UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

- v - : **12 Cr. 847 (PGG)**

**GILBERTO VALLE,** :

Defendant. :

----------X

# REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT GILBERTO VALLE'S MOTION FOR A NEW TRIAL

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## Introduction

Mr. Valle's opening memorandum showed that a new trial is warranted because (1) the weight of the evidence demonstrates that no conspiracy to kidnap ever existed, and (2) the government secured his conviction by making a host of improper but highly effective arguments in summation. Nothing in the government's prolix response refutes this showing.

First, the government barely addresses the weight of the evidence, focusing instead on its alleged legal sufficiency. But even if the evidence were sufficient under Rule 29, that would not eliminate the need for a new trial under Rule 33. As the government does not dispute, the Rule 33 standard is much broader than the Rule 29 standard: the Court, for example, need not view the evidence most favorably for the government, it may assess the strength and reliability of the evidence as a whole, and the Court need find only that a new trial would be in the "interest of justice," Fed. R. Crim. P. 33(a), not that no rational juror could convict. *See* Mem. of Law in Support of Defendant Gilberto Valle's Motion for a New Trial ("Rule 33 Mem.") 4-6. Under that flexible standard, the Court should exercise its "broad discretion" to grant a retrial, *see United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001), because the supposed evidence of Valle's

guilt – internet "chats" with strangers encountered on a fantasy fetish website, the bulk of which were admittedly fantasy role-play, a pleasant family brunch with an old college friend (at her suggestion), and the $1 PBA cards Valle gave to some friends and acquaintances – is so wanting. *See* Argument, Point 1, *infra*.

Second, the Court should reject the government's contorted effort to defend its offensive summation remarks. Unable to cite any cases that support its no-holds-barred rhetorical tactics, the government instead struggles at length to distinguish factually the cases cited by Mr. Valle. This effort is misguided because the defense never contended that those cases were "on all fours" with this one. Rather, the cases establish important principles governing what a prosecutor may and may not say in summation. By violating those principles repeatedly in this case, the government pushed the jury to convict despite the weak proof of guilt.

The government also falsely accuses defense counsel of having "invited" many of the challenged summation comments. For example, the government claims that it was merely responding to the defense's supposed "repeated arguments" that Valle was not "a danger," Response 53, that he "had no access to dangerous instruments," *id.* at 64, and that his fantasies should be "disregarded," *id.* at 72. In fact, the defense never made *any* of these arguments. The government's reliance on the "invited response" doctrine is thus entirely misplaced. *See* Argument, Points 2.1, 2.4, 2.6, *infra*.

In addition, the government focuses artificially on each challenged argument in isolation, and repeatedly ignores what the prosecutors actually said. We implore the Court to take a broader view that considers the prosecutors' actual words to the jury (rather than what the prosecutors now claim they meant), and the likely effect those words had as a whole. Given the always-

conceded depraved nature of Mr. Valle's online chats (including thoughts of cannibalism, torture, and murder) and the appalling documentary evidence, his wife's highly emotional (but ultimately inconclusive) testimony, and his headline-grabbing status as a New York City police officer (with access to a "loaded weapon," a fact the prosecutors never let the jury forget), a danger existed from the inception of this case that the jury would convict based on emotion – revulsion at his thoughts, for example, or anger that a police officer could hold such ideas, or fear that he might act on them someday – rather than proof that an actual conspiracy existed.

The improper comments, taken as a whole, ensured that this danger came to pass. Among other misconduct, the government's wildly inflammatory analogies and references stoked the jurors' fears about their own personal safety; the government explicitly asked the jury to convict based on who Valle supposedly "really is" (Tr. 1608:10-11), rather than what he allegedly did; the government made unsupported and false claims in the guise of "common sense" or "common experience;" and the government improperly asked jurors to assess reasonable doubt based on Valle's failure to explain his conduct and how they would "feel" if Valle had raped and killed women (Tr. 1607:15-17). In these and myriad other ways, the government conveyed to the jury an irresistible but highly improper message: Don't take a chance with Valle; his thoughts make him "sick" and dangerous, and the mere possibility that he (like the hypothetical "sadistic chef") might act on those thoughts is sufficient to convict him. *See* Argument, Point 2, *infra*.

In summary, in its zeal to obtain (and now, to preserve) the conviction of this so-called "sick" and "dirty cop" (Tr. 1613:1-2, 1608:8-9), the government has neglected its overriding duty to ensure that justice is done. That duty now falls to this Court, which should order a new trial to avert the wrongful conviction of a man whose only "crimes" were committed in his imagination.

## Argument

**1. The government fails to refute Mr. Valle's showing that the verdict is contrary to the weight of the evidence.**

The government argues that Mr. Valle's challenge to the weight of the evidence "is merely a recitation of his arguments for judgment of acquittal." Response 50.

This is false. Mr. Valle's opening memorandum demonstrated (at pp. 6-9) that, even if the evidence were sufficient to convict when viewed most charitably for the government – and it is not – the evidence is so lacking in persuasive force that grave doubt necessarily remains as to whether he is guilty of conspiracy or was merely engaged in fantasy role-play, like thousands of other people who frequent the dark and disturbing side of cyberspace. Nothing in the government's papers eliminates that doubt.

Further, as the government does not dispute, the standard for granting a new trial is broader than the standard for granting a judgment of acquittal. *See, e.g., United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001) (affirming the grant of a new trial and noting that "the trial court has broader discretion to grant a new trial under Rule 33 than to grant a motion for acquittal under Rule 29"); 3 Charles Alan Wright *et al.*, *Fed. Prac. & Proc.* § 582, at 444 (4th ed. 2011) ("The power of the district court is much broader when deciding a Rule 33 motion for a new trial.") (footnote omitted). The Court is permitted to evaluate the strength and reliability of the evidence as a whole and to order a new trial if it determines that a miscarriage of justice may have occurred. *See* Rule 33 Mem. 4-5.

The government argues that "the proof of Valle's participation in the charged conspiracy ... was based on an extensive documentary record and the testimony of several different witnesses who shed light on Valle's criminal conduct from different angles...." Response 51.

Nothing could be further from the truth. The supposed "extensive documentary record" of guilt consists, in reality, only of internet "chats" among strangers who never met, spoke with each other, or exchanged identifying information. The chats were never acted upon, and the overwhelming majority of them were "clearly role-play" according to the FBI itself. *See* Tr. 651:8. This evidence is fully consistent with the defense that Valle never went beyond elaborate fantasy role-play, much less entered into a conspiracy. Further, even if the Court could be confident that Valle was "for real," no convincing proof shows that any of Valle's three alleged "co-conspirators" was serious about his outlandish "plans" to abduct, kill, and eat women. And if the "co-conspirators" were not serious, but were merely fantasizing or pretending, then no conspiracy could exist as a matter of law. *See, e.g., United States v. Rosenblatt*, 554 F.2d 36, 38 (2d Cir. 1977) (citations omitted) ("[U]nless at least two people [agree], no one does. When one of two persons merely pretends to agree, the other party, whatever he may believe, is in fact not conspiring with anyone.").

What does the government mean by "the testimony of several different witnesses who shed light on Valle's criminal conduct from different angles?" Response 51. Is the government referring to Kathleen Mangan, Valle's wife, who had no relevant testimony to offer on whether Valle was "for real" or merely fantasizing? Or is it referring to the supposed "victims," all of whom testified that the Gilberto Valle they knew since college was a nice, non-violent person? Or does the government mean FBI Agent Walsh, who, with barely a year of experience with the Bureau (*see* Tr. 418:16-17), and with no expertise in distinguishing fantasy "chats" from genuine criminal conspiracies (*see* Tr. 654:10-15), simply decided to put some of Valle's chats into a "real" pile?

To be sure, the government is adroit at stringing abhorrent internet chats together to create the chimera of a real "plot." But, in the final analysis, the government's claims regarding the strength of its proof are just hyperbole. No compelling proof establishes an actual criminal agreement or true "overt acts" in furtherance of one. Rather, the record consists largely of unsupported assertions by the prosecutors and an inexperienced FBI agent, with no relevant expertise, that some of Valle's chats were "real." That is speculation, not convincing, reliable proof of guilt beyond a reasonable doubt.

In sum, the weight of the evidence is not consistent with a real criminal conspiracy. A real kidnapping conspiracy lasting nearly a year would involve concrete real-world steps (such as in-person meetings, attempted abductions, transfers of funds, gathering of kidnapping equipment, etc., not just a pleasant family brunch) that demonstrably move the criminal venture forward. A real conspiracy would not involve chats replete with adolescent references to "LOL" [Laughing Out Loud] (*see, e.g.*, Tr. 447:5-6 ("Moody Blues" requests a "meaty, not fatty [victim] ... LOL")), discussions of kidnapping someone who possessed "a sexy spare outfit and pajamas" (Tr. 438:22-23), and other indicia of their fictional nature. And a real conspiracy would not involve total strangers creating seemingly detailed "plots" – including an agreed-upon "price" and a firm kidnapping "date" – that simply disappear over and over again without any explanation or follow-up discussion. Rather, the evidence is far more consistent with the behavior of people with hyperactive imaginations engaged in a depraved online game of role-play to obtain their sexual "kicks." That is not a crime. Accordingly, the Court should order a new trial.

**2. The government's attempt to justify its highly improper remarks in summation should be rejected.**

**2.1 The government fails to show that the "sadistic chef" analogy was proper or harmless.**

Mr. Valle's opening papers showed that the government's rebuttal summation improperly invoked an analogy that asked the jurors, in assessing reasonable doubt, whether they would continue eating at their favorite New York City restaurant upon discovering that the chef harbored deep-seated fantasies about poisoning them by putting cyanide in their food. *See* Rule 33 Mem. 29-33; Tr. 1583:24-1584:7. This inflammatory and utterly irrelevant analogy – to which the defense immediately objected – was grossly improper and highly prejudicial because it put the jurors in the shoes of potential murder victims, and explicitly equated the jurors' decision about their own personal safety with the decision about whether the government had proven Valle's guilt beyond a reasonable doubt.

The government's strained attempt to defend the analogy only exposes how indefensible it is. The government claims – without citing any authority – that the analogy was "an appropriate response to a repeated attempt by the defense to argue that the defendant's violent 'fantasies' could be disregarded in the determination of his intent to participate in the conspiracy." Response 72.

This claim is baseless. First, the defense never argued that Mr. Valle's fantasies could be "disregarded," as the government falsely asserts. On the contrary, the defense explicitly invited the jurors to focus on Valle's fantasies – including their often preposterous nature, the fact that he never acted on them, and the puzzling fact that supposed "plots" kept vanishing with no explanation – in deciding what his intent was. Indeed, the defense implored the jurors to read

"every last one" of Valle's fantasy chats in reaching its verdict. *See* Tr. 1555:24-25 ("I am asking you to read the chats, every last one of them.") ; Tr. 1551:5-7 ("This is storytelling. That is why I want you to read every last one of [the chats]. You will see it is make believe.").

Second, even if the defense had argued that Valle's fantasies should be "disregarded," the "sadistic chef" analogy would not be a proper response. The analogy did not merely illustrate the asserted (but unproven) claim that fantasies prove criminal intent; it instead asked the jurors to find Valle guilty because they would never put their own lives in the hands of someone who harbors violent fantasies. In other words, the government asked the jurors to convict if there was any chance the chef (and, by obvious extension, Valle) would act on his fantasies. Under the law, however, the jurors had to acquit unless *the government proved*, beyond a reasonable doubt, not simply that Valle might act on his fantasies, but that he had *already acted on those fantasies by joining a criminal conspiracy*.

The government also struggles in vain to distinguish *United States v. Henry*, 545 F.3d 367 (6th Cir. 2008), which held that the government acts improperly in summation by asking rhetorical questions or invoking analogies that shift or dilute the burden of proof. *See* Rule 33 Mem. 30-32. The government contends that "no similarity" exists between *Henry* and this case because the prosecutor in *Henry* posed a "hypothetical" rather than an "analogy," and asked the jurors whether they would allow their own children to work for the defendant, whereas no children were involved in the "sadistic chef" analogy. Response 72.

This anemic effort to distinguish *Henry* is misguided. True, the particular offensive remarks in that case are not identical to those at issue here, but the principle is the same: the government may not invoke analogies or hypothetical scenarios that ask jurors to consider their

own feelings about the defendant or that put the jurors in the shoes of the defendant's actual or would-be victims, and then pose misleading and irrelevant questions that confuse, distract, and frighten the jury. That is exactly what the government did here.

Nor has the government shown that the improper analogy was isolated or "harmless." Far from it. The "sadistic chef" analogy illustrates much of what was wrong with the entire rebuttal summation: it conveyed to the jury the extraordinarily powerful but highly improper message that Valle should be convicted because he might act on his thoughts, rather than because he was guilty of the crime of conspiracy.

The government also argues that Valle could not have been prejudiced because the "sadistic chef" analogy, and the government's other graphic references to uncharged violent crimes like terrorism and bank robbery, were no more inflammatory than the evidence before the jury, which featured "vivid descriptions of violence that Valle planned for his targets, to include sexual assault, stabbing, and cannibalism." Response 94. As the Second Circuit recognized when it rejected a similar argument and granted a new trial based upon repeated misconduct by a prosecutor in summation, "This argument is unsound: that the trial evidence was (unavoidably) inflammatory was no reason for the government to raise the temperature in the courtroom by irrelevant sensation." *United States v. Farmer,* 583 F.3d 131, 148 (2d Cir. 2009).

**2.2 The government fails to show that the airplane hijacking analogy was proper or harmless.**

The government's effort to justify its airplane hijacking analogy is equally unpersuasive.

The government suggests that the analogy did not necessarily remind the jury of the events of September 11, 2001, but rather may have called to mind a number of other acts of terror committed in the sky since then. *See* Response 75-76 & n.14.

This point helps the defense, not the government. The principal vice of the hijacking analogy is not that it necessarily invoked the extraordinarily painful, frightening, and anger-inducing memories of 9/11 – though it likely did that – but that it reinforced the improper idea, present throughout the entire rebuttal summation, that violent fantasies lead to violent crimes, and that the jury needed to act as an arm of law enforcement by stopping Valle before he hurts somebody.

The jury's function, of course, was not to prevent crime, but to decide the facts impartially and dispassionately. *See*, *e.g.*, *United States v. Cunningham*, 54 F.3d 295, 300 (7th Cir. 1995) ("The Government may not attempt to obtain a conviction by appealing to jurors to prevent future crimes....") (citations omitted). The hijacking analogy, "chilling" by the prosecutor's own description (*see* Tr. 1594:15), inevitably led the jury away from its proper role, and thus warrants a new trial.

### 2.3 The government fails to show that the bank robbery analogy was proper or harmless.

The Court should also reject the government's effort to defend the bank robbery analogy.

The analogy was ostensibly offered to illustrate the false contention (*see* Rule 33 Mem. 19; Dietz Decl. ¶ 18), that, "You can't have a fantasy where you have unwilling participants in the fantasy." Tr. 1582:18-19. The prosecutor posited this terrifying scenario:

> Think about a situation with a bank robbery. You are standing in the bank, waiting to cash your paycheck. A bunch of men run in with guns, and they place guns to people's heads. They are screaming at the tellers, give us all your money, this is a robbery, give us your money.
>
> Then a few minutes later, the police bust in. Someone sets off the silent alarm and the police bust in and arrest these men. And when they get arrested they say, oh, oh, we were just playing. We are part of an acting troupe. This is what we do. We

> like to put on these plays where we pop into banks and, you know, we simulate robberies. We had no actual intention of robbing anyone. We were going to go back and give the money back after it was over.
>
> What would your response be to that? You would say that that is absurd. The reason that you would say that that is absurd is because you don't need to involve unwilling participants in a way that would make them reasonably believe that they have been placed in harm's way for a fantasy. You don't have to. It is completely unnecessary. You do have to do that if you are engaging in an actual plan to victimize real women.

Tr. 1582:20-1583:15.

Notably, the government never explains how this incendiary analogy was relevant or proper. And for good reason: it wasn't. The analogy once again put the jurors in the shoes of the crime victims "standing in the bank" (as was the case with every analogy presented by the government). And it falsely suggested that Valle couldn't have been just fantasizing because, like the bank robbers (who placed "guns to people's heads"), he had nearly completed his planned crimes and had deliberately placed innocent bystanders in jeopardy – propositions for which there is no evidence.

If the government wanted to make the point that Valle had taken too many concrete steps towards a real kidnapping to claim he was just fantasizing, then it should have made that point directly and cited evidence to back that assertion up. Of course, there was no such evidence, because Valle never took any steps to kidnap anyone. The bank robbery scenario was thus an improper and inflammatory way of pushing the jury to convict.

**2.4 The government fails to show that it was proper to ask the jurors how they "would feel" if Valle harmed people and to argue that Valle was guilty simply because the FBI arrested him.**

The government tries to excuse many of its below-the-belt arguments by claiming that a criminal trial allows "some showing of feeling." Response 69. Mr. Valle never contended otherwise; within proper bounds, counsel is permitted to argue with vigor and emotion. But what counsel may *not* do is to ask the jury to decide the case based on *its* feelings or passions, as the government did here.

The government explicitly asked the jurors to assess reasonable doubt based on how they "would feel" if "something had happened to all these women." Tr. 1607:15-17. Of course, the jury would feel terrible, outraged, and saddened. But such feelings have nothing do with whether reasonable doubt existed as to Valle's guilt, as the prosecutor falsely suggested.

The government went even futher, telling the jury that the "fact" that the FBI reasonably decided to arrest Valle "eliminates the possibility that we have a reasonable doubt in this case." Tr. 1607:22-23. This flagrant remark was reversible error in itself. Courts have uniformly held that "it is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted." *United States v. Bess*, 593 F.2d 749, 754 (6th Cir. 1979) (citing cases from the Fifth, Sixth, and Seventh Circuits). The remark here was even worse, because the prosecutor did not just suggest that Valle was guilty because he had been prosecuted or indicted, which would have been bad enough; the government argued he was guilty simply because the FBI had decided to arrest him. This serious error alone warrants a new trial.

Unable to defend its egregiously improper remarks, the government instead seeks to blame defense counsel by claiming that she impugned the integrity of the FBI. This is untrue:

counsel merely argued, based on evidence in the record, that the FBI had not adequately evaluated the possibility that Valle's conduct was just role-play. In any event, if the government thought that counsel had improperly maligned the FBI, the appropriate response would have been to cite evidence demonstrating that the FBI had acted thoroughly. Instead, the government asked the jury to evaluate reasonable doubt based on how it "would feel" if Valle had harmed people – and, by obvious implication, how it would feel if he were to harm people following an acquittal.

Nothing in the government's Response – or in any case we have found – justifies such a naked appeal to raw emotion.[1]

**2.5 The government fails to show that it was proper to argue that Valle's fantasies are "not ok" and to falsely accuse defense counsel of defending those fantasies.**

The government claims that it acted properly by arguing that Mr. Valle's fantasies are "not ok"and by accusing defense counsel of endorsing their content. The government asserts it was merely making the unobjectionable point that Valle's fantasies were relevant to determining his intent. *See* Response 52, 56, 58.

This is nonsense. The government asked the jury to convict because Valle's thoughts are awful, and because it was supposedly not "ok" for him to walk around New York City with those

[1] In a strained after-the-fact attempt to justify its misconduct, the government argues that the defense also made improper arguments in summation. The effort fails. The defense summation was properly based on the evidence and reasonable inferences from the evidence. Tellingly, the government never objected at trial to any of the comments it now contends were improper. And even if the government could show that counsel's comments occasionally crossed the line, the government's over-the-top arguments were neither responsive nor "suitable to the occasion." *United States v. Walker*, 835 F.2d 983, 989 (2d Cir. 1987) (while government is entitled to respond to defense arguments, "its reply must be suitable to the occasion") (citation omitted).

thoughts in his head. Look again at what the government said, remarks the government conveniently omits from its papers:

> First, since the beginning of this case—and it is clear now because of the summation, that from the beginning of this case until the end, right now, defense counsel has been trying to sell you on two broad concepts that are in total conflict with your common sense.
>
> *The first one is the idea that it is OK, a police officer, walking around New York City with a loaded weapon who on a daily basis is engaging in making detailed plans about the execution of actual women. That is one of the underlying themes of what we just heard, that that is just something that is OK.*
>
> The second broad theme that sort of underlies everything that Ms. Gatto is getting at is this idea that *you should somehow not be disturbed by the fact that this man, a police officer, walking around New York City every single day with a loaded weapon has a—*
>
> MS. GATTO: Objection.
>
> THE COURT: Overruled.
>
> MR. JACKSON: —primary sexual fantasy of seeing women mutilated and harmed in horrific ways, that this is the thing that turns Gil Valle on, *that you should somehow not be bothered by that.*

Tr. 1578:3-24 (emphasis added).

These remarks did not make the benign point that Valle's fantasies were relevant to his state of mind, as the government pretends. The remarks unabashedly sought to arouse the jury's passions by falsely presenting the issue in dispute as whether Valle's fantasies are "ok," whether the jury should be "bothered" by them, and whether he should be walking around the streets of New York City with a "loaded weapon" while thinking bad thoughts. For all the reasons discussed in our opening papers, that effort was highly improper and prejudicial. Having used the inflammatory remarks to obtain Valle's conviction, the government cannot run away from them now.

**2.6 The government fails to show that its many references to Valle's service weapon were proper or harmless.**

Mr. Valle's opening memorandum showed that the government's rebuttal summation referred excessively to his service pistol, described at times as a "loaded weapon," in a transparent effort to scare the jury. *See* Rule 33 Mem. at 9-12, 21-23; *see generally* Tr. 1578:8-11 (arguing that it was not "OK" for "a police officer [to be] walking around New York City *with a loaded weapon*" while "making detailed plans about the execution of actual women"); Tr. 1578:16-24 (arguing that the jury should "be disturbed by the fact that this man, a police officer, [is] walking around New York City every single day *with a loaded weapon*" while having violent sexual fantasies); Tr. 1579:7-9 ("We are talking about the idea that a man *who is entrusted with the ability to walk around this city with a weapon* is sexually stimulated by the idea of a woman who is about to be executed."). Tr. 1609:6 (arguing that Valle "has access to weapons.... He has a gun."). Tr. 1607:7-8 (reminding the jury again that Valle "is a[n] NYPD officer who carries a gun").

The government claims that the many gun references were simply a response "to defense counsel's repeated arguments that the defendant had never posed any danger to his victims" and had "no access to dangerous instruments." Response 64.

This argument is specious. First, defense counsel never argued that the defendant was not a danger, an issue relevant to bail decisions, civil commitment proceedings, and sentencing determinations, but not to whether he is guilty of conspiracy. *See, e.g., Simmons v. South Carolina*, 512 U.S. 154, 163 (1994) ("Arguments relating to a defendant's future dangerousness ordinarily would be inappropriate at the guilt phase of a trial, as the jury is not free to convict a

defendant simply because he poses a future danger; nor is a defendant's future dangerousness likely relevant to the question whether each element of an alleged offense has been proved beyond a reasonable doubt."). Rather, the defense argued that reasonable doubt existed as to his intent because he was engaged in fantasy only, he never carried out any one of his alleged "plans" (despite clear opportunities to do so), and, for his entire life, was a non-violent person with no history of acting out against women.

Defense counsel also never argued that Valle had "no access to dangerous instruments," as the government falsely claims. Response 64. Clearly, like all police officers on patrol, he had a gun and handcuffs.[2] Rather, counsel argued that he never agreed to commit a crime and never acted or intended to act on his violent thoughts. Thus, the government's repeated inflammatory references to Valle's gun were not responsive to anything defense counsel said.

Further, the government's claim that it was merely responding to defense counsel's supposed "danger" arguments is belied by the fact that the government referred to Valle's gun first, in its main summation – before defense counsel summed up. *See* Tr. 1517:15-17 ("There is no dispute that Officer Valle was a police officer in Manhattan and that he walked around New York City with his police shield, his handcuffs and a gun.").

In short, the government's repeated references to Valle's gun were not a "response" to anything the defense said, but an improper tactic used to arouse the fears and passions of the jury.

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[2] The defense did argue that Mr. Valle had none of the grisly torture equipment he claimed to possess, not to show that he wasn't dangerous, but to show that he was constantly making things up as part of fantasy role-play. At no point did the defense argue that Valle lacked access to a gun or handcuffs or that, if he had intended to kidnap someone, he lacked the means to do so.

**2.7 The government's effort to justify its unconstitutional references to Valle's silence should be rejected.**

Mr. Valle's main memorandum showed that the government commented improperly on his failure to testify, and unfairly shifted the burden of proof, by arguing:

> By the way, throughout the entire defense summation, and as I said before we have the burden of proof, but since they did challenge the relevance of these searches that he engaged in of these women, *it is important for you to consider the fact that you heard no reasonable explanation of why he is risking his job, his freedom, his livelihood, his life by conducting blatantly illegal searches of the very women he is talking about during the time period leading into these conspiracies. You heard nothing.*

Tr. 1605:2-12 (emphasis added).

These comments were highly improper. By telling the jurors that it was "important ... to consider" that they had "heard nothing" from the defense to explain Valle's computer searches, the prosecutor invited the jury to hold Valle's silence against him, in violation of the Fifth Amendment, *see Griffin v. California,* 380 U.S. 609 (1965), and also improperly shifted the burden of proof. *See, e.g., United States v. Triplett*, 195 F.3d 990, 995 (8th Cir. 1999) (prosecutor violated *Griffin* by arguing in rebuttal summation, "You never heard evidence that the defendant didn't know that he possessed the drugs," because jury would have understood the remark as a reference to defendant's silence at trial); *United States v. Wihbey*, 75 F.3d 761, 768-70 (1st Cir. 1996) (prosecutor violated *Griffin* by stating that the jury should acquit if defense counsel "can stand up and explain away" certain evidence, but that "[t]here's just no other explanation except the one that's been provided from the witness stand by the eight witnesses called by the government"); *United States v. Skandier*, 758 F.2d 43, 45-46 (1st Cir. 1985) (holding that a "how-does-counsel-explain" argument is a *Griffin* violation and an impermissible shifting of the burden of proof).

The government claims that its remarks could not possibly have been improper because the first half of the first sentence acknowledged that the government had the burden of proof. Response 77. This is sophistry. The government appears to believe that, so long as it prefaces an argument with the disclaimer, "we have the burden," then all the improper burden-shifting arguments that follow, no matter how outrageous, are immune from judicial review. The law is to the contrary. *See United States v. Boskovic*, 472 F. App'x 607, 609-10 (9th Cir. 2012) (unpublished) (comparing defendant in summation to the mass murderer "Son of Sam" was improper even though prosecutor prefaced remark by expressly disclaiming "any analogy between the defendant and Son of Sam;" disclaimer was "disingenuous"); *Jewett v. O'Dea*, 194 F.3d 1312, 1999 WL 1023744, at *5 (6th Cir. 1999) (unpublished) (holding that prosecutor's remarks constituted harmful constitutional error even though prosecutor acknowledged that "the defendant had a right not to testify," where prosecutor immediately thereafter stated, "but then the Commonwealth's evidence stands unrefuted and unchallenged by anybody.").

The government also claims that its remarks did not improperly comment on the defendant's silence because the prosecutor meant to refer only to defense counsel's failure to explain Valle's computer searches, not the defendant's own failure to do so. *See* Response 78-79. This is no defense. As the First Circuit recognized when it rejected this same argument nearly three decades ago, "Surely counsel and the defendant are one." *Skandier*, 758 F.2d at 45-46; *see also United States v. Hortman*, 82 F. App'x 476, 479 (7th Cir. 2003) (unpublished) ("This court has ... recognized that when the defendant is the only voice of contradiction, whether the failure to rebut is articulated as the defendant's direct failure or defense counsel's failure, the effect may be [a] prejudicial ... Fifth Amendment violation....") (citing *United States v. McClellan*, 165 F.3d

535, 547 (7th Cir. 1999) ( "[W]e have previously held that in situations where the defendant was the only person who could have denied the Government's evidence, it makes little difference whether the prosecution was referring to the defendant's or his counsel's failure to make such a denial as the reference would, by default, go to the defendant's failure to testify...."")).

Moreover, the prosecutor's improper conduct appears to have been deliberate. As the *Skandier* decision noted in 1985, the government's official playbook at that time recommended the improper tactic of presenting a "how-does-counsel-explain" argument in summation. *See* 758 F.2d at 44-45. That unconstitutional tactic apparently still remains part of the government's arsenal three decades later. The prosecutor here resorted to the tactic to secure Mr. Valle's conviction. If that is not "flagrant abuse" warranting a new trial, we don't know what is.

Finally on this point, even if the prosecutor's improper remark were only an accident, it would not matter. The *Griffin* test does not look exclusively at what the prosecutor subjectively intended, but how the jury would "naturally and necessarily" have understood his remarks. *See*, *e.g.*, *United States v. Knoll*, 16 F.3d 1313, 1323 (2d Cir. 1994) ("The test ... looks at the statements in context and examines whether they naturally and necessarily would be interpreted by the jury as a comment on the defendant's failure to testify.") (internal quotation marks omitted).

Here, the only way counsel could have explained Valle's alleged "blatantly illegal searches" was if Valle himself had taken the stand and explained them, a point the government does not contest. Accordingly, whether the prosecutor meant to refer to Valle personally or only to his counsel, the jury "naturally and necessarily" would have taken the government's comments

(including, "You heard nothing") as a reference to Valle's silence, a violation of the Fifth Amendment that by itself warrants a new trial.[3]

**2.8 The government fails to show that its many references to "common sense" in lieu of evidence were proper or harmless.**

Mr. Valle's opening memorandum showed (at pp. 15-21) that the prosecutor in rebuttal repeatedly and improperly presented his own unsworn, untested opinions about various controversial subjects as matters of simple "logic, "common sense," and "common experience," even though the government never presented any expert testimony or other evidence to support them. The government's response is unavailing.

The government claims that the many appeals to the jury's "common sense" or "common experience" were proper because they were based on reasonable inferences from the evidence. *See* Response 59-62. This is demonstrably false. For example, one of the key issues in dispute at trial was whether Valle's internet conversations constituted real kidnapping plans or just a deviant form of sexual entertainment that depended on simulated realism to be titillating. On this central issue, the prosecutor told the jury in rebuttal that Valle's online activity, including his penchant for viewing violent imagery, was "not a sexual thing at all" and that his photographs of various women "have no sexual value." Tr. 1596:16-19. But the government had introduced no

[3] As the government notes (Response 96-97), the Court instructed the jury, as part of its charge, that the government had the burden of proof, that the defendant had the right not to testify, and that the jury should not draw any negative inferences from the exercise of that right. But these instructions did not specifically address any of the prosecutor's many improper remarks, including the assertion that it was "important" that the jury had "heard nothing" from the defense regarding the reasons for Valle's computer searches. Accordingly, the instructions were not adequate to cure the prejudice that resulted. *See, e.g., United States v. Hardy*, 37 F.3d 753, 757 & n.3, 758-59 (1st Cir. 1994) (general jury instructions were not adequate to render *Griffin* violation and other improper closing arguments harmless).

evidence at all – expert or otherwise – to support these controversial (and, according to Dr. Dietz, false) claims; they certainly were not matters that the jury's "logic" or "common sense" alone could resolve. Accordingly, the remarks were highly improper. *See United States v. Suarez*, 588 F.2d 352, 354 (2d Cir. 1978) ("[C]ounsel [may not] substitute his own opinions on summation in lieu of expert testimony, where such is called for.") (citing *King v. United States*, 372 F.2d 383, 394 (D.C. Cir. 1967) ("It is elementary that a prosecutor may not import his own testimony into a criminal trial. The doctrine has full vitality not only where the prosecutor is asserting a fact within his individual cognizance, but also where ... the prosecutor is asserting a belief or opinion that is properly the subject of expert testimony. The prosecutor is not free to offer his opinion in lieu of calling an expert witness. It compounds the mischief that here his belief was contrary to the testimony of the duly qualified expert witnesses.")).

Indeed, this Court ruled before trial, when it authorized the defense to call Dr. Dietz as a witness, that the subject matter at issue was beyond the ken of the jury, making the prosecutor's appeal to "common sense" in lieu of evidence especially egregious. The Court ruled that various subjects were likely to be beyond the common knowledge of the jury, including "the likelihood of violent conduct by men who are sexually aroused by sexually sadistic images; the coping mechanisms such men often develop, including role play over the internet; and the psychological condition that Valle allegedly suffers from, and how that condition has manifested itself in his actions." *United States v. Valle*, 2013 WL 440687, at *8 (S.D.N.Y. Feb. 2, 2013). The Court specifically ruled that these matters could not "fairly be described as 'commonplace experience[s].'" *Id.* Given this ruling, the government acted improperly by claiming, without any foundation in the evidence, that Valle's attraction to violent images was "not a sexual thing at all."

The government's excuse is that neither side decided to call an expert witness. But that is precisely the point. Far from justifying the government's conduct, the fact that neither side introduced expert testimony precluded the government from simply making up its own conclusions and claiming they flowed inexorably from "common sense."

The error is even more troubling because the government had a detailed written summary of Dr. Dietz's conclusions before trial, which contradicted many of the prosecutor's assertions in rebuttal. It is true that the government was not required to accept Dr. Dietz's conclusions as conclusive. But the government was not permitted to simply contradict those conclusions in rebuttal summation, without any basis in the evidence for doing so. Yet that is precisely what happened.[4]

The government also claims that juries are routinely permitted to rely on their common sense. Response 59. Again, this misses the point. While prosecutors may ask a jury to use common sense in deciding what inferences to draw from the evidence, they may not invoke "common sense" as a substitute for evidence, particularly where the Court already ruled that the subject matter was beyond the jury's common experience and required specialized knowledge. *See* Rule 33 Mem. 15-21.

The government also dismisses Dr. Dietz's post-trial declaration as "irrelevant" and "improperly submitted," without citing any authority. Response 60 n.9. The opinions of one of

[4] From its inception, this case had all of the ingredients that cause prosecutors, even otherwise responsible prosecutors, to misbehave and juries to convict wrongly: sex, albeit of a particularly sensational and lurid variety, chilling discussions of (imagined) violence towards women, lots of media attention, sympathetic "victims," and the fact that the defendant was a police officer. The United States Attorney's Office for the Souther District of New York should have been extra cautious under these circumstances to avoid any improprieties that could affect the fairness the trial. Sadly, it took a different tack.

the world's foremost forensic psychiatrists and criminologists – and no "hired gun" for the defense bar – cannot be so flippantly disregarded. Dr. Dietz has explained in detail the many ways in which the rebuttal summation was misleading or false. The government offers nothing to rebut Dr. Dietz's conclusions in its Response, even though it long ago retained an expert psychologist of its own. Dr. Dietz's uncontradicted views necessarily raise grave doubt that the jury was misled by the rebuttal summation and that the verdict was based on false and unsupported claims. For that reason alone, a new trial is warranted. To the extent the Court has any reservations about granting a new trial, we urge the Court to conduct an evidentiary hearing so that it may hear from Dr. Dietz in person.

**2.9 The cumulative effect of the government's improper arguments warrants a new trial.**

While each of the government's many improper comments is sufficient to warrant a new trial, their cumulative effect requires one. Contrary to the government's position, the improper comments were so numerous and, in combination, so prejudicial, and the evidence of guilt so underwhelming, that they undermine confidence in the verdict.

We begin with applicable harmless error standard. The government's improper comment on Valle's failure to testify, its related burden-shifting arguments, and its contention that it was not "ok" for Valle to walk the streets of New York City with a loaded gun while fantasizing, are all errors of constitutional magnitude. As a consequence, the government must prove, beyond a reasonable doubt, that they had no effect on the jury. *See Chapman v. California*, 386 U.S. 18, 24 (1967). This the government cannot do. On the contrary, given the inherently disturbing subject matter on trial, and the paucity of the evidence, the improper remarks likely resonated with the jury and affected its deliberations.

The remaining improper remarks compounded the harm caused by these constitutional violations, thereby reinforcing the need for a new trial. During the "sadistic chef" analogy, for example, the government explicitly argued that the jurors "couldn't be convinced to eat at that restaurant," and that, "*for the same reason*," they should reject Mr. Valle's defense. Tr. 1585:4-7 (emphasis added). The jury easily could have accepted this misleading but powerful argument. In the absence of any special curative instructions, the jurors had no reason to know that the government's argument was baseless, and that the existence of reasonable doubt had nothing to do with whether they were willing to risk their own lives by eating at the potentially deadly restaurant described by prosecutor. This error alone thus likely influenced the verdict.

The government's many other improper comments were also prejudicial, especially when viewed as a whole. The comments were so pervasive and inflammatory that even the most conscientious jury would have found it impossible to ignore them.

In conclusion, this is not a case in which the government's improper summation remarks can simply be dismissed as inadvertent, isolated, or minor missteps occurring against a backdrop of overwhelming evidence. On the contrary, the improper comments by this experienced prosecutor were no accident: they were made because the defense summation was effective, and because the prosecutor had no persuasive evidence of an actual conspiracy to cite in rebuttal. Instead, the government took advantage of the unavoidably disturbing subject matter of this case by appealing directly to the jury's fears, passions, and moral outrage at Valle's thoughts, leading it away from its proper role as impartial arbiter. Given the overall weakness of the government's case, and the danger that the improper comments swayed the jury, this Court should grant Mr. Valle a new trial.

## Conclusion

For these reasons and those stated in Mr. Valle's opening memorandum, if the Court declines to grant a judgment of acquittal, it should vacate the jury's verdict and grant a new trial.

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Respectfully submitted,

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