Wood was impeached. The video showed Azamat using the restroom at 7:48 p.m. , subsequent to the time he signed the Miranda Form.

Agent Azad, who was cross examined several days later also testified concerning the use of the restroom and the timing of the Miranda form. Like Agent Wood, he was similarly impeached with a prior sworn statement, although not in a written affidavit, rather from his testimony in a prior proceeding concerning the voluntariness of Azamat statements at the Police Barracks. Trial Tr. Day 8, page 137, lines 1-6. During the prior proceeding Agent Azad testified under oath that Azamat used the restroom prior to signing the advice of rights form. Id. Unlike Agent Wood, however, Agent Azad testified that it was not Azamat who initially asked to use the restroom, rather it was "we"[5], Agent Azad and Wood, who initially offered Azamat the restroom, but Azamat declined and only later requested to use the restroom. Trial Tr. Day 8, page 105-106, lines 23-25 and 1-9.

Agent Wood went on to testify how she interviewed Azamat from approximately 7:30 p.m. through sometime after midnight on April 20, 2013. While she testified that the interview was complete shortly after midnight, she conceded that Azamat remained at the Barracks until Federal Agents took him home at approximately 4:30 a.m. Agent

[5] Through the use of Agent Azad's pronoun "we" it is unclear weather Agent Azad literally meant that both he and Agent Wood asked Azamat if Azamat wanted to use the restroom, or if it was Agent Azad who asked the question, and Agent Wood was present when the question was asked. Pronoun confusion would continue throughout the trial.

Wood discussed the substance of the interview that conflicted with Agent Azad's, lay witnesses, Andrew Dwinell's and Bayan Kumiskali's testimony, as well the Government's own documentary evidence.

Agent Wood testified that Azamat claimed he received a text message from Dias on the evening of April 18, 2013, wherein Dias purportedly wrote "have you seen the news?" Trial Tr. Day 6, page 26 lines 18-23. According to Agent Wood, Azamat responded that he had not, and Dias then informed Azamat that Dzhokhar was on the news as the Marathon Bomber. Id. The Government's printouts of text messages from both Azamat and Dias Kadbrybayev's phones admitted into evidence never cooborated Agent Wood's testimony, as no such text exchange existed between Azamat and Dias. Government's Trial Exhibits 46 & 47. While the Government alleged that Azamat erased some of his text messages, the Government never claimed Dias erased text messages, and Dias text message between Azamat and Dias were admitted into evidence with no such exchange between Dias and Azamat. Id.

Agent Wood further testified about what happened at Dzhokhar's dorm room on the evening of April 18, 2013. Agent Wood claimed that when Dias and Azamat arrived at the Pine Hall Dorm room, Dias located Dzhokhar's roommate and talked to the roommate while Azamat and Robel "hung back", and then subsequently the roommate allowed all three, Dias, Azamat and Robel into the room. Trial Tr. Day 6, page 105 lines 5-11. Once in the room, Azamat found a pair of beats headphones that belonged to him. Trial Tr. Day 6, page 27 lines 17-18. Agent Wood testified that she could not recall Azamat stating he watched TV in the dorm room. Trial Tr. Day 6, page 103 lines 17-18. According to Agent Wood on direct, Azamat informed her that "they" also took a laptop

computer, and a backpack. Trial Tr. Day 6, page 27 lines 7-11. During cross examination, however, Agent Wood backtracked and stated Azamat told her in his first statement that Dias took the backpack, and when later discussing the backpack Azamat used the words, "took the backpack", but did not indicate who took the backpack. Trial Tr. Day 6, page 76 lines 7-10. Agent Wood never testified that Azamat and Dias discussed taking any items inside the dorm room.

Agent Azad's testimony concerning what transpired in the dorm room was inconsistent with Agent Wood's account, as well Agent Quinn's. According to Agent Azad on April 20, 2014 he interviewed Azamat at the Tip O'Neil Building along with Agent Quinn. During the interview Azad claimed all three men, Robel, Dias, and Azamat, entered the dorm room and started to watch a movie. During the movie, Dias eventually got up and started to search through Dzhokhar's belongings. Trial Tr. Day 8, page 122 lines 5-8. Agent Azad testified that Dias found a jar of Vaseline in the room and then "mouthed" or "whispered" to Azamat that Dias believed Dzhokhar used the Vaseline to make a bomb. Trial Tr. Day 8, page 122 lines 11-16. While Agent Azad testified Azamat used the word "we" when referring to the pronoun ofwho removed the items, Agent Azad, maintained that in the dorm room Dias was the one searching as Azamat watched TV. Trial Tr. Day 8, page 122-123 lines 23-25 and Lines 1-7.

While Agent Quinn during his testimony discussed the subject of Vaseline in the dorm room, Quinn admitted that Azamat never claimed Dias whispered the information about Dias' belief concerning Dzhokhar using Vaseline to make a bomb. Trial Tr. Day 9, page 71, lines 4-9.

Andrew Dwinells, Dzhokhar's roommate, testified as to what happened on the night of April 18, 2013 in the dorm room. Andrew Dwinells testified that at approximately 10:00 p.m. he was working on his homework at the Pine Hall Dorm common area, when Dias Kadrybayev approached him seeking access. Dias requested access to the Dzhokhar's dorm room to retrieve something, and showed Andrew the text exchange between Dias and Dzhokhar from earlier that evening. Trial Tr. Day 6, page 134-135. Dwinells testified after a couple of minutes of entering the room, Dias sent a text message. Trial Tr. Day 6, page 135 lines 13-18. [6] Approximately ten minutes later, two other friends showed up, Azamat and Robel. Dias looked around the room for something, while the other two guys, Azamat and Robel, were just kinda like there and watched T.V. Trial Tr. Day 6, page 135, lines 16-25. Neither Azamat or Robel assisted or joined Dias in his search. Trial Tr. Day 7, page 11 lines 6-9. During the course of Dias' search, Dias found some marijuana and showed it to both Azamat and Robel. Trial Tr. Day 6, page 137, lines 1-13. Dwinells never testified that Dias showed either Azamat or Robel anything else from the dorm room that evening, other than a bag of marijuana. Andrew Dwinells made no mention of a discussion between Azamat and Dias concerning vaseline, or even seeing a jar of Vaseline that evening. Andrew Dwinells did not see anyone remove anything from the dorm, except one gentleman, who took a pair of beats headphones. Trial Tr. Day 7, page 28 lines 3-6.

After]leaving the dorm room, Azamat, Dias, and Robel went back to the apartment on 69A Carriage where Dias eventually discarded the backpack in a dumpster. Agent Wood testified that once at the apartment Dias was the one who removed the

[6] This corresponded with the text exchange Dias had with Robel, wherein Dias text Robel, "Dzhokhar", "Come to Dzhokhar's". Ten minutes later Robel and Azamat came to Dzhokhar's dorm room.

contents from the backpack, and discarded the backpack. Trial Tr. Day 6, page 29 lines 13-15. Agent Wood further testified that Azamat never directly or indirectly indicated that he ever even touched the backpack. Trial Tr. Day 6, page 103 lines 5-8. During the early morning hours of April 19, 2013, after Tamerlan had been killed Dias was pacing the room trying to decide what to do, and stated "we should throw out the backpack with the firework." Trial Tr. Day 6, page 34 lines 16-20. According to Agent Wood, Azamat said, "I agree." Trial Tr. Day 6, page 34 lines 22. Notwithstanding, Azamat made it clear to Dias that Dias needed to remember where he put it, just in case. Trial Tr. Day 6, page 33 and 92, lines 2-4 and lines 4-8.

Agent Wood admitted that she never asked Azamat nor did Azamat ever mention the location where Dias discarded the backpack. Trial Tr. Day 6, page 101, lines 9-15. Her reasoning for not asking the question made little sense. She claimed she never asked about the location, because Dias had already been supplied the information. Such reasoning contradicted her prior testimony about continuing to question Azamat about the contents of the backpack, after learning Dias informed other Agents the backpack contained empty fireworks. Finally, there was no evidence that Dias and Azamat ever discussed the potential evidentiary value of the backpack and fireworks, or Bayan's comment concerning its evidentiary value.

Agent Azad and Quinn who were both present during the same interview on April 20, 2013 gave conflicting accounts of what occurred back at the apartment on the evening of April 18, 2013 and the early morning hours of April 19, 2013. Agent Azad testified the day after Bayan Kumiskali's deposition was played before the jury. According to Agent Azad, Bayan Kumiskali became upset that items from Dzhokhar's dormitory room

were at the apartment on 69A Carriage Drive, and as a result Dias and Azamat decided they should get rid of it. Trial Tr. Day 8, page 123, lines 18-24. Notwithstanding, Agent Azad admitted that this information never appeared in the 302 Report he drafted concerning the interview. Trial Tr. Day 9, page 26, lines 1-22. Agent Quinn, however, testified that the topic of Bayan Kumiskali being upset was never discussed in interview with Quinn and Azad. Trial Tr. Day 9, page 65, lines 4-7. Agent Quinn further testified that Azamat never informed the Agents that he assisted Dias in any way in discarding the backpack. Trial Tr. Day 9, page 64, lines 19-20.

Agent Wiroll claimed he received a written report, a 302, from Federal Agents on April 20, 2014 and then subsequently converted parts of the Agents words in the 302 into his own Report, the I-213. Trial Tr. Day 7, page 54-55, lines 22-25 and 1-2. Of note, Azamat was placed in removal proceedings for allegedly violating his student visa after UMass improperly dismissed him academically due to an error on the part of the Navitas Program in calculating his GPA. Trial Tr. Day 5, page 121-122. DHS did not place Azamat in removal proceedings as a result of alleged criminal conduct. Notwithstanding, according to Agent Wiroll he wanted to go over the information he obtained from Federal Agents with Azamat.

According to Agent Wiroll, he read his prepared I-213 Report out loud to Azamat. Trial Tr. Day 7, page 45, lines 20-24. Agent Wiroll was asked to read the report to the jury *the way* he read it to Azamat. Id. When Agent Wiroll began to read the report, the way he read it to Azamat, he was instructed by the Court to *slow down* as it was difficult for both the Reporter and the rest us to "pick up." Trial Tr. Day 7, page 46, lines 2-7. There was no evidence that Agent Wiroll slowed down when he read the report to

Azamat, a Kazhakstan National who was using the aid of the consul, a nonofficial interpreter.

Agent Wiroll claimed the I-213 report he read to Azamat contained a section that read as follows:

> "Tazhayakov was present with Dias Kadrbayev on the night they removed items from Tsnaraev's UMass Dartmouth dormroom after the Boston Marathon Bombing. Tazhayakov along with Kadbrayev removed these items because they suspected Tsarnaev was one of the Boston Marathon Bombers and they came up with a plan to dispose of the items." Trial Tr. Day 7, page 49, lines 2-5.

Agent Wiroll testified that once he read up to "(…) suspected Tsarnaev", Agent Wiroll then asked Azamat a question, and Azamat asked to speak with the Consul. Trial Tr. Day 7, page 46-47, lines 14-24, and lines 2-8. After speaking with the Consul, Azamat looked back at Agent Wiroll, and Agent Wiroll "just continued" to read the rest of the document. Trial Tr. Day 7, page 48, lines 21-24.

Agent Wiroll further testified that Azamat objected to the word "plan" the Agent read from his Report. Trial Tr. Day 7, page 49, lines 15-29. According to Agent Wiroll, Azamat informed the Agent that Azamat "more like agreed." Trial Tr. Day 7, page 59, lines 20-25. There was no discussion between Azamat, and Agent Wiroll as to the specifics of the discussion between Azamat and Dias concerning the "items". Agent Wiroll never testified as what "items" were taken, or who actually took the unidentified "items". Agent Wiroll also testified that Azamat informed the Agent that "he did not know what was in it." Trial Tr. Day 7, page 51, lines 5-11. When pressed by the Court what Azamat was referring to when Azamat informed the Agent "he did not know what was in it" the plan, agreement, or the object, Agent Wiroll testified that Agent Wiroll

believed it was the object. Trial Tr. Day 7, page 51 lines 5-23.

Agent Wiroll then testified that Azamat signed a Notice, to Appear in Immigration Court, and by signing the Notice to Appear, Azamat essentially adopted a separate and distinct document, Agent Wiroll's I-213 Report. Trial Tr. Day 7, page 49, lines 15-25. Furthermore, other than reading the I-213 Report to Azamat, there was no evidence that Agent Wirholl actually provided Azamat with the opportunity to review the I-213. While Azamat inferably was given the Notice to Appear to sign, the Notice to Appear never mentioned the I-213 Report or its substance, nor did the Notice to Appear inform Azamat that by signing the Notice to Appear, Azamat adopted the language in a separate Report read aloud to him by Agent Wiroll. Trial Tr. Day 7, page 63, lines 2-12. The Notice to Appear merely informed Azamat that he had been served with the Notice to Appear, and that he would need to go to Immigration Court. Id.

I. ARGUMENT:

In considering *and granting* a Rule 29 motion, where a fact to be proved is also an element of the offense . . . ***it is not enough that the inferences in the government's favor are permissible***." *U.S. v Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995) (Emphasis supplied). Instead, this Court must be satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt. Id., see also *United States v. Pappathanasi*, 383 F.Supp.2d 289, 290 (D.Mass. 2005). The Court must reject "those evidentiary interpretations . . . that are unreasonable, insupportable, or overly speculative . . . ." *United States v. Ofray-Campos*, 534 F.3d 1, 31-32 (1st Cir. 2008), *quoting United States*

v. Hernandez, 218 F.3d 58, 64 (1st Cir. 2000). Courts have recognized that "if the evidence viewed in the light most favorable to the prosecution gives '***equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence***,' then 'a reasonable jury ***must*** necessarily entertain a reasonable doubt." ' *United States v. Glenn*, 312 F.3d 58, 70 (2d. Cir. 2000), *quoting United States v. Lopez*, 74 F.3d 575, 577 (5th Cir.1996). (Emphasis supplied); see also *United States v. Ayala-Garcia*, 574 F.3d 5, 11 (1st Cir. 2009)(emphasis in original).

A. Conspiracy Charge (Count One)

1. The evidence adduced at trial was insufficient to prove beyond a reasonable doubt that (a) an agreement to obstruct justice existed, or (b) even assuming arguendo an agreement to obstruct justice did exist, that Azamat Tazhaykov deliberately and intentionally with the specific intent to violate 18 USC 1519 joined in the agreement.

The indictment charged that Dias and Azamat, along with another, known to the Grand Jury, did knowingly conspire between April 18, 2013 and April 20, 2013, to obstruct justice in the Boston Marathon Bombing case by agreeing to knowingly alter, destroy, conceal, and cover up tangible objects belonging to Dzhokhar Tsarnaev, namely a laptop computer and a backpack containing fireworks and other items.

In order for the Government to prove the crime of conspiracy, it needed to prove, beyond a reasonable doubt, two crucial elements:

First, the Government had to prove that two or more persons entered into the criminal agreement charged to obstruct justice alleged in the indictment; and

Second, that Azamat willfully- meaning deliberately and intentionally with the

specific intent to obstruct justice or influence the investigation joined in the agreement.

a. The Lack of Conspiracy Between Azamat and Dias:

A conspiracy does not exist merely because two or more people discuss a crime. "Men do not conspire to do that which they entertain only as a possibility; they must **unite** in a purpose to bring to pass all those elements which constitute the crime." *United States v. Penn,* 131 F.2d 1021, 1022 (2d Cir. 1942) (Learned Hand, J.). A conditional offer to engage in a crime is not a meeting of minds. *United States v. Melchor-Lopez*, 627 F.2d 886, 891-92 (9th Cir. 1980); *United States v. Anello,* 765 F.2d 253, 262 (1st Cir. 1985). "'Exploratory and inconclusive' or 'preliminary' discussions and negotiations are insufficient to establish an agreement." *United States v. Iennaco*, 893 F.2d 394, 398 (D.C. Cir. 1990).

Mere knowledge, approval, or acquiescence in the object or purpose of a conspiracy is insufficient to prove participation in it**.** *United States v. Falcone*, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940). A conspiracy conviction "requires that a defendant's 'membership in a conspiracy be proved on the basis of his own words and actions (not on the basis of mere association or knowledge of wrongdoing).'" *United States v. Richardson*, 225 F.3d 46, 53 (1st Cir. 2000) (quoting *United States v. Cintolo*, 818 F.2d 980, 1003 (1st Cir. 1987)). With regard to the second element, and as this Circuit has previously emphasized a person can have knowledge a criminal conspiracy exists, but the person would not be guilty so long as he/she does not join and intentionally aid in the conspiracy. *United States v. Gomez-Pabon*, 911 F.2d 847, 852 (1st Cir. 1990). Being merely present in a place where a criminal conspiracy is occurring, or associating

with members of a conspiracy, is insufficient evidence that such person became a member of the conspiracy. *Id.* at 853. This is the case even where a person may know that a conspiracy exists, and fails to take any actions to stop it.

i. The Dorm Room:

The Government presented no evidence of an agreement to remove items from Dzhokhar's dorm room between Azamat and Dias. The evidence adduced at trial was that Azamat received a text message from Dias to come pick Dias up at the apartment on 69 Carriage Drive.[7] Azamat received the text message at approximately 9:00 p.m., well after Dias had engaged in a text exchange with Dzokhar outside of Azamat's presence. While Dias showed CNN reports of images that resembled Dzhokhar, as a suspect in the Boston Bomging, to Azamat outside of 69A Carriage Drive there was no discussion between Azamat and Dias about removing items from Dzhokhar's dorm before leaving to go the Dorms. Additionally, there was certainly no evidence that Azamat was even aware that Dzhokhar kept anything of evidentiary value at his dorm room prior to Azamat visiting the dorm room with Dias and Robel. While the Government presented evidence that outside the dorm room Dias showed Azamat the text exchange Dias had with Dzhokhar, there was never a discussion between Azamat and Dias about a concerted effort between the two of them to remove items from Dzhokhar's dorm room.

[7] While Agent Wood testified Azamat informed her that Azamat received both a telephone call from Dias and exchanged text messages with Dias about Dzhokhar being the bomber prior to coming back to the apartment, such testimony is uncorroborated by the Government's own documentary evidence. For example, Dias text messages show no such exchange between Azamat and Dias. Additionally the Government's own witnesses testified that Azamat cell phone service was not working at the time, therefore, he could not have received a telephone from Dias. Notwithstanding, even if Azamat did receive such a phone call or a text message from Dias, such evidence does not show an agreement between Dias and Azamat to obstruct justice.

The evidence presented at trial was that Dias, independently, went and found Dzhokhar's roommate, Andrew Dwinells, and sought access to the dorm room alone. While Azamat entered the dorm room approximately ten minutes after Dias, Azamat did nothing in the dorm, but watch television and inform Andrew Diwnells that he [Azamat] would be taking his "beats headphones."

The evidence failed to show that Azamat partipated in Dias' search, distracted Andrew Dwinells, or assisted Dias in the removal of items. While the Government, may point to the testimony of their federal agents that suggested Azamat used the term "we" when describing who took the items, the items were incapable of being taken by more than one person, at a time, and the use of the pronoun "we" was merely figurative to connote Azamat's presence. The items removed from the dorm room included, the laptop, a blue and red hat, the backpack, and a pair of headphones. Dias himself according to Bayan's testimony informed Bayan that, "I" took the backpack, not Azamat and I, or even Azamat for that matter. Throughout the Agents testimony, not a single Agent testified that Azamat ever used the pronoun "I" when describing the action of taking any of the items, other than the beats headphones.

Dias' comments to Azamat about vaseline and Azamat's observation of the empty fireworks inside the dorm room are not evidence of an agreement between Dias and Azamat to remove the vaseline, and the empty fireworks. A person's knowledge about criminal activity does make one a co-conspirator so long as he/she does not join and intentionally aid in that conspiracy. *United States v. Gomez-Pabon*, 911 F.2d 847, 852 (1st Cir. 1990). The Government presented no evidence that Azamat and Dias had a discussion, plan, or agreement about removing *items* from the dorm room. Other than the

Agents testimony of Azamat's use of the of pronoun "we" when describing who removed *items*, there was no evidence that Azamat participated in Dias' search, rendered any aid, or actually removed any of the "items," other than Azamat's beats headphones. While the Government may have arguably presented evidence through the testimony of Agent Quinn and Azad that Azamat knew there was something nefarious about the vaseline and the empty fireworks, knowledge, even when coupled with presence is insufficient to form membership in a conspiracy when one does not join and aid in the venture. *United States v. Gomez-Pabon*, 911 F.2d 847, 852 (1st Cir. 1990)

ii. 69A Carriage Drive

The only potential evidence of a conspiracy was an agreement between Bayan Kumiskali and Dias Kadrybayev.[8] When Azamat, Dias and Robel returned to the apartment it was Dias and Bayan, alone, in Dias' bedroom where the two had a private discussion about the backpack. Dias admitted to Bayan, "I took a backpack." At this point Bayan informed Dias that the backpack could be evidence, and Dias responded he had not considered that. Bayan became concerned and wanted nothing to do with the backpack. She instructed Dias to get rid of it, and to get it out of the house. During this private discussion between Dias and Bayan, Azamat was not present nor did Azamat partake in Bayan and Dias' exchange.

Dias' statement to Azamat that "we should throw out the backpack with the firework", and Azamat's alleged response, "I agree" does not prove a conspiracy, because Azamat and Dias' discussion did not go beyond preliminary talk. *Arbane*, 446

[8] Counsel does not concede that a conspiracy existed between Dias and Bayan.

F.3d at 1229. *United States v. Arbane*, 446 F.3d 1223, 1229 (11th Cir. 2006). Azamat and Dias did not reach an actual "'meeting of the minds' to achieve an unlawful result" *Id.* While the Government may attempt to argue that Agent Wiroll testified that Azamat used the word *agree*, Agent Wiroll never testified as to the specifics of the discussion between Azamat and Dias. The only Agent that provided evidence of the discussion between Azamat and Dias at the apartment, was Agent Wood.

These "'[e]xploratory and inconclusive' or 'preliminary' discussions and negotiations are insufficient to establish an agreement." *Iennaco*, 893 F.2d at 398; *United States v. Guevara*, 706 F.3d 38 (1st Cir. 2013)**;** *see also Penn*, 131 F.2d 1021. In *Penn*, kidnappers for ransom had agreed to kidnap rich children and "had discussed two places which might be satisfactory." The Court found insufficient evidence that the conspirators had agreed to move the victims across state lines, because there was no evidence that the conspirators "had agreed upon one of" the two places they discussed (even though both places were out-of-state). *Id.* at 1022. Although the interstate travel element in *Penn* is not directly implicated here, that case illustrates the firmness of purpose that must exist to prove an agreement. Discussing the possibility to doing something is not enough. As Courts have explained: "Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime." *Id.*

Here, Dias used conditional language, and merely made an exploratory statement to Azamat that we "should" throw out the backpack. A discussion about the possibility to do something is not enough. While Agent Wood testified that Azamat uttered the words, "I agree", there was never a discussion between Azamat and Dias as to where the

backpack "should" be thrown out, and/or what Azamat and Dias' roles would be in relation to Dias' suggestion. Of course, the defense does not mean to suggest that Agent Wood's testimony was honest and credible.

The defense cautions the court not to get hung up on the connotation of the word "agree", especially when the word proceeds conditional language like "should". Just because a person agrees with a statement does not mean the person agrees to actually join in and aid in the action of the statement. For example, two business people, Business Person A and Business Person B, on April 15 are discussing their tax debt, the large amount of money they will have to that day. Business Person A, makes the statement "we should not pay our taxes", and Business Person B says "I agree." Business A does not pay her taxes. Such a scenario does not mean that Business Person B has actually entered into a conspiracy with Business Person A to not pay taxes. Rather, and without more, Business Person B has merely approved of the statement that Business Persons A and B *should* not pay taxes. Such approval does not show an actual intention on the part of Business Person B to not pay her taxes or to aid Business Person A to not pay her taxes.

The Government presented no evidence that Azamat deliberately and intentionally with the specific intent to violate 18 USC 1519 joined in an actual conspiracy with Dias. While Azamat's response as to Dias' suggestion concerning the possibility of what to do with the backpack may be considered approval of Dias' exploratory statement, such approval is insufficient to prove that Azamat deliberately and intentionally joined a conspiracy. Mere knowledge, approval, or acquiescence in the object or purpose of a conspiracy is insufficient to prove participation in it. *United States*

v. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940). A defendant's 'membership in a conspiracy must be proved on the basis of his own words and actions (not on the basis of mere association or knowledge of wrongdoing).'" *United States v. Richardson, 225 F.3d 46, 53 (1st Cir. 2000) (quoting United States v. Cintolo, 818 F.2d 980, 1003 (1st Cir. 1987)).*

Other than uttering words of approval for Dias' exploratory statement of what should be done, Azamat never promoted the venture himself. The second element of the conspiracy count, has been used interchangebly with the language "intent to agree to participate in the conspiracy **and** an intent to commit the underlying substantive offense." *Gomez-Pabon*, 911 F.2d at 853; *United States* v. *Drougas*, 748 F.2d 8, 15 (1st Cir. 1984). To prove intent to participate and commit the substantive offense there must be something more than [m]ere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy; the defendant must in some sense promote their venture himself, make it his own, have a stake in its outcome,' or make 'an affirmative attempt to further its purposes.'" *United States v. Ceballos*, 340 F.3d 115, 124 (2d Cir. 2003) (citations omitted) (quoting *Cianchetti,* 315 F.2d at 588; *United States v. Direct Sales Co.,* 319 U.S. 703, 713 (1943)). Conspiracy requires proof that the participants actually depend on each other—not for mere whimsy or pleasure, but to achieve "a shared, single criminal objective." *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1123 (10th Cir. 2011).

The government failed to prove that Azamat had "a stake in the outcome", that he made any affirmative attempt or action to further the purpose of what "should" be done with the backpack, or that there existed interdependent joint actions between Dias and

Azamat to further the alleged unlawful objective. The evidence established that Dias was the one who had searched the dorm room and located the backpack, it was Dias who took the backpack from the dorm room to the apartment on 69A Carriage Drive, and it was Dias who discarded the backpack by himself and alone. According to Agent Wood, Azamat never directly or indirectly indicated that he ever even touched the backpack. Trial Tr. Day 6, page 103 lines 5-8. There was no evidence that Azamat accompanied Dias to the dumpster where Dias tossed the backpack. The evidence adduced at trial indicated that Azamat only became aware of the location where Dias tossed the backpack the following day, April 20, 2013, after the Police Barracks interview. Finally, even the words Azamat uttered to Dias, "remember, where you put it, just in case," on the morning of April 19, 2013 indicate Azamat never intended to obstruct justice, conceal and/or destroy the backpack. Trial Tr. Day 6, page 33 and 92, lines 2-4 and lines 4-8.

Based on the foregoing, a rational trier of fact would have to conclude that the evidence was insufficient to prove beyond a reasonable doubt that Azamat entered into an actual agreement with Dias, or was a member of a conspiracy, and as such the conviction under Count One of the Superseding Indictment must be dismissed.

Defense counsel contends the erroneous conviction on the Conspiracy count was also was used by the jury to convict Azamat of the Second Count, Obstruction of Justice.

B. Azamat did not Obstruct Justice, Aid and Abett in the Obstruction of Justice, and for the reasons discussed above as well as additional Due Process Constraints there was insufficient evidence to convict Azamat for the substantive offense under Pinkerton.

In order for the jury to return a verdict of guilty on Count two, Obstruction of Justice, the jury was required to find the following beyond a reasonable doubt:

First, the jury was required to find that Azamat altered, destroyed, concealed, or covered up a tangible object; Second that he did so knowingly; and Third, that Azamat acted with the intent to impede obstruct or influence the investigation or proper administration in the Boston Marathon Bombing case.

The Court instructed the Jury that there were three ways the Government could prove the defendant guilty of the substantive offense.

(i) First that Azamat committed the offense of obstruction of justice with the requisite knowledge and intent.

(ii) Second that someone else committed the offense, and Azamat knowingly and willfully associated himself in some way with that crime and willfully participated in the crime as he would in something he wished to bring about through some affirmative act in furtherance of the offense.

(iii) The third and final way, the Government could prove the offense was to prove beyond a reasonable doubt that some person with whom Azamat conspired committed the crime and Azamat and that person were members of a conspiracy, the crime was committed in furtherance of the conspiracy, and the crime was a forseeable dimension of the alleged conspiracy in that Azamat could reasonably have anticipated such a crime would be a necessary and natural consequence of the conspiratorial agreement.

The evidence presented at trial would lead any rational trier of fact to fairly conclude that the Government did not meet its burden with regard to any of the above

elements and ways to prove obstruction of justice in violation of 18 USC 1519. Specifically, upon a review of the evidence the Government introduced confirms that it failed to establish any of the three ways to prove the substantive offense.

1. The Government presented no evidence that Azamat altered, destroyed, concealed, or covered up the backpack containing fireworks, a jar of vaseline, and a thumb drive.

The Government presented absolutely no evidence that Azamat altered, destroyed, concealed or covered up the backpack containing fireworks, a jar of vaseline, and a thumb drive.[9] What the trial record clearly established, and which was discussed in detail above, was that Dias was the person who actually took the backpack containing the aforementioned items from Dzhokhar's dorm room, brought them back to the apartment at 69A Carriage Drive, and subsequently tossed them in the dumpster after being admonished by his girlfriend. Most importantly, and what the trial record confirms is that Azamat never even touched the backpack, and the items contained therein.

While the Government, may point to the testimony of their federal agents that Azamat used the term "we" when describing who took "items", the items were incapable of being taken by more than one person, at a time, and the use of the pronoun "we" was merely figurative to connote Azamat's presence. Additionally, Andrew Dwinells testified that he saw one person take one item, the headphones. Most importantly, however, what the trial record confirms is that at the very least, all of the evidence introduced by the Government with regard to this theory of Tazhayakov's guilt only supports a theory of innocence.

[9] The laptop computer will not be addressed, as the jury found Azamat not guilty as to this object.

2. Azamat did not knowingly and willfully associate himself in some way with the crime, nor did he willfully participate in the crime as something he wished to bring about through some affirmative act in furtherance of the offense.

It is well established, that in order to be an aider and abettor the defendant must knowingly and willfully associate himself with the venture in some fashion, "participate in it as something that he wishes to bring about," or "seek by his action to make it succeed." *United States v. Urciuoli*, 513 F.3d 290, 299 (1st Cir. 2008) (quoting *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938)). The rule is similar with respect to establishing membership in a conspiracy. See *United States v. Cirillo*, 499 F.2d 872, 883 (2 Cir. 1974) ("There must be some basis for inferring that the defendant knew about the enterprise **and intended** to participate in it or to make it succeed"); *United States v. Cianchetti,* 315 F.2d 584, 588 (2 Cir. 1963) (co-conspirator must make an "affirmative attempt" to further the purposes of the conspiracy); *United States v. Falcone*, 109 F.2d 579, 581 (2 Cir. 1940) (co-conspirator must "promote [the] venture himself, . . . have a stake in its outcome").

For reasons discussed under the analysis above, with regards to the conspiracy count, equally here, there was insufficient evidence to prove beyond a reasonable doubt that Azamat aided and abetted Dias in the removal of the backpack from the dorm room, and/or Dias' subsequent placement of the backpack in the dumpster.

Other than Azamat's presence at the dorm room, and Azamat's alleged use of the pronoun "we" when discussing the removal of "items", there is not an iota of evidence to connect Azamat with Dias' removal of "items" from the dorm room. Azamat took no action. Azamat did not correspond with Dzhokhar about removing items from the dorm room, Azamat was not even shown the text exchange between Dias and Dzkohar until he

was already outside the dorm, Azamat did not assist or accompany Dias when Dias spoke with the roommate to gain access to the dorm room, Azamat did not distract the roommate during Dias' search, Azamat did not help Dias locate items in the dorm room, carry the backpack to the car, load the backpack in the vehicle, or assist Dias in taking the backpack into 69A Carriage Drive.

There was not an iota of evidence that Azamat participated or took any action with Dias in discarding the backpack. Other than uttering words of approval for Dias' exploratory conditional statement of what *should* be done, Azamat never promoted the venture himself. Azamat did not provide Dias with the trash bag to conceal the backpack, he did not suggest the location where Dias eventually discarded the backpack, he did not go with Dias, nor did he act as a lookout as Dias tossed the backpack into the dumpster. Azamat took no action, he did not participate.

Absent evidence of such purposeful behavior on Azamat's part, presence at the scene of a crime, even when coupled with knowledge that at that moment a crime is being committed, is insufficient to prove aiding and abetting.

a. Even if, Azamat's words of approval could be considered participation, there was no evidence that Azamat specifically intended to obstruct justice.

18 USC 1519 is a specific intent crime. *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011). Specific intent requires a showing that Azamat intended to impede, obstruct or influence the investigation, not merely an intent to take or throw away a backpack. While the principle of "intent" ordinarily means general intent, in situations

where an action is not necessarily wrong or harmful the Government must prove the defendant specifically intended the **purpose** behind the act. *United States v. Tobin,* 552 F.3d 29, 33 (1st Cir. 2009). In Tobin, the Court interpreted 47 U.S.C. § 223(a)(1)(D), which prohibits making repeated phone calls to the same number with an intent to harass as a specific intent crime rather than a general intent crime. *Id.* *Tobin* held that the government must prove the defendant specifically intended to harass the person at the called number because "[t]here is nothing inherently wicked or even suspect about multiple phone calls" absent the wicked intention motivating them." Id. " In a general sense, "purpose" corresponds with the common-law concept of specific intent, while "knowledge" corresponds with the concept of general intent. *United States v. Bailey,* 444 U.S. 394 (1980).

Like the defendant, in *Tobin,* here, there is nothing inherently wicked or suspect about throwing a backpack in a dumpster, absent a wicked intention to obstruct justice. Azamat never uttered the word "I agree" with the specific purpose to obstruct justice, if anything, Azamat simply did not want the backpack at his apartment. His follow up to Dias to remember where you [Dias] put it just in case further supports Azamat's specific purpose.

Where the defense and prosecution theories are equally viable, a judgment of acquittal is required "where the evidence is in equipoise, or nearly so, even when viewed in the *government's* favor." *United States v. Ayala-Garcia*, 574 F.3d 5, 11 (1st Cir. 2009)(emphasis in original). Where a fact to be proved is also an element of the offense, however, "it is not enough that the inferences in the government's favor are permissible." *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995). A court "must also be

satisfied that the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *Id.* "[I]f the evidence viewed in the light most favorable to the prosecution gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,' then 'a reasonable jury must necessarily entertain a reasonable doubt.'" *Glenn,* 312 F.3d at 70 (quoting *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir. 1996)).

Even assuming arguendo that Azamat's allegedly uttered words "I agree" could be considered participation in a conspiracy, the Government submitted insufficient evidence to prove beyond a reasonable doubt that Azamat had the *specific intent* to obstruct justice. Azamat never intended to impede the Government's investigation. Dias was the one who took items from the dorm room and brought them back to an apartment he shared with Azamat. From Bayan's testimony it was clear that Dias had not even realized the gravity of what he did until Bayan told him, and ordered him to get the backpack out of the apartment. And, really who could blame her, she did not want it around. The evidence taken in its best light established Azamat's alleged statement of "I agree" to what *should* be done with the backpack was not to impede the Government's investigation, rather the purpose behind such a statement was to distance himself from the backpack. To suggest that Azamat wanted to help or assist Dzokhar is incredible. Dzohkar was done, there was no helping him.[10] A major manhunt was underway for Dzokhar. Dzokhar's picture was plastered all over the internet, as well as media around

[10] The Government in its closing argument improperly mischaracterized the evidence and represented that Azamat told the Agents he agreed to take the backpack and throw it away because he wanted to help Dzokhar. (Trial Tr. Day 12, page 8, lines 23-25). There was simply no evidence of the Government's mischaracterization. While Agent Wood testified that Azamat informed her he omitted certain information because he was trying to defend Dzkohar, this is not an admission by Azamat as to his specific purpose behind the purported agreement.

the world. Dzokhar was beyond help.

3. Under Pinkerton Azamat cannot be guilty of the substantive offense of obstruction of justice because the evidence was insufficient to prove beyond a reasonable doubt that that Azamat entered into an actual agreement with Dias, or was a member of a conspiracy to obstruct justice.

Pinkerton declared that when a criminal conspiracy is proven to exist each member may be charged with the foreseeable substantive crimes of his co-conspirators. *Pinkerton v. U.S.,* 328 U.S. 640, 647, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946). As the issue of conspiracy was broached at length above, the undersigned incorporates by reference those same arguments to support the contention that Azamat did not enter into an actual agreement with Dias, nor was Azamat a member of a conspiracy to obstruct justice.

a. Even Assuming Arguendo, that a Conspiracy was proven, Due Process Constrains the application of *Pinkerton*, as any Relationship between Azamat and Obstruction of Justice is Less Slight.

Due process constrains the application of *Pinkerton* where the relationship between the defendant and the substantive offense is slight." *United States v. Collazo-Aponte*, 216 F.3d 163, 196 (1st Cir. 2000)(quoting *United States v. Castaneda*, 9 F.3d 761, 766 (9th Cir. 1993)), *vacated on other grounds*, 532 U.S. 1036, 149 L. Ed. 2d 1000, 121 S. Ct. 1996.

Any relationship Azamat may have had with the substantive offense was less than slight. While much of the case law surrounding *Pinkerton's* due process constraints centers on foreseeability, such a concept is not a usual criminal law concept and surely not a concept that puts meaningful due process limits on criminal liability. *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003). At least one court has treated the

foreseeability and due process inquiries separately. *See United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985) (conducting separate "reasonable foreseeability" and "individual culpability" inquiries).

The law has not yet developed clear and cogent standards to assess the outer due process limits of *Pinkerton*. *United States v. Hansen*, 256 F. Supp. 2d 65, 67 n.3 (D. Mass. 2003). Academic commentators are also troubled by limited view of foreseeability as the single due process constraint on *Pinkerton*. "Why does the law treat all secondary parties alike, despite their varied levels of contribution to crime? Why is the person who renders minor encouragement or trivial assistance treated the same as the mastermind behind a crime? Why does the criminal law potentially equate the villainy of an Iago with the loyalty of a spouse who furnishes lunch to her perpetrator-husband?" Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 Hastings L.J. 91, 92 (1985).

Academic Commenters are also troubled by the Courts lack of statutory authority in *Pinkerton*. "The *Pinkerton* decision majority appears to have created an entirely new basis for criminal liability out of statutory thin air, arguably in violation of the prohibition against creation of federal common law crimes. To this day, the Pinkerton "elements" are nowhere to be found in the federal criminal code, though they have been incorporated into provisions of the (now discretionary) Federal Sentencing Guidelines." VICARIOUS CRIMINAL LIABILITY AND THE CONSTITUTIONAL DIMENSIONS OF PINKERTON, 57 Am. U.L. Rev. 585

With these due process principles in mind, to hold Azamat liable for the substantive offense that is punishable by up to twenty years, when the only evidence adduced at trial, was Azamat's presence, alleged use of the pronoun "we", and allegedly uttering words of approval for Dias' exploratory conditional statement of what *should* be done violates due process. Azamat's involvement in the substantive offense was less than slight, he rendered absolutely no assistance or participation in the removal, and subsequent placement of the backpack in the dumpster. Azamat had no communication with Dzokhar concerning removing items from the dorm room, nor did he have any communication with Bayan and her instructions to Dias to get rid of the backpack.

C. There was Insufficient Evident that Azamat Knew the Backpack Contained a Thumbdrive.

There was insufficient evidence that Azamat knew the backpack contained a thumb drive. The guilty verdict as to the backpack must be set aside as the evidence was insufficient to support a conviction that Azamat had knowledge the backpack contained a thumb drive. The use of the conjunctive "and" in the verdict form describing the contents of the backpack required the jury to find that Azamat had knowledge the backpack contained not only the fireworks and vaseline, but also the thumb drive. There was not an iota of evidence produced at trial to support the theory that Azamat had any knowledge about the thumb drive.

The facts in this case are distinguishable from *Griffin*. In *Griffin* the defendant was charged with a conspiracy alleged to have two objects, but was implicated in only one of those. *Griffin* v. *United States*, 502 U.S. 46, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991). The lower court instructed the jury that it could return a guilty verdict against

defendant if it found that she had participated in either of the two objects, and the jury returned a general verdict of guilty, without specifying on which count it relied. *Id.* at 47-48. The Supreme Court in *Griffin* held that "'when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Id.* at 56-57. Notwithstanding, an instruction that all objects of a multi-object conspiracy had to be proved would go against *Griffin*. *United States v. Mitchell*, 85 F.3d 800, 811 (1st Cir. 1996).

Under the facts of this case, this Honorable Court did not instruct the jury that it could return a guilty verdict against Azamat, if it found Azamat had conspired to obstruct justice or obstructed justice concerning any of the three objects located in the backpack, the vaseline, the fireworks **or** the thumbdrive. Unlike Griffin where the jury returned a general verdict of guilty, but was instructed that a guilty verdict could be returned if it found that the defendant participated in either of the objects, here the jury was instructed in the conjunctive not the disjunctive. The jury form specifically used the conjunctive not the disjunctive when listing the objects located in backpack, and therefore, required that Government to prove beyond a reasonable doubt that Azamat had knowledge of all three objects. There was not an iota evidence to prove that Azamat knew the thumb drive was in the backpack.

IV. Agents Wood's, Azad's and Wiroll's Testimony were Incredible.

Agent Wood's, Azad's and Wiroll's testimony were incredible. Credibility determinations are within the jury's province, and the Court will not disturb such determination unless there is no reasonable way a jury could have found the witnesses believable. *United States v. Hernandez*, 218 F.3d 58, 64; *see also United States v. Gomez-*

Pabon, 911 F.2d 847, 853 (1st Cir. 1990) (holding that a jury's assessment of a witness's credibility will not be disturbed unless the testimony is "incredible or insubstantial on its face" (quoting *United States v. Aponte-Suarez,* 905 F.2d 483, 489 (1st Cir. 1990))) (internal quotation marks omitted).

Much of Agent Wood's testimony is beyond assailable, and crosses the line into incredible. Apart from Agent Wood being impeached during her cross examination with her affidavit, Agent Wood's testimony as to Azamat's alleged statement "I agree" was contrived. Azamat, a nineteen year foreign exchange student, according to Agent Wood uttered the words "I agree" to Dias. Common sense tells us that this is not how young people speak, and especially individuals that are only 19 years old. While the word "agree" may very well be in the vocabulary of a nineteen college student, its use between Azamat and Dias, is less than unlikely. Instead, Agent Wood's testimony was nothing more than contrived.

Completely unsupported by phone records and the text messages submitted as evidence, is Agent Wood's testimony that Azamat admitted he received a telephone call and text message from Dias wherein Dias informed Azamat, Dzokhar was on the news at the bomber. On April 18, 2013, Azamat's cell phone was shut off, he could not receive telephone calls. As to the text messages, the Government's own printouts of text messages from both Azamat and Dias Kadbrybayev's phones admitted into evidence never cooborated Agent Wood's testimony.

Finally Agent Woods testimony that Azamat allegedly informed her he omitted information because he was trying to defend Dzhokhar is incredible. (Day 6 Trial Tr. page 26, lines 1-6). Right before Azamat was brought to the Police Barracks, Agent

Walker informed Azamat that Dzhokhar was "dead", in other Dzhokhar was beyond defending. Additionally, the entire World by this time was aware Dzhokhar was one of the Bombers , there was no defending Dzhokhar.

Agent Azad's testimony that Azamat allegedly said on the evening of April 18, 2013, Bayan got upset, and then Dias and he *decided* to get rid of the backpack is incredible. Agent Azad, like Agent Wood, was also impeached, only not with an affidavit, but with his testimony in a prior proceeding. While this does not necessarily mean that Agent Azad is completely untruthful, it casts a dark shadow on his credibility, especially in light of the circumstances surrounding Azamat's purported statement. The circumstances include the fact that Agent Azad admittedly omitted the statement from his 302, and even more troubling Agent Quinn, the Agent who was with Azad, testified that during the same interview the topic of Bayan Kumiskali being upset never came up, and Azamat never informed the Agents that he assisted Dias, in any way, in discarding the backpack. Trial Tr. Day 9, page 64, lines 19-20.

Agent Wiroll's testimony that when Azamat signed a Notice to Appear in Immigration Court, he essentially adopted a separate and distinct document, the I-213 Report, is incredible. The two documents the Notice to Appear, the only document Azamat was provided an actual hard copy of, and Agent Wiroll I-213 Report that was rapidly read out loud to Azamat are two separate and distinct documents. Furthermore, other than reading the I-213 Report to Azamat, there was no evidence that Agent Wirholl actually provided Azamat with the opportunity to review the I-213. While Azamat inferably was given the Notice to Appear to sign, the Notice to Appear never mentioned the I-213 Report or its substance, nor did the Notice to Appear inform Azamat that by

signing the Notice to Appear Azamat he adopted the language in the I-213. Trial Tr. Day 7, page 63, lines 2-12. The Notice to Appear merely informed Azamat that he had been served with the Notice to Appear, and that he would need to go to Immigration Court. Id.

E. Dias Statement to Agent Azad was Improperly Elicited During Agent Azad's Direct Examination in Violation of *Crawford*, *and then Improperly Highlighted by the Government in Closing Argument.*

During Agent Azad's direct examination, Dias' alleged statement implicating Azamat in taking items from the dorm room was improperly elicited. (Trial Tr. Day 8, page 108-109, lines 23-25 and 1-4). Agent Azad testified that Dias informed Azad, "we" (Dias and Azamat) took the backpack and fireworks from the dorm room. Id. While Agent Azad was later impeached during cross-examination by his testimony in another proceeding[11] the improperly elicited testimony was already before the jury. On re-direct the Government, attempted to elicit the same testimony, this time more explicitly, from Agent Azad. Trial Tr. Day 9, page 41-42 lines 15-25 and 1-5. was not permitted to do so by this Honorable Court. *Id.* To compound matters, the Government highlighted Agent Azad's testimony concerning Dias statement in its closing argument. (Trial Tr. Day 12, page 28 lines 11-19).[12]

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI. *Crawford* held that testimonial statements by declarants who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-

[11] During the prior proceeding, Agent Azad confirmed Dias described that "he" [Dias] was the one who had taken items from the dorm room, not "we".

[12] "He [Azad] then came back, and he [Azad] spent 15 minutes with the defendant, and he said at this point he knows Kadyrbayev said, 'We took backpack with fireworks.' (Trial Tr. Day 12 Government's Summation, page 28 lines 14-16)

examine the declarant. 541 U.S. 36 (2004). The "Crawford analysis generally requires a court to consider two threshold issues: (1) whether the out-of-court statement was hearsay, and (2) whether the out-of-court statement was testimonial." *United States v. Earle*, 488 F.3d 537, 542 (1st Cir. 2007). A defendant is deprived of his Sixth Amendment right of confrontation when the admission of statements by a non-testifying co-defendant inculpate the defendant. *Bruton v. United States*, 391 U.S. 23 (1968).

The entire purpose of severance and separate trials of the three defendants, in this case, was to avoid the Sixth Amendment Constitutional violations should statements against one defendant that implicate another be admitted into evidence. Here, the Government conceded the defendants motions for severance to avoid this very problem. Notwithstanding, the Government elicited testimony from Agent Azad concerning a statement Dias made, and later highlighted the statement in closing argument that implicated Azamat in collectively taking items from the dorm room. There can be no dispute that an out-of-court confession, "taken by police officers in the course of [custodial] interrogations," is testimonial in nature. *See* Crawford, 541 U.S. at 52. While the Government may argue that Dias out of court statement was not offered to prove the truth of the matter asserted during Azad's direct examination, the Government's use of the statement during its summation forecloses such an argument. The Government argued to the jury in closing, that Dias statement supported the Government theory, essentially using the statement to prove the truth of the matter asserted.

II. RULE 33

In the alternative, a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, should be granted because allowing the verdicts to stand, against Tazhayakov would be a "manifest injustice," as there is a real concern that Azamat may have been wrongly convicted. *United States v. Villarman-Oviedo*, 325 F.3d 1, 15 (1st Cir. 2003); *United States v. Andrade*, 94 F.3d 9, 14 (1st Cir. 1996).

LEGAL STANDARD FOR NEW TRIAL

"A district court has greater power to order a new trial than to overturn a jury's verdict through a judgment of acquittal." *United States v. Rothrock*, 806 F.2d 318, 321 (1st Cir. 1986). Unlike when ruling on a motion for judgment of acquittal, in considering whether to exercise its discretion to order a new trial based upon the weight of the evidence, the district court does not view the evidence in the light most favorable to the government. *See, e.g., United States v. Kellington*, 217 F.3d 1084, 1095 (9th Cir. 2000). Critically, unlike the judgment-of-acquittal context, "[i]n considering [a new trial motion], the court has broad power to weigh the evidence and assess the credibility of . . . the witnesses who testified at trial." *Rothrock*, 806 F.2d at 321, *quoting United States v. Wright*, 625 F.2d 1017, 1019 (1st Cir. 1980). *See, e.g., United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004); *United States v. Wilkerson*, 251 F.3d 273, 278 (1st Cir. 2001); *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000); *United States v. Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997). If, after conducting such a review, the district court concludes, in the exercise of its discretion, that the evidence preponderates so heavily against the verdict that a new trial is required in the interests of justice, it may so order. *See, e.g., United States v. Villarman-Oviedo*, 325 F.3d 1, 15 (1st Cir. 2003); *United States*

v. Andrade, 94 F.3d 9, 14 (1st Cir. 1996)

As has been set forth throughout this memorandum, this is nothing less than a tragic situation where the jury was wholly unable to differentiate between merely uttering words of approval the use pronouns taken out of context, and participation. The jury lacked the legal sophistication and the wherewithal to appreciate the distinctions. Arguably, the jury lacked the ability to separate Dias acts and intentions from those of Azamat.

The Eight Circuit Court of Appeals, in *United States v. Dodd*, 391 F.3d 930 (8th Cir. 2004), affirmed the District Court's grant of a new trial, pursuant to Rule 33, writing:

> ". . . it was within the District Court's province to weigh the evidence, disbelieve witnesses, and grant a new trial-even in dutifully rehashed the evidence that Dodd possessed and distributed drugs, but the District Court assumed these two facts in reaching its conclusion regarding Dodd's conviction on the conspiracy charge. The District Court granted a new trial because it was ***"left with a perpetual 'bad taste' in its mouth over the nature, quantity, and character of evidence" of Dodd's involvement in the conspiracy.*** In these circumstances, we cannot say the District Court abused its discretion in granting Dodd's motion for a new trial. Dodd, 391 F.3d at 935 (Emphasis Supplied.)"

Indeed, the instant case also leaves "a perpetual bad taste in the mouth" over the nature, quantity, and character of evidence against Azamat– especially since most all of the evidence presented against him was hearsay in the form of testimony form Federal Agents that were impeached, gave inconsistent accounts, and failed to record and make an actual record of what was they say Azamat said The government has skewed, twisted and completely manipulated the intentions, meanings, and purposes behind Azamat alleged words of approval. The jury was unable to appreciate or see beyond the distortion, leaving then a very unique case where there is an genuine concern that an

innocent person may have been convicted. In reviewing all of the facts and evidence submitted during the trial, it is clear that this case is nothing less than a situation where the jury was confused not only as to the Court's instructions,[13] but unable to differentiate between Azamat's seperate conduct, or lack thereof, with that of Dias' actions. Azamat asks this Court to examine the entirety of the evidence presented in this case. Upon such examination, Azamat respectfully submits this Court will find that allowing this guilty verdict to stand will be a manifest injustice.

WHEREFORE, based on all the reasons set forth above, Azamat's motion for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure and/or motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure, must be granted in their entirety; or alternatively a hearing be granted on both motions.

Dated this 8th day of September, 2014

Respectfully submitted,

/s/ Nicholas M. Wooldridge Esq.
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[13] One of the Juror's interviewed by the Press directly after the verdict, informed the Press the Jurors failed to head the Court's instruction concerning the burden of proof. "We were all shocked when the prosecution rested and the defense immediately rested," the juror said. "We were like, 'You're not going to put a defense on?' They didn't call a single character witness. Someone said, 'Who could they have called?' How about a professor? How about a neighbor? They called no one." See. http://masslawyersweekly.com/2014/07/21/juror-offers-insights-in-wake-of-tazhayakov-verdict/#ixzz3CluYAAqR

Certificate of Service

I hereby certify that I caused the above document to be served on counsel of record for the Government by filing it via the Court's CM/ECF system on this 8th day of September, 2014.

/s/ Nicholas M. Wooldridge Esq.
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