11-2763-cr(L)

United States Court of Appeals
for the Second Circuit

Docket Nos. 11-2763-cr (L); 11-2884-cr (con); 11-2990-cr (con); 11-3785-cr (con)

UNITED STATES OF AMERICA,

Appellee,

-v.-

JAMES CROMITIE, AKA Abdul Rehman, AKA Abdul Rahman,
DAVID WILLIAMS, AKA Daoud, AKA DL,
ONTA WILLIAMS, AKA Hamza,
LAGUERRE PAYEN, AKA Amin, AKA Almondo,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Opening Brief for Defendant-Appellant David Williams

THEODORE S. GREEN
Attorney for David Williams
Green & Willstatter
200 Mamaroneck Avenue, Suite 605
White Plains, New York 10601
(914) 948-5656

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PRELIMINARY STATEMENT

This appeal is from a judgment of the United States District Court for the Southern District of New York (Honorable Colleen McMahon, United States District Judge), convicting David Williams of one count of conspiracy to use weapons of mass destruction in violation of 18 U.S.C. §2332a(a)(2)(c)(Count One), three counts of an attempt to use a weapon of mass destruction in violation of 18 U.S.C. §2332a(a)(2)(c) (Counts Two through Four), one count of conspiracy to acquire and use anti-aircraft missiles in violation of 18 U.S.C. §§2332g(a)(1), (b)(1), (b)(4), (b)(5) and (c)(1) (Count Five), one count of an attempt to acquire and use anti-aircraft missiles in violation of 18 U.S.C. §§ 2332g (a)(1), (b)(1), (b)(4), (b)(5) and (c)(1) (Count Six), one count of a conspiracy to kill officers and employees of the United States, in violation of 18 U.S.C. §§1114 and 1117 (Count Seven), and one count of an attempt to kill officers and employees of the United States in violation of 18 U.S.C. §§1114 and 2 (Count Eight). Appellant was sentenced to a term of 25 years imprisonment on each count, all such terms to run concurrently.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this federal criminal prosecution pursuant to 18 U.S.C. §3231. Pursuant to 18 U.S.C. §3742(a)(1), this

appeal is taken as of right for review of an otherwise final sentence imposed in violation of law. Sentence was imposed on June 29, 2011, and a final judgment was filed on July 8, 2011. A notice of appeal from the final judgment was timely filed on July 7, 2011.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should the District Court's entrapment instruction have included an instruction in accordance with *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. en banc 1994), including language instructing that, in determining whether the government has proved predisposition beyond a reasonable doubt, the jurors should consider whether the defendant was so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so?

2. Did the District Court abuse its discretion in permitting evidence of an explosive test demonstration that was inflammatory and whose prejudicial effect outweighed any probative value?

3. Should the district court, in imposing sentence, have considered the doctrine of sentencing manipulation as a basis for departing from the mandatory minimum?

4. David Williams adopts and joins in the appellate points of his co-defendant appellants.

STATEMENT OF FACTS

Shaheed Hussain, a Pakistani national who was facing a deportation proceeding following a federal fraud conviction, began working for the FBI in the lower Hudson valley, where he was eventually instructed to attend services at a mosque in Newburgh, New York. He drove expensive cars and presented himself as a wealthy Pakistani businessman in an effort to attract people from the largely poor congregation. (A.591-592)[1] Hussain also held himself out as someone knowledgeable about Islamic teachings. (A. 1382-1383) In June 2008, Hussain met James Cromitie, a Wal-Mart worker, at the mosque, beginning a series of talks between the two men. (A. 596-604) On a number of occasions, Hussain brought Cromitie to a house on Shipp Street in Newburgh that the FBI had rented and outfitted with video and audio

[1] References to material in the Joint Appendix submitted by Appellants are cited herein as "(A.___)." References to the separately-filed joint Special Appendix are cited as "(S.A. __)." References to the trial transcript are cited as "(Tr.___)."

recording equipment that Hussain could activate as he wished. The FBI also had the capability to equip Hussain with recording devices for his person and his car. However, it was not until October 12, 2008, that Hussain began recording any of their meetings.

In their talks, Cromitie denounced Jews and the United States, often in strident and bigoted tones, and voiced angry feelings about particular Jewish people he had encountered, but also talked about dealing with his angry feelings through his own religious faith. (A. 2777-2781) Hussain, however, tried to lay a theological foundation for Cromitie taking violent action. For example, he told Cromitie that the teachings of the Prophet Mohammed permitted or even required Muslims to commit violence against non-believers (A. 1376-1377), described Jews and other non-believers as "evil" and urged that "you, me, all these brothers, have to come up with a solution to take the evil down. That's how, it's the hadith." (A. 2798-2800) The first time they met, Hussain raised the topic of Stewart airport, telling Cromitie there were "a lot of military planes that was taking arms and ammunitions to Afghanistan and Iraq." According to Hussain, Cromitie said, "These arms are going to kill Muslims." (A. 604)

From the very first recording, Hussain made clear that he had substantial resources and could help Cromitie financially. "You need something brother, you call

me, you let me know, brother. Okay?" (A. 2806) On October 31, 2008, Hussain twice told Cromitie, "If you need money, come to me." (A. 2918; 2920) On November 14, 2008, Hussain said to Cromitie: "If you need money, I can give you money." (A. 3118) Over the course of their relationship, Hussain would also give small amounts of money to Cromitie to help him meet basic living expenses. (A. 1399-1400)

In their early recorded meetings, Cromitie made false and even preposterous claims regarding his background, his physical prowess and past criminal exploits committed either by himself or a supposed collection of rough characters with whom he claimed to have associated. He told Hussain, for example, that he did a thousand pushups a day (A. 2858), claimed that he had served fifteen years in prison for a homicide (a claim readily shown to be untrue by running Cromitie's criminal record), that his father was from Afghanistan (A. 2773, 2814, 3230), that he and associates had fired "gas bombs" into a police station, and that one of his brothers had staged a spectacular jewel heist of Tiffany's that netted $126 million. (A. 1457-1458) Sometimes he referred to supposed associates of his as "team" or a "Sutra team." (A. 1403-1407)

It would become painfully obvious that there was no such "team". Hussain kept pressing Cromitie to produce others and made clear that there was money in it

for them. (A. 1403-1407; 1475-1476) Yet, Cromitie would constantly make excuses for why he could not produce any such people and told Hussain that these people (if they even existed) had no ideological motives whatsoever. During one conversation, Cromitie acknowledged "You can always find someone . . . if you tell someone that there's money involved for them and that you don't have to worry about doing nothing where they're going to get hurt, they're gonna go, they're gonna come." When Hussain inquired,"But do you think that these guys that you're talking about are Mus – will do for the money or for the cause?" Cromitie responded, "they will do it for the money, they're not even thinking about the cause." (A. 3287-3288) By December 2008, Hussain had spent six months attempting to groom Cromitie as an FBI target and had come up with nothing except a lot of talk steered by Hussain's repeatedly bringing up the subject of doing something for the "cause" and claiming to have connections to the Pakistani terrorist organization Jaish e Mohammed ("JEM"). (A. 1399-1401) Hussain became increasingly impatient with Cromitie. He began offering big material inducements (such as offering Cromitie his BMW upon completing a mission (A. 1231, 1598-1599, 1651-1652)) and became more pro-active in trying to get Cromitie to recruit others.

For example, on December 10, 2008, Hussain complained to Cromitie "But you've not started the first step, brother. Come on." After Cromitie responded

"Huh?", Hussain elaborated: "The first step has not been started. You know, with the target, the recruiting, and the codes." Cromitie responded, "Maybe it's not my mission then. Maybe my mission hasn't come yet." (A. 3504)

On December 17, Cromitie remarked that the people he speaks to have "excuses . . . I tell them, you won't be part of the booty." (A. 3530-3531)[2] Hussain acknowledged this to be "True" (A. 3531) Cromitie advised Hussain that he has told these other persons "there's a lot of money involved in it for you guys, too. We just helping out our brotha out," to which Hussain responded, "True". (A. 3533) During this conversation, Hussain also launched into what will become a running theme throughout the recordings – *i.e.*, his repeatedly naming, as potential recruits, specific persons from the Newburgh mosque, or others in the Newburgh area. Thus, Hussain inquired of Cromitie, "What do you think about Brother Badi?" and asked about another person named Wali, both congregants at the mosque. (A. 3545-3546) Hussain acknowledged at trial that he was trying to get Cromitie to go out and recruit people for an operation. (A. 1923-1927)

<u>"We need bodies"</u>

Later in this December 17 conversation, Hussain further pressed for recruits, referring to them as "bodies": "The equipment is not a problem. . . We don't have a

[2]The government's transcript writes "booty" somewhat phonetically as "bui."

problem with equipment. We have a problem with bodies. . . . If you can get the bodies, the equipment will be here brother. That's my word. The bodies is what we need." (A. 3555) He repeated it over and over during the conversation: "If we could get some bodies it would be nice. If we have bodies it would be nice." (A. 3542); "If we have other bodies with us, it would be nice. Ok?" (A. 3543); after Cromitie voiced displeasure at the word, Hussain repeated: "It's bodies. B-O-D-D-double X-Y-Y" (A. 3543); "It would be nice, brother. It would be really nice. We can have more bodies with us. Real, good Muslim brothers would be nice, you know?" (A. 3543); "We need bodies. We need the bodies you know" (A. 3568) Still later in this conversation, Hussain suggested another name as a recruit, a person named Tariq. (A. 1927-1929)[3] Hussain also told Cromitie how many "bodies" were needed: "Yeah, but if you can raise a couple of other guys, you know? Two or three more guys. I mean it's not that we are going to rob a bank." (A. 3601)

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[3]Tariq was a friend of Cromitie who wandered into Hussain's crosshairs on November 7, 2008, because he happened to be standing outside Cromitie's house when Hussain drove up one day. Tariq ended up driving around with them and passing some time at the Shipp Street house that day, but he said nothing of significance. Yet, Hussain persisted in proposing Tariq as a recruit for a mission, even after learning from Cromitie that Tariq was not a Muslim. (A. 1927-1929) Astonishingly, when Agent Fuller applied for a tap on Cromitie's phone, he swore to Judge Cote that Tariq was one of several "Target Subjects" planning bombings and missile attacks.

As the trial court would later find in a post-verdict decision, the December 17 conversation also evidences that "it was not Cromitie's idea to shoot a missile at military aircraft at Stewart Airport" (S.A. 145) Thus, on December 17, Hussain urged Cromitie: "Let's do the target first. Pick up a target first. Let's do the surveillance". When Cromitie uttered the incomplete sentence "After we grab a target then (UI)", Hussain continued to instruct him: "then the people will follow you, you know? Your brothers will follow you. People like Badi . . . People like Wali. People . . . they, they'll follow you, you know? Because this is a good thing". Cromitie asked "what do you suggest?", adding "Stewart Airport?" When Hussain replied "It's up to you", Cromitie reminded Hussain "But that's the place you told me." Hussain acknowledged it was his idea: "Yeah. Yeah. I told you because airports are close by, you know? A military target would be fine. You think a military target's nice, you know? It's nice." (A. 3536-3537) Cromitie responded "I think we could do that", and seems to go along with Hussain's idea to go out and view Stewart (he had never been there before) , but in fact he does nothing. (A. 3537)

After December 17, 2008, Hussain broke off contact with Cromitie for more than two months in order to travel outside the country. During this break, the FBI – knowing there was virtually no chance of Cromitie doing anything unless Hussain was successful in inducing him into (and supplying the means for) a mission – did not

keep Cromitie under surveillance and assured officials at Stewart airport that Cromitie posed no real threat. (A. 393-400)

Hussain reestablished contact with Cromitie on February 23, 2009. Hussain himself had gotten a rude shock three days earlier when, upon returning from overseas, he was detained at JFK airport. Accustomed to enjoying free traffic in and out of the United States despite his felony record, this time he had to call his FBI handler, Agent Robert Fuller, to get "paroled" into the country. Hussain testified that, as a result of his temporary JFK detention, it dawned on him that he faced possible deportation as a consequence of his Federal fraud conviction. (A. 1505-1507, 1930-1938) When he met Cromitie again on February 23, he went about his task with renewed vigor and a new angle: the "look-out guy." As Hussain acknowledged at trial, he – not Cromitie – conceived the idea that Cromitie should try to recruit people as "look outs" for a mission. He gave this idea to Cromitie on February 24, 2009, after successfully imploring Cromitie to go with him on a drive around Stewart airport to conduct what he called "surveillance." (A. 1945-1947) Moreover, the day before, on February 23, 2009, Hussain emphasized to Cromitie the need to assemble a "team" and inquired when Cromitie can "get a couple of other guys." (A. 3599) He also introduced the concept of rewarding Cromitie – as well as any recruits – in

"two ways", meaning they would enjoy a heavenly paradise but, more importantly, would also be rewarded with cash. (A. 745, 1513-1519, 1933, 1936-1937)

During their February 23, meeting, Hussain urged Cromitie to "speed up the process" of recruiting people. Cromitie is at first bewildered, "What is you talking about?" – and then tried to beg off any suggestion that he recruit others – "I don't know I wish I coulda gotten somebody else, but I'm not, I'm not gonna involve anybody else." (A. 3610; 1939-1945). Ignoring Cromitie's protestation, Hussain instructed Cromitie: "Talk to the mosque. Talk to the people in the mosque, you know?", Cromitie became angered: "Don't ask me to do that. . . Don't ever ask me to ask the brothers in the mosque to do anything." (A. 3610-3611) Hearing this, Hussain switched gears, and instead urged Cromitie to reach out to the Newburgh community in general to find recruits: "And you, you know the whole town . . . Mhmm, you know the whole town." (A. 3610-3611; 1939-1945)

During their February 24, 2009, drive around Stewart airport, it is clear that Cromitie fully understood Hussain's message about using a lot of money to persuade people to join in as lookouts. He prefaced one conversation with the words "now that we're talking money with these guys I'll probably get somebody." (A. 3650) He went on to refer to the money as "good money" and "you looking not to hurt no one . . . you just want to set example." (A. 3651) "You have to be real stupid to tell me no.

You're going to be lookout out from $20,000 miles away. They gonna understand." (A. 3655) He added that he would be able to assure the "brothers" who got involved that they would not have to "worry" because "You did the job. We're gonna take care of you." (A. 3651) Later in that same conversation, Cromitie remarked that Hussain had given him "an idea", mainly that he would offer persons $25,000 to act as the lookouts. (A. 3655) Cromitie added: "If you can assure them that they gonna see that much money, they gonna go for it." (A. 3691) Hussain responded: "If that's the case, ya know, let's have a meeting." (A. 3692)

Cromitie avoiding Hussain

After February 24, 2009, there is a hiatus of six weeks, until April 5, 2009, during which Cromitie avoided and distanced himself from Hussain. He falsely told Hussain that he was going to stay in North Carolina, something the government knew from contemporaneous wiretaps of Cromitie's telephone to be false, as Cromitie had remained in Newburgh. Hussain, in his zeal to reestablish contact, became something of a stalker, leaving repeated telephone messages for Cromitie which are not returned, trying to enlist the assistance of Cromitie's wife by having her call him from her phone, and repeatedly showing up outside Cromitie's home in an unsuccessful effort to find him. (A. 1547-1562; 1570-1571).

"I told you I can make you $250,000"

Finally, on April 5, 2009, Cromitie returned one of Hussain's calls, after losing his job at Wal-Mart. During this conversation Cromitie falsely told Hussain that he had been away in North Carolina. After telling Hussain "I need to make some money brother," Hussain responded, "I told you I can make you $250,000, but you don't want it brother. What can I tell you?" As the trial court would later find in one of its post-trial written decisions, Hussain was referring here to a previous, unrecorded offer of a quarter-million dollars that he had made to Cromitie back in February as an inducement to join a mission. (S.A. 71-72). Upon Hussain making the offer again on April 5, Cromitie agreed to meet with Hussain again, a meeting which took place two days later on April 7. (A. 1571-1576; 4484-4487).

"My life is on the line here" – "We need lookout guys"

At the April 7, 2009, meeting, Cromitie was reluctant to get involved in a mission with Hussain ("I really don't have to do nothing crazy as of yet. . . . I think I need to really, really think about this . . . You just have to give me a little time. . . I'm going through so much . . . I'm about to lose my mother.") (A. 3704) Undeterred, Hussain told Cromitie that his "brothers" wanted him to finish the job, and that "my life is on the line here," making clear that his "brothers" will harm him if he fails to complete the mission (A. 3714-3716) When this seemed to soften

Cromitie's resistance – "don't do that, Brother", he pleaded to Hussain when the latter tells Cromitie his life is at stake (A. 3716) – Hussain relentlessly pressed Cromitie on the need to recruit "lookouts", while making clear that they will be paid:

"if we . . . get a couple of guys - - lookouts . . . but they have to believe in, its not only the money. . . the lookout guys have to believe in it." (A. 3717);

"we need to have lookout guys" (A. 3727);

"and we need to have some lookout guys you know. I think there's a couple of guys in the mosque." (A. 3728);

"and we need lookout guys. We need lookout guys; we can find some lookout guys who . . . believe in the cause, I believe there are a couple of them . . . you can talk to them." (A. 3729)

When Cromitie asked, "do you know who you're talking about?", Hussain suggested a couple of names from the mosque (A. 3729)

"if you can get 2-3 guys , you know, lookouts . . you tell them as much as you can . . .it should be for the cause, less for the money, more for the cause." (A. 3732-3733)[4]

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[4]Hussain's efforts to create a conspiracy and fill its ranks with warm bodies comes through clear enough in the transcript of the April 7 conversation. It is, however, a tape worth viewing to best appreciate the utter transparency of his agenda, as Hussain keeps bringing the conversation around to the subject of "lookout guys", sometimes in a patently non-sequitur fashion.

That evening, Cromitie spoke on the telephone with Hussain, during which Hussain promised Cromitie an all-expense paid trip to Puerto Rico. Cromitie told him that his friend "Daoud" said hello, prompting Hussain to inquire whether that person could be "part of us." Cromitie told him no. (A. 4488-4491)

On April 10, 2009, Hussain drove to Cromitie's residence, from where he intended to buy a camera for Cromitie and then proceed to the Riverdale section of the Bronx (a destination pre-selected by the FBI). That day, David Williams, who had never before appeared or been heard on any recordings, was outside Cromitie's apartment building. At the time, Williams was living with his mother in the same housing project as Cromitie. Because Williams' mother was a close friend of Cromitie's wife, Cromitie referred to him informally as his "nephew." (A. 789-791; 1966-1968)

Williams rode along with Cromitie and Hussain to Riverdale, where Cromitie took photographs of synagogues, using the camera that Hussain bought for him. (Cromitie had told Hussain he accidentally broke the first camera that Hussain bought in February; in reality, Cromitie had sold it for $60.) Although David Williams, who was introduced to Hussain as "Daoud", accompanied them, he asked no questions about what the men were doing, nor did Cromitie or Hussain discuss any details in front of Williams. Hussain bought lunch for the men, continuing a practice of

constantly paying for meals and beverages that he had begun months earlier with Cromitie. Afterwards, Hussain took them to the vicinity of Stewart airport, where Cromitie took more pictures. Later that day, Hussain privately asked Cromitie whether Williams was involved with them, and Cromitie told him emphatically that Williams was not. (A. 789-795)

Yet, when Hussain and Cromitie met a few days later on April 16, 2009, Hussain pressed Cromitie to recruit David Williams as a "lookout guy". When Cromitie remarked that he can "take care of Daoud" with "whatever monies you give me," Hussain insisted he would give him "separate money", adding, in self-serving fashion, "this is not for the money, you're not doing it for the money at all" (A. 3762-3763) Hussain admitted at trial that he was giving the impression that it was "a lot of money." (A. 1646-1648) Cromitie also told Hussain that he had not spoken with David Williams about an operation and that after the April 10 trip to Riverdale, Williams had been arrested on a minor marihuana charge in New York city and was now serving a ten-day jail sentence.[5] Hussain promptly offered to bail him out and to drive to the New York city jail where Williams was held to "pick him up",

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[5]Under New York law, a person serving a 10-day sentence would normally serve six days (including the day of arrest), factoring in good-time reductions. New York Penal Law § 70.30(4). Although the trial court, in its decision denying defendants' post-trial motions to dismiss for legal insufficiency, found that Williams was released on April 20 (S.A. 118-120), this was incorrect, as he could have been released days earlier.

although he never did. Cromitie "wonder[ed]" about Williams, citing his recent arrest, the fact that "he slips up a lot" and that he is "not careful". Hussain concurred, calling him "Stupid David." (A. 1962-1966; A. 3738-3746)

Far from dissuading Hussain, however, this assessment of Williams seemed to only stiffen Hussain's resolve to draw Williams in. The next day, April 17, Hussain again pressed Cromitie to involve David Williams, inquiring whether "he is with us or not." Cromitie responded "you can't say yet." Having now been told at least four times that William was not involved, Hussain nonetheless pressed for Williams' recruitment. He concocted the idea that Williams' services are needed because "that missile thing is heavy to pick up, and we have to put it in a . . . SUV right there. There's a space up there. We can put it in there, but, uh, if Umar can, I mean, Daoud can be with us, you know, that would be wonderful. It would be really good." (A. 3795)

Around this time, Hussain also began using the recorded conversations to make it sound like the reward money Hussain was offering was to fund travel expenses. He pushed the idea of Cromitie traveling to Florida, or some other destination, "when everything is done", adding that when Cromitie returned from there "then you can start doing whatever you want to do." When Cromitie asked: "What are you saying?", Hussain clarified: "I am saying you will, inshallah, you will

have enough here to do what you want to do." (A. 3759) Cromitie pushed back at the idea of traveling, saying, "technically, we really wouldn't have to go nowhere, 'cause they'll never know." Hussain added that it is not for "money" but "for Allah" and Cromitie responded, "Yeah, I know, but I need to know, where do we pick up our money." Hussain told him it will be jihad money and Cromitie commented "they're paying us to do this." Cromitie then said that the first thing he will do with his money is "get me a car" and Hussain replied, "buy a brand new car, brother."[6] (A. 3763-3784)

During the April 17, 2009, conversation Hussain became more directly involved in trying to recruit persons. "I think we can get Daoud, Chase and I think I can get Wali too," he told Cromitie (A. 3801). Cromitie told Hussain that he will stress to prospective lookouts that "me and you going to do the stuff, we just want them to look out, that's it." Hussain agreed, saying "the *lookout* guys", putting an

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[6]Although Hussain tried to fudge the point in his testimony, he would admit at trial that the money offered to Cromitie and recruits was reward money that the men could spend as they wished, and not expense money to fund some post-mission travel. (A. 1939). However, in a debriefing with the FBI held on November 13, 2009 (months after the arrests and prompted by defense pre-trial demands that the government disclose evidence of inducements), Hussain would claim that the only money offered to recruits was expense money so they could leave the area for a time after the operation. (A. 1649-1650). Evidently, Hussain thought the money offers would be viewed as more palatable if presented as expense money rather than outright cash payments. On the tapes, he unsuccessfully tries to sell Cromitie (and, later, David Williams) on the importance of traveling after a mission, evidently in the hope that he could later argue that he had only offered expense money. Of course, at trial, Hussain could not credibly sustain that deception, and admitted that he was offering cash that the men could spend as they wished.

inflection in his voice that clearly that suggests they are not asking much of these lookouts. "Me and you", continued Cromitie, "as a matter of fact, we just letting 'em know. And nobody is getting hurt so you don't have to worry about it." Hussain heartily agreed, to the point of conferring a religious blessing on it: "It's Allah *subhana wa tala* [peace be upon Him] and nothing more". Cromitie reiterated: "And, and, let 'em know, we, don't, nobody is gonna be hurt, so don't go worrying." Hussain approved as well, saying, "*Insha'Allah* [God willing]." (A. 3801)

Not content to trust Cromitie to do the recruiting, Hussain, soon afterward approached Wali at the mosque (the same Wali he had been proposing as a potential recruit for months), and asked him directly if he would participate in a jihad mission. (A. 839-840).

On April 23, 2009, David Williams appeared for the first time at the Shipp Street house with Cromitie. Hussain told Williams he could only be in it for Allah and jihad and not money, but Cromitie assured Williams, without contradiction by Hussain, that "they givin' us money anyway." Hussain told Williams, "If you're doing it for the money, don't do it. I don't want you to do it." Williams said that he understood "perfectly. He told me." (A. 3834-3836) Hussain, who had learned that Williams' younger brother was ill and in the hospital, offered to take Williams to visit his brother at the hospital (proposing to combine that with a surveillance trip and a

trip to retrieve a Stinger missile), but never made good on that promise. (A. 2002-2006, 3751, 3832-3833)

On April 24, Hussain drove the men around Stewart airport, after first stopping to buy them breakfast. (A. 3880-3881) At first, he stopped at the intersection of Route 17K and a residential side street called Fletcher Avenue, where they could see a number of giant C5 cargo planes parked at the airport across the street. Williams took some of the pictures with the camera supplied by Hussain. Hussain pulled his car onto the lawn of a property that bordered 17K, which immediately brought the owner out to confront the men. Hussain then turned to Cromitie and Williams, and specifically asked for Williams' opinion on that spot. After Williams made the obvious point that it was a place where one could easily get caught, as opposed to the other side of the airport, Hussain drove around to the other side. (A. 2006-2011; 3891-3897) Hussain was already familiar with the access roads surrounding the airport, having been given a tour by the FBI back in February "so he would be able to transport Cromitie and show him different locations that he would be interested in selecting." (A. 148-149) However, it was Hussain, not Cromitie or Williams, who selected a location, directing their attention to a "small hill" (which Agent Fuller dubbed the "grassy knoll") from which C5 cargo planes could be seen parked at the airport. They agreed it was a good spot, but Williams added "We want to just destroy

property, we don't want to take no lives", to which Cromitie agreed. Williams somehow thought that, in the immediate aftermath of the operation, it would it would be a good idea to stay at a Marriott Hotel that bordered the airport, and Hussain agreed. (A. 2006-2011; 3905-3911)

On April 28, the two other "lookouts", Onta Williams and Laguerre Payen, appeared for the first time. During a meeting at the Shipp Street house with Hussain and all four men, Hussain explained to the three recruits: "Your job is lookout. You don't meet us. We don't meet you . . . You don't know us. We don't know you" (A. 4084) and also preached to them that "Prophet Mohammed did jihad. He fought five wars, so theres' nothing wrong with wars". (A. 4082). Cromitie emphasized that the lookouts would be "nowhere in sight". (A. 4079) When Cromitie privately raised concerns about Payen, who was "a little slow", Hussain dismissed that by stressing the limited role of the lookout: "He's a lookout. That's all we need, is a lookout." (A. 3972) When Cromitie raised that same concern on another occasion that day, Hussain responded: "These guys are going to stand in the corner, and they've done it a million times, and they're gonna lookout." [7] (A. 3995)

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[7]Hussain was using hyperbole here to stress how easy it was to be a lookout. There was no evidence that these men had ever previously filled that role "a million times", or even once.

Hussain regularly bought meals for the men when they were in his company. He also gave them small amounts of money for basic living expenses, such as groceries and rent, and gave David Williams $60 for train fare to visit his newborn child in a Brooklyn hospital. None of the men had a car or even a drivers license and went nowhere in connection with this case except as passengers in Hussain's automobiles.

Hussain had been pushing the four men to help him buy guns and on April 30, he drove Cromitie and David Williams to Brooklyn for that purpose (after first giving David's mother a lift to the Westchester Medical Center to visit David's still hospitalized younger brother). Hussain gave Williams $900 of government money to obtain two guns from inside a housing project, but Williams emerged with only one gun and handed Hussain only $200 in change, meaning that he had either overpaid for that single gun or pocketed the difference. Although Hussain would deny it at trial, he appears on tape to have believed the latter, as he becomes noticeably angered with Williams. (A. 2021-2027) The gun never figured into anything after that. The FBI took possession of it and removed the firing pin. On days when Hussain brought the men to a storage facility in New Windsor, New York (just south of Newburgh), the FBI would put the gun inside the storage unit, in case anyone of the men asked for it. However, none of the four defendants ever asked to have the gun during or

prior to the operation, and on the day of arrest, Hussain suggested that Cromitie bring the gun with them to Riverdale, which Cromitie declined to do. (A. 424-426; 1866)

In a wiretapped conversation dated May 1, 2009, Hussain calls Cromitie to tell him: "Very good news, very good news . . . the good news is I'm going to Florida to pick up the money." Near the end of the call, Cromitie predicted, "one more day, I'm supposed to get my car", to which Hussain responded, "you're getting you're car, brother, the Beamer." Cromitie responded, "when you promise me something I believe you." Hussain responded: "You should believe me, because I am your brother, I am your true brother . . . I love you to death, brother." (A. 4497-4500) Hussain called Payen and Onta Williams to tell them that "the cash rolled in." (A. 4501-4504)

During the next three weeks leading up to the arrests, Hussain pushed the operation along, aided by his FBI handlers, who were in full control of (and even pre-scripting) each day's activities. Hussain purchased cell phones for the men to use and took them on another trip to the "grassy knoll". On May 6, the plan was for Hussain to drive the men to a warehouse in Stamford, Connecticut (which Fuller had deliberately chosen to get the men to cross state lines), to show them the Stinger missile and the fake bombs. On the way, the men became aware that they were being followed by unmarked cars, Hussain doubled back to Newburgh, and Onta Williams

left to pick up a child from day care. The other three, however, continued on with Hussain, to the warehouse. There, in about 45 minutes, Hussain attempted to show them how to shoulder and fire a Stinger missile and how to activate the firing mechanism (a device set in a plastic case that included a cell phone, a timer knob and a toggle switch, connected with wires that had to be hooked up to blasting caps Tr. 2773-2775) of one of the fake bombs. Aside from Cromitie and Payen briefly shouldering the missile, Hussain conducted the demonstration himself. (A. 912-918; 925; 1760; 1764-1767)

Hussain would later bring Onta Williams to the storage facility in New Windsor, where he was allowed to shoulder the Stinger missile. Later, one of the fake bombs was brought to the Shipp Street house for another demonstration. (A. 195-198)

At a meeting on May 8, Hussain talked about taking "one plane from the air", prompting David Williams to say, "You said you didn't want to hurt nobody, why you hitting it in the air? There's people in the there . . . Ain't nobody not going to have to murder." Cromitie remarked "I don't wanna hurt nobody like that, but I just want to take the planes out" and he and David Williams agreed that it should be done at night "when nobody is . . . around." (A. 4276-4277)

On May 13, Hussain followed a script that Fuller had written out the day before: He drove the men to Riverdale to conduct surveillance and then took them to

the Stamford warehouse (this time, with Onta Williams, who, to that point, had not crossed state lines), to pick up a second Stinger missile, which was then brought to the New Windsor storage facility. (A. 199-200; 232-234; 1849-1841; 1843)

On May 15, in a meeting that was not recorded, Hussain told the men that the money that they would collect after the operation was held at UPS storage boxes and each man would be given a key to access his box. On May 19, a day before the date the FBI had chosen for the arrests, Hussain took the four men to dinner at T.G.I. Friday's in Newburgh. Hussain and Fuller deliberately chose not to record this meeting, yet it was at that time that Hussain claims that he told the men how much money was in the UPS boxes. At trial, he would maintain this figure was $5,000 for each man which, according to Agent Fuller, is all that he authorized Hussain to offer. (A. 1032-1037) As planned by the FBI, the operation on May 20 had evolved into one where two rental cars would be parked on Independence Avene in Riverdale, one in front a synagogue and the other near a community center several blocks south. The fake bombs were to be placed inside these vehicles and set to detonate after three hours (apparently by some combination of using the timer knob and calling the cell phone that was wired to the firing mechanism), by which time the men were supposed to be back in Newburgh, where the missiles would be fired at the planes on the ground. (A. 964-965; 980-990) On the way, Hussain tried to coach Cromitie on how

to connect wires to the bombs, but Cromitie could not do it and Hussain eventually gave up and performed the task himself. (A. 1874-1881)

Arriving in Riverdale on May 20, Hussain directed everything, telling David Williams when to get out of the car to take up his lookout post, directing the other two lookouts, and trying to instruct Cromitie on how to properly arm the bombs, who was having trouble understanding. After Cromitie put a device into one car, he returned to Hussain's vehicle, and revealed his lack of facility with it – "Holy shit! I forgot to turn it on". Hussain acted like it did not matter, and then spent some impatient moments trying to instruct Cromitie how to arm the other devices. After putting those in the second rental car, Cromitie returned to the car, was joined by Payen and Onta Williams, and all three were arrested there as a large law enforcement presence moved in. David Williams, who had left his lookout post and was standing directly across the street from the synagogue, was arrested there. (A. 980-990; 1867-1901)

<u>Construction of the "IED" Devices</u>

_____Richard Stryker, an agent working at the FBI laboratory in Quantico, Virginia, testified that he constructed the three IED devices at the request of Agent Fuller. Trying to recall his conversations with Agent Fuller, he remembered "essentially, I think it was something that could be hand carried." (Tr. 2772). Fuller did not specify

how much explosives to put into the bags, so Stryker decided on his own to use 30 blocks of explosives in each, "because simply that's what came in a case, and that's what would fit in each of the bags" and that made for a convenient number (Tr. 2772-2773). Stryker did not recall, and had no record of, Agent Fuller asking him to put steel ball bearings in the devices. Quantities of ball bearings were on hand in the laboratory, and Stryker decided how many to use (A. 2776-2777; 2784-2785; 2793). He chose that particular size bag for each device because he happened to have a bag of that size in the shop, and then went to a Home Depot to buy two more just like it (Tr. 2786, 2792, 2792). The bags were heavy, with the inert C-4 in each weighing 37 ½ pounds, and, and the bags, ball bearings, fusing device and other materials adding to the weight (Tr. 2788-2789).

Prior to the trial, the defense had moved *in limine* to preclude evidence of a test explosion – including video recordings of the explosions and still photographs – that the FBI conducted at Quantico, using bombs made from real C4, in the same quantities as the inert blocks put into the devices that Stryker built. The Court allowed the evidence, the defense renewed its objection before Stryker testified and unsuccessfully renewed its objections when he videos and still photographs were offered into evidence during Stryker's testimony. (Tr. 2733-2738; 2758-2768).

ARGUMENT

POINT I

THE DISTRICT COURT'S ENTRAPMENT INSTRUCTION SHOULD HAVE INCLUDED AN INSTRUCTION IN ACCORDANCE WITH *UNITED STATES v. HOLLINGSWORTH*, 27 F.3d 1196 (7TH Cir. En Banc 1994), INCLUDING LANGUAGE INSTRUCTING THAT, IN DETERMINING WHETHER THE GOVERNMENT HAS PROVED PREDISPOSITION BEYOND A REASONABLE DOUBT, THE JURORS SHOULD CONSIDER WHETHER THE DEFENDANT WAS SO SITUATED BY REASON OF PREVIOUS TRAINING OR EXPERIENCE OR OCCUPATION OR ACQUAINTANCES THAT IT IS LIKELY THAT IF THE GOVERNMENT HAD NOT INDUCED HIM TO COMMIT THE CRIME SOME CRIMINAL WOULD HAVE DONE SO.

In *United States v. Hollingsworth*, 27 F.3d 196 (7th Cir. en banc 1994), the Seventh Circuit, citing to *Jacobson v. United States*, 503 U.S. 540 (1992), held that in entrapment cases, predisposition "is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force." Accordingly, "[t]he defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation." *Id.* at 1200.

For those "traditional targets of stings" who are so situated – e.g., "[a] public official is in a position to take bribes; a drug addict to deal drugs; a gun dealer to engage in illegal gun sales" – "all that must be shown to establish predisposition and thus defeat the defense of entrapment is willingness to violate the law without extraordinary inducements; ability can be presumed. It is different when the defendant is not in a position without the government's help to become involved in illegal activity. The government "may not provoke or create a crime, and then punish the criminal, its creature." *Casey v. United States*, 276 U.S. 413, 423 (1928) (Brandeis, J., dissenting)." *Hollingsworth*, *supra*, 27 F.3d at 1200.

Relying on *Jacobson*, *Hollingsworth* held that for defendants "not in a position" to commit the crime when approached by government agents, "the demonstrated willingness of the defendant to commit the crime without threats or promises by the government" is not decisive. This is because entrapment, as defined in *Jacobson*, involves "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would never have run afoul of the law." *Jacobson*, *supra*, 540 U.S. at 553-554.

The *Hollingsworth* court illustrated this concept by a hypothetical posed to the government lawyer during oral argument:

> Suppose the government went to someone and asked him whether he would like to make money as a counterfeiter, and the reply was, 'Sure, but I don't know anything about counterfeiting.' Suppose the government then bought him a printer, paper, and ink, showed him how to make the counterfeit money, hired a staff for him, and got everything set up so that all he had to do was press a button to print the money; and then offered him $10,000 for some quantity of counterfeit bills. The government's lawyer acknowledged that the counterfeiter would have a strong case that he had been entrapped, even though he was perfectly willing to commit the crime once the government planted the suggestion and showed him how and the government neither threatened him nor offered him an overwhelming inducement. *Hollingsworth, supra*, 27 F.3d at 1199.

The *Hollingsworth* court observed that such cases, where sting operations are directed at those not positionally situated to commit the targeted offense, "are rare" and found entrapment as a matter of law as to two men induced into an international money laundering scheme – "a vocation for which neither had any training, contacts, aptitude, or experience". *Id.* at 1200.

The present case against David Williams and his three co-defendants – James Cromitie, Onta Williams and Laguerre Payen – is also such a "rare" case, and one which required a jury instruction in accordance with *Hollingsworth*.

The defendants requested an instruction that

> in determining whether the government has proved predisposition beyond a reasonable doubt, you should consider whether the defendant

> was so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so. In considering this aspect of entrapment, a defendant's lack of *present* means to commit a crime is not alone enough to establish entrapment if the government supplies the means. (A. 160-161; Defense Request to Charge, ECF Document #148)

What the Court actually charged was:

> The government can prove that a defendant was predisposed to commit the crimes charged, even if it does not prove that the defendant consciously thought about the particular crimes charged in this case, which are conspiring and attempting to use IEDs against synagogues, and missiles against the government, before those ideas were suggested to him. Also, the fact that the defendant lacked what we call the present physical ability to commit a particular crime before he encountered the government agent does not, without more, establish entrapment.
>
> However, you may consider evidence about such matters as you assess whether the government has proved beyond a reasonable doubt that any defendant was predisposed to commit a particular crime before he was approached directly or indirectly by the government agent. (A. 2516)

The charge, as given, did not permit the jury to find that a defendant was entrapped based on their assessment of whether he was "so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so", *Hollingsworth*, *supra*, or, as *Jacobson* puts it, whether, "if left to his own devices" the defendant "likely would never have run afoul of the law." *Jacobson*, *supra*, 540 U.S. at 553-554.

In *Hollingsworth*, the Court wrote that, prior to *Jacobson*, "the courts of appeals had been drifting toward the view, clearly articulated by the Second Circuit in *United States v. Ulloa*, 882 F.2d 41, 44, (2d Cir. 1989), that the defense of entrapment must fail in any case in which the defendant is "willing," in the sense of being psychologically prepared, to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless inveigled or assisted by the government." *Hollingsworth*, *supra*, 27 F.3d at 1198. In *Ulloa*, the Court approved the use of the phrase "ready and willing" in an entrapment instruction where readiness was equated with an "open amenability", as opposed to "physical readiness." *Ulloa*, *supra,* 882 F.2d at 44. However, *Hollingsworth* notes that *Jacobson* has since changed the landscape in entrapment.

In *United States v. Bala*, 236 F.3d 87, 94 (2d Cir. 2000), this court declined to decide whether a *Hollingsworth* charge was required because the evidence in that case was sufficient to establish capability, "without commenting on the degree, if any, that this approach materially differs from that in the Second Circuit."). [8]

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[8] In *United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997), the Ninth Circuit, hearing a *Hollingsworth* argument, declined to adopt "a requirement of positional readiness"; the Fourth Circuit declined to reach the issue in *United States v. Squillacote*, 221 F.3d 542, 567 (4th Cir. 2000), because "Squillacote clearly was in the position to commit the crimes with which she was charged". The Fifth Circuit granted *en banc* review of a *Hollingsworth* issue in *United States v. Brace*, 145 F.3d 247 (5th Cir. 1998) (en banc), but declined to reach the merits, finding that the issue had not been preserved for review.

As *Hollingsworth* notes, entrapment cases involving defendants not in a position to carry out the crime prior to government involvement are "rare" because in the typical sting operation law enforcement will target people who are so positioned. Indeed, had the government agents in this case followed the Attorney General guidelines for undercover operations cited in *Jacobson*, there would have been no prosecution here, for those preclude offering an inducement to commit a crime unless "(a) [t]here is a reasonable indication, based on information developed through informants or other means, that the subject is engaging, has engaged, or is likely to engage in illegal activity of a similar type; or (b) [t]he opportunity for illegal activity has been structured so that there is reason for believing that persons drawn to the opportunity, or brought to it, are predisposed to engage in the contemplated illegal activity." Attorney General's Guidelines on FBI Undercover Operations (Dec. 31, 1980), reprinted in S. Rep. No. 870682, p. 551 (1982), *cited in, Jacobson, supra*, 540 U.S. at 549, n.2.

Here, Hussain, acting as a government agent, after many months of trying to overcome James Cromitie's reluctance to join Hussain in an operation, made outlandishly huge money offers, even though both Hussain and his handlers well knew Cromitie lacked the acquaintances, the occupational background, the training

or the experience to commit crimes remotely similar to those that Hussain was seeking to induce.

Much like the counterfeiter hypothetical cited in *Hollingsworth*, the government supplied the fake bombs, the inert missiles, the vehicles, the cell phones, the cameras, the warehouse, the storage facility, the meeting house, and even the food and beverages that made this contrived scheme possible. Equally important to supplying the material needs, the FBI and Hussain stage-managed the process from beginning to end, to the point where they were able to script each day's activities in advance. This stage craft extended to acquiring the inert stinger missiles (which gave rise to a 25-year mandatory minimum) and constructing the three fake bombs that grew to their substantial size as a result of the imagination and resourcefulness of the laboratory technician assigned to the task.

With respect to the three "recruits" – David Williams, Onta Williams and Laguerre Payen – even manufactured the roles they were to have. It was clear from even the early taped conversations that Hussain was not content to build a case solely against Cromitie. He prodded Cromitie to recruit others (unabashedly referring to prospective recruits as "bodies") and told Cromitie how many additional people were needed. Hussain would propose specific people to Cromitie as potential recruits, sometimes from the Newburgh mosque and sometimes, as in the case of a non-

Muslim like Tariq, simply because they were acquainted with Cromitie. When Cromitie resisted Hussain's demands to try to recruit congregants at the mosque, Hussain urged him to reach out to "the whole town" to find recruits. In other words, far from identifying and seeking to approach targets who were in a position to commit bombings and missile attacks, Hussain did the opposite: he put out a general call for recruits and, to fill those roles, sent Cromitie out into the "whole" Newburgh community, armed with promises of substantial cash rewards. Indeed, precisely because Hussain expected that anyone recruited would *not* be positioned or predisposed to commit terrorist crimes, he invented a make-work role for Cromitie to sell to these prospective recruits, the "look out guy". Obviously, Hussain hoped that the relatively simple task of standing on a corner with a cell phone would make it easier to find people, and he stressed that as a selling point in his talks with Cromitie.

After first offering Cromitie a quarter-million dollars, he then relentlessly pressured Cromitie on the need for these "lookouts". After David Williams first appeared one day, he ignored Cromitie's repeated assertions that Williams was not involved and prodded Cromitie to recruit Williams (insisting he was needed both as a "lookout" and as a porter with a strong back to help carry that "heavy" missile). It did not matter that the lookouts were the kind of people who "slip[ped] up a lot" or

were "not careful" or were "stupid" or "slow" (as a couple of them were indeed characterized in Hussain's conversations with Cromitie), for Hussain was not thinking like a real terrorist. He was not trying to recruit people positioned to commit terrorist acts. Rather, he was trying to collect "bodies" to manufacture a "conspiracy" that did not yet exist.

None of the four defendants had any associations, training, experience, or occupations that would put them in a position to commit terrorist crimes. They had no bomb-making equipment in their homes, no access to or experience with military ordnance, no histories of similar crimes, did not belong to any organizations or associate with anyone advocating such crimes, had no literature in their homes advocating terrorist crimes, and had no prior histories of even discussing such crimes. They were unemployed or underemployed poor people who lacked money for groceries, rent and train fare, let alone the funds needed to bankroll a criminal operation like the one here.

Hollingsworth recognizes that the positional aspect of predisposition guards against targeting persons in sting operations unless those persons are likely to commit a particular type of crime without being induced to do so by government agents. When such likelihood exists, such a person may be legitimately targeted even if he

"he would not have committed [the crime]" at that precise time "but for that inducement[.]" *Hollingsworth*, *supra*, 27 F.3d at 1203. A *Hollingsworth* instruction addresses those "rare" instances where law enforcement oversteps those bounds, and this is such a case. The jury should have been permitted to consider the facts in light of the requested instruction, and certainly could have acquitted David Williams on that basis.

POINT II

THE DISTRICT COURT ABUSED ITS DISCRETION IN PERMITTING EVIDENCE OF AN EXPLOSIVE TEST DEMONSTRATION THAT WAS INFLAMMATORY AND WHOSE PREJUDICIAL EFFECT OUTWEIGHED ANY PROBATIVE VALUE.

Evidence which is not relevant is inadmissible, FRE 402, and even if relevant, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . or by considerations of . . . needless presentation of cumulative evidence." FRE 403. The Advisory Committee Notes to Rule 403 define "undue prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403, Adv. Comm. Notes. "The Notes are in accord with major treatises on the topic by elaborating that 'the availability of other means of proof may also be an appropriate factor' for consideration in the

balancing test." *United States v. Salim*, 189 F.Supp.2d 93, 98 (S.D.N.Y. 2002) (excluding post-operative photograph of physical injury given its "disturbing nature" and "the potential for confusing the issues or misleading the jury"), *citing* 22 Charles A. Wright & Kenneth Graham, Jr., *Federal Practice and Procedure*, §5214 (1978 ed.) ("The prejudice to an opponent can be said to be 'unfair' when the proponent of the evidence could prove the fact by other, non-prejudicial evidence.").

Further, video demonstrations present a particular risk that they will mislead jurors or that jurors will "place too great emphasis on their significance," *Busse v. Bayerische Motoren Wekre, A.G.*, 1997 U.S. Dist. LEXIS 2791, 20-24 (E.D.La. March 11, 1997), or that they will be given "exaggerated weight." *Barnes v. General Motors Corp.*, 547 F.2d 275 (5th Cir. 1977). When a video demonstration is proffered as a "re-enactment" of events, as opposed to merely illustrating "general scientific principles", it "must be substantially similar in order to be relevant." *Id.* "'[I]t is not required that all the conditions shall be precisely reproduced, but they must be so nearly the same in substantial particulars as to afford a fair comparison in respect to the particular issue to which the test is directed.'" *Barnes*, *supra*, at 277, *quoting Illinois Central Gulf Railroad Company v. Ishee, Miss.,* 317 So.2d 923, 926 (Miss. 1975). "If a videotaped test is insufficiently comparable to the circumstances of the

case, the videotape is inadmissible" under Rule 403. *Swajian v. General Motors Corp.*, 916 F.2d 31, 36 (1st Cir.1990).

Here, the government, over defense objection, was permitted to offer video recordings (and still photographs) of test explosions of bombs placed in automobiles, using a quantity of real explosive that matched the quantity of inert material that was used in constructing the fake bombs. The evidence is almost literally inflammatory as it shows the cars exploding amidst a collection of some two dozen plastic dummies arranged around them and a big fireball. The cars, along with the plastic dummies, are obliterated. Prior to trial, the government served notice of its intention to offer evidence of this test explosion, stating that its purpose was to establish that the fake bombs, if real, would have qualified as "destructive devices" within the meaning of 18 U.S.C. 2332a(c)(2)(A) and18 U.S.C. 921(a)(4). The defense moved *in limine* to preclude such evidence, arguing that the evidence was not probative of the knowledge or intent of the defendants, that the government "must confine itself to those facts and circumstances alleged to have been known to the defendants at the time of the offense conduct" and, to the extent the explosion video was probative of the fact that fake bombs, if real, would constitute destructive devices, a limiting instruction would be ineffective and that element could be proved by other means, such as having an expert testify. The *in limine* motion was summarily denied by the court in an oral ruling

that included no discussion or analysis and imposed no limitation on how the government could use the video. During trial, the defense renewed its objection prior to the video evidence being received. The defense again pointed out that the explosion could not be relied on as evidence of the defendants' knowledge of the capability of the bombs. The defense also argued that the test explosion was not comparable to the conditions that would have actually existed at the scene. At trial, it was established that the device was not supposed to go off until late at night (three hours after it was put in the car, or about 11:00 p.m.), a time when there would be very few people out in the street in that neighborhood, much less numerous people compassing a car. (Tr. 2733-2738) The government, as it did in opposing the *in limine* motion, continued to maintain that it was probative of the defendants' knowledge and was needed to prove the element of the existence of an explosive device, and downplayed the plastic dummies, asserting they were not lifelike. (Tr. 2737-2738) The defense also objected as each video and still photographs was offered. (Tr. 2758-2768)

The video evidence was highly prejudicial and tended to prove no material fact which the government could not prove by other means. It also invited confusion and misleading of jurors, as it raised a serious risk of being improperly relied on as evidencing the state of mind of the defendants and, indeed, was relied on for that

purpose in the government's summation. And, by exploding the car amidst more than two dozen plastic dummies that represented human targets, the video was not a fair comparison of the actual scene.

Here, the government manufactured and supplied the fake bombs, and supplied the automobiles in which they were placed. As with every other aspect of the case, the government exercised control over these devices from beginning to end. Whatever the defendants knew about the nature and operation of the devices came from the government's cooperating witness, Shaheed Hussain. As it developed at trial, the size of the fake bombs – which, with the blocks of inert C-4 and all the accessories, ended up weighing more than forty pounds each, and probably in the neighborhood of fifty pounds –was a function of the particular whims of the FBI laboratory technician who constructed them, who had only been told by the case agent to construct devices that a person could carry.

As such, this case differs from those where the government was permitted to offer evidence of detonation of replica bombs, where the defendant himself is alleged to have constructed a bomb. *See e.g. United States v. Jones*, 124 F.3d 781, 787 (6th Cir. 1997) (finding demonstrative evidence relevant to whether a device made from a car muffler and black powder and installed in a marijuana field was a bomb, as

opposed to a signaling device; district court permitted videotape of explosion, but excluded images of shrapnel hitting Styrofoam silhouettes).

As argued in the defense *in limine* motion, the government could not properly prove the defendants' knowledge of the destructive potential of any such devices, or their intent concerning same, by resort to an after-the-fact test explosion. Rather, the government should have been required to confine itself to those facts and circumstances known to the defendants, such as their own observations of the devices when Hussain opened one of the bags and displayed the C-4 and ball bearings inside and his explanation to them of the how the device worked.

The defendants had no military backgrounds, or training or experience with explosive devices, and were only allowed to see the fake bombs during the few brief occasions that Hussain and his handlers allowed. Because none of these defendants had ever seen a test explosion of a real bomb of this size, the test explosion played at trial had no probative value in proving the defendant's understanding of the fake bombs, while the prejudicial impact was great.

Further, in summation, the government, for dramatic effect, decided to end its arguments with a bang. The government played an explosion video as it was finishing its rebuttal summation and in the context of arguing that the video was probative of the defendant's prior knowledge of the devices. "They thought those

weapons were real. . . And they wanted it to be real. They wanted the bombs to explode in Riverdale. They wanted this to happen", the government lawyer argued, as the tape was played.

Moreover, the government did not need a test explosion to prove that the fake bombs, if real, would have qualified as "destructive devices" and, hence, as weapons of mass destruction within the meaning of 18 U.S.C. 2332a(c)(2)(A). The government had other means of proof available. A "destructive device" is defined, *inter alia*, as "any explosive, incendiary, or poison gas . . . bomb." 18 U.S.C. 921(a)(4) and, in this case, the evidence was that the fake bombs were purported to be made with blocks of military-grade C-4, which were connected to a fusing and firing mechanism. Accordingly, an expert could have offered testimony to establish that such a device, if real, would amount to a destructive device, without having to resort to a video of a big explosion.

This, of course, is symptomatic of a larger issue in this case – namely, the government's manipulation and control over the offense and its gravity. The fake bombs were as large as they were, not because of any input from these four Newburgh men, but because an FBI technician in Virginia found a certain size duffel bag in his lab, went out and bought two more at a Home Depot, and found that he could stuff thirty bricks of fake C-4 in each along with, for good measure, a collection

of steel balls that were on hand in the lab. Then, in preparing for trial, and at enormous expense, the FBI set off, and filmed, real explosions (blowing up a cars as well) with the same amount of real C-4. All of this effort did not go to investigating or uncovering a crime. It was simply part of the elaborate production of a government that has unlimited resources – or, at least acts like it does. And, it served no purpose other than to alarm, frighten and prejudice the jurors so that they would be more inclined to overlook the deficiencies in the government's proof of predisposition.

POINT III

THE DISTRICT COURT HAD AUTHORITY TO SENTENCE THE DEFENDANTS BELOW THE STATUTORY MANDATORY MINIMUM ON THE BASIS OF SENTENCING MANIPULATION AND/OR SENTENCING ENTRAPMENT AND, ACCORDINGLY, THE MATTER SHOULD BE REMITTED FOR RESENTENCE.

Prior to sentencing, defendant Onta Williams, joined by all other defendants, argued that the Court ought to depart from both the sentencing guidelines and the statutory twenty-five year mandatory minimum sentence that otherwise applied to Counts 5 and 6 (the missile counts relating to Stewart airport), on a theory of either sentencing entrapment or sentencing manipulation. (A. 2645-2649) The Court denied that application in a written decision. (S.A. 143-147)

"Sentencing manipulation" or "sentencing factor manipulation" occurs when government agents have improperly enlarged the scope or scale of a crime. *United States v. Montoya*, 62 F.3d 1 (1st Cir. 1995). In such cases, the First Circuit wrote in *Montoya*, "the sentencing court 'has ample power to deal with the situation" and this "broad principle applies to statutory minimums as well as to the guidelines." *Montoya*, *supra*, at 3.

Montoya states that a sentencing reduction based on improper manipulation is not established "simply by showing that the idea originated with the government or that the conduct was encouraged by it", "or that the crime was prolonged beyond the first criminal act", "or exceeded in degree or kind what the defendant had done before." *Id.* at 3-4. "What the defendant needs in order to require a reduction are elements like these carried *to such a degree* that the government's conduct must be viewed as 'extraordinary misconduct.'" *Id.* at 4 [italics in original]; *quoting United States v. Gibbens*, 25 F.3d 28, 31 (1st Cir. 1994).

Montoya also recognizes that the "extraordinary misconduct" standard "is general because it is designed for a vast range of circumstances and of incommensurable variables. *See Gibbens*, 25 F.3d at 31. The most important of these, as we have stressed, is likely to be the conduct of the government, including

the reasons why its agents enlarged or prolonged the criminal conduct in question. *See id.* at 31 & n.3." *Montoya*, *supra*, 62 F.3d at 4.

"'Sentencing manipulation' has been described as occurring 'when the Government engages in improper conduct that has the effect of increasing the defendant's sentence.'" *United States v. Caban*, 173 F.3d 89, 93 n.1 (2d. Cir. 1999), *quoting United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997).

Court have also recognized a related, but separate, concept of "sentencing entrapment", which "normally requires that a defendant convince a fact-finder that government agents induced her to commit an offense that she was not otherwise predisposed to commit." *United States v. Knecht*, 55 F.3d 54, 57 (2d Cir. 1997). Opinions on sentencing manipulation, on the other hand, indicate a broader concept that asks the court to consider whether "the manipulation inherent in a sting operation, even if insufficiently oppressive to support an entrapment defense, . . . or a due process claim, . . . must sometimes be filtered out of the sentencing calculus." *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992), *quoted in United States v. Sanchez*, 138 F.3d 1410 (11th Cir. 1998).

In denying the defense application for a departure from the mandatory minimum based on sentencing manipulation (or entrapment),[9] the Court agreed with the defense on a number of points. The Court wrote: "Defendants argue that the Government devised the plot to fire a Stinger missile toward Stewart AFB – and even went so far as to create an inert Stinger – for the sole purpose of making sure that, in the event of a conviction, the court could not sentence the defendants to less than 25 years. Considering only the evidence that is presently available to me, I would conclude that this is exactly what happened." (S.A. 144) The Court noted that charges relating to the missile attack against Stewart, and not the synagogue bombings, were the ones that carried 25-year minimums. Yet, "[t]here was no discussion of missiles in the opening months of the dance between Hussain and Cromitie; there was no mention of missiles when the FBI opened its formal investigation in September 2008", and "[t]he Government (not Cromitie) first introduced the idea of an attack on Stewart to the 'mission' several months after the CI proposed attacking Jewish targets." (S.A. 144) "Only then, believing they had

[9]The defense also sought a downward departure from the sentencing guidelines on that basis. The Court sentenced the defendants to the mandatory minimum after deviating downward by applying the factors under 18 U.S.C. §3553(a). However, if this Court remands to permit a departure from the statutory minimum, the trial court ought to consider sentencing manipulation as the basis for a guideline departure as well.

Cromitie on the hook, did Agent Fuller begin the process of acquiring the props needed for the planned sting", including the Stinger missile. (S.A. 144)

The Court also found unpersuasive the government's argument below that what it did here was analogous to sting operations where drug dealers are pressured to sell drugs above a certain mandatory minimum weight. That "analogy does not work" because here "the defendants were not engaged in any terrorist activity before they encountered the CI. In fact, they were not engaged in any sort of criminal activity at all." (S.A. 146) "There is no way that these four defendants would have dreamed up the idea of shooting a Stinger missile at an airplane or at anything else; there is certainly no way they could have acquired a Stinger missile, operative or inert, unless the Government provided them with one." (S.A. 146)

The court nonetheless concluded that it lacked authority to sentence the defendants below the 25-year minimum, stating that "the doctrine of sentencing manipulation (if it exists at all) is effectively a dead letter in cases where there are statutory minima." (S.A. 147) In its discussion, the court cited to *United States v. Oliveras*, 359 Fed. Appx. 257 (2d Cir. 2010) and *United States v. Pena*, 297 Fed. Appx 76 (2d Cir. 2008). (S.A. 147). In *Oliveras*, however, the Court noted that while it "has never formally recognized the validity of either of these doctrines, various panels have suggested that a departure based on manipulation or entrapment

might lie where the government engages in 'outrageous' conduct.' *Compare United States v. Gagliardi*, 506 F.3d 140, 148-149 (2d Cir. 2007) ([T]his Court has not yet recognized the doctrine of sentencing manipulation . . . It has, however, suggested that if a departure based on sentencing manipulation were valid, it would likely require a showing of outrageous government conduct.'") (internal quotation marks omitted), *with United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997) ("[T]he validity of the concept of sentencing entrapment has not been determined in this Circuit, but . . . even where it has been approved in theory, its potential application has been limited to outrageous official conduct which overcomes the [defendant's will."] (internal citations and quotation marks omitted)." *Oliveras*, *supra*, 359 Fed. Appx. at 261, n.12.[10]

In the present case, the government encouraged and prolonged a crime with respect to against persons who had never committed such offenses before and, the government did this to a degree that amounted to extraordinary and/or outrageous misconduct. While overcoming a defendant's will may be one way of showing such

[10]In *Pena*, the Court wrote that the defendant's argument that the Government manipulated his sentence by offering to sell more drugs to him than he could afford "should have been directed to the jury and not the sentencing judge." Since *Pena*, however, the Court has continued to note that the doctrine of sentencing manipulation remains unsettled in the Circuit. *Oliveras*, *supra*; *United States v. Deacon*, 413 Fed. Appx. 347, 350-351 (2d Cir. 2011) ("This Court has not yet recognized the doctrines of sentencing manipulation or sentencing entrapment."). Both *Pena* and *Oliveras*, of course, are non-precedential summary orders.

outrageousness, under the case-by-case approach recognized in *Montoya*, improper manipulation can be shown by "a vast range of circumstances and of incommensurable variables."

In this case, there are such circumstances from which the sentencing court could – and should – find improper manipulation and extreme and/or outrageous conduct directed towards increasing a defendant's sentence. In order to change Cromitie from a reluctant and wavering man – a man who used hateful speech but had done nothing – the government told Cromitie that his ill feelings against Jews were justified by his own religious beliefs, and that Cromitie should act on his words. The government spent months and months using an agent, posing as a rich man, to give Cromitie attention, friendship, and affection, along with cash gifts and promises of lavish material rewards in the future.

The government, not Cromitie, introduced the idea of an attack on Stewart airport and then procured the Stinger missile that made such a crime possible. (Count Six). The government also set out to create the conspiracy to go along with it (Count Five). Knowing that Cromitie had no associates – that there was no conspiracy – the government waged a relentless campaign to cobble one together from the unemployed and underemployed ranks of one of New York's poorest communities. In tapes that are chilling to watch, the government proposed the names of people from this

community that Cromite should try to recruit – “Badi”, “Wali”, “Daoud”, “Tariq” and others. In order to “speed up” this “process”, the government invented a role for these recruits – the “lookout” – and encouraged Cromitie to try to reach out to “the whole town” to draw people in by telling them that their role would be easy, that it paid a lot of money, and that they would not be hurting anyone. And, to insure that Cromitie would try his hardest to induce and convince people, it offered Cromitie a huge money award upon completion of the mission, while insisting that the “lookouts” were needed to complete it. The “lookouts”, too, were to be subjected to the same 25-year mandatory minimum.

The district court concluded that it lacked authority to depart from the mandatory minimum based on sentencing manipulation or entrapment and, accordingly, declined to consider whether the facts and circumstances warranted such a departure or to hold an evidentiary hearing, if needed. (S.A. 146-147) Because the court should have – and does have – that authority, the matter should be remanded for resentence. It is reasonably likely that Judge McMahon would impose a sentence below the mandatory minimum if instructed by this Court that she was empowered to do so.

POINT IV

CO-APPELLANT POINTS ADOPTED AND JOINED IN

David Williams adopts and joins in all of the arguments of his co-appellants, including the points of co-appellants that seek dismissal of the indictment for outrageous governmental misconduct and legal insufficiency. Fed. R. App. P. 28(i).

With respect to legal insufficiency, the trial Court, in denying the post-verdict motion to dismiss, focused on whether the government had adduced sufficient evidence of David Williams' ready response to inducement. (S.A. 94) This determination requires the trier of fact to know what took place between the defendant and the inducer prior to the defendant becoming involved in the criminal activity. It is not proven simply by trying to establish that this interaction took place within a particular time period. *See United States v. Lard*, 734 F.2d 1290, 1293-1295 (8th Cir. 1984) (finding entrapment as a matter of law based on lack of ready response during interaction with undercover agent over course of a day). Here, there was insufficient evidence of ready response as the government did not – and could not – offer evidence of the interaction between inducer and the defendant prior to joining the criminal activity.

CONCLUSION

FOR THE REASONS STATED HEREIN, THE INDICTMENT MUST BE DISMISSED, OR A NEW TRIAL ORDERED, OR THE MATTER REMANDED FOR RESENTENCE.

Dated: February 1, 2012

Respectfully submitted,

THEODORE S. GREEN
Attorney for David Williams
GREEN & WILLSTATTER
200 Mamaroneck Avenue - Suite 605
White Plains, New York 10601
(914) 948-5656

Word Count Certificate

The undersigned counsel for Appellant David Williams, hereby certifies that the foregoing brief complies with the type-volume limitations as set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The total number of words in the text of the foregoing brief (including headings, footnotes, quotations, but not including the table of contents and table of authorities) is 12,698 according to the word processing program used to prepare the brief.

Dated: February 1, 2012
White Plains, NY

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Theodore S. Green