UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
V.) Doc. No 13 CR 10238
ROBEL KIDANE PHILLIPOS)

MEMORANDA IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Now comes the Defendant, Robel Phillipos, who, by and through counsel, respectfully requests that this Court dismiss counts three and four of the indictment charging him with violations of the False Statements Act, codified at 18 U.S.C. § 1001(a)(2).

The Defendant makes the following arguments:

1) the statements in question under both counts are not material, and therefore not a violation of § 1001(a)(2);

2) the statements are not "statements" as defined under that statute, and therefore are not a violation of the law;

3) the statements were not knowingly false nor were made willfully to deceive;

4) the terrorism sentencing enhancement should be dismissed because the indictment does not show that the defendant knew he was being questioned in connection with a terrorism investigation where the questions related to the actions of individuals who were not involved in terrorism;

5) the statute at issue, 18 U.S.C. § 1001(a)(2), is unconstitutionally vague as applied in this case;

FACTS

Robel Phillipos, the Defendant, was a college student who was 19 years of age, at the time of the Boston Marathon Bombing. He was born and raised in the Boston area and has been

a lifelong resident of Massachusetts. He was raised by his hard working single mother, who was a protective services social worker and is now a domestic violence specialist for a service agency. Mr. Phillipos is a graduate of Cambridge Rindge and Latin School and was well respected by both peers and teachers alike. Prior to being questioned in connection with this case, he had no involvement whatsoever with the criminal justice system. Following the identification of the suspects of the Boston Marathon Bombing, Mr. Phillipos was questioned by federal agents because of his prior relationship with one of the suspects. He had attended high school at Cambridge Rindge & Latin with Dzhokar Tsarnaev, one of the alleged Boston Marathon bombers. Both Mr. Phillipos and Mr. Tsarnaev attended the University of Massachusetts at Dartmouth ("U Mass"), where they became friends. Mr. Phillipos never knew or suspected Mr. Tsarnaev would end up committing such an atrocious and heinous act. He was stunned when he saw news reports identifying Mr. Tsarnaev as one of the alleged bombers, and reported to agents that he wanted cooperate with law enforcement to bring Mr. Tsarnaev to justice. Mr. Phillipos was interviewed by the FBI several times over the course of seven days following the apprehension of Mr. Tsarnaev. The interviews ultimately led to Mr. Phillipos being charged with two counts of violating the False Statements Act, codified at 18 U.S.C. § 1001(a)(2). The contents of the interviews and the progress of the Joint Terrorism Taskforce ("JTTF") investigation are described below.

On April 19, 2013, Mr. Phillipos contacted law enforcement agents through a friend providing them with his contact information. At around 3:00 p.m. Mr. Phillipos received a phone call from the Federal Bureau of Investigation ("FBI") while he was eating lunch with some friends in Worcester. (*See* Exhibit 1, filed under seal). This was several hours after the JTTF had

identified both of the suspected bombers, engaged them in a shootout in Watertown. A house-by-house search of Watertown to locate Mr. Tsarnaev was underway.

During the interview, Mr. Phillipos was questioned about his relationship with Dzhokar Tsarnaev and other U Mass students that he spent time with the previous day, Dias Kadyrbayev and Azmat Tazhayakov. Mr. Phillipos told the FBI that he had met Mr. Tsarnaev the previous day while on campus, before he was identified as one of the suspects. Mr. Phillipos then provided the FBI with the names of the two co-defendants in this case, stating he had not seen Mr. Tsarnaev at their apartment. Mr. Phillipos also told the FBI that, even though he spoke to Mr. Tsarnaev the previous day, before his most recent encounter with Mr. Tsarnaev, the two had not seen each other for two and a half months.

After the agents interviewed Mr. Phillipos over the phone, a SWAT team was sent to Defendants Kadyrbayev and Tazhayakov's apartment. The SWAT team arrested Mr. Kadyrbayv, Mr. Tazhayakov and Ms. Bayan Kumiskali and took them to the Massachusetts State Police Barracks and questioned them for approximately eight to ten hours about the evening that Mr. Kadyrbayev and Mr. Tazhayakov allegedly took some items from Mr. Tsarnaev's U Mass dorm room.

While the two co-defendants were being interviewed, and after the JTTF had Mr. Tsarnaev in custody, around 7:00 p.m., agents called Mr. Phillipos and asked him to make himself available for a face to face interview. (*See* Exhibit 2, filed under seal). Mr. Phillipos complied, and about two and a half hours later, at 9:35 pm, three JTTF members interviewed Mr. Phillipos in one of their cars in the parking lot of Price Chopper Supermarket in Worcester, Massachusetts. The interview was not recorded, but two days later, on April 21, 2013, the agents wrote an account of what transpired during this interview. They remember that, while in the

agents' car, Mr. Phillipos answered questions about his relationship with Mr. Tsarnaev, what he knew about Tsarnaev's politics, and his background and personality. Mr. Phillipos again told the agents that he had seen Mr. Tsarnaev the previous day on campus but that their interaction was largely innocuous, they made small talk and Mr. Tsarnaev gave Mr. Tazhayakov a ride to his apartment.

Mr. Phillipos, who was terrified to discuss his marijuana use with the agents, told the agents that he had smoked marijuana earlier in the day and after he met up with Mr. Tsarnaev he went and, again, smoked marijuana with a friend, John Doe 1. (undersigned counsel has redacted certain names to protect the identity of individuals, a reference list of names with corresponding aliases has been filed under seal). Mr. Phillipos told the agents that Mr. Tazhayakov picked him up from the U Mass dorm and then he went back to Mr. Tazhayakov and Mr. Kadyrbayev's apartment where he fell asleep from about 8-10:00 p.m. When he woke up, he and Mr. Tazhayakov saw the news reports about the marathon bombings. He continued watching the television until about 4:00 a.m. He said he was in complete shock when the news showed a picture of Mr. Tsarnaev and the media identified him as one of the alleged bombers. Mr. Phillipos then allowed one of the agents to see his cell phone and take pictures of the prior text messages Mr. Phillipos exchanged with Mr. Tsarnaev as well as the contact information that Mr. Phillipos had for Mr. Tsarnaev.

The next day, April 20, 2013, at 4:00 a.m. four members of the JTTF interviewed Mr. Phillipos for a third time. (See Exhibit 3, filed under seal). The interview was conducted under the front entrance to 20 Upland Garden Drive. Again, the interview was not recorded. Agents prepared a report the day after the interview, on April 21, 2013.

During this third interview, the agents asked Mr. Phillipos if he returned to Mr. Tsarnaev's dorm room on the evening April 18 with defendants Tazhayakov and Kadyrbayev. Mr. Phillipos, who had been sleeping and just awoken by the agents, initially advised the agents that he did not remember going back. He then said that he did go back to Mr. Tsarnaev's dorm room but did not remember entering. Again, when asked if he remembered removing a laptop or any item from the dorm he said he did not remember. He then stated that he did not go into Mr. Tsarnaev's room that evening and he did not remove any items from the room. He said that the door to Mr. Tsarnaev's room was locked, that he knocked on the door but no one answered. He then checked the handle to see if the door was locked. Mr. Phillipos recalls that while this was going on he was watching one of the students, John Doe 2, getting a haircut in the dorm bathroom. He stated that he, Mr. Tazhayakov and Mr. Kadyrbayev then left dorm together.

At this third interview, Mr. Phillipos allowed the agents to photograph his cell phone, specifically the text conversations he had with Mr. Tazhayakov and Mr. Kadyrbayev as well as their contact information.

A few hours later, agents arrested Mr. Kadyrbayev and Mr. Tazhayakov at their apartment.

The next day, on April 21, 2013, at an unknown time, two members of the JTTF interviewed Mr. Tsarnaev at Beth Israel Deaconess Medical Center. (*See* Exhibit 6, filed under seal). Mr. Tsarnaev stated that he and his brother were the only individuals involved in the attack planning and execution. He further stated that he and his brother used powder from fireworks his brother purchased in New Hampshire to construct the bombs.

On April 22, 2013, at an unknown time, the same agents conducted a second interview of Mr. Tsarnaev at Beth Israel Deaconess Medical Center. (*See* Exhibit 7, filed under seal). During

the interview, Mr. Tsarnaev again stated that only he and his brother were involved in the bombings. He stated that because he had little privacy in his dorm, none of the explosive devices used during the bombings were constructed in his dorm room. He did leave one firework behind to have fun with by lighting it off. Mr. Tsarnaev also confirmed that on April 18, he contacted some friends to give away his laptop and other items in his dorm room because he did not expect to survive.

The morning of April 25, 2013, agents of the JTTF, who had been searching the New Bedford landfill for the discarded backpack, located the bag and photographed it as well as its contents. (*See* Exhibit 8, filed under seal).

Sometime that same day[1], on April 25, 2013, an agent of the JTTF called Mr. Phillipos and asked him to make himself available for another in-person interview. Mr. Phillipos agreed to meet with the agents. He then met with two agents at a public location near his house. (*See* Exhibit 4, filed under seal).

During the interview on April 25, 2013, Mr. Phillipos told the agents he was scared during the previous interviews. He was afraid of admitting that he had been smoking marijuana on April 18 on the U Mass campus. In fact, the only reason he was on the U Mass campus on April 18 was because he had to attend a disciplinary meeting because school officials found marijuana in his dorm room the previous semester.

Mr. Phillipos said the first thing he did on April 18 was go to his friend John Doe 3's dorm room to smoke some Marijuana. After smoking, he went to the 1:00 p.m. meeting with campus officials. After the meeting, Mr. Phillipos bumped into Mr. Tazhayakov and the two of them went to get some food at Wendy's. After eating, Mr. Tazhayakov and Mr. Phillipos went to

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[1] Though all previous reports made note of the time the interviews took place, the agents did not indicate when they spoke to Mr. Phillipos on April 25, 2013.

another friend's, John Doe 4, dorm room where Mr. Phillipos smoked some more marijuana. Mr. Phillipos recalls that Mr. Tazhayakov did not smoke, but did comment that Mr. Tsarnaev had actually quit smoking cigarettes and become more religious.

After smoking in John Doe 4's dorm, Mr. Phillipos, Mr. Tazhayakov and John Doe 4 went outside to look at John Doe 4's car, which had been damaged. Mr. Kadyrbayev was using the car that he and Mr. Tazhayakov owned together and Mr. Tazhayakov had no way of getting back to his apartment. Mr. Phillipos and Mr. Tazhayakov went to ask Mr. Tsarnaev if he would drive Mr. Tazhayakov back to his apartment, which he did. Obviously Mr. Tsarnaev had resumed his regular studies at U Mass Dartmouth following the marathon bombing and no one had any inkling of his involvement at the time. During the drive, Mr. Phillipos made small talk with Mr. Tsarnaev. They dropped Mr. Tazhayakov at his apartment and returned to U Mass. The two separated and Mr. Phillipos went to John Doe 5's dorm room. Mr. Phillipos spent about two hours in John Doe 5's room smoking marijuana with him and two other individuals who were rushing for a fraternity.

Mr. Phillipos then went back to John Doe 4's vehicle where he, John Doe 4 and John Doe 3 smoked some more marijuana. At this point, Mr. Tazhayakov sent Mr. Phillipos a message to meet at Mr. Tsarnaev's dorm room. Mr. Phillipos recalled that both Mr. Kadyrbayev and Mr. Tazhayakov were already at the room when he arrived. Mr. Phillipos recalls knocking on Mr. Tsarnaev's dorm room door but seemed to be watching a different student, John Doe 2, getting his hair cut in the bathroom. Mr. Phillipos was severely impaired by the effects of marijuana at this point. He smoked marijuana on no less than five occasions during the day, and had, immediately prior to meeting up with defendants Tazhayakov and Kadyrbayev, smoked marijuana for three consecutive hours with John Doe 5, John Doe 4 and John Doe 3.

Mr. Phillipos said he did not remember entering Mr. Tsarnaev's room, only standing at the door. But, at that time he was "stoned." Mr. Phillipos said he also did not remember Mr. Kadyrbayev and Mr. Tazhayakov removing a backpack from Mr. Tsarnaev's room. He did say that neither Mr. Kadyrbayev nor Mr. Tazhayakov were high at that time. After stating that he did not remember anything else, the agents told Mr. Phillipos that he was lying and threatened him that he could be prosecuted and imprisoned for lying to them. They then told him they believed he entered Mr. Tsarnaev's room with Mr. Kadyrbayev and Mr. Tazhayakov, and that he knew that they removed a backpack from the room containing fireworks. Mr. Phillipos said he did not have any memory of having done that. He reaffirmed that he only remembered standing outside the dorm room.

Mr. Phillipos, Mr. Kadyrbayev and Mr. Tazhayakov then went back to 69 Carriage Road where Mr. Phillipos smoked some more marijuana. He then took a nap. When he woke up, Mr. Phillipos saw the photo and video of the alleged marathon bombers. A few hours later, at around 4:00 a.m., Mr. Tsarnaev was identified by name.

Mr. Phillipos stated that he did not remember seeing any fireworks on April 18, 2013, and he did not observe anyone take a backpack out of Mr. Tsarnaev's room. Further he stated that he and Mr. Kadyrbayev and Mr. Tazhayakov did not have a discussion about a backpack. He did, however, say that he may have seen a Macintosh laptop on the dining room table at Mr. Kadyrbayev and Mr. Tazhayakov's apartment, but he was unsure.

At the end of the interview the agents "admonished" Mr. Phillipos, stating that they believed he was lying about the fact that he cannot remember much of what happened after he met up with Mr. Kadyrbayev and Mr. Tazhayakov.

On April 26, the day after having been told by agents that he was lying, Mr. Phillipos was taken to FBI field office for further interview and examination. Mr. Phillipos still did not have either an attorney or his mother present. For the first time, Mr. Phillipos was given a Miranda warning. During the interview Mr. Phillipos re-iterated that he could not say for sure if he had entered Mr. Tsarnaev's room on the evening of April 18, because he could only remember standing outside the room and that he was not aware that Mr. Tsarnaev was one of the alleged bombers until later that evening. Mr. Phillipos was questioned over the course of about five hours.

Eventually a written statement was prepared that Mr. Phillipos signed. The statement includes details from the evening of April 18 that Mr. Phillipos previously said he did not remember. Among them are that he, Mr. Kadyrbayev and Mr. Tazhayakov entered Mr. Tsarnaev's dorm room on the evening of April 18 and while there Mr. Kadyrbayev went through Mr. Tsarnaev's belongings including a dark backpack. Mr. Phillipos saw fireworks in the backpack, but does not recall seeing a laptop. Also, when they left the room Mr. Kadyrbayev was carrying the backpack slung over his shoulder. Later that evening Mr. Phillipos recalls that he, Mr. Kadyrbayev and Mr. Tazhayakov had a discussion about what to do with the backpack. When Mr. Kadyrbayev asked if he should get rid of the backpack Mr. Phillipos responded "do what you have to do." At that point Mr. Phillipos fell asleep, when he woke up the backpack was gone. He was not aware of where it had gone. (*See* Exhibit 4 at 9-10). This exchange is where the alleged misstatements in Count Four are derived. The interview was not recorded, but six days later, on May 1, 2013, the agents drafted a report of what they remember of the interview.

On August 29, 2013, Mr. Phillipos was charged with two counts of violating 18 U.S.C. § 1001(a)(2) for making false statements. These charges should be dismissed.

ARGUMENT

Pursuant to Fed. R. Cr. P. 12(b)(2), "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." As such a motion to dismiss is appropriate "where trial of the facts surrounding the commission of the alleged offense would be of no assistance". *See United States v. Covington*, 395 U.S. 57, 60 (1969). When deciding a motion to dismiss, a court reviews the indictment assuming its factual allegations to be true. *See United States v. Litvak*, 2013 U.S. Dist. LEXIS 154402 (D. Conn. Oct. 21, 2013) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16 (1952)). To prevail on a motion to dismiss the defendant must demonstrate that the allegations within the indictment, even if true, would not constitute an offense. *See United States v. Adams*, 2013 U.S. Dist. LEXIS 64845 (E.D.N.C. May 7, 2013) (citing *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004)). "A charge in an indictment is insufficient and must be dismissed when it does not describe conduct that is a violation of the criminal statute charged." *See Litvak*, 2013 U.S. Dist. LEXIS 154402.

I. The Court Should Dismiss both counts three and four of the indictment because the statements reflected in those counts are not material within the meaning of 18 U.S.C. § 1001(a)(2).

In order for the government to meet its burden with respect to count three and four, it must establish that the statements Mr. Phillipos made were *inter alia* material. 18 U.S.C. § 1001(a) (2); *United States v. Gaudin*, 515 U.S. 506, 509 (1995). "Materiality" under § 1001(a)(2) has been defined as a statement that "has a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." *Kungys v. United States,* 485 U.S. 759, 770 (1988). This does not require that the government actually rely on the misstatement, just that the statement "could have provoked

governmental action". *United States v. Sebaggala,* 256 F.3d 59, 64 (1st Cir. 2001). Yet, within this rather broad definition there remains a distinction that divides "the trivial from the substantive". *Kungys*, 485 U.S. at 770. The question in this case, therefore, is whether Mr. Phillipos's statements, if indeed they were false, were trivial or substantive to the JTTF investigation. Put another way were the statements predictably capable of influencing the decision-making process of the JTTF agents. In reviewing the content of the statements in their context and in comparison to the progress of the JTTF investigation, the answer to this question must be no.

A. The alleged false statements, even if they were made, were not material to the terrorism investigation and cannot serve as the basis for prosecuting Mr. Phillipos under the statute. The alleged statements were made after the investigation was concluded and had no material effect on the investigation whatsoever.

Even though the First Circuit found in *U.S. v. Mehanna*, that statements could still be considered material even if agents knew they were false at the time the statements were made, that is not what happened in this case. 735 F.3d 32, 54-55 (1st Cir. 2013). In *Mehanna* the defendant argued that his statements could not be material because the agents would never rely on them, as they knew his statements were false when he made them and therefore were not misled by them. *Id.* at 54. Though it is true that in this case the agents did not believe Mr. Phillipos, what separates this case from *Mehanna* is that, at the time Mr. Phillipos was interviewed by the JTTF agents, the investigation had already been concluded. Even if the Court assumes that the agents were completely ignorant to the falsity of the statements, there was nothing they could have done to act upon them. It is not alleged that Mr. Phillipos committed a crime that he was concealing, and there was no crime actually concealed. If the materiality

requirement of 1001 has any meaning, surely these are the types of statements it is designed to exclude.

Additionally, the First Circuit has said that in order for a statement to be considered material, it must bear on the investigation "in the abstract or in the normal course." *Id.* (citing *United States v. McBane*, 433 F.3d 344, 350-51 (3rd. Cir. 2005); *United States v. Edgar*, 82 F.3d 499, 510 (1st Cir. 1996)). Under this standard, Mr. Phillipos's statements could not possibly be material because the statements were so hesitant and dubious that no investigator would ever rely on them either in the abstract or in the normal course of a terrorism investigation.

During both the interviews where Mr. Phillipos allegedly made false statements, he told agents that he had been smoking marijuana essentially the entire day of April 18. He reported smoking marijuana on five separate occasions, sometimes for multiple hours on end. This fact was verified by the agents who interviewed the various participants. Within that context, Mr. Phillipos repeatedly said that he did not really remember what happened at Mr. Tsarnaev's dorm room and that he did not have a memory of the specific events that he was asked about. The only thing he could clearly recall was seeing a fellow student getting his hair cut in the bathroom. Despite his description of the events, the agents continued to push him for more concrete information, which he did not provide until hours of interrogation at the FBI office had passed. The statements did not direct their investigation as all three suspects had already been arrested at the time the statements were made. The only reason the agents continued to question Mr. Phillipos over the next few weeks was so they could prosecute him for making a false statement. Thus, the statements did nothing but invite prosecution on Mr. Phillipos and could not, therefore, be material as defined by § 1001(a)(2).

Further, this Court should not be misled by the vague notion that § 1001(a)(2) "covers 'any' false statement-that is, a false statement 'of whatever kind.'" *Brogan v. United States,* 522 U.S. 398, 400 (1998) (citing *United States v. Gonzalez*, 520 U.S. 1, 5 (1997)). In *Brogan,* the Court merely applied this language to decide that the "exculpatory no" doctrine did not apply to § 1001(a)(2). *Brogan* did *not* question the definition of materiality or its continued application to the statute. Nor could it make such an expansive change to the statute without mentioning the fact that it was overturning decades of precedent to the contrary.

Though the Court in *Brogan* held that the "exculpatory no" doctrine did not apply to § 1001(a)(2), it did suggest that a situation like the one presented in this case may fall within the ambit of the doctrine. A close reading of the case suggests this case would fall outside of § 1001(a)(2)'s proscription. The concurring opinion in *Brogan* noted that at oral argument, the Solicitor General stated the troubling possibility that government agents could use § 1001(a)(2) to "escalate completely innocent conduct into a felony." The Solicitor General went on: "[I]f an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove." *Id.* at 411 (Ginsburg, J., concurring).

Justice Ginsburg then pointed out that Congress did not intend to cast so large a net with § 1001. *Id.* at 412. She stated that the purpose of § 1001 was to "protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions." *Id.* at 413 n.4. In the instant case, the government approached the defendant several times, waiting for him

outside his home, taking him to random parking lots and even confronting him at 4:00 a.m. The defendant made no affirmative or aggressive statement to the agents, he merely responded to repeated questioning over the course of several days. This case illustrates the problems that occur when overzealous agents are aware of the expansive reach of §1001. Even though they were not misled and did not rely on Mr. Phillipos' statements, they continued to pursue him solely for the purpose of convincing him to say that he actually did remember being in Mr. Tsarnaev's dorm room. Not because that fact was germane to the investigation, not because they believed he committed a crime or could provide additional understanding, but simply because it would be inconsistent with his previous statements. This is not the type of situation that congress intended to proscribe with §1001. Being misled by the lie itself is the harm that Congress sought to prevent. It did *not* seek to put into law a "gotcha" statute, as it is being applied in the instant case.

Because Mr. Phillipos's statements are not material, and fall outside the types of statements congress intended to criminalize with § 1001, the charges against him should be dismissed.

B. Even if this Court finds that Mr. Phillipos's statements did bear on the investigation in some minor way, Count four should be dismissed because none of the statements covered by that charge were material as they all occurred after the suspects had been interrogated and arrested and all the relevant evidence had been recovered.

With respect to count four, all of the alleged false statements were provided on April 25, 2013, after the JTTF had conducted extensive interviews with Mr. Tazhayakov, Mr. Kadyrbayev and Mr. Tsarnaev, had recovered the missing backpack, and had place all three men under arrest. Thus, there is no possible scenario where Mr. Phillipos's statements could have influenced the decision making process of the JTTF because all the suspects had already been questioned and arrested. Simply put, there was no further investigation to influence, the alleged suspects had

been thoroughly interrogated and brought into custody. Therefore nothing Mr. Phillipos could have said would have influenced the agents' decision making, short of suggesting that there were additional suspects that should be apprehended. That simply is not what happened in this case.

None of the allegedly false statements included in Count Four could be material because at the time they were made, the investigation had been concluded. Therefore, at the very least, this Court should dismiss Count Four of the indictment.

II. Mr. Phillipos's statements are not "statements" within the meaning of § 1001(a) (2).

Not every statement made is a "statement" for purposes of section 1001(a) (2). *United States v. Chevoor*, 526 F.2d 178, 183 (1st Cir. 1976); *but see*, *Brogan*, 522 U.S. at 400. If an individual's statement to the government is not one covered by § 1001's proscription, then it cannot be used to sustain a charge of making a false statement under § 1001.

Similar to Justice Ginsburg, the First Circuit has repeatedly stated that it is troubled by the idea that § 1001 covers F.B.I. investigations. "The courts have had difficulty in affirming [§ 1001's] coverage of F.B.I. investigations. Although differing rationales have been used, there is widespread agreement that mere negative responses to government initiated inquires should not be included in the statutory proscription." *Chevoor*, 526 F.2d at 183. The First Circuit went on to state that § 1001 was intended to cover investigations for activities such as tax fraud, because they were likely to entail a monetary loss to the government. The Court suggested, therefore, that where a loss of money was not a target of the investigation, § 1001 was not intended to cover F.B.I. interrogations. *Id.*

In *Chevoor*, the First Circuit described the types of statements that are not § 1001 "statements." In that case the defendant did not present a false claim against the government, nor was his investigation relative to a claim the government might have had against

him. The F.B.I. questioned Chevoor in the course of a criminal investigation; he denied involvement in, or knowledge of the criminal activity. The scenario was repeated at the Strike Force office. The defendant did not initiate anything; he did not even go so far as to fabricate a misleading story in response to the inquiries. He merely gave negative, oral responses to the questioning. No oath was given; no transcript taken. The interviews were informal. Under all these circumstances, the Court held that Chevoor's responses were not 'statements' within the meaning of 18 U.S.C. s 1001. *Id.* at 183-84.

Though the Supreme Court overruled portions of *Chevoor* in *Brogan,* the remainder of the opinion is still a binding precedent on this Court. Thus, when a defendant presents no false claim to the government; is merely questioned by the F.B.I.; no oath is given; no transcript is taken; and the interview is informal, the defendant's statements are not statements within § 1001's proscription. *Id.*

Justice Ginsburg reiterated *Chevoor's* continued validity in her concurring opinion in *Brogan*. She wrote that

> [§ 1001's] purpose was to protect the Government from the affirmative, aggressive and voluntary actions of persons who take the initiative; and to protect the Government from being the victim of some positive statement which has the tendency and effect of perverting normal and proper governmental activities and functions.

Brogan, 522 U.S. at 423 (Ginsburg, J., concurring) (citing *Paternostro v. United States,* 311 F.2d 298, 302 (5th Cir. 1962)).

Chevoor's scenario is nearly identical to the one presented in this case. Here, as in *Chevoor*, Mr. Phillipos did not fabricate a misleading story in response to the inquiries. He merely stated he did not remember specific events and gave negative, oral responses to the questioning. During the interviews, where he allegedly provided false statements, no oath was

given, no transcript was taken and the conversations were not recorded. The interviews were informal, they occurred at all hours of the day and night in various locations from Mr. Phillipos's front porch to the parking lot of a Price Choppers. As the case law dictates, these are not the type of statements covered by § 1001.

The Ninth Circuit supports the view of Justice Ginsburg and the First Circuit. In *United States v. Bedore*, the defendant, was visited at his home by an F.B.I. agent. 455 F.2d 1109, 1110 (9th Cir. 1972). The agent wanted to serve a subpoena upon him, but apparently did not know what he looked like. When the defendant answered the door, the agent informed him that he was looking for Bedore. The agent asked the defendant for his name, and he said that he was Tom Halstead, his roommate. *Id.* The Ninth Circuit held that this false statement was not the type of statement that § 1001 was designed to prohibit. *Id.* The court reasoned that § 1001

> was not intended to embrace oral, unsworn statements, unrelated to any claim of the declarant to a privilege from the United States or to a claim against the United States, given in response to inquiries initiated by a federal agency or department, except, perhaps, where such a statement will substantially impair the basic functions entrusted by law to that agency.

Id. at 1111; see also *United States v. Ehrlichman,* 379 F.Supp. 291, 292 (D.D.C. 1974) ("Most of the courts that have considered the issue have been troubled by the application of § 1001 to F.B.I. interviews."); *United States v. Bart,* 131 F.Supp. 190, 198, 205 (D.MD. 1955) (§ 1001 does not prohibit a false statement that is "not initiated or volunteered by the defendants but was only an answer given in response to a particular inquiry." It prohibits "affirmative or aggressive and voluntary actions of persons who take the initiative" and is designed "to protect the government from being the victim of some positive statement.").

Based on the definition of "statement" for purposes of § 1001 as defined by the Supreme Court, the First Circuit, and other courts, the defendant's statements in the instant case are

precisely those types of statements that are *not* prohibited by § 1001. The defendant took no initiative in making the statements to the F.B.I. agents; they came to him. The interview was informal; there were no oaths or transcripts taken. The defendant was not pursuing any monetary claim against the government, and the government was pursuing none against him.

The statements for which the defendant is now charged with a violation of § 1001(a)(2) are not "statements" pursuant to that statute. These charges must therefore be dismissed.

III. Mr. Phillipos's statements were not knowingly false and cannot therefore be a basis for prosecution under § 1001.

Though § 1001 seems to be relatively expansive in its scope, one of the limiting factors of the statute is its mens rea requirement, which mandates that the alleged misstatements be "knowingly and willfully" made. § 1001. At a very basic level, this requires that the government establish that Mr. Phillipos knew his statements were false when he made them. *See Yermian*, 468 U.S. at 66. However, because § 1001 is a regulatory statute, the knowing and willful requirements should also apply to the defendant's knowledge that he was committing a crime. Though ignorance of the law and mistake of law are not typical defenses to criminal statutes, regulatory crimes are a unique subset within criminal law that, when modified by a willful mens rea requirement, require the government to prove not just willful action, but willful violation of the law. *See Ratzlaf v. United States*, 510 U.S. 135, 141-49 (1994); *Cheek v. United States*, 498 U.S. 192, 199-201 (1991); *Lambert v. California*, 355 U.S. 225, 229-30 (1957); *Liparota v. United States*, 471 U.S. 419, 433-34 (1985); *cf. Bryan v. United States*, 524 U.S. 184 195-96(1998) (knowledge of unlawfulness is not a typical requirement); Dan M. Kahan, Ignorance of Law Is an Excuse – But Only for the Virtuous, 96 MICH. L. REV. 127, 150 (1997) (noting that "courts permit mistake of law as a defense . . . selectively across malum prohibitum crimes").

A. **Mr. Phillipos's statements were not knowingly false, as he repeatedly stated he had an imperfect memory of April 18.**

With respect to Mr. Phillipos's knowledge that his statements were false, the indictment falls short. The Government cannot establish that when Mr. Phillipos mad his allegedly false statements he was aware of their falsity. *See Yermian*, 468 U.S. at 66. Though the indictment claims that Mr. Phillipos's initial statements to the JTTF were knowingly and willfully false, it points to no specific facts that establish this contention. In fact, when one reviews the record of the JTTF investigation, a much different perspective is revealed.

In his initial conversation with agents, Mr. Phillipos did not mention being at Mr. Tsarnaev's dorm room on the evening of April 18. He told agents that he had been smoking marijuana all day and that he remembered going back to Mr. Kadyrbayev and Mr. Tazhayakov's apartment where he took a nap. It was not until April 20, when the agents asked him directly if he remembered going into Mr. Tsarnaev's dorm room that Mr. Phillipos said he did not remember going back to the room and did not remember removing a laptop or any item from the dorm room. He repeatedly told the agents that he had been smoking marijuana all day long and that he did not remember the events they were describing to him. After being interrogated by agents for several hours, and pressed to be more specific, Mr. Phillipos said that he knocked on the door to Mr. Tsarnaev's room, but did not enter. The only thing he did remember was watching John Doe 2 getting his hair cut in the bathroom. This statement appears to be derived entirely from information he received from the agents during the interrogation and extrapolation based on his own imagination.

During the interrogation on April 25, the JTTF agents note that they told Mr. Phillipos what they believe had happened on the evening of April 18. They also told him that their version was supported by several witnesses. Despite hearing the agent's versions of events Mr. Phillipos

stated the only thing he could remember was knocking on the door and watching John Doe 2 getting his hair cut.

The following day, on April 26, while Mr. Phillipos was at the Boston Office of the FBI, he was again interrogated for five hours. During this interrogation the agents repeatedly told him they thought he was lying. As part of the interrogation they provided him with more and more details of what they thought happened on April 18. Only after hours and hours of interrogation did Mr. Phillipos sign the statement prepared by the JTTF agents. The simple fact that Mr. Phillipos signed the statement on April 26 does not establish that when he made any prior statements he knew that they were false. All of his prior statements were qualified by the fact that he did not remember what had happened. It was only after Mr. Phillipos had been interrogated for multiple hours over the course of several days, and only after he was presented with a prepared statement that he allegedly remembered the events of April 18. This scenario does not establish that Mr. Phillipos's initial statements were false. Moreover, the lack of evidence of specific knowledge is not saved by the facile statement in the indictment that the statements were knowing and willful. Because the indictment fails to establish that Mr. Phillipos knew his statements were false, it should be dismissed.

B. <u>Mr. Phillipos did not knowingly violate the law, and therefore did not violate § 1001.</u>

The indictment, further, contains no allegation that Mr. Phillipos was aware that making a false statement was a crime and therefore the charges should be dismissed. Because § 1001 is a special species of crime, specifically a regulatory crime, and the conduct it proscribes is not *malum in se* but rather *malum prohibitum*, the government should be required to establish that Mr. Phillipos knew he was breaking the law when he made the allegedly false statements. While ignorance of the law is not a typical defense, § 1001 is not a typical criminal statue. For some

regulatory offenses – particularly statutes like § 1001 that proscribe only "willful" of "knowing" conduct – the Supreme Court has recognized an ignorance-of-law or mistake-of-law defense, or has required affirmative proof of the defendant's knowledge that his or her conduct was unlawful. See *Ratzlaf*, 510 U.S. at 141-49; *Cheek*, 498 U.S. at 199-201; *Lambert*, 355 U.S. at 229-30. For criminal regulatory statutes that require the violators have a "willful" *mens rea*, there must therefore be proof that the defendant was aware that the conduct was unlawful.

In *Bryan*, the Supreme Court summarized this rule quite clearly: "[I]n order to establish a willful violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." 524 U.S. at 191-92 (internal quotation marks omitted). Since *Bryan*, the Court has reiterated this formulation on several occasions. See also *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 57 n.9 (2007) ("we have consistently held that a defendant cannot harbor such criminal intent unless he acted with knowledge that his conduct was unlawful") (internal quotation marks omitted); *Dixon v. United States*, 548 U.S. 1, 5 (2006) (the term "willfully" "requires a defendant to have acted with knowledge that his conduct was unlawful") (internal quotation marks omitted).[2] Though the Court has not had the opportunity to expand this reasoning explicitly to § 1001, the current case law surrounding regulatory offenses suggests that ignorance of the law should be a complete defense to making a false statement.

Here, the government makes no claim in the indictment that, at the time he made his statements, Mr. Phillipos knew that it would be a violation of the law to make a false statement. Therefore, even if this Court believes that Mr. Phillipos knew his statements were false, it must

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[2] The Defendant does not mean to suggest that the Government must prove the Defendant knew the specific code provision proscribing the conduct, even though the Court has so held with respect . See *Bryan*, 524 U.S. at 194; cf. *Ratzlaf*, 510 U.S. at 141 (anti-structuring statute); *Cheek*, 498 U.S. at 200 (tax statute).

still dismiss the indictment as statutorily insufficient because the Government does not claim he knew making a false statement would be a violation of the law.

IV. Even if Mr. Phillipos's statements fall within § 1001's scope, the terrorism sentencing enhancement should be dismissed because the indictment is based on a misapplication of § 1001 and does not state that Mr. Phillipos's alleged misstatements involved international or domestic terrorism.

In order for the Government to sustain its burden with respect to the terrorism sentencing enhancement, it must prove that the "*offense* involves international or domestic terrorism."[3] § 1001 (emphasis added). The statute is clear in its requirement that the *offense* involve international or domestic terrorism, not the investigation surrounding the alleged misstatements. Because the indictment only alleges that the defendant made misstatements "in a matter involving domestic and international terrorism within the jurisdiction of the executive branch", it fails to state necessary facts to support the sentencing enhancement. The terrorism sentencing enhancement must, therefore, be dismissed.

If the Government shows that "the offense involves international or domestic terrorism," the maximum possible term or imprisonment increases from 5 years to 8 years. 18 U.S.C. § 1001(a). Because the maximum sentence is altered by this evidence, the facts surrounding the sentencing enhancement must be proven by the Government at trial beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("any fact that increases the penalty for a crime beyond the proscribed statutory maximum must be submitted to a jury, and proven beyond a reasonable doubt."). Further, the Supreme Court has stated an element is a fact that a jury must

[3] Domestic terrorism has been defined as:

> activities that (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended- (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping.

18 U.S.C. § 2331(5).

find "unanimously and beyond a reasonable doubt." *Descamps v. United States*, 133 S. Ct. 2276, 2290 (2013); *see Schad v. Arizona*, 501 U.S. 624, 630-36 (1991); *United States v. Reeder*, 170 F.3d 93 (1st Cir.1999). Finally, This Court has the authority to dismiss any portion of the indictment that could raise the proscribed statutory maximum but is insufficiently supported by the facts in the indictment. Therefore, in this case, the sentencing enhancement is an additional element to the offense, and it is appropriate to move for dismissal of this element.

The statutory scheme at issue is clear in its requirement. The Government's interpretation of the statute, as expressed in the indictment, is contrary to this clear language of the statute. When "'the statutory language is unambiguous and the statutory scheme is coherent and consistent,'" statutory analysis begins and ends with the text itself. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)) (internal quotations marks omitted). Here, the statutory language has three distinct parts: first, the jurisdictional language "in any matter within the *jurisdiction* of the executive, legislative, or judicial branch of the Government of the United States" (emphasis added); second, the offense "whoever . . . knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation" and; third the sentencing language – which merges with the offense – "shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both." 18 U.S.C. § 1001. It is clear from this language that the sentencing enhancement, "offense involves international or domestic terrorism", is referring to the elements of knowingly and willfully making a materially false statement not the jurisdictional section of the statute.

In deciding whether a statute's language is clear, Courts will apply the plain meaning rule and in such a situation, the "duty of the interpretation does not arise". *Caminetti v. U.S.*, 22 U.S.

470, 485 (1917). The plain meaning of the word offense references the elements of a crime that proscribe particular conduct. Therefore, to determine what the offense in § 1001 is referencing, we determine what actions the defendant must take in order to breach the criminal law. Within this statute, the conduct proscribed is making a false statement. Therefore, when the statute references "offense" it is referencing not the jurisdictional language, which allows congress to pass the law, but the specific conduct proscribed.

Moreover, the fact that offense references conduct and not venue adds further support to this reading. In § 1001 the offense must take place within a certain venue, namely "in any matter within the jurisdiction of the executive, legislative, or judicial branch." However that venue is separately defined and does not modify the type of conduct proscribed. Further, it is illogical to claim that the word offense should modify the term "matter" in the statute because the latter is infinitely expansive and application of the statute in such a way would lead to absurd results. For instance a prosecutor could claim that a defendant made a false statement to a member of the FBI, and all FBI agents are supporting the agency's mission statement. The agency mission statement says that the agency goal is "to develop a comprehensive understanding of the threats and penetrate national and transnational networks that have a desire and capability to harm us. Such networks include terrorist organizations". FBI Mission Statement www.fbi.gov/about-us/intelligence/mission (last visited Apr. 10, 2014). Therefore, under this absurd reading, if the individual agent was acting in accordance with the agency mission, the matter necessarily involved international and domestic terrorism. This cannot be what the statute means.

Moreover, an analysis of the grammatical structure of the jurisdictional statement lends support the plain meaning of the statute. Within § 1001, the jurisdictional statement is a subordinate clause, specifically a non-restrictive relative clause, and therefore is not modified by

the sentencing enhancement, which intends to reference only the main clause. This grammatical structure is clear because the jurisdictional section contains a different subject – "matter" – and because the meaning of the sentence is not altered when it is entirely omitted. If the jurisdictional language is omitted, the base "offense" is revealed and the statute reads "whoever . . . knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation." Therefore the jurisdictional language is a non-restrictive relative clause. Moreover, the only time a subsequent sentence would modify a subordinate clause is if it were a relative clause or an adjectival clause. However, that is not the case here. An adjectival clause will meet three requirements: it will contain a verb, it will begin with a relative adverb (which this does not), and the relative clause will function as an adjective (which this does not). An easier test to apply, which will help determine whether a subordinate clause is an adjectival clause, is simply omit the clause from the sentence. When an adjectival clause is omitted, the sentence will lose all of its former meaning because the relative clause supplies necessary modifying information (the relative adverb and the adjective).[4] That is not the case with this statute. When the jurisdictional language is omitted, the statute actually becomes more clear and the offense makes more sense.

Finally, the Supreme Court has recognized that § 1001's "jurisdictional language appears in a phrase separate from the prohibited conduct" and therefore the terms 'knowingly and willfully" did not modify the "predicate circumstance that those statements be made in a matter within the jurisdiction of a federal agency." *Yermian*, 466 U.S. at 69. The Court further justified

[4] The placement of the mens rea element before the different subdivisions of the statute does not change the grammatical structure of the underlying statute. Even if it did change the grammatical meaning of the sentence it would have no effect on which portions of the sentence were referenced by the term "offense" because the particular mental state is not a separate element of the crime and therefore not part of the "offense." *See Schad v. Arizona*, 501 U.S. 624 631-37, 649 (1991) (juror unanimity not required between premeditated murder and felony murder to convict for first degree murder).

its finding by stating "the jurisdictional language was added to [§ 1001] to limit the reach of the false-statement statute". *Id.* at 74. Further, because the jurisdictional language was added to the statute after the offense had already been established, its purpose was to limit application of the statute, not expand it. If the interpretation put forth by the indictment were used, the possible application of § 1001 would be drastically increased rather than limited by the jurisdictional language. Just as Congress did not intend for the terms "knowingly and willfully" in § 1001 to modify the jurisdictional language, they similarly did not intend the jurisdictional language to expand the scope of the sentencing enhancement.

Because the word "offense" in the sentencing enhancement is intended to reference the main clause of the previous sentence, knowingly and willfully making a false, fictitious, or fraudulent statement, and not the jurisdictional language, in order for the Government to sustain the charge against Mr. Phillipos it must prove that his allegedly false statements involved domestic terrorism. Put another way, when Mr. Phillipos made his statements, the statements themselves must have involved acts dangerous to human life that appear to be intended to coerce a population, or influence or affect the conduct of a government. 18 U.S.C. § 2331(5).

In this case, the indictment merely alleges that "in a matter involving domestic and international terrorism" Mr. Phillipos made false statements, not that Mr. Phillipos's alleged misstatements involved domestic and international terrorism. Even though indictments are to be read in a plain and commonsense manner, the indictment in this case clearly falls short of the statutory requirements. *See United States v. Flemmi*, 245 F.3d 24, 29 (1st Cir.2001). Even applying the plain and commonsense meaning of this indictment, it clear that it was based on a misunderstanding of the statute. The indictment erroneously assumes that the terrorism sentencing enhancement could apply if that matter within the jurisdiction of the government

involved terrorism. Yet the statute does not require that the matter within the jurisdiction of the government involve terrorism, but that the "offense" involve terrorism. § 1001.

Therefore, even if all the allegations contained in the indictment were proven beyond a reasonable doubt, it would still be insufficient to apply the terrorism sentencing enhancement in this case. Therefore the terrorism related charges should be dismissed.

V. The indictment should be dismissed because § 1001(a)(2) is unconstitutionally vague as applied in this case.

A criminal statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams,* 553 U.S. 285, 304 (2008). "Of these, the more important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." *City of Chicago v. Morales,* 527 U.S. 41, 65 (1999).

Justice Rehnquist, dissenting in *United States v. Yermian,* stated that "the language and legislative history of § 1001 can provide no more than a guess as to what Congress intended." 468 U.S at 76. He was discussing the issue of § 1001's governance when a defendant was not actually aware of federal agency involvement when the defendant made the statement, an issue not presented in the instant motion. Justice Rehnquist's observation, however, does apply here, especially when considered in light of the issues of materiality, whether a statement is a § 1001 "statement," how much knowledge a defendant must have of the investigation and what proof is required to establish the terrorism sentencing enhancement.

In 1996, Congress amended § 1001 to provide an explicit materiality requirement. 18 U.S.C. § 1001. A number of circuit decisions had already interpreted § 1001 to have a materiality requirement. By formally adding the materiality requirement, Congress intended some

("material") false statements to be prohibited under § 1001, and some ("non-material") false statements to be exempt from prohibition. The Supreme Court's statement in *Brogan* that § 1001 "covers any false statement," 522 U.S. at 400, cannot, therefore, be true. The Court appeared to recognize this, opining that "a *disbelieved* falsehood [may not] pervert an investigation" and therefore is not subject to § 1001's prohibition. *Id.* at 402. The Court then concluded, however, that there was no basis for the premise that "only those falsehoods that pervert governmental functions are covered by § 1001." *Id.* A dissenting Justice Stevens noted that the unqualified language of § 1001, as stated by the majority, rejected well-settled court interpretations that limited the statute's application. *Id.* at 419 (Stevens, J., dissenting).

Justice Ginsburg, concurring, was concerned with "the extraordinary authority Congress, perhaps unwittingly, has conferred on prosecutors to manufacture crimes." *Id.* at 408 (Ginsburg, J., concurring). She noted that at oral argument, the Solicitor General himself observed that § 1001 could be used to "escalate completely innocent conduct into a felony." *Id.* at 411. On prior occasions, the Government had indicated to the Court its hesitance to apply § 1001 to "simple false denials of guilt to government officials having no regulatory responsibilities other than the discovery and deterrence of crime." *Id.* at 414. Congress, said the Government, did not intend § 1001 to apply to such situations.

In past arguments to the Supreme Court, the government acknowledged the facility that § 1001 provided to prosecutors and law enforcement agents to manufacture crime. This is the Court's main concern that activates the vagueness doctrine. *City of Chicago v. Morales, supra.* Despite this facility, if the language of § 1001 and opinions interpreting it were adequate to set forth what statements are § 1001 "statements" and what is meant by material, the statute may be saved from unconstitutional vagueness. The statute and judicial opinions, however, only

muddy the waters. The Court in *Brogan* stated that "all" false statements "of whatever kind" are material, even though the statute itself requires that statements be "material." Justices Rehnquist, Stevens, and Ginsburg expressed their concern arising from this fundamental vagueness.

In this case, the vagueness of § 1001 is even more striking. Mr. Phillipos made his statements in response to the JTTF visiting him. He was not presenting any claim to the government in order to receive a benefit. He was a passive participant in the interrogation with the agents. His conversation with the agents is similar to that considered by the First Circuit in *Chevoor* and the Ninth Circuit in *Bedore*. Both circuits held that statements produced by such conversations were not governed by § 1001. *Chevoor* was, with the exception of the exculpatory no doctrine, affirmed by Justice Ginsburg in *Brogan, supra*.

If a person of ordinary intelligence had reviewed this law prior to speaking with the JTTF, he would have concluded either that any statements he made, true or false, during such conversations were not prohibited under § 1001, or that determining which statements were prohibited and which were not was impossible. He would therefore have no notice as to which statements were prohibited and which were not. This inability to discern the coverage of a criminal statute establishes that the statute is unconstitutionally vague as applied to Mr. Phillipos. Counts Three and Four must, therefore, be dismissed.

CONCLUSION

For the aforementioned reasons, the Defendant Robell Phillipos, respectfully requests that this court dismiss the charges against him.

Respectfully Submitted,
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by his attorney

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