

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA )  
 )  
 v. )  
 ) Crim. No. 13-10238-DPW  
ROBEL KIDANE PHILLIPOS (3), )  
 )  
 Defendant. )

**GOVERNMENT’S OPPOSITION TO DEFENDANT’S MOTION FOR  
FOR JUDGMENT OF ACQUITTAL AND NEW TRIAL**

The United States hereby opposes the defendant Robel Phillipos’ (“defendant” or “Phillipos”) motion to set aside the jury’s verdicts of guilty and enter judgments of acquittal under Fed. R. Crim. P. 29(c) or alternatively, grant a new trial under Fed. R. Crim. P. 33(b)(2). Phillipos’s motion is premised upon five grounds, each of which, as discussed below, is without merit: (1) insufficient evidence that the alleged false statements were material; (2) insufficient evidence to support the Section 1001 terrorism enhancement; (3) the charged false statements fail to state an offense under Section 1001; (4) insufficient evidence on the “knowingly” element of Section 1001; and (5) Section 1001 is unconstitutional vague as applied to the defendant. Further, this Court has already rejected two of Phillipos’ claims -- that the indictment was deficient in pleading a Section 1001 offense and Section 1001 is unconstitutionally vague as applied to him -- when it denied the defendant’s Motion to Dismiss.

On October 28, 2014, after carefully weighing the evidence and deliberating for several days, the jury convicted Phillipos of two counts of making false statements that involved a terrorism investigation. *See* Docket #510. The jury verdict should not be overturned as it is based upon overwhelming evidence of the defendant’s guilt. Rather than telling the truth when interviewed by members of the Joint Terrorism Task Force (“JTTF”) who were seeking to obtain information regarding the Boston Marathon bombings and the suspected bombers, the defendant

chose to conceal information and lie to investigators. As a result, he was interviewed several times by law enforcement over the course of six days. During each of these interviews, he lied. On April 26, 2013, after initially lying to FBI Special Agent Michael Delapena, the defendant finally admitted the truth and signed a written statement (Ex. 11) acknowledging, among other things, that he had indeed remembered going inside the suspected bomber's dormitory room with Dias Kadyrbayev and Azamat Tazhayakov on the evening of April 18, 2013 and saw them remove a backpack containing fireworks.

## **I. STATEMENT OF FACTS**

### **A. Convicted False Statements**

The jury found Phillipos guilty of two counts of making false statements in violation of 18 U.S.C. § 1001. Specifically, the jury found the defendant guilty of making two false statements to law enforcement on April 20, 2013: (1) he did not remember going to Dzhokhar Tsarnaev's dormitory room on the evening of April 18, 2013 (Count 1, Statement 1 on Verdict Slip); and (2) he returned to the door of Dzhokhar Tsarnaev's dorm room on the evening of April 18, 2013 at approximately 10:00 p.m. with Kadyrbayev and Tazhayakov (Phillipos admitted that he had gone to Dzhokhar Tsarnaev's dormitory room earlier in the afternoon), but no one entered the dormitory room (Count 1, Statement 2 on the Verdict Slip). *See* Docket #510. The jury also found the defendant guilty of making three false statements to law enforcement on April 25, 2013: (1) he only entered Dzhokhar Tsarnaev's dormitory room on one occasion on April 18, 2013, which was sometime in the afternoon when he spoke to Dzhokhar Tsarnaev for approximately ten minutes (Count 2, Statement 1 on Verdict Slip); (2) neither he, Kadyrbayev, or Tazhayakov took a backpack from Dzhokhar Tsarnaev's dormitory room on the evening of April 18, 2013 (Count 2, Statement 5 on Verdict Slip); and (3) he was not aware of Kadyrbayev or Tazhayakov removing anything from Dzhokhar Tsarnaev's dormitory room on the evening of

April 18, 2013 (Count 2, Statement 6 on Verdict Slip). *See id.* After determining that the defendant was guilty of making these five false statements, the jury then proceeded to part three of the verdict slip, as instructed by the Court, and concluded that each of these statements involved a terrorism investigation. *See id.*

B. Background<sup>1</sup>

On April 15, 2013, at approximately 2:49 p.m., while the Boston Marathon was underway, two explosions occurred in close proximity to the finish line. The explosions killed three people and physically injured more than 250 people. Tr. 5/60 (SA Christiana). The FBI's Joint Terrorism Task Force ("JTTF") immediately launched an investigation aimed at thwarting additional attacks and identifying and arresting the bombers. Tr. 5/56-57 (SA Christiana); 6/51 (SA Walker). During this terrorism investigation, members of the FBI's JTTF collected any physical evidence related to the bombings, scoured records and visual images, and interviewed hundreds of people. Tr. 5/61-63 (SA Christiana describing "enormous" investigation and steps taken to collect evidence); 6/51-63 (SA Walker describing investigative steps). The purpose of these interviews was to gather as much information as possible regarding the bombings and suspected bombers. *Id.*; *see also* 5/92 (SA Schwader explaining purpose of ten interviews (including two of Phillipos) that he conducted while assigned to JTTF bombing investigation).

On April 18, 2013, at a press conference at approximately 5:15 p.m., the FBI released video footage and photographs of the suspected bombers and solicited the public's assistance in identifying the bombers. Stipulation read to jury on October 6, 2014 (Day 5), Tr: 5/86-87; *see also* 6/51-52. "These photographs and video footage were widely rebroadcast by media outlets all over the country and the world." *Id.* The suspected bombers were not publicly identified

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<sup>1</sup>The evidence summarized herein draws all reasonable inferences and resolves all credibility conflicts in the light most favorable to the government as required when determining whether the evidence is sufficient to sustain a conviction pursuant to Rule 29. *United States v. Lizardo*, 445 F.3d 73, 81 (1<sup>st</sup> Cir. 2006).

until approximately 6:50 a.m. on April 19, 2013 when numerous media outlets announced that the men whose images appeared in the photographs and the video footage released by the FBI in the bombing investigation were Tamerlan Tsarnaev and Dzhokhar Tsarnaev and they were believed to be the suspected Boston Marathon bombers. *Id.*

At approximately 7:00 p.m. on April 18, 2013, more than 11 hours before the suspects had been publicly identified, the defendant, in the company of his friend, Jim Li, saw the images of the suspected bombers that had been released by the FBI on CNN. Jim Li testified that when the defendant saw these images, he said “Oh my God, that dude looks like Jahar.” Tr. 10/86. Li and the defendant then watched television coverage of the bombing investigation for 1 ½ hours until approximately 8:30 p.m. Li indicated that during that period of time, he and the defendant “were glued to the coverage of the Marathon bombing investigation.” *Id.* While they were watching the news coverage, Li’s roommate arrived, Quan Le, entered the room and said to the defendant and Li, “You need to look at this. Jahar’s on TV as the bombing suspect.” Tr. 10/87; *see also* 8/88-89.

At no time while watching the news coverage between 7:00 and 8:30 p.m. did the defendant call the authorities to report that he recognized Tsarnaev as one of the two suspected bombers. Instead, after leaving the Li and Le’s dormitory room, the defendant made plans with two other friends, Dias Kadyrbayev (“Kadyrbayev”) and Azamat Tazhayakov (“Tazhayakov”), to go to Tsarnaev’s dormitory room at the Pinedale Dormitory at the University of Massachusetts Dartmouth. The defendant called Kadyrbayev four times between 8:30 and 8:49 and then met Kadyrbayev and Tazhayakov outside Tsarnaev’s dormitory room at approximately 9:35 p.m. *See* Ex. 39 (Phillipos’ telephone records); Tr. 7/17 (Tazhayakov).

When the defendant met up with Kadyrbayev and Tazhayakov in the hallway outside Tsarnaev’s dormitory room, he was accompanied by Lino Rosas. Tr. 7/17. While Kadyrbayev

knocked on Tsarnaev's door and tried to get into his room, Tazhayakov talked to the defendant and Rosas about whether they had seen the FBI photographs of the bombing suspects. *Id.* The defendant and Lino Rosas indicated that they had seen them. Tazhayakov then stated that he (Tazhayakov) thought that one of the bombers looked like Tsarnaev. Both the defendant and Rosas agreed with Tazhayakov. Tr. 7/17-18.

Kadyrbayev was unable to get into Tsarnaev's dormitory room at that time and, as a result, all four men left the area and went to Lino Rosas' dormitory room. Tr. 7/19. After a few minutes, Kadyrbayev left Rosas' room but the defendant and Tazhayakov stayed there and played a video game. Tr. 7/20. Approximately fifteen minutes later, while the defendant and Tazhayakov were still playing the video game, the defendant received two text messages from Kadyrbayev at 9:58 p.m. and 10:00 p.m., which read: "Come to Jahars!!!," and "Jahars." Tr. 7/20-21; Ex. 42 at 5.

Shortly after 10:00 p.m., the defendant and Tazhayakov arrived at Tsarnaev's room and Kadyrbayev let them in. After entering the room, the defendant sat on Tsarnaev's bed while Tazhayakov sat on a chair on Tsarnaev's side of the room. Tr. 7/23-24. While the defendant and Tazhayakov were in Tsarnaev's room, Kadyrbayev frantically searched through Tsarnaev's belongings in close proximity to where the defendant was sitting for 20 minutes. Tr. 7/25-27 (Tazhayakov); 7/126-132 (Dwinells); see also Ex. 11 (In Phillipos statement, he indicated that "Dias went through Jahar's belongings."). For instance, Tazhayakov testified that Kadyrbayev searched Tsarnaev's bed on which the defendant was sitting, the drawers underneath the bed, and the floor in front of the bed. *Id.* During his search, Kadyrbayev showed Tazhayakov two items he found. The defendant was sitting within an arm's length of Tazhayakov when Kadyrbayev did this. Tr. 7/25-30. First, Kadyrbayev showed Tazhayakov a backpack he found that contained fireworks that appeared to have been emptied of some of their explosive powder. Tr.

7/27-29. Kadyrbayev held the backpack open for several seconds to show Tazhayakov its contents. Tr. 7/54. As indicated in the defendant's confession, when Kadyrbayev did this, the defendant also saw the fireworks in Tsarnaev's backpack. *See* Ex. 11 (In his written statement, the defendant admitted that when Dias opened the backpack, "I observed approximately seven red tubular fireworks, approximately 6 to 8 inches in length."). Additionally, when Kadyrbayev showed the fireworks to Tazhayakov, he said, "I believe he used these to make a bomb." Tr. 7/28. Second, Kadyrbayev showed Tazhayakov a jar of Vaseline. Tr. 7/30. When Kadyrbayev showed this jar to Tazhayakov, Kadyrbayev said, "I believe he used it to make a bomb." *Id.*

At approximately 10:35 p.m., the defendant left Tsarnaev's dormitory room with Kadyrbayev and Tazhayakov. When the men left Tsarnaev's dormitory room, Kadyrbayev took and removed Tsarnaev's backpack containing, among other things, Tsarnaev's laptop computer, fireworks, a jar of Vaseline, and a thumbdrive and brought Tsarnaev's items with them when they returned to Kadyrbayev and Tazhayakov's apartment on Carriage Drive in New Bedford. Tr. 7/32; *see also* 8/130-141 (SA Benton).

Later that evening, the defendant and Tazhayakov watched the news coverage of the manhunt for the suspected bombers. Tr. 7/38. While watching this coverage, the defendant and Tazhayakov discussed the bombings and the defendant stated that the "Boston Marathon bombings was the second biggest thing to happen after 9/11." Tr. 7/45.

In the early morning hours of April 19, 2013, Kadyrbayev told the defendant and Tazhayakov that he thought he should get rid of the Tsarnaev's backpack containing the fireworks. 7/39-40. Tazhayakov responded, "I agree," and the defendant responded, "do what you have to do." 7/39-40, 114; Ex. 11. After that conversation, Kadyrbayev put the backpack containing the fireworks, a jar of Vaseline, and a thumbdrive in a large trash bag and then placed it in garbage dumpster outside their apartment. 7/41-42, 66. (Kadyrbayev had already removed

Tsarnaev's laptop computer from the backpack and had decided to keep that item in their apartment. Tr. 7/42.). Although there is no evidence that Phillipos actually saw Kadyrbayev remove the backpack from the Carriage Drive apartment, Phillipos acknowledged in his written statement that after having this conversation with Kadyrbayev and Tazhayakov about getting rid of the backpack, he "took a two hour nap" and when he awoke, "the backpack was gone." Ex. 11.

On April 19, 2013, the Carriage Drive apartment complex's dumpster was emptied and its contents were moved to a landfill in New Bedford, Massachusetts. Tr. 8/126 (reading stipulation). Over the course of two days, April 25, 2013 and April 26, 2013, more than 30 federal agents searched this landfill for the evidence Kadyrbayev placed in the trash. Tr. 8/130-141 (SA Benton). At approximately 2:00 p.m. on April 26, 2013 – after the defendant had confessed to FBI SA Michael Delapena – federal agents found Tsarnaev's backpack at the landfill. Tr. 8/134; *see* 6/102 (SA Delapena explained interview took approximately three hours and was done by around 2:00 p.m.).

Despite Phillipos' assertions to the contrary (*see* Def. Mem at 10-12), the investigation of the Boston Marathon bombings was not completed with Dzhokhar Tsarnaev's arrest at approximately 8:49 p.m. on Friday, April 19, 2013. Tr. 6/53, 62-63 (terrorism investigation not over but rather in its infancy). Nor did the agents have a complete picture of the obstructive conduct that occurred in Tsarnaev's dormitory room before Phillipos was interviewed on April 20 or 25, 2013. *See* 9/105-106 (SA Quinn explaining during cross-examination that when he interviewed Phillipos on April 25, 2013, FBI "had information" from the interviews of Tazhayakov and Kadyrbayev but did not yet know if backpack had been removed. Rather, they "were waiting to try and substantiate."). Indeed, the agents did not even recover Tsarnaev's discarded backpack from Crapo Landfill until after Phillipos had confessed during his final FBI

interview on April 26, 2013. Until Tsarnaev's backpack was recovered, the agents were not able to substantiate or confirm that Kadyrbayev and Tazhayakov were telling the truth about what they had removed from Tsarnaev's dormitory room and the emptied fireworks containers they had seen in Tsarnaev's backpack. *See id.*

C. Interviews of Phillipos Conducted by Law Enforcement

Law enforcement agents assigned to the JTTF investigation of the Boston Marathon bombings interviewed Phillipos five times: (1) April 19, 2013 (3:20 p.m.); (2) April 19, 2013 (9:00 p.m.); (3) April 20, 2013; (4) April 25, 2013 and (5) April 26, 2013. During each of these interviews, the agents informed Phillipos that they sought his assistance and cooperation in the terrorism investigation of the Boston Marathon bombings. For instance, FBI Special Agent Quinn advised Phillipos:

I was interested in talking to him about any information that he might have, any detail that he might have regarding the bombing or anyone responsible, and I explained to him that if he had any detail, no level of detail was too small. He could provide information that might be helpful in preventing possible future bombings or hold those who were responsible for such bombings.

Tr. 9/16. Despite being informed of the significance of any information related to Tsarnaev and the bombings, Phillipos chose to lie to the agents and during each of his five interviews he made false, misleading, and inconsistent statements.

At approximately 3:20 p.m. on April 19, 2013, two agents assigned to the JTTF's Boston Marathon Bombing investigation, Special Agent Dwight Schwader, Department of Transportation, Office of Inspector General, and Detective David Earle, Essex County Sheriff's Office, called Phillipos on his mobile phone. Tr. 5/96-97. After the agents introduced themselves and advised Phillipos that they were working with "the FBI in investigating the Marathon bombing," they asked Phillipos a "few" questions. Tr. 5/97-98 (Schwader); see also 6/22-25 (According to Earle, agents told Phillipos that they were contacting him to obtain any



information he might be able to provide “concerning Dzhokhar Tsarnaev and the Boston Marathon bombing.”). During this brief telephonic interview, Phillipos admitted that he and Tsarnaev were friends and both students at University of Massachusetts at Dartmouth (“UMASS-Dartmouth”). Phillipos stated that he had seen Tsarnaev on April 18, 2013 in his dormitory room on campus between the hours of 12:30 and 2:00 p.m. Tr. 5/98. In addition, during this interview, the defendant told the agents that two students from Kazakhstan, Dias and Azamat, lived at an apartment on Carriage Drive in New Bedford. Tr. 5/99. Lastly, the agents asked the defendant whether had ever seen Tsarnaev at the Carriage Drive residence or was at that residence, to which he responded, “no.”<sup>2</sup> Tr. 6/26. At the conclusion of this interview, the agents asked Phillipos if he would be willing to meet with them later so they could talk to him face to face. Phillipos agreed. Tr. 5/100.

At approximately 9:00 p.m., Special Agent Schwader, Detective Earle, and another federal agent conducted a more detailed interview of Phillipos in person in a vehicle parked in a Price Chopper parking lot in Worcester. Tr. 5/100 (Schwader); 6/26-27 (Earle). This interview last approximately two hours. Tr. 5/104. At the outset of the interview, the agents reminded Phillipos that the reason that they wanted to speak to him was to gather “as much information as [they] could regarding the Marathon bombing.” *Id.*

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<sup>2</sup>The defendant admitted during later interviews that Tsarnaev drove Tazhayakov to the Carriage Drive Apartment less than 24 hours before this interview. Further, based upon a photograph admitted into evidence, on March 10, 2013, the defendant was sitting with Tsarnaev on a couch in the living room area of the Carriage Drive Apartment. *See* Ex. 20 and Tr. 6/60-61 (Walker describing people depicted in photograph and when photograph was taken). Special Agent Schwader had a slightly different recollection than Detective Earle. He testified that they asked Phillipos “if he had seen Dzhokhar at a residence at Carriage Drive located in New Bedford. He told us that he did not see Dzhokhar Tsarnaev at that residence.” Tr. 5/98. Irrespective of how the question was phrased, the import is the same -- Phillipos was concealing the fact that he had seen Tsarnaev at the Carriage Drive apartment from the investigators at this first interview.

During this interview, the agents initially asked the defendant general background questions, including how he met Tsarnaev, and then asked Phillipos questions about his activities during the week of the Marathon bombing, including Thursday, April 18, 2013. 5/105. Phillipos told the agents that he had met Tsarnaev when they attended the same high school in Cambridge and that in the fall of 2011, that he (Phillipos) and Tsarnaev both attended UMASS-Dartmouth and lived in the same dormitory. According to Phillipos, in 2011, he (Phillipos) began to socialize more with Tsarnaev. 5/106.

After obtaining information from Phillipos about his relationship with Tsarnaev, the agents asked Phillipos about his daily activities during the week of Marathon bombing. *Id.* At trial, Special Agent Schwader and Detective Earle testified that Phillipos provided them a detailed description of his activities on Thursday, April 18, 2013. Tr. 5/107-113 (Schwader); 6/27-29 (Earle). Phillipos recalled what he did from the moment he arrived on the UMASS-Dartmouth campus at 11:00 a.m. until 7:00 a.m Friday morning when Tsarnaev was publicly identified as one of the two Boston Marathon bombers. For instance, Phillipos told the agents that he came to the campus that day to attend a meeting with University's Health Department to discuss his smoking of marijuana in a dormitory in the fall of 2012 in violation of university rules. Before this meeting, he went to Jim Li and Quan Le's dormitory room until 12:45 p.m. Immediately after the meeting with university officials, which began around 12:45 and ended at approximately 2:00 p.m., Phillipos had lunch with Tazhayakov. At around 3:45 p.m., Phillipos indicated that he went to Tsarnaev's dormitory room with Tazhayakov and when they arrived both Tsarnaev and his roommate, Andrew, were in their room. Phillipos told the agents that both he and Tazhayakov entered Tsarnaev's dormitory room and stayed there for approximately ten minutes. According to Phillipos, at approximately 4:00 p.m., Phillipos accompanied Tsarnaev who drove Tazhayakov back to his apartment on Carriage Drive. After Tsarnaev drove

Tazhayakov to his apartment, Tsarnaev drove back to campus with Phillipos and dropped Phillipos off there.

Phillipos told the agents he remained on the UMASS-Dartmouth campus until approximately 7:00 p.m. when Tazhayakov picked him up and drove Phillipos back to Tazhayakov's Carriage Drive residence. 5/110; 6/28. Phillipos claimed that Kadyrbayev stayed with his girlfriend (Bayan) in their bedroom that entire evening. Phillipos further asserted that he slept at the Carriage Drive apartment from 8:00 p.m. until 10:00 p.m. and when he awoke, he watched the news coverage regarding the Marathon bombing with Tazhayakov until 4:00 a.m. *Id.* During this interview, Phillipos did not tell the agents that he had returned to Tsarnaev's dormitory room on the evening of April 18, 2013. 5/111 (Schwader). Nor did he tell them that he had in fact gone inside Tsarnaev's dormitory room with Tazhayakov around 10:00 p.m. and watched as Kadyrbayev searched Tsarnaev's room and removed evidence. 6/28-29 (Earle).

At approximately 4:00 a.m. on Saturday, April 20, 2013, Special Agent Schwader and Detective Earle, accompanied by two other agents, interviewed Phillipos a third time. 5/121-123; 6/30. This interview lasted approximately 30 minutes. During this interview, the agents asked the defendant if he gone into Tsarnaev's dormitory room at approximately 10 p.m. on April 18, 2013 and whether he had returned to Tsarnaev's dormitory room on the evening of April 18, 2013. 5/123-124; 6/30-32. In response to these questions, Phillipos initially told the agents that he did not remember returning or going into Tsarnaev's room on the evening of April 18, 2013. *Id.*; *see* 5/123 (Schwader: "Mr. Phillipos told us repeatedly that he didn't remember going into the room."); 6/30-31 (Earle: "At first he said he could not recall, he could not remember returning to the dorm room..."). Later during the interview, however, the defendant finally admitted that he did remember going to the door of Tsarnaev's room with Kadyrbayev and Tazhayakov at approximately 10:00 p.m. but "[h]e denied that anyone entered the room."

5/123-124; 6/30-31. Phillipos told the agents that when he, Kadyrbayev and Tazhayakov arrived at Tsarnaev's dormitory room, Phillipos knocked on the door but no one answered. 5/124. Phillipos told the agents that he then checked the door's handle and determined that it was locked, so they left the area. *Id.* The agents asked the defendant whether they had removed any items from Tsarnaev's dormitory room. Initially, the defendant responded that he did not remember but later denied that anything had been removed. 5/125. Further, the defendant denied that they had removed a laptop or backpack from Tsarnaev's dormitory room. *Id.* At no time during this interview did the defendant claim he couldn't remember because he was too high or intoxicated. 6/13-14, 19 (Schwader).

At approximately 7:00 p.m. on April 25, 2013, FBI Special Agent Timothy Quinn called the defendant and asked the defendant whether he would be willing to meet with him (SA Quinn) "in the vicinity of his residence and talk about any information that he might have with regard to the bombing investigation." The defendant agreed. Tr. 9/13-14. Shortly after this telephone conversation, Special Agents Quinn and Michael Sieland interviewed Phillipos inside a vehicle in a parking lot near his residence for approximately 2 ½ hours. Tr. 9/14. During this interview, Phillipos told the FBI Special Agents, among other things, that he recalled entering Tsarnaev's dormitory room only one time on April 18, 2013, which was sometime in the afternoon. According to Phillipos, he went inside Tsarnaev's room on the afternoon of April 18, 2013 and "made some small talk with Tsarnaev." Phillipos indicated that he was only inside Tsarnaev's room on that afternoon for a brief period of time and that while he was inside Tsarnaev's room, Tsarnaev's roommate was also there.<sup>3</sup> Phillipos told the agents that he did not recall entering Tsarnaev's dormitory room a second time later on April 18, 2013. Nor did he recall seeing a

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<sup>3</sup>According to the testimony of Tsarnaev's roommate, Andrew Dwinells, this interaction did not occur. Dwinells testified that he did not see Tsarnaev awake on Thursday, April 18, 2013. Tr. 7/124. Further, Dwinells did not observe Tsarnaev have a conversation with anyone in their room at any point on April 18, 2013. *Id.*

backpack removed from Tsarnaev's room on April 18, 2013. Further, he told the agents that he never saw any fireworks on April 18, 2013. Tr. 9/18-22,

Phillipos stated that, at around 8:00 p.m. on April 18, 2013, he remembered getting a text message from Kadyrbayev requesting that he (Phillipos) come to Tsarnaev's dormitory room. Phillipos indicated that in response to this text message, he returned to Tsarnaev's dormitory room. Tr. 9/24. Phillipos stated that when he arrived at Tsarnaev's room, Kadyrbayev and Tazhayakov were standing next to the door. While standing immediately outside Tsarnaev's room, Phillipos told the agents they (Kadyrbayev, Tazhayakov, and himself) "made small talk" and discussed that "last time they had seen Dzhokhar" Tsarnaev. *Id.* Phillipos claimed that he observed a black, Haitian student whose first name he believed was Seth getting a haircut in a bathroom across the hall from Tsarnaev's door. Tr. 9/24-26. Phillipos further claimed that he only recalled standing at the entrance of Tsarnaev's room but not going inside. According to Phillipos, they stood at the doorway for "a short while." Tr. 26. Phillipos advised that he was stoned during this time period. Tr. 9/24-25. In contrast, Phillipos stated that neither Kadyrbayev nor Tazhayakov were high at this time. Phillipos also told the agents that he recalled telling Dias that he was stoned while standing outside Tsarnaev's dormitory room door. *Id.*

Although initially the defendant told the FBI Special Agents that he didn't remember entering Tsarnaev's dormitory room on the evening of April 18th, the second time Special Agent Quinn asked him whether he entered Tsarnaev's room that evening, the defendant answered with a simple, decisive, "no." Tr. 9/32. Phillipos' answers to these questions, which the jury concluded were false, foreclosed additional questions from being posed by the agents. Tr. 9/32-34. As Special Agent Quinn explained at trial, when this interview was conducted, Phillipos, Kadyrbayev, Tazhayakov were all "persons of interest in connection with the bombing itself." Tr. 9/32. The FBI did not know whether any of these men had knowledge of the Marathon

bombing before the bombing occurred. Tr. 9/33. Nor did the FBI fully understand “the roles of Kadyrbayev, Tazhayakov, and the defendant in connection with the removal of any items from [Tsarnaev’s] dorm room.” *Id.*

During this interview, Phillipos similarly claimed that: (1) he never saw a backpack in Tsarnaev’s dormitory room on the evening of April 18, 2013; (2) he never saw any fireworks in Tsarnaev’s room on the night of April 18, 2013; (3) neither he nor Kadyrbayev or Tazhayakov took a backpack from Tsarnaev’s room on the evening of April 18, 2013; (4) he did not observe anyone take a backpack out of Tsarnaev’s room on April 18, 2013; (5) he was not aware of Kadyrbayev or Tazhayakov removing anything from Tsarnaev’s dormitory room on the evening of April 18, 2013; and (6) Phillipos, Kadyrbayev, and Tazhayakov did not engage in any discussion regarding plans to discard or dispose of a backpack during the evening of April 18, 2013. Tr. 9/34-38.

On the following day, April 26, 2013, Phillipos voluntarily came to the FBI’s Boston office for his final interview. At approximately 11:00 a.m., Special Quinn introduced the defendant to FBI Special Agent Delapena. 6/99-101. After advising Phillipos of his Miranda rights (Ex. 10), Delapena interviewed the defendant for approximately three hours. 6/102 (interview done by around 2:00 p.m.). Initially, the defendant told Special Agent Delapena that he did not remember going into Tsarnaev’s room. 6/103-104, 132. “Toward the end of the interview, [Phillipos] then admitted to [Delapena] that, in fact, he did remember going into the room.” 6/104. After this admission, Phillipos confessed to Delapena that he saw Kadyrbayev remove a backpack containing fireworks from Tsarnaev’s room and that he recalled a conversation about getting rid of the backpack. Special Agent prepared a written statement of what Phillipos told him he remembered about the evening of April 18, 2013, which Delapena typed on a computer that was located on a desk in front of him and Phillipos. 6/104-113.

Phillipos reviewed every line of the statement as Delapena typed it and made all changes and revisions Phillipos requested. 6/107-108. After conducting this process for the entirety of a two page, single spaced statement, the defendant signed the statement in Delapena's presence. 6/108. The defendant's written statement, which read as follows, was admitted into trial as Ex. 11:

I, Robel Phillipos, want to make a statement regarding my knowledge of the events on Thursday, April 18th and Friday April 19th, following the Boston Marathon bombings. Specifically, I want to discuss what occurred at Dzhokhar Tsarnaev's dorm room. He is known to me simply as "Jahar." I also want to state what happened at the New Bedford apartment belonging to the roommates Dias and Azamat.

On Thursday, April 18th, at approximately 9pm, I received a text from my friend Dias. The text asked me to go to Jahar's room. As requested, I went to the room, where Dias and Azamat were waiting in front of the door. Dias has free access into the room unless the door is locked, which it was not. Jahar's roommate Andrew was there but said very little and did not object when Dias went through Jahar's belongings. One of the items was a dark backpack, possibly with one red stripe. He opened the bag, at which point I observed approximately seven red tubular fireworks, approximately 6 to 8 inches in length.<sup>4</sup> I do not recall if they had fuses. I know that Jahar has a black SONY laptop, but I do not recall Dias taking it. It is possible that it was in the backpack.

After a short time, we left Jahar's room, Dias carrying the bag slung over his shoulder. We exited the building via the rear exit, where Dias had his BMW parked. He has a license plate on it which reads "Terrorista" Dias drove me and Azamat to their apartment in New Bedford. I recall that the backpack was not in the back seat with me; therefore, he must have placed it in the trunk of the car.

Once at their apartment, we all started to freak out, because it became clear from a CNN report that we were watching that Jahar was one of the Boston Marathon bombers. During much of the time with Dias and Azamat, I did not understand what they were saying the majority of the time because they were speaking in Russian, which I don't understand.

At one point that evening, around 11:00pm, the three of us had a discussion about what to do with the backpack and fireworks. Dias asked, in words I can't exactly recall, if he should get rid of the "stuff", which I took to mean the backpack. I said in response, "do what you have to do." I was concerned how it would look if the Police found us (Jahar's friends) with a backpack with fireworks, given what had happened. I took a two hour nap, and when I awoke,

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<sup>4</sup>This description of the fireworks Phillipos saw in Tsarnaev's backpack is nearly identical to the fireworks found in Tsarnaev's backpack recovered from the Crapo landfill. *See* Ex. 30.

the backpack was gone. I do not know for sure who took it from the apartment. I am aware that there is a dumpster about 80 or 90 yards from their apartment.

In retrospect, I should have notified the Police once I knew Jahar was the bomber. Further, I should have turned over the backpack to the authorities. I regret these decisions. I make this statement without any threats or promises made to me.

Sincerely  
Robel Phillipos

## II. LEGAL ARGUMENT

### A. Legal Standard

When a defendant challenges his conviction on the grounds of evidentiary sufficiency, this Court considers all trial evidence as a whole “drawing all inferences in the light most consistent with the jury’s verdict.” *United States v. Milkiewicz*, 470 F.3d 390, 392 (1<sup>st</sup> Cir. 2006); *see United States v. Matthews*, 498 F.3d 25, 30 (1<sup>st</sup> Cir. 2007) (“Circumstantial, as well as direct evidence, is properly taken into account, and we must uphold the jury’s verdict ‘when it is ‘supported by a plausible rendition of the record.’”) (citations omitted). As the First Circuit explained in *United States v. Olbres*, 61 F. 3d 967, 970 (1<sup>st</sup> Cir. 1995), when a defendant mounts a sufficiency challenge under Rule 29,

all the evidence, direct and circumstantial, is to be viewed from the government’s coign of vantage. Thus, the trial judge must resolve all evidentiary conflicts and credibility questions in the prosecution’s favor; and, moreover, as among competing inferences, two or more of which are plausible, the judge must choose the inference that best fits the prosecution’s theory of guilt.

*Accord United States v. Hernandez*, 218 F.3d 58, 64 (1<sup>st</sup> Cir. 2000) (noting “[d]efendants challenging convictions for sufficiency of evidence face an uphill battle on appeal.”).

Furthermore, the Court must reject only “those evidentiary interpretations ... that are unreasonable, insupportable, or overly speculative, and must uphold any verdict that is supported by a plausible rendition of the record.” *United States v. Ofray-Campos*, 534 F.3d 1, 31-32 (1<sup>st</sup>



Cir. 2008) (citations omitted). The defendant cannot prevail using this legal standard as the evidence of Phillipos' guilt was substantial. Accordingly, this Court should not disturb the thoughtful and consistent verdicts rendered in this case.

**B. Defendant's Legal Arguments are Baseless.**

**1. No merit to evidentiary sufficiency challenge on element of materiality.**

As the jury properly concluded in finding Phillipos guilty, his false statements were material. A statement is material if it has "a natural tendency to influence, or [is] capable of affecting or influencing, a government function." *United States v. Sebaggala*, 256 F.3d 59, 64-65 (1<sup>st</sup> Cir. 2001); *United States v. Arcadipane*, 41 F.3d 1, 7 (1st Cir. 1994). "The test of materiality is whether the false statement in question had a natural tendency to influence, or was capable of influencing, a governmental function. Thus, if a statement could have provoked governmental action, it is material regardless of whether the agency actually relied upon it." *Sebaggala*, 256 F.3d at 64-65 (citations omitted); *see Arcadipane*, 41 F.3d at 7; *see also United States v. Mubayyid*, 658 F.3d 35, 74 (1<sup>st</sup> Cir. 2011) (rejecting materiality challenge and affirming conviction under 1001(a)(2) where defendant's false statement effectively cut off FBI agent's line of inquiry at interview and testimony established that had the defendant answered the question truthfully, "it would have drastically changed the course of the interview" and the agent would have asked an entire line of "additional" questions). Recently, the First Circuit reaffirmed this formulation of the materiality requirement in *United States v. Mehanna*, 735 F.3d 32 (1<sup>st</sup> Cir. 2013). The Court reiterated that, "the knowledge of the interrogator is irrelevant to the materiality of the defendant's false statements." *Id.* at 54. Here, as in *Mubayyid*, Special Agents Dwight Schwader, Detective Earle, and Special Agent Timothy Quinn testified, had Phillipos answered the questions truthfully, they would have asked additional questions and pursued additional lines of inquiry, which Phillipos' lies foreclosed. *See* 5/128-129 (Schwader: if

Phillipos had told Schwader he had gone inside Tsarnaev's room, "interview would have been drastically different."); 6/45 (Earle would have asked him different questions); 9/32-39 (Quinn would have asked different and additional follow-up questions if Phillipos had told him that he went inside Tsarnaev's dormitory room on evening of April 18, 2013, had seen a backpack or fireworks inside Tsarnaev's room, or had seen anybody remove anything from Tsarnaev's room). Accordingly, Phillipos' false statements had the capability of influencing a JTTF terrorism investigation. That is all this is required.

The defendant erroneously claims that the terrorism investigation had concluded prior to the interviews of the defendant and therefore, could not serve as the basis for the guilty verdicts in this case. *See* Def. Mem. at 10-11. That argument is not supported by the facts established at trial. As FBI Special Agent Walker testified, in April 2013 when the defendant made the false statements at issue the JTTF was "literally in the infancy of our investigation." Tr. 6/62. Further, Walker explained that the terrorism investigation was still continuing at the time he testified in October 2014. Tr. 6/53. Similarly, as highlighted above (*supra* at 7-8 & 13-14), when the defendant was interviewed on April 20 and 25, 2013, the FBI was still in the process of determining whether the defendant played any role in the bombing and what happened in Tsarnaev's dormitory room on the evening of April 18, 2013. Tr. 9/32-33 (Quinn).

Similarly, the defendant seeks to have this Court adopt a heightened materiality standard that requires the government to prove reliance (*e.g.*, that the government was misled by the defendant's alleged false statements) or that the defendant's truthful responses would have led to the discovery of relevant information. *See* Def. Mem. at 10-13. The First Circuit has rejected such a formulation of the materiality standard. *See Mehanna*, 735 F.3d at 54 (the charged false "statement need not actually have influenced the government function. It is enough that the 'statement could have provoked government action.'").

Further, the Court correctly instructed the jury on the element of materiality. The Supreme Court has held that the issue of materiality is a factual question for the jury. *See United States v. Gaudin*, 515 U.S. 506 (1995). Because the jury determined that the statements were materials and there was sufficient evidence upon which to base the verdict, this Court should deny the motion for a judgment of acquittal and new trial.

**2. The government proved that the defendant's false statements involved a terrorism investigation.**

Phillipos made the false statements during interviews being conducted in the JTTF's terrorism investigation of the Boston Marathon bombings. Clearly, the Boston Marathon bombings fall within the ambit of 18 U.S.C. § 2331. *See* 18 U.S.C. § 2331(5) (defining domestic acts of terrorism as "acts dangerous to human life that are a violation of the criminal laws of the United States" that "appear to be intended to intimidate or coerce a civilian population ..."). As demonstrated by Phillipos' own text messages (Ex. 42), he understood that he was being questioned about an act of terrorism and his relationship to a terrorist. Further, each interviewer testified that he explained to Phillipos that the purpose of the interview was to gather as much information as possible about the bombings and the suspected bombers. Even if the Court were to conclude that the alleged false statements did not pertain directly to the bombing, they clearly involved evidence of bomb making materials found in a suspected terrorist's room and actions designed to impede a terrorism investigation. *See Mehanna*, 735 F.3d at 55 (affirming conviction under Section 1001(a)(2) for making false statements that "had a natural tendency to influence an FBI investigation into terrorism."). That is a sufficient evidentiary basis to uphold the verdicts here.

Moreover, the legislative history supports a broad reading of the term "involves international or domestic terrorism." The Intelligence Reform and Terrorism Prevention Act of 2004 added the terrorism penalty enhancement provision to Section 1001(a) to deter people from

making false statements that had the potential to impede a terrorism investigation. Congress intended the increased penalty to apply to actions like those alleged against Phillipos. The House Report states, in pertinent part:

This section amends §§ 1001(a) and 1505 of title 18, to increase penalties from not more than 5 years to not more than 10 years for making false statements and obstructing justice, if the subject matter relates to international or domestic terrorism and directs the United States Sentencing Commission to amend the Sentencing Guidelines to provide an offense level increase of at least 18 for such offenses. The section is *to cover an individual who purposefully impedes or hinders an investigation of domestic or international terrorism*. The Committee believes that even 1 minute wasted to ascertain the offender could lead to immense harm. Every minute is critical in an investigation, and intentionally sending investigators on the wrong path or deliberately slowing down an investigation by refusing to assist law enforcement could cost lives. The increase in penalty reflects that this is a severe crime and should be adequately punished.

H.R. Rep. No. 108-505, at 8 (2003) (Conf. Rep.) (emphasis added).

**3. Defendants' claim that his statements are not cognizable under Section 1001 should be rejected.**

The Court should reject the defendant's claim that the false statements for which he has now been convicted are not the type of statements that Congress intended to criminalize. Prior to trial, the Court rejected this same argument in denying the defendant's motion to dismiss. The defendant identifies no authority and makes no new argument but rather simply incorporates by reference the argument made in his motion to dismiss. This argument is based upon cases adopting the so-called "exculpatory no" doctrine (*e.g.*, *United States v. Chevoor*, 526 F.2d 178 (1<sup>st</sup> Cir. 1976); *United States v. Bedore*, 455 F.2d 1109 (9<sup>th</sup> Cir. 1972)). In *United States v. Brogan*, the Supreme Court rejected the "exculpatory no" doctrine, holding that Section 1001 does not include an exception for false statements to investigators that constitute a mere denial of wrongdoing. 522 U.S. 398 (1998). "By its terms, 18 U.S.C. § 1001 covers 'any' false statement -- that is, a false statement 'of whatever kind.'" *Id.* at 399 (citation omitted). By rejecting the "exculpatory no" doctrine as a defense to criminal liability under Section 1001, *Brogan*

abrogated the Court of Appeal decisions, upon which the defendant is relying, that embraced that doctrine. *Brogan* therefore forecloses the defendant's argument on this basis.

**4. The government proved that the defendant willfully and knowingly made the false statements.**

The jury was instructed to find, and the government proved, the defendant made the false statements willfully and knowingly. Other than incorporating by reference the argument made in his Motion to Dismiss, the defendant has failed to articulate any deficiency in the government's proof at trial. As established above, the government proved that the defendant knew the statements were making to investigators were untrue when he made them. For instance, after initially lying to Special Agent Delapena that he did not remember going into Tsarnaev's dormitory, he admitted that he did in fact remember going into his room. Similarly, he was advised by the agents that he could go to jail for making the false statements and given opportunities to correct his statements. Tr. 5/127-128; 9/57. Accordingly, this argument should also be rejected.

**5. The application of Section 1001 to the defendant does not constitute a due process violation as it is not unconstitutionally vague.**

The defendant's argument is entirely based upon the vagueness argument contained in his previously filed Motion to Dismiss, which this Court has already rejected. There is no merit to the defendant's vagueness challenge.<sup>5</sup> The language of Section 1001(a)(2) "is not so indefinite as to be void for vagueness." *United States v. Gibson*, 409 F.3d 325, 334 (6<sup>th</sup> Cir. 2005) (denying defendant's constitutional vagueness challenge to Section 1001(a)(2)).

"The Due Process Clause 'mandates that, before any person is held responsible for violation of the criminal laws of this country, the conduct for which he is held accountable be

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<sup>5</sup>In his Motion to Dismiss, the defendant made an undeveloped, general vagueness argument based upon *Brogan* and his argument that his statements were not material. For the reasons stated above, the defendant's materiality and *Brogan* arguments are baseless and should be rejected by this Court.

prohibited with sufficient specificity to forewarn of the proscription of said conduct.” *United States v. Lachman*, 387 F.3d 42, 56 (1<sup>st</sup> Cir. 2004). Under the void-for-vagueness doctrine, a statute or regulation that criminalizes conduct “must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Here, there is no question that an ordinary person would understand that it was a crime to lie to law enforcement agents. Section 1001(a)(2) penalizes lying. It is not an ambiguous or complicated statute or regulation, which requires legal training to understand. See *Lachman*, 387 F.3d at 56 (Even where “a statute or regulation requires interpretation,” that fact “does not render it unconstitutionally vague.”). By its plain text, the statute placed Phillipos on notice that his conduct was unlawful.

Further, Section 1001(a)(2) only imposes criminal penalties for knowing and willful false statements. This scienter requirement ensures that negligent misstatements are not penalized. See *United States v. Ragen*, 314 U.S. 513, 524 (1942) (“a mind intent upon willful evasion is inconsistent with surprised innocence.”). “Where a statute ‘explicitly provides that a criminal violation of its terms must be willful,’ the void-for-vagueness doctrine is especially inapposite ...” *United States v. Wu*, 711 F.3d 1, 15 (1<sup>st</sup> Cir. 2013). The government proved at trial that Phillipos committed the charged offense willfully, meaning that he was aware, in a general sense, that making false statements to the investigators was prohibited by law. Thus, because the jury was properly instructed and found that the defendant made the false statements knowingly and willfully, and the language of Section 1001(a)(2) put the defendant on notice that lying to agents conducting a terrorism investigation was unlawful, Counts Three and Four of the Superseding Indictment are not unconstitutionally vague and the defendant’s convictions should not be vacated on due process grounds.

**CONCLUSION**

WHEREFORE, for the reasons set forth above, the Government respectfully requests that the Court deny defendant Phillipos' Motion for a Judgment of Acquittal and/or a New Trial in its entirety.

Respectfully submitted,

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Certificate of Service

I do hereby certify that a copy of this motion was served upon counsel of record via ECF on this 16th day of January 2015.

/s/ B. Stephanie Siegmann  
B. Stephanie Siegmann