Motion #2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

: **09 Cr. 558 (CM)**

-v-

:

**JAMES CROMITIE,**
**DAVID WILLIAMS,** :
**LAGUERRE PAYEN, and**
**ONTA WILLIAMS** :

Defendants. :

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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT ONTA WILLIAMS' MOTION TO DISMISS THE INDICTMENT BASED ON OUTRAGEOUS GOVERNMENT MISCONDUCT**

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## INTRODUCTION

Defendant Onta Williams's Memorandum of Law in Support of Motion to Dismiss the Indictment details the unique degree to which the government created, orchestrated, and otherwise manufactured a "terrorist plot" to ensnare persons who were not and never had been engaged in any such activities and who patently lacked the means, resources, skills, or connections to commit any such acts. Moreover, well-established case law recognizes that this degree of governmental overparticipation violates due process and requires dismissal of an indictment.

While not disputing the astonishing extent to which it participated in the charged offenses, the government nonetheless urges the Court to deny the motion to dismiss.

The government accuses defendants of "blatantly" misstating the facts, but offers no examples of such purported misstatements. Instead, the government tries to demonstrate that James Cromitie – the primary target of the FBI's agent provocateur was a "hate-filled, virulent anti-Semite" who was "ready and willing to engage in violence" and had a history of violence and experience with explosives.

Remarkably, the government largely ignores defendants' legal arguments. Instead, it simply asserts that claims of outrageous governmental misconduct based on overparticipation in the crime are "not cognizable" as a "matter of law "

The government is wrong on both the facts and the law First, defendants made *no* factual misstatements. Second, the government's characterization of Cromitie as a hate-filled bigot, experienced with explosives and "ready and willing" to engage in violence, is *unsupported* by the government's own evidence. Third, the assertion that defendants' legal arguments are "not cognizable" as a "matter of law" is directly *refuted* by controlling Supreme Court and

Second Circuit precedent.

The indictment must be dismissed.

## ARGUMENT

## I. THE GOVERNMENT NEITHER IDENTIFIES ANY MISSTATEMENTS OF FACT BY DEFENDANTS NOR POINTS TO ANY OTHER FACTS THAT WOULD JUSTIFY THE GOVERNMENT'S OUTRAGEOUS MISCONDUCT IN MANUFACTURING THE CHARGED CRIMES

### A. THERE ARE NO MISSTATEMENTS OF FACT IN DEFENDANT'S MEMORANDUM OF LAW

The government boldly accuses defendants of "egregiously misstat[ing] the facts and background of the investigation," and making "blatant misrepresentations of the facts to the Court." Government Memorandum (hereinafter GM) at 2. This name-calling, however, is not backed up by even a single specific example of such purported misstatements. The facts recited in Defendant's Memorandum are scrupulously accurate.

### B. THE GOVERNMENT DOES NOT CITE ANY FACTS TO SUPPORT ITS CLAIM THAT CROMITIE WAS AN "ENTHUSIASTIC" PARTICIPANT "READY AND WILLING TO ENGAGE IN VIOLENCE"

Rather than pointing to any actual misstatements of fact, the government primarily complains that defendants have "selectively quoted recordings to portray the lead defendant, James Cromitie, as a highly reluctant wrongdoer who tried to constantly rebuff the relentless badgering of the Confidential Informant." GM at 2. In reality, says the government, Cromitie's statements show an "enthusiasm to participate, and his desire to do things and be reachable to the CI" and "make clear that he was ready and willing to engage in violence." GM at 8, 10.

The government does not support its allegation that Cromitie was an "enthusiastic" participant "ready and willing to do violence" with any facts. Although the government repeatedly quotes Cromitie (often out of context) as expressing violent or hateful views, it is

unable to point to a single thing Cromitie actually did – or even agreed to do with Hussain between June 2008 and February 2009

The undisputed facts show that Cromitie was extremely reluctant to accede to Hussain's demands and importunings that he help commit terrorist acts. Hussain, the government provocateur, first met Cromitie in June 2008. Within days, he informed Cromitie that he was the representative of a Pakistani terrorist organization and asked Cromitie to join the group and help him commit terrorist acts. Over the next eleven months, Hussain had literally dozens of conversations with Cromitie, both in person and over the telephone. In the course of those discussions, Hussain repeatedly and explicitly asked Cromitie to make a plan, pick a target, find recruits, get guns, conduct surveillance, etc. He also offered financial rewards – for example, extraordinary sums of money and a BMW -- if Cromitie would agree to help Hussain and his terrorist organization.

For nearly a year, Cromitie continually evaded and declined Hussain's importunings. He did not supply any guns, obtain any recruits, agree to any plan, or select any targets. Although Cromitie at times appeared to express an abstract interest in Hussain's proposals, he balked every time Hussain sought a more concrete commitment or action. Moreover, when Hussain (after trying for months) finally persuaded Cromitie to do something on February 24, 2009[1], Cromitie's immediate response was falsely to tell Hussain he was moving to North Carolina and then avoid all of Hussain's efforts at contacting him for the next seven weeks. In light of this record of avoidance and evasion, the government's insistence that Cromitie was an "enthusiastic"

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[1] On February 24, Hussain bought Cromitie a digital camera and drove him to Stewart Airport so that Cromitie could take some pictures. As with everything else, this activity was entirely Hussain's creation. Indeed, although he lived for years only a few miles away, Cromitie admitted to Hussain that the occasion was the first time he had ever been to Stewart Airport.

participant "ready and willing to engage in violence" is meritless.[2]

### C. THE GOVERNMENT'S CLAIM THAT CROMITIE HAD A HISTORY OF VIOLENCE AND EXPERIENCE WITH EXPLOSIVES IS UNSUPPORTED BY ANY CREDIBLE FACTS

The government also apparently seeks to justify its misconduct in manufacturing the charged crimes on the ground that during the course of the investigation it learned about Cromitie's "history of violence, and specifically his prior use of explosives." GM at 10-11 The government notes Cromitie's boast that at some unspecified time "at least six of us" were "going into [New York] towns that we didn't even know" and using flare guns to shoot gasoline bombs into police stations and police cars.[3] GM at 11 It also cites Cromitie's brag that in 1994 he threw an "Ash can" [a firecracker supposedly so powerful that Cromitie told Hussain one could "blow out half of that wall"] into a police station in the Bronx. GM at 11-12.

The experienced FBI agents and assistant United States Attorneys monitoring this investigation must have known that Cromitie's tales about attacking police stations and cars with gas bombs hurled from flare guns were ludicrous fantasies designed only to impress Hussain. As best as counsel can determine, there have been no incidents of any police stations in New York ever having been attacked in such a manner and/or a police station in the Bronx having been attacked with an explosive device in 1994.[4]

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[2] Even after Hussain reminded Cromitie that "I told you, I can you make you $250,000" (4/5/09, T3 call #4320), Cromitie was reluctant to get involved. (4/7/09, DVD 20).

[3] In this same conversation, Cromitie also ridiculously asserted that one of the perpetrators was now in prison for having stolen $126 million dollars from Tiffany's.

[4] If anyone involved in the investigation had bothered to look at Cromitie's rap sheet, he or she would have realized that it was particularly unlikely Cromitie could have bombed anything in 1994 because he was in jail for all but 19 days of that year (Bates 116-17). Moreover, the

Cromitie's other comments about his experiences with violence and crime were just as false and easily disprovable. For example, Cromitie told Hussain he had served fifteen years in prison for shooting and paralyzing the 12 year old son of a rival drug dealer But, as the government well knew, Cromitie has no convictions for *any* crimes of violence or weapons possession – let alone a conviction for attempted murder -- and the longest sentence he had served was 4½ years. (Bates 120). On other occasions, Cromitie bragged to Hussain that he used his job at Wal-Mart to steal handguns from shipments to the store. But, as the government must have known, Wal-Mart does not even sell handguns and has not done so since 1994. (See http://www.nytimes.com/1993/12/23/business/wal-mart-to-end-sales-of-handguns-in-stores.html?pagewanted=1).[5]

## D. THE GOVERNMENT'S CHARACTERIZATION OF CROMITIE AS "HATE-FILLED" IS INACCURATE AND DOES NOT JUSTIFY THE GOVERNMENT'S MISCONDUCT IN MANUFACTURING A CRIME

Finally, much of the government's Statement of Facts seeks to show that Cromitie was a "hate-filled, virulent anti-Semite" who engaged in "venomous rants" against Jews and Americans. GM at 2, 8. This characterization is both inaccurate and largely irrelevant.

The government's "proof" that Cromitie is a blood-thirsty bigot is premised entirely on

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government did not even have to look at Cromitie's rap sheet to realize there were some obvious contradictions in Cromitie's self-reporting on his criminal past. According to Hussain, on June 23, 2008, Cromitie said that he had been sentenced to fifteen years in prison in December of 1991 (Bates 1530). If that were true, he surely would not have been at liberty in 1994.

[5] Cromitie also apparently tried to impress Hussain with a series of easily ascertainable falsehoods about his background. Among other things, he told Hussain that he was 54 years old but did a thousand push-ups a day; that his father was from Afghanistan, that his mother had carried him, *in utero*, in Afghanistan, that he had been to Afghanistan three times, most recently in 1995; and that his girlfriend had served a 14 year sentence for attempted murder As the government could have discovered with a minimum of checking, none of these things was true.

comments he made in response to Hussain -- a professional informant and provocateur who constantly tried to turn his conversations with Cromitie in an anti-Semitic or anti-American direction while pretending to be interested in Cromitie's life, paying for his meals, and giving and offering him money In context, it is clear that to receive this attention and money, Cromitie said what he thought Hussain wanted to hear Other than Cromitie's statements to Hussain, the government does not cite any evidence that Cromitie harbored bigoted opinions and we do not believe there is any Notably, the government secretly recorded thousands of conversations between Cromitie and numerous individuals other than Hussain. In none of these conversations does Cromitie make any anti-Semitic or anti-American comments. Nor did the government find any anti-Semitic or anti-American documents when it searched Cromitie's home following his arrest.

Cromitie's seemingly extreme rants also have to be viewed in conjunction with his other fantastic statements to Hussain. As demonstrated above, virtually everything Cromitie told Hussain about himself and his activities was untrue, usually obviously so. We believe the evidence will show that the hateful views he supposedly expressed to Hussain were similarly dissembled.

Finally, and most importantly, the government does not explain why Cromitie's unpleasant words, even if taken at face value, would justify the government's wholesale manufacturing of a crime. This heavily-monitored investigation went on for more than eight months before Cromitie, despite relentless pressure, agreed to do anything with Hussain. Over that period of time, the government had to have realized that Cromitie was not, and never had been, engaged in any terrorist activities and lacked the resources, skills, or connections to commit

any such crimes. Thus, even if Cromitie was "full of hatred" (a characterization we emphatically deny), the government was not justified in instigating and engineering an elaborate fake terrorist plot. Indeed, it is the essence of outrageous government misconduct to manufacture a crime for no purpose other than to prosecute someone who is neither engaged in nor capable of committing such activities – which is exactly what happened here.

## II. CONTROLLING SUPREME COURT AND SECOND CIRCUIT PRECEDENT REFUTES THE GOVERNMENT'S ARGUMENT THAT DEFENDANTS' CLAIMS OF OUTRAGEOUS GOVERNMENTAL MISCONDUCT ARE "NOT COGNIZABLE" AS A "MATTER OF LAW"

Citing numerous cases, defendants' Memorandum of Law persuasively demonstrates that the government violated due process by creating, directing, supplying, funding and micro-managing every aspect of a faux "terrorist plot" designed to ensnare persons who were not and never had been involved in any similar activities. DM at 22-36. The government's legal argument, however, neither addresses the substantive merits of defendants' claim nor tries to distinguish the legal authority upon which defendants rely Instead, the government boldly contends that this Court is simply powerless to do anything about its misconduct. According to the government, claims about official overparticipation in a crime "are *not cognizable* under Second Circuit law" and are "precisely the type of allegations that the Second Circuit stated unequivocally cannot – as a matter of law – constitute outrageous government misconduct amounting to a Due Process violation." GM at 16.

The government's meritless position ignores controlling precedent. The Supreme Court, the Second Circuit and numerous other federal courts have explicitly acknowledged that governmental over-involvement in a crime may, if sufficiently extreme, violate due process.

United States v. Russell, 411 U.S. 423 (1973), is the seminal case on outrageous governmental misconduct. The defendant in Russell claimed that he had been denied due process because of an alleged intolerable degree of governmental participation in the charged criminal enterprise. The Supreme Court did not hold that such a claim was "not cognizable." Rather, it carefully reviewed the facts of the case, and concluded that the government's investigatory conduct in that case was not so outrageous as to bar a prosecution. The Court specifically left open the possibility that "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." Id. at 431-32. See also Hampton v. United States, 425 U.S. 484, 495 & n.7 (1976) (Powell, J., concurring) (reaffirming possibility that government overparticipation in criminal activity could, if it reached a "demonstrable level of outrageousness," violate due process).

Since Russell and Hampton, the Second Circuit has repeatedly recognized that government overparticipation in a crime could be so extreme as to violate due process. In United States v. Rahman, 189 F.3d 88 (2d Cir 1999), the defendants claimed that the government had "lent direction, technical expertise, and critical resources to the bombing plot through Salem, an informant" and that the indictment, therefore, should have been dismissed "by reason of the government's 'overinvolvement' in the conspiracy " Id. at 131 Citing United States v. Russell, the Second Circuit ruled that "such an argument *might in principle prevail* even where, as here, the defendants were not entrapped by the Government." Id. (emphasis added).[6]

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[6] The Second Circuit denied relief in based on the facts. In Rahman, the defendants "were already actively advancing a conspiracy, and they already had substantial resources and technical expertise....[t]here was no evidence that the criminal conspiracy would have foundered without

Similarly, in United States v. Schmidt, 105 F.3d 82 (2d Cir 1997), the defendant sought to dismiss the indictment on the ground that the government's extensive involvement in her plot to escape from prison constituted governmental misconduct. The Second Circuit agreed that such allegations of manufactured crime, if proved, would warrant dismissal of the indictment:

> Nevertheless, a claim that the government has acted outrageously is taken seriously because ensuring that the government does not trample in an unconscionable manner on individual dignity is a bed-rock duty of judicial officers. *Sometimes the government's involvement in manufacturing crime* is demonstrably outrageous, and in those cases, the convictions of targeted defendants have been set aside.

Id. at 91 (emphasis added).

Accordingly, far from being "not cognizable," there are literally dozens of opinions from this Circuit and others in which courts have considered, and sometimes accepted, motions to dismiss based on an allegations of government overparticipation. See, e.g., United States v. Ascencio, 873 F.2d 639, 640 (2d Cir 1989); United States v. Nunez-Rios, 622 F.2d 1093, 1098 (2d Cir. 1980); United States v. Lakhani, 480 F.3 171 (3d Cir 2006); United States v. Bogart, 783 F.2d 1428 (9th Cir. 1986); United States v. Kassar, 582 F.Supp. 488 (S.D.N Y 2008). In light of these many cases, the government's position that defendant's claims must be rejected "as a matter of law" borders on the frivolous.[7]

**CONCLUSION**

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the Government's entry " Rahman at 91 The facts in this case are precisely the opposite.

[7] In a footnote, the government also suggests that a claim of outrageous misconduct based on harm to third parties "has obviously never been recognized by the Second Circuit." GM at 18 n. 5. This assertion is equally without foundation. See United States v. Chin, 934 F.2d 393 (2d Cir 1991) (reviewing, on the merits, defendant's claim that conduct of investigation violated due process because of potential harm to third parties and noting that allegations "raise[d] very serious concerns"). See also United States v. Archer, 486 F.2d 670, 676-77 (2d Cir. 1973).

The government's Memorandum of Law in Opposition to Defendants' Motion to Dismiss the Indictment for Outrageous Governmental Misconduct essentially concedes that the crimes charged against defendants were manufactured by the government. The government's attempts to defend this egregious misconduct are factually unsupported and legally meritless. Accordingly, the Motion to Dismiss the Indictment should be granted.

Respectfully submitted,

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