UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA

- v. -

S1 09 Cr. 1037 (RWS)

PATRICK NAYYAR,

Defendant.

- -x

SENTENCING SUBMISSION OF THE UNITED STATES OF AMERICA

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PRELIMINARY STATEMENT

The Government respectfully submits this memorandum in connection with the sentencing of Patrick Nayyar ("Nayyar," or the "defendant"). Through this memorandum, the Government addresses three principal topics that are relevant to the sentencing of the defendant.

First, this memorandum sets forth facts and circumstances of the defendant's criminal conduct that bear upon the application of the United States Sentencing Guidelines ("Guidelines" or "U.S.S.G.") to this case and the appropriate sentence.

Second, the memorandum addresses how the Guidelines sentencing range should be calculated, and how the statutory sentencing factors enumerated in Title 18, United States Code, Section 3553(a) should be applied, in this case. In that discussion, this memorandum addresses the propriety of applying certain of the Guidelines' terrorism-related enhancements to Nayyar's conduct, a subject also addressed in the defendant's sentencing submission, dated May 30, 2013 (*see* Docket Entry No. 65) ("Defendant's May Memorandum," or "Def. May Mem."), and the Court's sentencing opinion, dated June 5, 2013 (*see* Docket Entry No. 66) (the "June Opinion" or "June Op."). As described in more detail below, the Government respectfully submits that while a downward variance– pursuant to the Section 3553(a) sentencing factors -- from the Guidelines sentencing range is appropriate in this case, each of the terrorism-related enhancements recommended by the Probation Office's Presentence Investigation Report ("PSR") was appropriately applied to the defendant's conduct.

Third, this memorandum addresses the arguments raised in the defendant's *pro se* omnibus motion to vacate the verdict of the jury and sentence of the Court, dated August 21, 2013 ("Defendant's August Memorandum," or "Def. Aug. Mem."). All of these arguments are without merit. In addition, they are procedurally barred. Many were waived because the defendant failed to file them in advance of trial, as required by Federal Rule of Criminal

Procedure 12(b)(3). Several more, which concern rulings of the Court or advice Nayyar received from his attorneys, were waived because the defendant failed to file any post-trial motion for the requested relief within the time limits proscribed by Federal Rule of Criminal Procedure 33, and to the extent that the defendant seeks to challenge any of the Court's rulings regarding admissibility of evidence and the efficacy of his counsel's representation at trial, those challenges are not properly before the Court at sentencing. Instead, they must be raised on appeal or through a motion pursuant to Title 28, United States Code, Section 2255.

In short, the Government respectfully submits that the Probation Office correctly determined that the Guidelines call for a recommended sentencing range of 360 to 900 months' imprisonment. Notwithstanding that, for the reasons set forth below, imposition of a substantial sentence – albeit one below the advisory Guidelines sentencing range – is sufficient but not greater than necessary to achieve the legitimate sentencing objectives enumerated in Section 3553(a).

DISCUSSION

I. FACTUAL BACKGROUND AND GUIDELINES CALCULATION

A. Overview of Nayyar's Offense Conduct

Detailed descriptions of Nayyar's offense conduct are set forth in the Probation Office's Presentence Investigation Report, *see* PSR ¶¶ 11-22, and the Court's June Sentencing Opinion, *see* June Op. at 7-14. The Government will repeat not those descriptions here; instead, the Government submits the following additional facts that were adduced at trial and are relevant to determining the appropriate sentence in this case.

A confidential informant (the "CI") recorded approximately ten separate meetings with Nayyar and his indicted co-conspirator, Mulholland. *See* PSR ¶¶ 14-17; June Op. at 9-10. In those meetings, Nayyar stated that he could acquire various weapons and other military materiel,

including sniper rifles, missiles, vehicles, bullet proof vests, and night vision goggles, which he would sell to Hizballah through the CI. *Id.* Some additional details of those meetings that shed light on Nayyar and his crimes are summarized below:

- On July 20, 2009, the CI met with Nayyar. Nayyar cautioned the CI that when meeting with Hizballah, the CI should not think that Hizballah was stupid. The CI asked Nayyar to stop repeating the name Hizballah and instead to use the term "brothers" when referring to Hizballah. Nayyar then encouraged the CI to use codes for certain other words in the future, such as missiles or bulletproof vests. At that meeting, Nayyar stated that he had access to sniper rifles, which the CI then could provide to Hizballah. Nayyar also indicated that he had access to armor penetrating sniper bullets and night-vision goggles.

- On July 31, 2009, the CI met with Nayyar and Mulholland. Nayyar offered to sell a Ford truck to the CI, claiming that the truck could carry eight missiles weighing 2,000 pounds each. Mulholland confirmed that each missile weighed 2,000 pounds. Nayyar agreed, among other things, to provide the CI with copies of an arms catalogue, an armor plate, a printout of technology descriptions, and a bill of sale for the Ford truck at the next meeting.

- On August 1, 2009, the CI met again with Nayyar and Mulholland. Mulholland asked the CI about the mobile telephone networks used in Lebanon so that Mulholland would know what items to provide to "them," clearly referring to Hizballah. At that meeting, Nayyar gave the CI a catalogue from "Orion Corporation," which contained descriptions and specifications for various weapons ranging from high-powered rifles to rocket-propelled grenades. Nayyar told the CI to make copies of the catalogue and to send all but the last page of the catalogue to the CI's Hizballah contacts. Nayyar went on to state that he could ship bulletproof vests directly to Lebanon, and that he could provide an armor plate and bulletproof vest to the CI in the United States to be shipped to Lebanon. In addition, Nayyar stated that he had a "CIA special gun" that he could sell to the CI, which gun the CI then could send to the "Mullah" of Hizballah, who might want it for his own protection.

- On August 3, 2009, the CI met again with Nayyar and Mulholland. At that meeting, Nayyar stated that he would provide a sample of the armor plating, the handgun, and a sample armor piercing bullet to the CI at the next meeting. The CI then discussed with Nayyar and Mulholland how Hizballah loads trucks with missiles, and that Hizballah can use a lot of trucks. At that point, Mulholland asked if Nayyar had ground the Vehicle Identification Number on the truck down. The CI told Nayyar and Mulholland not to worry because when Hizballah finishes with the truck, Hizballah will blow it up so there will be no evidence.

- On August 5, 2009, the CI met again with Nayyar and Mulholland. Nayyar gave the CI a handgun and a box of ammunition in exchange for $1,000. After leaving the residence,

Nayyar offered to sell a Toyota pick-up truck to the CI to ship to Lebanon. The CI told Nayyar that Hizballah was only looking for United States trucks with a carrying capacity of over 10,000 pounds because Hizballah wants trucks in which it can carry missiles. Mulholland then told the CI that he needs to know the communications networks that Hizballah uses so that the equipment can be tuned to that network facility. Nayyar also provided the CI with an armor plate with what appeared to be three bullet indentations in it. Finally, Nayyar arranged for a Ford truck to be towed to the CI's residence.

- On August 8, 2009, the CI met again with Nayyar and Mulholland. Nayyar stated that he was leaving for Atlanta, Georgia, and would be accompanied by Mulholland and Nayyar's uncle. Nayyar stated that he would bring back some items from his contact in Atlanta for the CI. The CI provided Nayyar with $3,000 in pre-recorded buy money as a partial payment for the Ford truck. Nayyar further stated that he would use the money to purchase some additional items from his contact in Atlanta.

In addition, during those meetings Nayyar himself provided the CI with printouts of specifications for an M-18 Claymore mine as well as specifications from a U.S.-based company known as ATN for night-vision goggles. June Op. at 10; PSR ¶ 16. A search of Nayyar's phone at the time of his arrest revealed that he had saved in his phone a number for "ATN." PSR ¶ 20. During his initial, Mirandized confession, Nayyar told the FBI that he had contacted ATN in order to try to obtain night-vision goggles to sell to the CI.

B. Procedural History and Nayyar's Repeated False Testimony Before the Court

The defendant was arrested on September 23, 2009 in Brooklyn, New York. PSR ¶ 22; June Op. at 14. Thereafter, the defendant sought to cooperate with the Government with regard to the activities of his co-conspirators. Specifically, on October 7, 2009, the defendant met with representatives of the United States Attorney's Office and agents of the FBI and the Joint Terrorism Task Force. At that meeting, the defendant was represented by counsel. The defendant reviewed the proffer agreement with his attorney, re-reviewed it with attorneys for the Government and his counsel, said that he understood its terms, and executed the agreement. Thereafter, Nayyar reiterated many of the statements that he had made during his September 2009 post-arrest confession. In addition, Nayyar provided further detail regarding Romulus

Zakaria and said that Zakaria had provided him with the technical specifications for the M-18 Claymore mine that he had provided to the CI, and that Zakaria had said he could obtain those mines if Nayyar wanted them. During the proffer session, Nayyar further stated that, although he had lied to the CI about the reasons for his trip to Atlanta, Georgia (which in reality was not a trip to obtain items for the CI), he nevertheless had taken substantial steps to try to acquire M-16 assault rifles for the CI, including but not limited to contacting two different individuals whom he believed might have access to M-16 assault rifles.[1]

Thereafter, on November 24, 2010, the defendant filed a motion to suppress his post-arrest statements. *See* Docket Entry No. 16. In support of that motion, the defendant filed an affidavit in which he falsely claimed, *inter alia*, that the FBI falsely arrested his wife and threatened to deport her if the defendant did not cooperate. *See, e.g.*, Docket Entry. No. 16 at 4 ("Agents then stated to me that if I did not confess, and 'cooperate,' the federal government would deport my wife to Belarus, and our children then ages 6 and 4, would be taken from us and placed in Foster Care.").

On February 2, 2011 and March 21, 2011, this Court conducted an evidentiary hearing regarding the defendant's motion to suppress his post-arrest statements. *See generally* Docket Entry No. 31 (04/22/2011 Order). At that hearing, the Government called three witnesses, including the defendant's estranged wife, each of whom refuted the defendant's claim that threats had been made to the defendant about his family. *See id.* at 5-8 (summarizing the Government's case). Following the Government's case, the defendant testified in support of his motion. Specifically, the defendant testified that FBI agents had "threatened me saying that if

1 At trial, based on the statements made by counsel during the defense opening, the Court ruled that the Government was entitled to offer the defendant's proffer statements to refute the defendant's claim that his *Mirandized* post-arrest statement was "not the truth." *See* Tr. at 149:6-11.

you do not say what we want, we will have your wife, since she's Belarusian and she's illegal, we will deport her back to Belarus, we will deport your mother back to India, and since your children are American citizen[s], they will be taken away and given to the custody of the state or the foster home." *Id.* at 4; *see also id.* at 3-5 (summarizing the defense testimony).

Shortly after the hearing, the defendant filed a *pro se* motion to suppress his proffer statements. *See* Docket Entry No. 26. In support of that motion, the defendant falsely claimed, *inter alia*, that his own defense counsel "threatened the Defendant with his wife's deportation and his children being placed in foster care should Defendant refuse to cooperate." *See* Docket Entry No. 31 (04/22/2011 Order) at 5.

On April 22, 2011, this Court denied Nayyar's motion to suppress his post-arrest statements. *See generally* Docket Entry No. 31 (04/22/2011 Order). In finding that the defendant's waiver of his *Miranda* rights and subsequent confession were both knowing and voluntary, the Court not only credited the testimony of the agents, *see id.* at 11-12, but also concluded that the defendant's testimony was "not credible," *id.* at 12.

Shortly thereafter, on May 16, 2011, this Court entered another Order denying the defendant's motion to suppress his proffer statements. *See generally* Docket Entry No. 38 (05/16/2011 Order). In addition to rejecting each and every ground for relief proffered by the defendant, the Court rejected the defendant's claim that his defense counsel had threatened him. The Court noted that the defendant's claim was "undercut by the fact that he had already voluntarily made lengthy post-arrest statements admitting to illegal conduct," *id.* at 5, and that it previously had rejected the defendant's allegations that the Government "made similar threats against him and his family," and had found those "allegations to be incredible." *Id.*

In advance of trial, the Government moved *in limine* for various rulings. Included in those requested rulings was one permitting the Government to cross examine the defendant – should he testify – on the Court's prior findings regarding the defendant's false testimony. See Docket Entry No. 54 (Government Motion *in limine*). Specifically, the Government contended that such findings were probative of the defendant's character for untruthfulness, and therefore the Government should be permitted to cross examine the defendant about the Court's prior findings that the defendant testified untruthfully. *See id.* at 29-32.

Although the Court initially reserved on that motion, when the defendant indicated his intention to take the witness stand, the issue became ripe. *See* Tr. at 315. The Court agreed that the use of such findings "is entirely appropriate under [Rule] 608," *id.* at 315:5-8, and that there was no question that "it's admissible," but the Court nevertheless found that pursuant to Federal Rule of Evidence 403 there was a danger of unfair prejudice and precluded the Government from offering the Court's prior findings regarding the defendant's credibility, *id.* at 315:19-25; *cf. id.* at 316:1-5 ("I chose to believe the agents and not the defendant[]. I am not sure what kind of a finding. If it were a perjury finding, no question. I think even then if the same judge was involved, it would be questionable.").

At trial, the defendant chose to testify in his defense. Despite the Court's prior rulings rejecting the defendant's claims that he and his family were threatened, the defendant again provided the same false testimony in front of the jury:

> Q. Now, you have mentioned that you knew nothing about Hizballah, right?
>
> A. I know they were political group in Lebanon. That much I knew. Not -- I'm not completely aware of it that I am going to say. But I don't know in detail like the gentleman that spoke.

> Q. I wouldn't expect you to know in detail like the gentleman who spoke, but you did tell Agent Kelley that you knew that Hizballah was a terrorist organization, did you not?
>
> A. Yes, I did say, but I was threatened.
>
> Q. So you said that because you were threatened?
>
> A. Yes. Because I was threatened. I thought they would deport my wife and my mother, and my children would go to care of the state.
>
> Q. And you knew to say that it was a terrorist organization –
>
> A. That's what they told me. If you don't say it, we are going to deport your wife, your mother, and since your children are American citizens, they are going to be in foster home, which is in the care of the state.
>
> Q. Your testimony is that Agent Kelley and the others not only threatened you, but they basically gave you a script of what to say. That's your testimony?
>
> A. I never said they gave me a script. They told me what they wanted to hear. And I asked them what do you want to hear. They say, you have got to say that the things that you give Ali is going to a terrorist organization.
>
> Q. According to you, you were threatened by the FBI agents and the other law enforcement personnel who were there, and then they told you, we need you to say the following and you said it?
>
> A. 100 percent. And the reason why –

Tr. at 447:10-448:14. Later in his testimony, as he had done in his *pro se* motion to suppress his proffer statements, the defendant again falsely testified to the jury that his own defense attorney had threatened him with deportation if he did not cooperate with the Government. And then, after repeating those lies, the defendant compounded them by suggesting that his then wife was given a "U-Visa" in exchange for the defendant's proffer:

> Q. I want to take you to what was called the proffer agreement or the proffer meeting that you had with the group of individuals. At

that meeting, you identified the lawyer you were with, and you said that there was a moment where you took a break. I don't want you to tell me what your lawyer said, but what I want you to do is, after that conversation what did you think you needed to do?

A. Basically, basically what happened over there during the proffer was the lawyer told me that my wife could still be –

THE COURT: It'll be stricken.

A. -- be deported.

Q. I know it's hard for you, Mr. Nayyar, because you're trying to tell what happened here, but I just want you not to tell us what your lawyer said. Just tell us what you did after you had the conversation with your lawyer?

A. I -- I made stories up there too for the government so that nothing would happen to my wife, so that my kids won't suffer. And you will see also that the government did offer my wife a U Visa.

MR. RITCHIN: Objection.

THE COURT: It'll be stricken.

Q. Well, did you know whether or not you your wife got a U Visa?

A. From the 3500 material –

Q. Do you know –

THE COURT: Please.

Q. From your own mind, do you know?

A. My wife was promised a 3500 –

THE COURT: No.
A. From, from –

THE COURT: Just a second. Ladies and gentlemen, we'll have a short recess.

Tr. 486:21-488:2 (emphasis added). That false testimony, and the false claim that the defendant's wife was offered a U-visa by virtue of the defendant's statements to the Government, required the Government to call a rebuttal witness to establish that Nayyar's estranged wife had received a U-visa by virtue of her status as a victim of a crime committed by Nayyar, and not because of any statements made by the defendant. *See* Tr. 512-515.

As the Court is aware, at the conclusion of the case, the jury returned a verdict finding the defendant guilty on all counts.

C. The Obstruction of Justice Enhancement Should Be Applied to Nayyar's Recommended Guidelines Sentencing Range

In the Presentence Investigation Report, the Probation Office determined that the defendant's base offense level was 26, pursuant to U.S.S.G. § 2M5.3(a). PSR ¶ 29. In addition, because the defendant conspired to sell firearms and ammunition to Hizballah, knowing that they would be used in furtherance of violence, the base offense level was increased by two levels, pursuant to U.S.S.G. § 2M5.3(b)(1). PSR ¶ 30. Further, because the offense involved, or was intended to promote, a federal crime of terrorism, as defined in 18 U.S.C. § 2332b(g)(5), the offense level was increased by another 12 levels, pursuant to U.S.S.G. § 3A1.4(a). PSR ¶ 31. In view of the foregoing, the Probation Office calculated the defendant's total offense level as 40. Moreover, pursuant to U.S.S.G. § 3A1.4, the defendant's Criminal History Category is VI. PSR ¶45. Based on a total offense level of 40, and a Criminal History Category of VI, the Probation Office concluded that the defendant's Guideline term of imprisonment is 360 to 900 months. PSR ¶ 79.[2]

2 The statutory maximum penalty on all counts is 900 months, so that replaces life as the upper end of the Guidelines range.

The defendant did not object to any of these calculations, and instead asks that the Court downwardly depart from the Guidelines range or vary downward on the basis of other Section 3553(a) factors.

The Government concurs in all but one respect with the Guidelines calculations set forth in the Probation Office's Presentence Investigation Report, *see* PSR ¶¶ 26-38, which was adopted in the Court's June Opinion, *see* June Op. at 16-19. The sole point of departure, from the Government's perspective, is the propriety of an enhancement pursuant to Section 3C1.1 of the Guidelines for obstruction of justice. While it noted that Nayyar testified "both at trial and during a hearing before the Court," and in that regard "may have provided false exculpatory testimony," PSR ¶ 33, the Probation Office nonetheless did not apply the enhancement and instead "defer[red] to the Court to conclude if this adjustment applies."

The Court "exercise[d] its discretion pursuant to § 3C1.1 to refrain from enhancing the Defendant's offense level despite the Government's assertion that the Defendant 'may have provided false exculpatory testimony' during the cour[se] of his trial and a hearing before the Court." June Op. at 17 n.2. While application of the two-level enhancement pursuant to Section 3C1.1 would not change the Guidelines sentencing range of 360 to 900 months imprisonment, *see* June Op. at 18; PSR ¶ 82, the Government respectfully requests that the Court reconsider this conclusion.

The basis for applying this adjustment is not simply the Government's assertion; the Court has already found that the defendant's testimony at the pretrial suppression hearing was "not credible." See Docket Entry No. 31 (04/22/2011 Order) at 12. Moreover the defendant's repeated false statements, while under oath, fall within the heartland of this Guidelines enhancement. The defendant's conduct -- making false statements under oath, both in a hearing

and a trial – falls squarely within two of the "examples of covered conduct" set forth in the Application Notes to this Guideline. *See* U.S.S.G. § 3C1.1, App. n.4(B) ("committing, suborning, or attempting to suborn perjury . . ."); *id.* App. n.4(F) ("providing materially false information to a judge or magistrate judge"). In addition, there can be no doubt that the subject of the defendant's false testimony pertained to "material" evidence as defined under that Guideline. *See* U.S.S.G. § 3C1.1, App. n.6 ("'Material' evidence, fact, statement, or information, as used in this section, means evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination."). And given that the defendant provided testimony at trial that was identical in all material respect to testimony that this Court previously had rejected as "incredible," there can be no claim here that his false trial testimony "result[ed] from confusion, mistake, or faulty memory." U.S.S.G. § 3C1.1, App. n.2 (Limitations on Applicability of Adjustment).

Accordingly, the Government respectfully submits that an enhancement for obstruction is appropriate in this case. And even if the Court declines to impose this enhancement in its Guidelines calculation at sentencing, the Government respectfully submits that the defendant's willingness to proffer false testimony to the Court and the jury on repeated occasions can and should be considered in determining the appropriate sentence under Title 18, United States Code, Section 3553(a). *See, e.g.*, 18 U.S.C. § 3553(a)(2)(A) (requiring sentencing courts to consider the need for the sentence imposed "to promote respect for the law").

II. Nayyar's Offense Conduct Warrants a Substantial Term of Imprisonment

The offense conduct in this case is extremely serious --- conspiring to provide material support to Hizballah that included weapons, bullet-proof vests, night-vision goggles, vehicles, and other materials sought by the terrorist group to engage in violence against those it perceives as its enemies, including the United States. Indeed, as was demonstrated at trial, the defendant

not only conspired – he actually provided a handgun, ammunition, and a truck he believed would be used to carry missiles to an individual he believed would transport them to Hizballah. An individual residing in the United States who actively sought to establish himself as a source of supply of military-grade materials to a terrorist organization should be treated firmly and sentenced to a substantial term of imprisonment, both because of the seriousness of the crime of supplying a terrorist organization and because those who seek to enrich themselves by providing such materials to terrorist organizations must be deterred from doing so.

While the Government has made no claim here the defendant was himself a member of Hizballah, or that he conspired to engage in, or engaged in, acts of violence, the defendant's crimes nonetheless are very serious crimes. Terrorist organizations need more than ideologically motivated members and violent operatives to spread terror. They also need those willing to supply the organizations with the weapons and other materiel necessary to conduct their deadly work. And that is precisely what Nayyar aspired to be. As the trial testimony and the defendant's own statements made clear, Nayyar sought to establish himself as a broker of weapons and other tools of violence. And his eagerness to achieve that ambition, and to obtain the money it would bring, led him to care not at all that those he conspired to supply were terrorists. A substantial term of imprisonment is necessary to reflect the seriousness of this conduct, and to deter others who would engage in similar conduct. A message must be sent that providing weapons and military materiel to terrorist organizations – regardless of the motive for doing so – is very serious criminal conduct.

A. Applicable Law

The United States Sentencing Guidelines (the "Guidelines") still provide strong guidance to a sentencing court in the wake of *United States* v. *Booker*, 543 U.S. 220 (2005) and *United States* v. *Crosby*, 397 F.3d 103 (2d Cir. 2005). Although *Booker* held that the Guidelines are no

longer mandatory, it also held that district courts must "consult" the Guidelines and "take them into account" when sentencing. 543 U.S. at 264. Since *Booker*, the Supreme Court has reaffirmed the central place of the Guidelines: "[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range" — that "should be the starting point and the initial benchmark." *Gall* v. *United States*, 552 U.S. 38, 50 (2007).

After that calculation, a sentencing judge must consider seven factors outlined in Title 18, United States Code, Section 3553(a): "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); the four legitimate purposes of sentencing, *see id.* § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); the Guidelines range itself, *see id.* § 3553(a)(4); any relevant policy statement by the Sentencing Commission, *see id.* § 3553(a)(5); "the need to avoid unwarranted sentence disparities among defendants," *id.* § 3553(a)(6); and "the need to provide restitution to any victims," *id.* § 3553(a)(7). *See Gall*, 552 U.S. at 49-50 & n.6.

In determining the appropriate sentence, the statute directs judges to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing, which are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a)(2).

Courts may not presume that the appropriate sentence necessarily lies within the Guidelines range, but "the fact that § 3553(a) explicitly directs sentencing courts to consider the

Guidelines supports the premise that district courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Gall*, 552 U.S. at 50 n.6. Their relevance throughout the sentencing process stems in part from the fact that, while the Guidelines are advisory, "the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives," *Rita* v. *United States*, 551 U.S. 338, 348 (2007), and the Guidelines are "the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions," *Gall*, 522 U.S. at 46; *see also Rita*, 551 U.S. at 349. To the extent a sentencing court varies from the Guidelines sentence, "[it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50.

B. The Guidelines' Terrorism-Related Enhancements Do Not Overstate the Seriousness of this Offense

The application of U.S.S.G. § 3A1.4(a) does not overstate the seriousness of Nayyar's criminal conduct. In 1994, Congress mandated that the Sentencing Commission provide for a Guidelines enhancement for terrorism offenses to ensure that those convicted of such crimes receive punishment commensurate with the extraordinary nature of their conduct. *See United States* v. *Stewart*, 590 F.3d 93, 172 (2d Cir. 2009) (citing Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 120004, 108 Stat. 1796, 2022). The resulting "terrorism enhancement" at U.S.S.G. § 3A1.4 reflects Congress's intent that defendants convicted of terrorism offenses serve sentences appropriate to their uniquely dangerous crimes. As Judge Walker explained in his concurrence in *Stewart*:

> The import of this enhancement 'could not be clearer': It reflects Congress' and the Commission's policy judgment 'that an act of terrorism represents a particularly grave threat because of the dangerousness of the crime and the difficulty of deterring and

> rehabilitating the criminal, and thus that terrorists and their supporters should be incapacitated for a longer period of time.'

Id. at 172-73 (quoting *United States* v. *Meskini*, 319 F.3d 88, 92 (2d Cir. 2003)). The enhancement appropriately assesses the seriousness of the offense in this case. The defendant was a resident of the United States who engaged in a conspiracy with the goal of supplying weapons and military materiel to a terrorist organization that targets the United States and its allies. Moreover, the defendant's participation in a conspiracy to support terrorism was not a momentary lapse, but rather represented the culmination of a desire to establish himself as a weapons broker that had spanned several years.

Nayyar and his co-conspirators did more than exhibit an abstract commitment to supplying weapons; they provided real support in the form of a firearm, ammunition, technical specifications for other military-grade items (*e.g.*, night-vision goggles and bullet-proof vests), and a truck that Nayyar believed would be used to carry missiles for Hizballah. And as the defendant made clear when he provided those materials to the CI – he was looking to establish a long-term relationship with the terrorist organization as a supplier of bullet-proof vests for its militant members. The evidence recovered from the defendant's computer, as well as the defendant's own statements (*e.g.*, that the "mullah" of Hizballah would like the firearm), also made clear that, in agreeing to provide these materials to Hizballah, the defendant knew well that it was a terrorist organization. Nayyar's conduct falls squarely within the kind of dangerous activity that Congress and the Commission have deemed worthy of significant punishment through the application of the terrorism enhancement. To conclude that this enhancement is not appropriately applied to the type of conduct engaged in by the defendant would thwart Congress and the Commission's intent to ensure that acts of terrorism are severely punished and disregard the nature of the defendant's conduct.

Similarly, the enhancement's impact on Nayyar's applicable Criminal History Category does not "grossly overstates Mr. Nayyar's criminal history," as the defense suggests. Def. May Mem. at 12. Rather, the effect of the enhancement on the applicable Criminal History Category reflects the Commission's assessment of the need for deterrence and likelihood of recidivism in terrorist offenses. As the Second Circuit has previously recognized, "the Sentencing Commission had a rational basis for creating a uniform criminal history category for all terrorists under [U.S.S.G.] § 3A1.4(b), because even terrorists with no prior criminal behavior are unique among criminals in the likelihood of recidivism, the difficulty of rehabilitation, and the need for incapacitation." *Stewart*, 590 F.3d at 143 (citing *Meskini*, 319 F.3d at 92). The same high likelihood of recidivism, difficulty of rehabilitation, and need for incapacitation apply to Nayyar, even though he is not a political ideologue or religious extremist. As noted in the Probation Office's Presentence Investigation Report, as early as 2000 or 2001, Nayyar had sought to establish himself as a broker of weapons and military-grade items. Although Nayyar temporarily abandoned that aspiration, when the opportunity presented itself several years later, Nayyar again leapt at the opportunity to enrich himself through the arms-trafficking business.

Furthermore, despite the defense's contrary assertion, application of the terrorism-related enhancement in determining the appropriate Guidelines range does not run afoul of the concerns articulated in *United States* v. *Dorvee*, 616 F.3d 174 (2d Cir. 2010). First, the Second Circuit's decision in that case, which concerned the entirely separate Guideline applicable to child pornography cases, was based in part on its assessment that that Guideline was "irrational[]" and, "unless carefully applied, [could] easily generate unreasonable results." 616 F.3d at 187-88. By contrast, the Second Circuit has expressly *endorsed* the "rational[ity]" of the terrorism enhancement. *See Meskini*, 319 F.3d at 92.

This case does not implicate *Dorvee*'s concern about "Guidelines projections at or beyond the statutory maximum in run of the mill cases. *See* Def. May Mem. at 9-11 (citing *Dorvee*, 616 F.3d at 186). If there is a "run-of-the-mill" terrorism case, this is not it. This case involved a defendant living in New York City who not only conspired to provide material support to Hizballah, but who actually provided a firearm that he believed would be used by Hizballah's leader, ammunition, and a truck he understood would carry missiles. The defendant also offered to obtain other military-grade items for the terrorist organization. The defendant did not do this on a lark or a whim, nor was he induced or persuaded to do so. Rather, the defendant provided these materials in order to establish *bona fides* with an individual whom he believed to be a source of supply to a terrorist organization, *bona fides* that the defendant admitted he hoped to parlay into establishing himself as a major supplier of bullet-proof vests for the terrorist organization. This conduct falls well within the type of conduct that the terrorism-related enhancement was designed to deter.[3]

Second, it is a fundamental principle of sentencing law that, as part of its sentencing analysis, the district court must properly calculate the applicable Guidelines range, using the relevant Guidelines provisions. *See* 18 U.S.C. § 3553(a) ("The court, in determining the particular sentence to be imposed, shall consider . . . the kinds of sentence and the sentencing range established for [ ] the applicable category of offense committed by the applicable category

3 Equally unavailing is the defendant's argument that the "two point weapons enhancement, which applies broadly in any case where resources were provided with reason to believe that they 'are to be used to commit or assist in the commission of a violent act'" pursuant to U.S.S.G. § 2M5.3(b)(1)(E) should not apply here because "[s]ince terrorist organizations by definition engage in violent acts, the adjustment applies in virtually every material support conviction." Def. May Mem. at 11. This concern about overbreadth is inapplicable here. The defendant was convicted of providing, among other things a firearm firearms and other military-grade materials to Hizballah – those materials are exactly the type of materials envisioned by the enhancement in Section 2M5.3(b)(1).

of defendant as set forth in the [Sentencing Guidelines].”). As Section 1B1.1 of the Guidelines makes clear, the process of correctly calculating a defendant's offense level includes the application of any adjustments warranted by the facts of the case. *See* U.S.S.G. § 1B1.1(a)(3) (noting that courts must “[a]pply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.”); *Dorvee*, 616 F.3d at 177 n.1 (“A district court is . . . required to determine whether any adjustments -- in this case ‘enhancements’ under U.S.S.G. § 2G2.2 -- in Chapter Two apply and, if so, adjust the defendant's base offense level.”).

Nothing in *Dorvee* suggests that it upended these well-established principles. Indeed, the *Dorvee* Court reviewed the application of three Section 2G2.2 enhancements and concluded that there was no procedural error in applying them. *See id.* at 180. While the *Dorvee* Court went on to criticize Section 2G2.2 as a whole, at no point did it instruct district courts not to apply the Section 2G2.2 enhancements; nor did it attempt to rewrite the Sentencing Guidelines by limiting the application of the Section 2G2.2 enhancements to situations where they apply to an “unusual degree.” To the contrary, *Dorvee* reaffirmed the principle that district courts must accurately calculate the Guidelines as a first step in fashioning a sentence: “in light of the Sentencing Commission's relative expertise, sentencing courts ‘must consult [the] Guidelines and take them into account when sentencing.’” *Id.* at 188 (quoting *United States* v. *Booker*, 543 U.S. 220, 245, 264 (2005)). Only after this calculation is complete can a sentencing court proceed to consider whether the guidelines range resulting from the application of Section 2G2.2 is appropriate in a particular case. *See, e.g., United States* v. *Chow*, 10-4570-cr, 441 Fed. App'x. 44, 45 (2d Cir. Nov. 21, 2011) (“Nothing in *Dorvee* precludes application of the § 2G2.2 enhancements to the

calculation of the Guidelines range from which a court may then vary. Nor does *Dorvee* condition application of § 2G2.2 enhancements on heightened findings.").

Applying *Dorvee* to the sentence challenged in *United States* v. *Tutty*, 612 F.3d 128 (2d Cir. 2010), the Second Circuit rejected the argument that *Dorvee* rendered the Section 2G2.2 enhancements inapplicable to all but the most egregious cases. In that case, the defendant was subject to a four-level enhancement based on "only a single image" of sadistic, masochistic, or violent material. 612 F.3d at 131. The Court of Appeals held that the district court did not err when it applied the relevant Section 2G2.2 enhancement in calculating the applicable Guidelines range because the limited nature of Tutty's violation "d[id] not render the enhancement inapplicable." *Id.* Rather, "the district court may choose to consider this fact in its analysis under 18 U.S.C. § 3553(a)." *Id.* Accordingly, the teaching of *Dorvee*, as applied by the Second Circuit, is that the Section 2G2.2 enhancements should be applied when warranted by the facts of the case, but district courts should consider whether a variance is appropriate when the resulting Guidelines range is unduly harsh. The facts of this case plainly establish the propriety of the terrorism enhancements, for Guidelines calculations purposes, as to Nayyar's crimes. As such, to the extent that a sentence of less than 360 months should be considered – and the Government respectfully submits that they do – any such deviation from the recommended Guidelines sentencing range is addressed more properly in the context of a variance pursuant to the Section 3553(a) sentencing factors, rather than through a downward departure under the Guidelines.

Finally, the defendant's claim that *Dorvee* applies with equal force in this case because "the 12 level enhancement is the product of a Congressional directive to the Sentencing Commission and not the result of the Commission's institutional role of developing Guidelines

based on empirical data" misses the mark. Def. May Mem. At 10 (quoting U.S.S.G., App. C, Amend. 526). As the Court of Appeals recently clarified:

> This Court has never held that the lack of empirical evidence underlying a particular guideline automatically renders unreasonable a sentence within or outside of the guideline. *Dorvee*, 616 F.3d at 184–88; *see also United States* v. *Perez–Frias*, 636 F.3d 39, 43 (2d Cir.2011) (noting that "the absence of empirical support is not the relevant flaw we identified in Dorvee " but rather the fact that Congress ignored the Commission and amended the guidelines). Contrary to [the defendant's] argument, in *Dorvee* we were concerned with "the fact that the district court was working within a Guideline that is fundamentally different from most," *Dorvee*, 616 F.3d at 184, because amendments by Congress over time, which the Commission opposed, resulted in "cobbled together" Guidelines that recommended sentences above the statutory maximum, *id.* at 186. We have no such concern in the present case, even though the reentry Guidelines were developed without the benefit of empirical evidence, because the reentry Guidelines clearly reflect two legitimate and distinct policies that bear on sentencing. The offense-specific enhancement under section 2L1.2 "is designed to deter aliens who have been convicted of a felony from re-entering the United States," but in contrast the criminal history calculation under section 4A1.1 "is designed to punish likely recidivists more severely." *United States* v. *Carrasco*, 313 F.3d 750, 757 n. 2 (2d Cir.2002) (internal citation and quotation marks omitted).

United States v. *Rijo*, 10-4541-cr, 467 Fed. App'x 24, 26 (2d Cir. Mar. 15, 2012). As in *Rijo*, the terrorism enhancement clearly reflects legitimate and distinct policies that bear on sentencing. *See Meskini*, 319 F.3d at 92 (specifically endorsing the rationality of the terrorism enhancement). Congress and the Commission rightly have concluded that those who seek to supply terrorist organizations to enrich themselves – as Nayyar has done here – represent a particularly grave threat to society at large, and therefore should be deterred, punished, and incapacitated for a longer period of time through an enhancement that increases both their offense level and their criminal history category.

Accordingly, the Government respectfully submits that *Dorvee* neither requires nor suggests that the terrorism-related enhancements should not apply in this case or that a downward departure or variance should be granted on the ground that the enhancements overstate the seriousness of the offense. To the contrary, the normal process applies: the Court should calculate the Guidelines range using the terrorism-related enhancements, and then go on to consider the remainder of the Section 3553(a) factors in determining the appropriate sentence.

C. The Court Should Impose a Substantial Term of Imprisonment Here

Pursuant to *Gall*, the sentencing analysis starts with the advisory Guidelines range. *See also* 18 U.S.C. § 3553(a)(4). There is no dispute here that, if not for the combined statutory maximum penalty of 900 months' imprisonment, the applicable Guidelines range would be 360 months to life. However, in light of that statutory maximum, the applicable Guidelines range is 360 to 900 months' imprisonment. This Guidelines range reflects the considered judgment of the Sentencing Commission, after examining "tens of thousands of sentences and work[ing] with the help of many others in the law enforcement community over a long period of time" in an effort to fulfill the same objectives set out in Section 3553(a). *Rita*, 551 U.S. at 349. The Guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice," and accordingly, the Guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Id.*

A substantial term of imprisonment is appropriate to address the goals of punishment and deterrence and in light of the nature of the offense in this case. Nayyar's offense is an enormously serious one, both in terms of the nature of his conduct and the length of his involvement. Nayyar sought to establish himself as a weapons broker as early as 2000 or 2001, and even traveled to Romania to meet with prospective weapons suppliers during that time. Nayyar discussed with the Romanians and others deals for weapons such as machine guns and

rocket-propelled grenades. All that he required was a buyer who could fund his weapons-dealing enterprises.

In the summer of 2009, Nayyar believed that he had another chance to follow his dream of establishing himself as a weapons broker. Nayyar jumped at the chance to establish himself as a purveyor of military-grade items. The fact that Hizballah is a terrorist organization that engages in acts of extreme violence, for Nayyar meant only that it promised a lucrative business opportunity and a potential steady customer that would help him achieve his goal of establishing a bullet-proof vest manufacturing facility in India. And the mechanism through which he hoped to facilitate his dealings with Hizballah was the CI – an individual whom Nayyar's "sixth sense" had told him had connections in Lebanon.

Based on what the CI had told him about shipping construction equipment to Lebanon, Nayyar believed that the CI could ship materials, without proper invoices or customs declarations, to Lebanon. He saw this as an opportunity, and turned his conversation with the CI from construction equipment to the supply of weapons. He and the CI then discussed Nayyar's supplying, and the CI buying, missiles, sniper rifles, M-16 rifles, ammunition, handguns, night-vision goggles, GPS systems, and bullet-proof vests. To Nayyar's understanding, the end-user of these materials was to be the "brothers" in Hizballah. The evidence at trial made clear that Nayyar engaged in these discussions with full knowledge that Hizballah was a terrorist organization. For example, the recordings of the conversations between Nayyar and the CI make explicit reference to Hizballah – including Nayyar's telling the CI that the leader of Hizballah would be very interested in a particular type of handgun. During these meetings, Nayyar and his co-conspirator discussed the CI the constant need for secrecy and security – they used code words, like the "brothers," to refer to Hizballah; they removed the batteries from their telephones

during meetings; and they warned the CI to avoid using certain search terms on the Internet that might alert the authorities. Moreover, searches of the defendant's computer revealed that he had read at least one article that described Hizballah as a terrorist organization and recounted some of their historical terrorist acts.

And this conduct was far from an "inchoate" offense as the defense argued at trial, and as they now contend at sentencing. *See* Def. May Mem. at 11 (describing Nayyar's offenses of conviction as "five inchoate offenses"). Indeed, in furtherance of his goals, Nayyar took several substantial steps to establish his *bona fides* as an arms dealer, and commence a relationship with Hizballah that he hoped would garner him millions of dollars. To that end, he recruited his friend and indicted co-conspirator, Conrad Stanisclaus Mulholland, to travel from the United Kingdom to the United States to help him coordinate his business deals with Hizballah. He sold the CI a handgun. He sold the CI ammunition – ammunition that Nayyar described as "assassination bullets," which in fact were hollow-point bullets designed to increase lethality. And he sold the CI a pick-up truck, which Nayyar believed would be used to transport missiles for Hizballah.

Those were all items that Nayyar had on hand – items that he sold to the CI for approximately $10,000. Nayyar admitted he had provided those items to the CI while he was trying to put into place a procurement network for bullet-proof vests and night-vision goggles. And while he did not provide bullet-proof vests or night-vision goggles to the CI, he tried to do so. He conducted numerous searches on the Internet on how to procure the materials necessary to construct bullet-proof vests. He visited websites for suppliers of bullet-proof vests and night-vision goggles. And in the days prior to his arrest, he even contacted a manufacturer of night-

vision goggles by telephone, and programmed into his personal cellular phone that manufacturer's telephone number.

Had the CI not been a CI, the only substantial impediment to Nayyar and Mulholland's goal of become major suppliers to Hizballah would have been a lack of funds necessary to procure military-grade items; funds that they hoped and expected to receive through their dealings with Hizballah.

Furthermore, Nayyar's conduct following his arrest underscores the need for a substantial sentence in this case to promote respect for the law. Throughout the four years that this case has been before Your Honor, Nayyar has demonstrated himself to be unrepentant and unapologetic. Despite giving two, detailed post-arrest confessions that not only were materially consistent with one another but also were thoroughly corroborated by independent evidence, to this day Nayyar continues to deny his involvement in the conspiracies of which he was convicted. He seeks to cast the blame for his arrest and conviction everywhere and anywhere so long as it does not rest with him. And in an effort to escape responsibility for his crimes, the defendant has lied repeatedly to this Court. He lied in his motions to suppress his statements. He lied when he testified in his defense at his suppression hearing. And he lied when he took the stand at trial. Those lies demonstrate not only Nayyar's unwillingness to accept responsibility, but also his utter disregard for the criminal justice system.

Against this backdrop, it is clear that Nayyar's conduct calls for a substantial term of imprisonment that will not only deter Nayyar from future crimes, but will also deter others from engaging in similarly dangerous conduct, protect the public, and promote respect for the law. We turn next to the question of whether that substantial sentence must be within the Guidelines

rangeof 360 to 900 months in order to comply with the purposes set forth in Title 18, United States Code, Section 3553(a)(2).

The Government respectfully submits that a sufficient sentence need not be within the Guidelines range for two principal reasons. The defendant is 50 years old. A substantial sentence, albeit one short of the low end of the Guidelines sentencing range, will incapacitate the defendant for a sufficient period of time such that if and when he is released, he is unlikely to commit additional terrorism offenses. This is especially true here because Nayyar is not an ideologue or an extremist, but was motivated by greed, a motivation that will not necessarily lead him back to the company of terrorists or terrorist organizations. Moreover, no harm was actually done to victims of terrorism by the defendant's crimes because he was dealing with a CI. The potential for harm is not changed by that fact, but the harm that was done is, and the "seriousness of the offense," 18 U.S.C. § 3553(a)(2)(A), surely includes the harm it actually caused.

Accordingly, when the defendant's criminal conduct is considered in view of the factors enumerated in Section 3553(a), the Government respectfully submits that a substantial term of imprisonment, but one below the recommended Guidelines sentencing range, is appropriate in this case.

III. The Relief Sought in the Defendant's August Memorandum Should Be Denied in Its Entirety

On or about August 21, 2013 – nearly 18 months after the jury returned verdicts of guilty – the defendant filed a 37-page memorandum in which he asked the Court "to vacate the verdict of the Jury and Sentence of the Court." *See generally* Def. Aug. Mem. The bases for this relief cited by the defendant included the following: (i) motions to suppress evidence that had been seized in the course of the investigation; (ii) motions to vacate the verdict based on purported errors in the Court's evidentiary ruling; and (iii) prosecutorial misconduct and *Brady* violations.

Each and every ground proffered in the defendant's motion is without merit. In addition, the Court need not reach the merits of the defendants' claims because they are time-barred by the relevant rules that govern such motions and therefore the errors Nayyar asserts can only be raised on appeal or in a motion made pursuant to 28 U.S.C. Section 2255. Accordingly, for the reasons set forth below, the Court should deny the relief sought in the Defendant's August Memorandum in its entirety.

A. The Defendant's Additional Arguments to Suppress Evidence Have Been Waived

In the August Memorandum, the defendant sets forth new arguments that he contends would have resulted in the suppression of evidence obtained in the course of the investigation. *See*, *e.g.*, Def. Aug. Mem. at 8-7 (arguing that his then wife could not consent to a search of his laptop computer), *id.* at 12-14 (arguing that the search of his mother's apartment was illegal),[4] *id.* at 16-17 (arguing that the Government "failed to tender a warrant or court order by which CI Ali was authorized to surreptitiously tape my discussions with C.I.").[5] None of these arguments was raised in the course of the extensive pretrial proceedings in this case, which lasted over two and a half years. Accordingly, pursuant to Federal Rule of Procedure 12(b)(3), these arguments were waived and are not properly before the Court at sentencing.[6]

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4 The defendant erroneously contends that "the government has never tendered a copy of the search warrant for my mother's apartment." Def. Aug. Mem. at 13. That is not so. A copy of the search warrant and the supporting affidavit were produced to counsel for the defendant on or about March 22, 2010 – approximately two years prior to the commencement of trial -- and marked with control numbers 00000092 to 110.

5 The recordings of the defendant were made with the consent of the CI, who was a party to each of the conversations – whether telephone or in-person – that were captured on the recordings. Accordingly, there is no requirement for a warrant or wiretap authorization.

6 The defendant also contends that the Government illegally offered testimony from his then-wife at his suppression hearing. *See* Def. Aug. Mem. at 4-7. Although the defendant objected to her testimony at the hearing, this claim also must be rejected because the law is clear

Rule 12(b)(3) of the Federal Rules of Criminal Procedure requires that motions to suppress evidence be made before trial. Fed. R. Crim. P. 12(b)(3). Rule 12(e) provides that a party "waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) . . . ." Fed. R. Crim. P. 12(e). Relief from this waiver may be obtained only for "good cause." *Id.*

Likewise, the Second Circuit has stated that it "will find complete waiver of a suppression argument that was made in an untimely fashion before the district court unless there is a showing of cause." *United States* v. *Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (refusing to review waived suppression claim even for plain error). Even where some motion to suppress was filed in the district court, this waiver principle will bar review of particular arguments not raised in that motion. *See United States* v. *Klump*, 536 F.3d 113, 120 (2d Cir. 2008) ("It is well-settled that 'the failure to assert a particular ground in a pretrial suppression motion operates as a waiver of the right to challenge the subsequent admission of evidence on that ground.'") (quoting *United States* v. *Schwartz*, 535 F.2d 160, 163 (2d Cir. 1976)); *United States* v. *Rollins*, 522 F.2d 160, 165-66 (2d Cir. 1975) ("the failure to assert before trial a particular ground for a motion to suppress certain evidence operates as a waiver of the right to challenge the admissibility of the evidence on that ground").

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that "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." *Trammel* v. *United States*, 445 U.S. 40, 53 (1980) (rejecting petitioner's claim of privilege where spouse chose to testify against petitioner even after receiving a grant of immunity and assurances of lenient treatment). Moreover, as the defendant conceded in lodging this objection at the suppression hearing, "I have given divorce, we signed papers, but the divorce is not finalized, your Honor." 02/02/2011 Tr. at 2-3. Accordingly, even under the Supreme Court's earlier decision in *Hawkins* v. *United States*, 358 U.S. 74 (1958) – which explicitly was modified by the Supreme Court in *Trammel* -- such testimony would not have been foreclosed by the spousal privilege. *See United States* v. *Fisher*, 518 F.2d 836, 840 (2d Cir. 1975) ("there is no reason whatever to believe that the pending appeal by Mrs. Fisher from the divorce decree will spark successful attempts to save this marriage, and there is accordingly no justification for applying the spousal privilege").

Here, none of the additional arguments for suppression cited in the defendant's August Memorandum was raised before trial and no cause for that failure has been shown. Accordingly, they have been waived.

B. The Defendant's Objections to the Court's Pretrial and Trial Rulings Are Time-Barred

The Defendant's August Memorandum also raises a series of challenges to evidentiary rulings made by the Court in the course of the trial. *See, e.g.*, Def. Aug. Mem. at 8-12 (arguing that evidence from his laptop computer should not have been admitted against him at trial); *id.* at 16-18 (arguing that failure to produce the CI deprived the defendant of his right to confrontation);[7] *id.* at18-20 (arguing that admission of the defendant's proffer statements was improper). Similarly, the defendant contends that the Court should have adjourned the trial "to enable the Defendant [to] prepare to answer the new indictment." Def. Aug. Mem. at 21-25.[8] Based on these claims, the defendant seeks to vacate the jury's verdict. Putting aside that each of these claims is devoid of merit as both a factual and a legal matter, these are claims that should have been raised in a post-trial motion pursuant to Rules 33 of the Federal Rules of Criminal Procedure. That rule sets forth clear time limits within which such motions must be brought, and defendant's failure to raise these claims until almost 18 months after his trial falls well outside of

7 This claim is substantially meritless because, in the context of consensual recordings, the Second Circuit consistently has held that the Government need not offer tapes through a contemporaneous witness to the recorded conversations. *See United States* v. *Fuentes*, 563 F.2d 527, 532 (2d Cir. 1977); *United States* v. *Bonanno*, 487 F.2d 654, 659 (2d Cir. 1973). Moreover, not only did the Government lay an adequate foundation for admission of the recordings, *see* Tr. 112-116; *see also Fuentes* 563 F.2d at 532 (noting that the standard for admission is for the Government to "produce clear and convincing evidence of authenticity and accuracy as a foundation for the admission of such recordings"), but the defendant did not object to the admission of the tapes at trial, *see* Tr. at 116.

8 Nayyar's additional claim that he "was not arraigned on the Superseding indictment before trial" is baseless. *See* Def. Aug. Mem. at 21. The record clearly demonstrates that the defendant was in fact arraigned on the Superseding Indictment at the final pretrial conference on March 15, 2012. *See* 03/15/2012 Tr. at 16, 21.

the 14 days permitted by the rule. *See* Fed. R. Crim. P. 33(b)(2) ("Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty").

Rule 33 provides, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Because motions for a new trial are disfavored in this Circuit, "the standard for granting such a motion is strict," *United States v. Gambino*, 59 F.3d 353, 364 (2d Cir. 1995), and it should be granted only with great caution in exceptional circumstances. *United States v. Zagari*, 111 F.3d 307, 322 (2d Cir. 1997); *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir. 1993); *United States v. Spencer*, 4 F.3d 115, 118 (2d Cir. 1993). The "'ultimate test' [in deciding a Rule 33 motion] is 'whether letting a guilty verdict stand would be a manifest injustice . . . There must be a real concern that an innocent person may have been convicted.'" *United States v. Canova*, 412 F.3d 331, 349 (2d Cir. 2005) (quoting *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001)); *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992).

As noted above, Rule 33 motions must be filed within strict time limits – namely 14 days after the verdict or finding of guilty. The time limitations specified in Rule 33 are to be read in conjunction with Rule 45(b) of the Federal Rules of Criminal Procedure, which permits a district court to extend the time within which a motion may be filed in certain circumstances, including upon a showing of good cause or excusable neglect. *See* Fed. R. Crim. P. 45(b)(1)(B) ("When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect."). Although the time limits of Rule 33 are not "jurisdictional" in that they do not deprive the district court of "subject matter jurisdiction,"

Eberhart v. *United States*, 546 U.S. 12, 16-17 (2005), they are to be "strictly enforced." *United States* v. *Robinson*, 430 F.3d 537, 542 (2d Cir. 2005). As the Advisory Committee Notes for the 2005 amendment to Rule 33 explained:

> Read in conjunction with the conforming amendment to Rule 45(b), the defendant is still required to file a timely motion for a new trial under Rule 33(b)(2) within the seven-day period specified. The defendant may, under Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.

Although neither Rule 33 nor Rule 45 defines "excusable neglect," courts apply an equitable test that considers all relevant circumstances, including: (1) the danger of prejudice to the non-moving party, (2) the length of delay and impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the moving party, and (4) whether the moving party acted in good faith. *See Williams v. KFC Nat'l Management Co.*, 391 F.3d 411, 415 (2d Cir. 2004) (*citing Pioneer Inv. Services Co. v. Brunswick Assoc. L.P.*, 507 U.S. 380, 395 (1993)); *In re Johns-Manville Corp.*, 476 F.3d 118, 124 (2d Cir. 2007).

Here, the defendant's motion fails to set forth any reason for the nearly 18-month delay in his filing of the instant motion. While he faults his counsel for failing to file any post-trial motions, the defendant does not indicate that that he asked his counsel to file a post-trial motion on any of the grounds that form the basis for the instant motion. Moreover, each of the grounds raised by the defendant in his August Memorandum with respect to the Court's pretrial and trial rulings was considered and rejected by the Court during the trial. *See, e.g.*, Tr. At 149:6-11 (ruling, over the defendant's objection, that the Government was entitled to offer the defendant's

proffer statements to refute the defendant's claim that his *Mirandized* post-arrest statement was "not the truth."); *id.* at 229-233 (denying defendant's motion for a mistrial on the basis of a purportedly illegal search of the defendant's computer); 03/15/2012 Tr. at 15-18 (denying defendant's application for a 30-day adjournment in view of the superseding Indictment).

The defendant's failure to file a timely Rule 33 motion on these grounds cannot be attributed to excusable neglect. To the extent that the defendant now wishes to challenge any of this Court's rulings, the proper forum in which to do so is on appeal.

C. The Defendant's Claims of Prosecutorial Misconduct Are Procedurally Barred, Devoid of Merit, and Without Basis in Fact

As part of his August Memorandum, the defendant also argues that the Court should vacate the verdict against him based upon his claims of prosecutorial misconduct. *See* Def. Aug. Mem. at 25-33. In support of that motion, the defendant argues that the prosecutors: (i) improperly induced his then wife to testify against him, *see* Def. Aug. Mem. at 25-26; (ii) made misrepresentations to the Court regarding the circumstances of the search of his laptop as well as the defendant's immigration status, *see id.* at 27-29, 30-31; (iii) made inappropriate remarks regarding the defendant's credibility during summation, *see id.* at 26-27; and (iv) suppressed exculpatory evidence, *see id.* at 29-30.

As an initial matter, the defendant's claims that his due process rights were violated by prosecutorial misconduct are time-barred. The first time the defendant has raised any objection to the prosecutors' conduct in these regards was in his August Memorandum – which was filed 18 months after the trial of this matter and 30 months after the suppression hearing. None of these claims is a claim "grounded in newly discovered evidence." Fed. R. Crim. P. 33(b)(1). Accordingly, the deadline for making these claims was "14 days after the verdict or finding of

guilty," Fed. R. Crim. P. 33(b)(2), a deadline that has long passed. *See, e.g.*, *United States* v. *Miranda*, H-05-492-5, 220 Fed. App'x. 965 (11th Cir. June 17, 2007).

Moreover, even if these claims were not time barred, none of those arguments has any merit, and they should be dispensed with summarily by the Court. With regard to the defendant's first argument, the testimony adduced at the suppression hearing is directly to the contrary and clearly demonstrates that the defendant's then wife was not coerced into testifying against the defendant. Rather, the evidence established that she had agreed to testify of her own free will and believed that she had been handled professionally and courteously by the FBI. *See generally* 02/02/2011 Tr. at 3-29 (suppression hearing testimony). In addition, shortly after the defendant's arrest, the defendant's ex-wife submitted a letter to the FBI, the purpose of which was "express my gratitude for outstanding professionalism with which FBI agents handle[d]" the arrest and her family. In that letter, the defendant's ex-wife noted that the FBI "exercised their power without any sort of force and not me, neither my husband were deprived of our dignity, human or legal rights." The letter goes on "to emphasize [the] polite, friendly and caring attention of FBI agents to my six and four years old children during the arrest proceedings." As such, the defendant's first claim is belied by the record.

Similarly unfounded and contrary to fact is the defendant's claim that the prosecutors made misrepresentations to the Court with respect to the circumstances of the search of his laptop. *See* Def. Aug. Mem. at 27-29. As the defendant acknowledges, *see* Def. Aug. Mem. at 28, one of the AUSAs provided a detailed attorney proffer of the facts and circumstances underlying the search of the computer, *see* Tr. 229-231. As set forth in that proffer, the Government represented that it had conferred with the relevant witnesses, and confirmed that Agent Kelley was the only FBI agent to review the contents of the lawfully-seized laptop prior to

the issuance of the search warrant authorizing search of that laptop in October 2010.[9] As is clear from the face of the search warrant affidavit, that affidavit makes no reference to any information contained on the computer, and relies solely on information that was available to the Government at the time of the defendant's arrest. The probable cause supporting that warrant therefore was not tainted by any prior review of the laptop. In the face of these facts, the defendant contends that the "[p]rosecutory knowingly lied to the Court at the trial." Def. Aug. Mem. at 28. The only support that Nayyar musters for his unfounded theory that Detective Michael O'Brien had not been "walled off" from the pre-search warrant review of the laptop is a reference in the communication log, dated September 8, 2010, that stated "Spoke with case agent – warrant is coming for review of machine. Case agent requested Michael P. O'Brien also be granted access." Defense Exhibit 14. But that entry in no way contradicts the prosecutors' representations to the Court. Indeed, the entry itself made clear that the Government was in the process of obtaining a search warrant for the computer. And the log's reference to a request that Detective O'Brien be granted access, which follows the phrase "warrant is coming," suggests that Detective O'Brien was to be afforded access to the laptop only after the search warrant had been obtained. Indeed, when anyone actually reviewed the computer at the lab, an entry was made in the log to that effect, and the only entries showing that Detective O'Brien reviewed the

9 Nayyar also argues that the Government misled the Court in the search warrant application and "lied about their knowledge and the source of their knowledge." Def. Aug. Mem. at 28. Specifically, Nayyar contends that Detective O'Brien "was one of the officers that was physically present at my apartment . . . and arrested me, searched my apartment, and seized among other things my laptop computer." As the testimony at the suppression hearing made clear, Detective O'Brien indeed was present at the time of Nayyar's arrest (and never has represented to the contrary). Notwithstanding that, after the defendant was placed under arrest, Detective O'Brien and Special Agent Kelley transported the defendant from the premises to FBI headquarters for processing and a post-arrest interview; O'Brien did not therefore search the defendant's apartment. Thus, there simply is no basis in fact for Nayyar's contention that Detective O'Brien "searched my apartment, and seized among other things my laptop computer."

laptop post-date October 21, 2010, when the warrant was obtained. *See*, *e.g.*, Exhibit 14 entry dated 12/18/2009 ("SA Kelley started his review at the NYO CART Lab. Review halted as possible CP observed by SA Kelley"); entry dated 03/07/2011 ("Det. Ludow and Det. O'Brien reviewed at NYO CART lab.").

Similarly unavailing is the defendant's claim that the Government has misrepresented his immigration status (or lack thereof) to the Court. *See* Def. Aug. Mem. at 30-32. The defendant's continued claim that he has legal immigration status in the United States has been refuted repeatedly and thoroughly. *See, e.g.*, 03/21/2011 Tr. at 119-138 (testimony regarding Nayyar's immigration status); *see also* Suppression Hearing GX-4, GX-5, GX-6, GX-7, GX-8.

The defendant also argues that the undersigned committed prosecutorial misconduct when they referred to him as "'a liar' and 'pathological liars numerous times," and through the comparison of the defendant's testimony with that of Agent Kelley. *See* Def. Aug. Mem. at 26-27. A defendant asserting that a prosecutor's remarks warrant reversal "face[s] a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of [his] right[ ] to a fair trial." *United States* v. *Locascio*, 6 F.3d 924, 945 (2d Cir. 1993). "To warrant reversal, the prosecutorial misconduct must cause the defendant substantial prejudice by so infecting the trial with unfairness as to make the resulting conviction a denial of due process." *United States* v. *Elias*, 285 F.3d 183, 190 (2d Cir. 2002). Thus, "[i]t is a 'rare case' in which improper comments in a prosecutor's summation are so prejudicial that a new trial is required." *United States* v. *Rodriguez*, 968 F.2d 130, 142 (2d Cir. 1992) (quoting *Floyd* v. *Meacham*, 907 F.2d 347, 348 (2d Cir. 1990)); see also *United States* v. *Young*, 470 U.S. 1, 11-12 (1985) ("A criminal conviction is not to be lightly overturned on the basis of a prosecutor's inappropriate comments standing alone.").

Where a defendant seeks a new trial because of alleged prosecutorial misconduct, the Court should consider three factors: "'the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct.'" *United States* v. *Parkes*, 497 F.3d 220, 233-34 (2d Cir. 2007) (quoting *United States* v. *Melendez*, 57 F.3d 238, 241 (2d Cir. 1995)). The Court should order a new trial only if the remarks, "viewed against the entire argument before the jury, deprived the defendant of a fair trial." *United States* v. *Pena*, 793 F.2d 486, 490 (2d Cir. 1986) (citations and internal quotation marks omitted). Such a finding is generally made only on the basis of repeated improper statements by the prosecutor, not on merely one or two ill-advised remarks. *See United States* v. *Evangelista*, 122 F.3d 112, 120 (2d Cir. 1997) ("'[M]ost of the cases in which we have reversed convictions as a result of prosecutorial misconduct have involved repeated improper statements whose aggregate effect was more likely to undermine the fairness of the trial.'") (quoting *United States* v. *Melendez*, 57 F.3d at 241); *Floyd* v. *Meachum*, 907 F.2d at 353 (emphasizing that reversal for prosecutorial misconduct was "based on the cumulative effect of the three alleged categories of improper remarks," which constituted "repeated and escalating prosecutorial misconduct").

The references about which the defendant complains do not constitute prosecutorial misconduct at all, let alone prosecutorial misconduct that warrants a new trial. As an initial matter, the description of the defendant as "pathological" was first given by defense counsel during his opening statement:

> But there's more than that that Patrick Nayyar, that you're going to hear from the tapes. Quite frankly, and I apologize for saying this about him, he's pathological. He just runs at the mouth. He says anything. Everybody's met somebody like that. He'll say whatever it is to keep a conversation going, to make himself look like a big shot. He'll say whatever it takes to make himself feel important, and he does. But the one thing that's clear from what Patrick Nayyar says, it's not the truth.

Tr. 22:12-20. The only other references to "pathological" in the entire trial transcript are when one of the prosecutors asked the defendant whether "you heard your lawyer say in opening statements that you are pathological," and in so hearing, whether the defendant "understood him to be referring to a pathological liar," Tr. at 481:2-7, and when a prosecutor later referred to the defense's admission that Nayyar is a pathological liar, Tr. 636:19-21. Similarly, with respect to the term "liar," the prosecutors used that term four times – twice as described in the preceding sentence, once in summation, *see* Tr. 597:12, and twice in rebuttal, *see* Tr. 636:21-25. Each of these references to the defendant being a "liar" referred to the defense theory of the case as described in the defense opening, *see* Tr. 22:12-20. Referring to, and even adopting, a defense theory that the defendant was a liar hardly can be described as misconduct, let alone misconduct that "deprived the defendant of a fair trial." *Pena*, 793 F.2d at 490. *See also United States* v. *Craig*, 573 F.2d 455, 494 (7th Cir. 1977) ("Since there is a factual basis in the record for the prosecutor's comments, and since the record does not show an abusive and indecorous use of the term 'liar' we find no prejudice from its use").

Lastly, the defendant complains that the prosecutors suppressed exculpatory evidence.. *See* Def. Aug. Mem. at 29. In support of this, the defendant argues that the prosecutors did not play a portion of a tape at his trial *Id.* Putting aside the fact that all of the consensually monitored recordings were produced to the defendant in discovery, the Government also introduced into evidence unedited versions of all of the consensually monitored conversations in this case. As such, the Government has not suppressed any evidence, let alone exculpatory evidence as the defendant contends.

CONCLUSION

For the foregoing reasons, the Government respectfully submits that a substantial term of imprisonment is appropriate in this case, although it need not be a term that falls within the

Guidelines range in order to comply with the purposes of sentencing. Moreover, the Government respectfully submits that the Court should deny the defendant's August 21, 2013 omnibus motion to vacate the verdict of the jury and the sentence of the Court without an evidentiary hearing.

Dated: New York, New York
November 26, 2013

Respectfully submitted,

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