11-2763

11-2884-(CON), 11-2900-(CON), 11-3785-(CON)

In the

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES CROMITIE, a/k/a ABDUL REHMAN, a/k/a ABDUL RAHMAN, DAVID WILLIAMS, a/k/a DAOUD, a/k/a DL, ONTA WILLIAMS, a/k/a HAMZA, LAGUERRE PAYEN, a/k/a AMIN, a/k/a ALMONDO,

Defendants-Appellants.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT JAMES CROMITIE

CLINTON W. CALHOUN, III, ESQ.
CALHOUN & LAWRENCE, LLP
Attorneys for Defendant-Appellant
James Cromitie
81 Main Street - Suite 450
White Plains, New York 10601
(914) 946-5900

Appeal Press - (914) 761-3600 (212) 267-6602 (15823)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

Page

STATUTES

MISCELLANEOUS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	:	
-against-	:	Docket No. 11-2763
JAMES CROMITIE, DAVID WILLIAMS, ONTA WILLIAMS and LAGUERRE PAYEN,	:	
Appellants.	:	

REPLY BRIEF FOR DEFENDANT-APPELLANT JAMES CROMITIE

PRELIMINARY STATEMENT

James Cromitie (hereinafter "Appellant" or "Cromitie") has appealed from a judgment of the United States District Court for the Southern District of New York (Honorable Colleen McMahon, United States District Judge), convicting him of one count of conspiracy to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C), three counts of an attempt to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C), 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), 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), one count of a conspiracy to kill officers and employees of the United States in violation of 18 U.S.C. §§ 1114 and 1117, 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. The convictions were the result of a prolonged sting operation by the FBI, led by a perjurer and convicted felon Shahed Hussain as its informant, to involve Cromitie and his co-defendants in a would-be bombing of a Jewish community center and synagogue in the Bronx and a would-be Stinger missile attack on military planes at Stewart Airport. Cromitie was convicted along with his co-defendants and sentenced to a term of 25 years imprisonment on each count, all such terms to run concurrently. He is serving that sentence now.

Cromitie filed his main brief on appeal on February 1, 2012, in which he argued that his conviction and sentence should be set aside for two principal reasons:

(1) Cromitie was entrapped as matter of law. Cromitie asserts that the district court erred in denying his post-trial motion based on entrapment and maintains that the record developed at the trial of this case indisputably established that he was induced by the government to commit the crimes of which he was convicted, and that the government failed to prove beyond a reasonable

doubt that he was predisposed to commit those crimes before and independent of the government's sting operation against him (Cromitie Br. at 26-43)[1]; and

(2) The government's conduct directed against Cromitie was fundamentally unfair and deprived him of his Due Process rights. Cromitie maintains that the district court should have granted his pre-trial and post-trial motions based on the government's unprecedented over-involvement in the design and manufacture of the crimes of conviction, its extraordinary and persistent inducement of him to commit those crimes, its exploitation of Cromitie's religious beliefs in its pursuit of him, and his unusual vulnerability as a target of this kind of government operation (Cromitie Br. at 43-67).

Cromitie also adopted and joined the arguments raised by the other appellants David Williams, Onta Williams and Laguerre Payen. (Cromitie Br. at 69).

The government filed its brief in opposition on August 1, 2012. In that brief, it argues that the district court was correct in denying the above motions by Cromitie. As to the issue of entrapment, the government asserts that Cromitie and

---

[1] References to Cromitie's main brief are indicated by "Cromitie Br. at ___" and to the government's brief in response by "Govt. Br. at __." References to the Joint Appendix and the Special Appendix filed with appellants' briefs are indicated by "JA __" and "SA __," respectively, and to the government's supplemental appendix by "GSA __."

his co-defendants were not induced by the government to commit the subject crimes and that they were pre-disposed to commit them. (Govt. Br. at 38-72). As to the Due Process violation, the government argues that Hussain and the FBI's conduct was entirely proper and that Cromitie and the other defendants were not coerced into committing the crimes of conviction. (Govt. Br. at 73-86).

This brief on behalf of James Cromitie is in reply to the government's submission.

THE GOVERNMENT'S "STATEMENT OF FACTS"

The government's brief begins with a "statement of facts" that is noteworthy both for what it states and for what it leaves out. In this "statement of facts," the government offers a portrayal of James Cromitie, which runs throughout its entire brief, as an already-formed terrorist and the mastermind of the would-be attacks of May 20, 2009. That portrayal is so ludicrous and so utterly at odds with the record that it could not be the view of anyone but the most zealous partisan. Indeed, the government did not even make these arguments at trial.

This new incarnation of Cromitie presented in the government's brief certainly was not the view of the district court that presided over the trial of this case and heard all of the evidence. At the sentencing of Cromitie, the court

described him, correctly, as "bigoted and suggestible" (JA 2710) and took note of his epic "buffoonery" (JA 2716). The court observed that "I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition." (Id.)(See also JA 2718: "[T]here never would have been any terrorist operation if the government had not made one up..."). In truth, Cromitie occupied the role of "someone else's tool" (JA 2715) and was the mastermind of nothing.

The chronology set forth in the "statement of facts" begins with Cromitie's encounter with the government's informant Hussain on June 13, 2008, in the parking lot of the mosque where Cromitie worshiped. The fact that it does not begin earlier is significant: there was no evidence of a single event, act or even utterance by Cromitie before he met Hussain that would have indicated an interest in terrorism or violence. Cromitie was 42 years old in June, 2008, and there was nothing in those years of existence to suggest the slightest inclination toward the crimes that Hussain led him into. That Cromitie approached Hussain in the parking lot and that he supposedly said on the ride home that he "want[ed] to do something to America" depend for their very existence on the credibility on Hussain, whose lies and perjury are well-documented in the record. (SA 134-141) (in fact, the district court labeled Hussain a "serial liar" at SA 138). Further, even

if Cromitie did express such a wish, it is impossible to know what it meant. It is far too much to read into it a desire to blow up synagogues with car bombs or to shoot Stinger missiles at military aircraft, and there is nothing in Cromitie's past to suggest such a desire. Nevertheless, despite its corrupt and polluted source that is Hussain, the "do something to America" statement is treated as a given by the government and becomes the centerpiece of its brief, quoted and cited at least eight times.

The "statement of facts" also chronicles Cromitie's fantastic and invented tales of derring-do and his outlandish prejudiced remarks and notes that the FBI wondered whether, just maybe, Cromitie was the "proverbial talker." (Govt. Br. at 7). That he was, of course, and with Hussain's provocation, Cromitie kept right on talking and making stuff up. What becomes clear throughout the many long conversations he had with Hussain is Cromitie's willingness to say anything and agree with anything in order to ingratiate himself to Hussain. Why? Money is why: money that Hussain gave him for food, money for rent, money for weed and later, for fantastic amounts of cash and cars and vacations promised and dangled in front of him by Hussain.

The record also makes clear Cromitie's unwillingness or inability, or both, to actually do anything — such as coming up with an actual plan, or recruiting a

team (exposing the fantasy of his claim that he supposedly had a "sutra" team at his command), identifying targets, or even finding an illegal gun for sale, in Newburgh no less. The government's selective quoting of Cromitie's endless talk cannot mask his lack of action. He proved himself over and over to be the proverbial talker that the FBI knew he was.

That is all Cromitie was until he lost his job at Walmart and was running out of money. The suggestion in the government's "statement of facts" and elsewhere in its brief that Cromitie was not acting for the money is belied by the record, by the Santa's list of material goods offered to him by Hussain (Cromitie Br. at 57-58), which included money, cars, vacations and more and which the government, glaringly, fails to mention in its brief, and by Cromitie's recorded words when he re-connects with Hussain after losing his job:

> Cromitie: Yeah, I have to try to make some money brother.

To which Hussain responds:

> Hussain: I told you, I can make you 250,000 dollars, but you don't want it brother. What can I tell you?

And what Cromitie can and does tell Hussain is:

> Cromitie: Okay, come see me brother. Come see me.

(JA 4486) (Emphasis added).[2] Any lingering notion that Cromitie was not in it for the money should have taken flight at that point, but not so with the government's brief (Govt. Br. at 62-64). The district court, at sentencing, also saw this money motive clearly: "You [Cromitie] agreed to do what you agreed to do and you planned to do what you planned to do because you wanted money" (JA 2713), and "the fact is that [Cromitie] resisted Mr. Hussain's blandishments for many, many months until his personal circumstances made the offer of pots of money too great to resist ..." (JA 2718). Yet, the government's "statement of facts" ignores the "pots of money" and the other promised wealth too, and even makes reference to Hussain's ridiculous and fabricated explanation for the offer of $250,000 as if it were true or should be accorded any credibility at all. (Govt. Br. at 19). The district court found that explanation to be one of several acts of perjury by Hussain in his trial testimony. (SA 136-137).

The government's "statement of facts" also puts forth, as if it were true, that Cromitie identified a synagogue as a potential target (Govt. Br. at 10), but it was Hussain who immediately before was talking about a "Jew center" and "Yahudi

---

[2] This conversation, recorded on an FBI wiretap of Cromitie's phone, is significant because Hussain did not know it was being recorded. (JA 1572). It captures on the record Hussain's "off-the-record" offer (he thought) of $250,000, which he clearly had offered previously and about which he lied repeatedly at trial, as the district court found. (SA 136).

centers" that Cromitie clearly picked up on (JA 3294, 3316), and it was Hussain who, in subsequent discussions of targets, had to remind Cromitie repeatedly of synagogues (JA 3351, 3552). Nevertheless, the government, still pursuing a fictional version of Cromitie, again insists the "synagogue thing" was Cromitie's preference (Govt. Br. at 13), but even on that occasion in December, 2008, what Cromitie actually said was: "And ... I don't know about the synagogue thing. I don't know ..." (GSA 149, JA 3556). It is simply wrong to suggest that Cromitie was either the initiating or driving force behind any plan to bomb synagogues. The record shows that Hussain was, and Cromitie ultimately followed along.

Equally wrong is the suggestion that Cromitie was the initiating or driving force behind the plan to fire Stinger missiles at military planes at Stewart Airport. (Govt. Br. at 13, 41-46, 61). That suggestion was dispatched firmly and correctly by the district court:

> ... Based on the evidence known to me, certainly the evidence credited by me, it is the government, not Cromitie, that first introduced the idea of an attack on Stewart several months after the confidential informant proposed to attack Jewish targets.
>
> While Mr. Cromitie lived in Newburgh, he had never been to Stewart. The confidential informant told Cromitie that supply planes for U.S. troops in Afghanistan were flying out of the airport. He didn't otherwise know that. It is clear from the December 17,

> 2008 conversation between the confidential informant and Cromitie that it was not Cromitie's idea to shoot a missile at military aircraft at Stewart Airport. And that can be found at Government Exhibit 113E1-T [See JA 3526].
>
> Only after that conversation did Agent Fuller begin the process of acquiring the prop needed for the planned sting. In a December 23 investigative plan filed with his superiors, 3501-287, Agent Fuller included the following plan, "Prepare Tier 1 OIA communication in order to utilize inert explosives and/or military weaponry to show Cromitie based on targets identified." The targets had, of course, been identified in the first instance by the government. It is beyond [cavil] that the idea for the missile was the government's. Indeed, I very much doubt that James Cromitie had any idea what a Stinger missile was. (JA 2685) (Emphasis added).

In its portrayal of James Cromitie and his supposed role in conceiving, planning and carrying out the crimes of conviction, the government has selected and spun the "facts" it likes, even when the weight of the record plainly says otherwise, and it has omitted the facts it finds inconvenient. Its "statement of facts" goes far beyond the "most favorable light" it gets to enjoy as the prevailing party at trial and becomes revisionist history that does not accurately reflect the record. This approach points to the need for a large grain of salt when reading the government's "statement of facts," and for the need to save some salt for the government's arguments.

ARGUMENT

I. JAMES CROMITIE WAS ENTRAPPED.
(Replying to Government's Brief, Point I(A))

James Cromitie has contended since the beginning of this case that he was entrapped, and it was his first point on appeal. (Cromitie Br. 26-43).

The government's response gets off to a shaky start by pointing to, in an effort to rebut Cromitie's claim of entrapment, the defendant's "enthusiasm" and "complete absence of any moral hesitation." (Govt. Br. at 38). But these are not elements to a defense of entrapment, and the government cites no authority for them. Nor would it make much sense to require a lack of enthusiasm or moral hesitation on the part of a defendant claiming entrapment since such emotions may or may not be present in any given case and would be difficult to gauge in any event. Finally, the government's assertion is in fact untrue in this case: Cromitie's well-documented inaction, his words evincing a desire not to harm innocent people, his prompt selling of the camera Hussain bought him for some quick cash, and his six weeks of active, intentional avoidance of Hussain despite Hussain's near-manic efforts to contact him, belie any assertion of "enthusiasm" or "complete absence of moral hesitation." In reality, they prove the opposite.

(a) Inducement by the Government.

Despite abundant proof — and the district court's finding — to the contrary, the government persists in its argument that Cromitie and his co-defendants were not induced by Hussain to commit the crimes of conviction. The burden on a defendant to show inducement is "relatively slight," United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994), a burden nowhere acknowledged in the government's brief. In any event, this "relatively slight" burden was easily met by Cromitie.

The government also avoids meaningful discussion of the facts that are incompatible with its argument that Cromitie was not induced. The lack of any evidence whatsoever of an interest by Cromitie in terrorism or violence before he met Hussain should be significant. Moreover, as far as evidence in the record is concerned, it is astonishing and telling that the government would ignore all of the money, the cars, the vacations, the barber shop, and everything else that Hussain promised Cromitie in order to get him on-board with the plan. It is hardly a stretch to conclude that Cromitie, an impoverished man of limited intellect but with no prior interest in terrorism or violence, was induced by Hussain and the wealth and objects he promised to undertake the crimes that led to the conviction in this case. Cromitie even says so when he calls Hussain on April 5, 2009. (JA 4486).

Instead, the government relies on the vague, ill-formed words of Cromitie, the proverbial talker, trying to ingratiate himself to Hussain, while ignoring his many contradictions. Indeed, it is Hussain who turns Cromitie's generalized anger in the direction of "jihad" (Hussain: ... if you really have to do something, you have to do something in jihad, and try and do something...", Cromitie: "You right brother, you're telling me, right? You right, Hakim, I'm sure" (JA 2777-2778)). Cromitie was suggestible and malleable in the hands of Hussain and eventually began to mouth the words of jihad and terrorism, but the thoughts had been implanted by Hussain. It was Hussain who claimed membership in Jaish-e-Mohammed and described that group's mission and acts of terrorism to Cromitie. He even invited Cromitie to join him in attending a Jaish-e-Mohammed conference in Pakistan. (JA 613). In the end, Hussain managed to warp Cromitie's self-proclaimed quest to be a "good Muslim" (JA 4592) into something quite different.

Despite his best efforts, Hussain nevertheless was unable to prod Cromitie to take action, to come up with a plan, or a target, or a gun, or recruit others, none of which Cromitie seemed able or interested enough to do. It was not until Hussain put "pots of money" and other items of wealth into the conversation that

he got Cromitie to move. And of course by that time Cromitie had lost his job at Walmart and told Hussain he needed "to try to make some money." (JA 4486).

Contrary to the assertions in the government's "statement of facts," the charged crimes were not Cromitie's idea. Without Hussain's manipulations and inducements, those crimes would never have even occurred to Cromitie, let alone be committed, and the district court so found. The government's contention that "the charged crimes were Cromitie's idea" (Govt. Br. at 45) and therefore he was not induced by Hussain is swamped by a record that shows literally overwhelming inducement. As this Court phrased it in United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952), Hussain induced Cromitie and thereby indeed "got the accused in motion."

(b) Cromitie Was Not Predisposed.

Once governmental inducement has been established, it becomes the prosecution's burden to prove, beyond a reasonable doubt, that the defendant was already disposed to commit the crime of conviction before the government turned its attention to him and independently of that attention. Jacobson v. United States, 503 U.S. 540, 549 (1992). To do that, the government asserts that the evidence showed "an already formed design on the part of the accused to commit" the

charged crime and, in any event, "a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." United States v. Al-Moayad, 545 F.3d 139, 154 (2008)[3] (Govt. Br. at 46). Thus, says the government, Cromitie was predisposed to commit the crimes of which he stands convicted.

The government has a big problem at the very outset in making the above argument: the two alternatives it relies on, already-formed design and ready response, are logically inconsistent with each other in their respective underpinning and would not co-exist in the same case as to the same defendant. A defendant with an "already formed design" could not "respond" — readily or not — to an inducement to commit a crime he had already formed a design to commit, and a defendant who is responding readily is responding to something, i.e., an inducement that would have been unnecessary if he already had the design to commit the charged crime. The district court recognized this inconsistency explicitly (SA 102-103) and denied Cromitie's post-trial motion on the grounds

---

[3] The Al-Moayad decision and a host of other decisions cited by Cromitie in his brief (Cromitie Br. at 28, 34) also provide that the government may establish pre-disposition by showing "an existing course of criminal conduct similar to the crime for which [the defendant] is charged." Id. There is no proof, and no suggestion from the government, that this alternative has any application to Cromitie.

that he had an already-formed design, not that he provided a ready response to Hussain's inducements. The government, in its brief, on the other hand, does not recognize the inconsistency between the two alternatives and attempts to straddle two horses heading in opposite directions.

The government's lack of resolve is explainable by the fact that the evidence, even viewed most favorably to the government, does not support either alternative. Indeed, the district court's finding of an "already formed design" cannot be squared with its own observation that

> There is not the slightest doubt in my mind that James Cromitie could never have dreamed up the scenario in which he actually became involved. And if by some chance he had imagined such a scenario, he would not have had the slightest idea how to make it happen.

(SA 103). In fact, the court, in recognizing that "the precise targets of the jihadist attacks, as well as the method for carrying them out were suggested by Hussain (which means they were, ultimately, the FBI's idea)" (id.), seems to verge on a ready-response rationale for denying Cromitie's post-trial motion, but it ultimately does not adopt that rationale. In any event, there was no evidence at trial that Cromitie had ever acted in a way or even uttered a word before meeting Hussain that indicated he possessed any terrorist inclinations, let alone an already formed design to commit the crimes with which he was charged. Further, his statements

to Hussain upon their meeting and thereafter were largely vague, contradictory, or prompted and goaded by Hussain, or all three. There is simply no proof, before Cromitie met Hussain and independent of that poisonous relationship, that Cromitie was pre-disposed to commit the crimes of conviction, as Jacobson requires. The district court was wrong to conclude otherwise, and the government is wrong to argue otherwise now.

The government compares its proof in this case to decisions in other cases "upholding the sufficiency of predisposition evidence." (Govt. Br. at 54). However, a reading of the cases cited by the government proves how different they are from this case. In United States v. Al Kassar, 660 F.3d 108, 119-120 (2d Cir. 2011), the Court took note of the "defendants' knowledge of how to procure and smuggle arms suggest[ing] experience in the trade;" in United States v. Brand, 467 F.3d 179, 194-195 (2d Cir. 2006), a child enticement case, the defendant previously had entered chat rooms with names suggesting underage sex; and in United States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993), a child pornography case, the defendant earlier had expressed an interest in materials involving "youngest performers." All of these defendants thus had engaged in acts prior to the government's involvement, which informed the issue of predisposition and explained their response to the government's subsequent approach and invitation

to commit a crime. Not so James Cromitie. He had engaged in no acts prior to the government's involvement to indicate any predisposition at all toward terrorism or violence.

Thus, everything the district court relied on in denying Cromitie's motion, and everything the government now relies on to hold on to its conviction, occurred after Hussain met Cromitie and began to work him. That Cromitie made stupid, bigoted statements cannot be denied, but they are far more indicative of a desire to please and to ingratiate than a desire to do harm, past, present and future. Even assuming arguendo that these statements meet the requirement of Jacobson at all, their vague and contradictory content and Cromitie's motive for making them undermine their value as proof that he was predisposed to commit terrorism. In any event, those statements most surely were "the product of the attention that the Government had directed [him]," Jacobson, 503 U.S. at 550, and therefore they simply do not illuminate a predisposition to commit the crimes of conviction before receiving that attention.

The government's alternative argument, that of "ready response" (Govt. Br. at 59), itself has a ready response: there was no response from Cromitie that was ready or prompt or not the product of Hussain's persistent importuning of him. Over the many months of their relationship, Cromitie resisted the informant's

requests to come up with a plan, to select targets, or to recruit additional jihadists. When Hussain left for Pakistan, Cromitie "just dropped everything" (JA 3596), a fact the government recognized when it informed Stewart Airport officials that Cromitie "would not conduct anything without assistance from [Hussain]." (JA 4573). Thereafter, Cromitie laid low and maintained silence for six weeks and avoided Hussain's repeated efforts to contact him. Cromitie only resumed that contact when he needed money. There are many words to characterize Cromitie's response to Hussain, but "ready" would not be one of them.

Comparisons with other cases only serve to reinforce the fact that James Cromitie had done nothing and said nothing before meeting Hussain to indicate an interest in terrorism or violence. He was importuned with religion and then with material goods, overwhelming to a man of limited means and intellect and, although he talked a great deal and a great deal of it was hateful, he still resisted acting. Only when he lost his job and his need for money became acute did he finally succumb to Hussain's promises and join in Hussain's plan. No other case looks like this one, and its unique and unprecedented nature was certainly noted by the district court. (JA 2710-2711).

Nevertheless, if the standards set down in previous cases are meant to apply and if the words in those cases are given their ordinary meaning, then James

Cromitie was induced to by the government to commit a crime that he was not disposed to commit before and independent of the attention Hussain and the FBI directed toward him. Although the planned would-be crimes were unthinkable, their nature and heinousness do not change the fact that Cromitie was entrapped. He would not and would never even have imagined the crimes of conviction before Hussain came along with those "pots of money." Cromitie's post-trial motion for a judgment of acquittal should have been granted.

II. THE GOVERNMENT'S CONDUCT DIRECTED AT JAMES CROMITIE WAS FUNDAMENTALLY UNFAIR.

(Replying to Government's Brief, Point II)

James Cromitie contends that the totality of the government's conduct against him, which conduct baited and lured him into involvement in a crime he never would have committed if he had been left alone, was fundamentally unfair and violated his Due Process rights. (Cromitie Br. at 43-69). He made this objection before trial and renewed it after trial in a motion to dismiss the indictment, but the district court denied the motion. (SA 61). In that, the court erred. The motion should have been granted.

The government argues that the district ruled properly, that Hussain and the FBI's conduct was entirely proper, and that Cromitie and the other defendants

were not coerced into committing crimes. (Govt. Br. at 73-86). However, the government fails to grasp properly the law and fails to address Cromitie's contentions, and both failures work to undermine its argument.

While the legal origins of Cromitie's Due Process assertion are clear enough,[4] the present contours of the law in this area are much less so. Analysis of government misconduct by employing adjectives to determine whether it is "outrageous" enough, or "shocking" enough, or "egregious" or "repugnant" enough, is not especially helpful, particularly in a unique and complex case like this one. Respectfully, neither is the fact that this Court has never found a Due Process violation based on government misconduct. (Cromitie Br. at 46-47; Govt. Br. at 76-77). The boundary lines of proper and improper government conduct are ever harder to discern for everyone when there is not one case that can be pointed to as an example of when the government went too far. Cromitie believes his case provides that example.

---

[4] Both Cromitie and the government cited United States v. Russell, 411 U.S. 423 (1973), and Hampton v. United States, 425 U.S. 484 (1976), in their briefs, and Cromitie cited Kinsella v. United States, ex rel. Singleton, 361 U.S. 234, 246 (1960), for the concept that Due Process is implicated by "the denial of that 'fundamental fairness, shocking to the universal sense of justice.' (Citations omitted)."

The government begins its discussion with the proposition that its conduct was "entirely proper." (Govt. Br. at 79). Contrary to the government's assertion (Govt. Br. at 82), no one has contended that sting operations, even "elaborate" ones, are per se improper, but the sting operation in Cromitie's case differs from those in every other case cited by the government. In every other case, there was prior or ongoing criminal activity, United States v. Al Kassar, 660 F.3d 108 (2d Cir. 2011), United States v. Rahman, 189 F.3d 88 (2d Cir. 1999), United States v. Lakhani, 480 F.3d 171 (3d Cir. 2007), or a pre-existing criminal plan, United States v. Schmidt, 105 F.3d 82 (2d Cir. 1997), or, in the Abscam cases, criminal legislators who "showed up to take the bribes." United States v. Myers, 692 F.2d 823, 837 (1982). In this case, by contrast, there was no prior or ongoing criminal conduct, no pre-existing criminal plan, and Cromitie can hardly be described to have just "showed up" to participate in a crime. Rather, Cromitie was an unknown who was doing nothing. There was no evidence he had any criminal plans or intentions or even thoughts, least of all a plan to commit the kind of extraordinary and murderous violence that was designed by Hussain and his FBI handlers. In fact, as the district court found, there would have been no crime at all "except the government instigated it, planned it, and brought it to fruition." (JA 2718). James Cromitie and the other defendants were not terrorists, posed no danger to anyone,

and would never have conceived, let alone executed, the acts that led to their conviction if the government had left them alone. From such a starting point, the government's conduct in Cromitie's case sets it separate and apart from other reported cases.

The government mischaracterizes the defense's Due Process contention as a "recast entrapment claim" (Govt. Br. at 81) by focusing on Cromitie's inducement, but this is simply not so. Cromitie's brief recognized explicitly that entrapment is a separate issue and that his Due Process claim rests upon the government's misconduct. (Cromitie Br. at 47). Cromitie then proceeded to build his argument based on that misconduct in all its particulars:

(1) The government's over-involvement in every aspect of this case (Cromitie Br. at 49);

(2) The government's extraordinary and persistent efforts to induce Cromitie (Cromitie Br. at 55);

(3) The government's exploitation of Cromitie's religious beliefs (Cromitie Br. at 61); and

(4) The government's unfair targeting of a vulnerable defendant (Cromitie Br. at 65).

It is remarkable how little of Cromitie's argument the government actually responds to in its brief. Rather, it musters a brigade of straw men and then proceeds to knock each of them down. To be clear, Cromitie never argued that the government's "principal investigatory technique (i.e., deploying a confidential informant, who recorded conversations and promised material rewards)" (Govt. Br. at 82) was violative of his Due Process rights. It should be plain that his argument goes not to the technique but to the government's actual conduct in this case. Nor was there any contention that Cromitie was "coerced" (Govt. Br. at 84), as that word is commonly used and understood.

There is virtually no response from the government to the particularized misconduct set forth by Cromitie, a silence that says that there really is no response. The government quotes the Al Kassar decision that "financial ... inducements are not outrageous conduct," 660 F.3d at 123 (Govt. Br. at 84), but does not address the provenance of that statement, i.e., the Abscam cases, that involved criminal targets having nothing in common with Cromitie, a distinction in circumstances that should make a great deal of difference and that was set forth in Cromitie's brief. (Cromitie Br. at 59-61).

Likewise, the government studiously avoids any discussion of the exploitation of Cromitie's religious beliefs, except to state, again, that it was

Cromitie who first approached Hussain and spoke of a desire to "do something to America." This non sequitur does not speak at all to the exploitation that followed and was described in Cromitie's brief.[5] As noted above, it also depends on Hussain's non-existent credibility for its force.

Cromitie also contended that the government's targeting of him as a vulnerable and disadvantaged individual is appropriate for the Court to take into account, a consideration suggested by the decision in United States v. Schmidt, 105 F.3d at 92. He asserted that the characteristics of a target, such as a United States Senator in Abscam or a mentally ill individual in Schmidt or an impoverished, gullible and suggestible street person such as Cromitie, are appropriate to consider when calibrating the fairness of the government's conduct against the target. (Cromitie Br. at 65-67). It is in that vein that Cromitie urges that, for example, "extremely large financial inducements" do not mean the same thing to all potential targets, and that such inducement could well overwhelm the

---

[5] As another example of selective quoting, the government argues that Cromitie, in initiating the relationship with Hussain, "stated that he wanted to join Jaish-e-Mohammed, an organization that [Hussain] had just described as a terrorist organization." (Govt. Br. at 85). Left out is the fact that Hussain first offered Cromitie a chance to join him for a Jaish-e-Mohammed conference in Pakistan (JA 613). Also left out is Hussain's statement: "I said OK, and you can join Jaish-e-Mohammed." (Id.) Cromitie appears to have accepted this ridiculous invitation at face value. Hussain's guile and Cromitie's guilelessness were never more evident.

resistance of an impoverished or intellectually limited person and not that of, say, a United States Senator. Thus, the nature and vulnerabilities of the target should be a consideration in appropriate cases such as this one. The government did not respond to this argument in its brief.

Lastly, the government attempts to diminish the decision in United States v. Twigg, 588 F.2d 373 (3d Cir. 1978), by distinguishing its facts (Govt. Br. at 83), but the principles announced in Twigg and the Third Circuit's willingness to mark the line crossed by the government are what is important. Without characterizing the government's conduct with any of the usual adjectives such as "outrageous" or "shocking," the Twigg court stated succinctly:

> We do not believe the Government may involve itself so directly and continuously over such a long period of time in the creation of criminal operations, and yet prosecute its collaborators.

588 F.2d at 379. Those words could easily have been said by the district court in this case, and in essence they were, certainly as to the government's extended and extensive involvement in the creation of a crime that never, ever would have been committed otherwise. (SA 103). The principles and the fortitude of the Twigg

decision are worthy of this Court's consideration in this case, and Cromitie's reliance on it is not misplaced as the government argues.[6]

James Cromitie is no terrorist and has never posed a threat to anyone. He had never done, planned or even contemplated doing violence until he was poisoned by the government's informant. As the district court viewed it, it is certain that no real terrorist would have had anything to do with the likes of James Cromitie. (JA 2716). Only the government could have taken Cromitie and his co-defendants so far from their nature, (id.), men who

> 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.

(JA 2687) and move them with money and other promises to do what they never would have done if they had been left alone.

The totality of the government's conduct deprived James Cromitie of Due Process and was fundamentally unfair. The government may ignore his

---

[6] Cromitie also cited (Cromitie Br. at 46, 54-55), but the government did not address, the decision in United States v. Lard, 734 F.2d 1290, 1297 (8th Cir. 1984), that relied on Twigg and, also without the usual adjectives, criticized a government operation "aimed at creating new crimes for the sake of bringing criminal charges against Lard, who, before being induced, was lawfully and peacefully minding his own affairs."

arguments, but Cromitie believes and has seen, in his own case and in decisions in other cases, that the courts will not ignore them. Alexander Hamilton wrote in the Federalist Papers, No. 22, that "Laws are a dead letter without courts to expound and define their true meaning and operation." There is no higher law in our society than the Constitution, and no provision in the Constitution more important than the right of Due Process. Respectfully, it is for this Court to expound and define the meaning of Due Process in this case and to determine if the government's conduct toward James Cromitie, in its totality, met the standard of fundamental fairness that Due Process demands. If this Court concludes that it did not, Cromitie's conviction was unjust and cannot be allowed to stand.

CONCLUSION

For the foregoing reasons and those previously stated, Appellant James Cromitie respectfully asks that his conviction and sentence be set aside and that he be afforded such other relief as the Court deems just and proper.

DATED: White Plains, New York
September 28, 2012

Respectfully submitted,

CALHOUN & LAWRENCE, LLP

BY: _____

Clinton W. Calhoun, III
81 Main Street, Suite 450
White Plains, New York 10601
(914) 946-5900

Attorneys for Defendant-Appellant
JAMES CROMITIE