UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

YASSIN AREF,
Petitioner,

Case No. 1:04-CR-402 (TJM)

V.

UNITED STATES OF AMERICA,
Respondent.

MOHAMMED MOSHARREF HOSSAIN,
Petitioner,

Case No. 1:04-CR-402 (TJM)

V.

UNITED STATES OF AMERICA,
Respondent.

Proposed **AMICUS BRIEF**
Project SALAM, the Muslim Solidarity Committee And the Masjid As Salaam

On October 10, 2006, Yassin Muhidden Aref (hereinafter "Aref"), and Mohammed Mosharref Hossain (hereinafter "Hossain") were convicted of terrorism-related charges in connection with an FBI sting involving the sale of a fake missile for a fictitious terrorist attack, and for money laundering. Aref was also convicted of one count of lying to the FBI. On March 8, 2007 the two defendants were sentenced to 15 years incarceration each. Their appeals to the Second Circuit Court of Appeals and to the U.S. Supreme Court were denied, and they have exhausted their appellate remedies.

Aref and Hossain have petitioned this court pursuant to the Federal Rules of Criminal Procedure, Section 2255 for, among other issues, the appointment of an independent prosecutor to review their cases to determine if the government and the courts provided them with necessary exculpatory information, a fair trial and justice. They seek relief similar to what was granted in People v. Theodore Stevens (a Stevens review), or what the Inspector General of the Department of Justice recommended in his June 10, 2009 Report to correct the failure of the Justice Department to identify and provide exculpatory information in terrorism cases – an independent review.

Amici, Muslim Solidarity Committee (hereinafter "MSC"), Project SALAM (hereinafter "SALAM"), and the Masjid As-Salaam respectfully submit this Amicus brief, pursuant to Rule 29 in support of the defendants 2255 petition and to present information which may assist the court in deciding the issues raised by the defendants, especially where the defendants are unrepresented.

INTEREST OF THE AMICI

1. Muslim Solidarity Committee (MSC)

Amicus MSC is an organization that was formed on October 13, 2006, after the convictions of Aref and Hossain, to care for the families of the defendants, and to advocate against the "preemptive prosecution" program of the United States Government which incarcerates "suspicious" Muslims, including Aref and Hossain, in order to preempt them from possibly committing crimes in the future.

The MSC, made up of Muslims and non-Muslims alike, has raised over $30,000 to date to support the families of the defendants by paying rent and buying food and helping them to become financially independent. Prior to sentencing, the MSC helped to obtain approximately 970 signatures on a petition to the court requesting leniency for the defendants, as well as encouraging over 100 letters to the court.

The MSC undertook to edit and publish Yassin Aref's autobiography, *Son of Mountains,* and assisted Shamshad Ahmad in editing and publishing his book about the FBI sting, *Rounded Up – Artificial Terrorists and Muslim Entrapment After 9/11.* The MSC also helped Ellie Bernstein produce her award winning film about the Aref/Hossain case, *Waiting for Mercy*. The MSC provided legal representation to the family of Yassin Aref in the form of a successful law suit against the US Government to obtain green cards for Aref's wife and children. And the MSC provided a continual source of information about the Aref/Hossain case for the public in the form of talks, rallies, letters, and articles, to community groups and scholars.

In his book *Rounded Up*, Shamshad Ahmad, the president of the Masjid As Salaam, made the following observation about the MSC

> Since then, [the founding of the MSC on October 13, 2006] this committee has literally assumed oversight of the welfare of the two defendants and their families. They have been steadfast in defending the Masjid As-Salaam and its community, and have become a watchdog group to ensure that Muslims are no longer targeted by the government. (*Rounded Up* p.168)

Aref, who has been incarcerated in two Communication Management Units in the mid-west (Terra Haute Ind., .and Marion, Ill.), is too far from Albany for his family to visit by themselves. The MSC has taken the Aref family on two 4 day trips out West to visit their father. Hossain, who is not in good health, is incarcerated in Fairton N.J., a 16 hour round trip from Albany including the visit. Members of the MSC have helped the Hossain family on numerous occasions to rent a van and make the long trip to visit Hossain in jail.

The MSC obtained grants from the Rosenberg Foundation for Children so that the children of the defendants could continue in their fine Islamic School in Albany, the An Nur school. Members of the MSC visit both families on a regular basis and have tried to provide resources so that the children will have to most normal upbringing possible under the circumstances.

2. Project SALAM (SALAM)

Amicus, Project SALAM (**S**upport **A**nd **L**egal **A**dvocacy for **M**uslim - hereinafter "SALAM") is an organization of groups from different parts of the United States, (including MSC), dedicated to researching whether the United States Government, in launching and operating its "preemptive prosecution" program, is violating the civil rights of Muslims across the United States. It was founded in August 2007 by representatives from the MSC, and from the Support Committees for Dr. Rafil Dhafir in Syracuse and for Syed Fahad Hashmi, in New York City. SALAM has also worked

closely with support committees for The Fort Dix 5, the Newburgh 4, Lynne Stewart, and has provided information to numerous organizations and individuals.

The first project of SALAM was to build a data base of Muslims and Muslim Organizations who were prosecuted (many in a preemptive manner) by the US government after 9/11. SALAM is presently following some 450 cases in its data base. This data base is available to anyone who visits the web site.

Using the data base, SALAM has prepared a series of letter-petitions (now totaling 7) calling on the President of the United States and the Attorney General of the United States to appoint special or independent prosecutors to determine whether, in connection with their preemptive prosecution program, prosecutors failed to provide appropriate exculpatory information, failed to provide fair trials, and failed to do justice to the Muslims that they targeted. (See www.projectsalam.org, a site which includes the data base, and the 7 SALAM letter- petitions to President Obama and Attorney General Holder). Over 2,600 people have signed these letter-petitions. A summary of the seven letter- petitions follows to show the broad range of topics and cases that SALAM has brought to the attention of the President and the Attorney General.

THE FEBRUARY 16, 2009 LETTER – A general request that the Justice Department review and dismiss cases involving "preemptive prosecution" in which innocent Muslims are targeted and convicted based on their religion and post 9/11 suspicion, rather than on evidence of actual crimes.

THE APRIL 4, 2009 LETTER – A request that the Justice Department review and dismiss certain specific cases of "preemptive prosecution" including: US v. Syed Fahad Hashmi; US v. Sami Al-Arian; US v. Rafil Dhafir; US v. Mohammed Hossain; and US v. Yassin Aref.

THE MAY 21, 2009 LETTER – A request that the Justice Department stop using various illegal practices against Muslims that violate the law, and treaties.

THE JULY 8, 2009 LETTER – A request that the Justice Department follow up on its exoneration of Sen. Theodore Stevens by exonerating innocent Muslims convicted in preemptive prosecutions that were based on entrapment by agents provocateur.

THE NOVEMBER 16, 2009 LETTER – A request that the Justice Department exonerate Muslims preemptively prosecuted on the basis of their charitable activities.

THE MARCH 8, 2010 LETTER – A request that the Justice Department exonerate Muslims preemptively prosecuted on the basis of the Material Support for Terrorism statutes, in situations where the statutes fail to provide notice that otherwise legal and even charitable activities are criminal.

THE APRIL LETTER (Presently in the process of being signed) – A request that the Justice Department deal with the serious issues of misconduct in which the Justice Department has been engaged, including the Office's failure to discipline lawyers who fail to disclose exculpatory information (the Stevens case)

3. Masjid As-Salaam

Amicus, Masjid As-Salaam is a mosque that was founded in October 1982 by Dr. Shamshad Ahmad, a physics professor at the State University in Albany (SUNYA) It moved to its present location at 276-278 Central Avenue in Albany in 1999, and Dr. Ahmad is now the president. It has grown to be one of the largest mosques in the Capital District.

Yassin Aref was the Imam of the Masjid As-Salaam, and Mohammed Hossain was one of its founders. When the FBI raided that mosque on August 5, 2004, and arrested Aref and Hossain, it threw the Muslim Community into turmoil. The members well knew that neither Aref nor Hossain had any involvement in terrorism. Affidavits attached to Aref's 2255 motion attest to the fact that Muslims who worshipped in the Masjid As-Salaam in

close association with Aref knew that Aref had never counseled violence or jihad or any illegality toward America. The community held Aref in the highest regard as a peaceful and spiritual person. They knew the two defendants had been tricked and entrapped by the FBI. Thus the Muslim community in Albany, like Muslim communities in many other parts of the US was faced with the terrifying prospect that the US government would trick and entrap innocent people simply because they were Muslim. If Aref and Hossain could be tricked and entrapped, then no Muslim was safe in the US.

The Masjid As Salam and indeed the whole Muslim community was profoundly affected by the sting and entrapment of Aref and Hossain, and yet the community has had no opportunity to be heard in the judicial proceedings. In this Amicus brief the Muslim community would have a chance to present its unique point of view.

4. Concerns of the Amici

The Amici are concerned about evidence that emerged after the convictions of Aref and Hossain which indicates that the defendants were framed by the FBI, because the FBI was suspicious about Aref's "ideology" and wanted to "preempt" him from any possible cooperation with terrorists. Hossain was simply involved as a way to get to Aref, and to generate a conspiracy with a non-governmental individual. The point of a sting is to give the target a fair choice of deciding whether to engage in criminal conduct or to withdraw from it. In the context of a "sting", a frame-up would occur when the government inserts information about the criminal nature of the sting in such a way that the target will not hear or understand that the sting is criminal. The government informant might, for

example, make incriminatory statements when the target is distracted, or in a code which the target does not understand, or in a manner to indicate that the statement is only a joke.

The possibility of a frame up is especially acute when, as here, the sting does not require that the target perform any act which is inherently illegal. When the target is invited to perform an inherently illegal act, such as buying drugs, the target is confronted with a clear choice of whether to participate or not. When the target is invited to perform a legal act (such as here witnessing a loan), which is made illegal only by outside circumstances, the government has a heavy burden of explaining clearly to the target why his legal act is made illegal by outside circumstances. Otherwise the target is not given a choice and the case is a frame-up. In the Aref/Hossain case there is abundant evidence that the "sting" was actually a frame-up in which Hossain was entrapped and Aref was never give a choice at all. This evidence includes the following:

1. A statement made by the prosecutor during summation that, "We are not proving that Mr. Aref is a terrorist." (Aref Aff. Para. 16 – Trial Transcript p. 2056)

2. An article by Bendan Lyons in the Times Union on October 12, 2006 which strongly suggested that Aref was framed by the FBI. The article quoted an unidentified FBI agent (later identified as FBI Agent Coll) as saying that the FBI decided after a long discussion not to show a missile to Aref, the way they showed a missile to Hossain. Instead the FBI decided to show Aref the trigger mechanism of a missile which is hard to identify as anything dangerous. "If Aref saw the missile", the agent said, "he may have been **spooked**", suggesting that the FBI's goal was to prevent Aref from realizing that the transaction was illegal and withdrawing ("spooking"). (Aref Aff. Para 20, Exhibit 2;).

Agent Coll later acknowledged providing this quote for the newspaper. (Aref Aff. para. 21, Exhibit 3)

3. A statement by the prosecutor on March 9, 2007 at a post-sentencing press conference in the Aref case, in which the prosecutor acknowledged that Aref was preemptively prosecuted.

> "Did he[Aref] actually himself engage in terrorist acts? Well we didn't have the evidence of that, but he had the ideology….Our investigation was concerned with what he was gonna do here and in order to **preempt** any, anything else, we decided to to take the steps that we did take…. I would say that there is a concern that he is one of those people [who might support terrorist activity] based on all the evidence that was uncovered in Iraq and all the additional evidence that was uncovered subsequently and that the sting **preempted** anything that might have happened later on. (Aref Aff. Para. 17, Exhibit 1)

4. A statement by the prosecutor on March 9, 2007 described the prosecution's understanding that Hossain was not a terrorist threat:

> Quite simply, with the assets that were available to the FBI at the time, they could not get to Aref directly. It would have been awkward, it would have been unseemly, it would have aroused suspicion. However, the informant [Malik] did have a prior, I'll call it, minimal relationship with Hossain and it was a way to get in. There was no thought by the way, at the beginning that we are going to bring Hossain in some big money-laundering scam, and put him in jail. The only thought was meet Hossain, get to know him and somehow be introduced to Aref. (Hossain Aff. Para 15, Exhibit 1)

5. The government sting was designed in such a way that incriminating sounding information would be quietly introduced into the conversations by the government's secret agent, Malik, under circumstances in which Aref would be unlikely to hear the information, or understand its meaning - a design characteristic of a frame-up [1] In a real

[1] The government "criminal information" consisted of statements by Malik on December 10, 2003 that his business involved selling "ammunition" (although selling ammunition is not illegal), and a statement (in response to Aref's comment that the transaction did not violate American law), that Malik did not pay taxes on the money (A-722). On January

sting the FBI should not have had any hesitation to clearly explain the illegal nature of the plot, and Aref's supposed role in it, so that Aref would have a choice as to whether or not to engage in criminal activity. Here the Government apparently tried to prevent Aref from knowing that his otherwise legal act of witnessing a loan was in any way participating in criminal activity.

The entire sting was designed to revolve around essentially **one sentence** uttered quickly by Malik to Hossain on January 2, 2004, while Aref was distracted in counting money for the loan. In all the hundred hours of conversations over more than 6 months of discussion, this one confused interrupted run-on sentence was the only sentence to directly connect the sale of the missile with the money for the loan that Aref was witnessing. The sentence, which Malik directed to Hossain, while Aref was concentrating on counting the money, is as follows:

Malik: Okay, and the $45,000 will be coming, like I have to give them something, you know, the instrument, and that will be coming like, in a, I would say probably couple of weeks from now, okay, cause you need money, then I have (interrupted by Hossain), because through, uh, because the last time I showed you, you know when I have to send

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2, 2004 Malik, after distracting Aref by asking him to count a wad of money, flashed the trigger mechanism to Hossain, said to Hossain that it was part of the missile he [Malik] had shown Hossain, and that when it was delivered he could get more money. Aref did not look up from his counting or respond to indicate he had heard or seen anything. On January 14, 2004 Malik stated in the middle of a long rambling comment about JEM, that they had sent a missile (always mispronounced as "mizzaile" to NY City "to teach President Musharref [of Pakistan] not to fight with us". Aref responded that he did not know anything about JEM, and made no comment to indicate he had heard or understood the reference to the missile; On February 12, 2004, Malik said not to go to NY City next week because a missile attack was coming. Neither Aref nor his friend Shaar took the comment seriously because it was not connected to any discussion, and if a serious attack was contemplated, Malik would hardly talk about it to a stranger (Shaar). The jury acquitted Aref of all the counts associated with these conversations. Aref was convicted only for the conversation on June 10, 2004 which was conducted in code for which Aref did not know the meaning. (Aref Aff., para. 33-48)

this in, then they will give me $45,000, $50,000, okay. (/Shows trigger mechanism to Hossain). This is the part of the missile (mispronounced as "mizzaile") I showed you (interrupted by Hossain), so as soon as it come, I'll give you, this is $5,000, so next couple of weeks, or less, I'll give you more money.

The Government in its brief to the Second Circuit claims that Malik's garbled statement to Hossain shows that "Aref was told that the CW's cash came from the sale of a missile to mujahideen", (Government's brief p. 83), but of course, Aref distracted and counting the money, would hardly have paid any attention to this confused gibberish. [2] Memoranda which indicated the FBI's intention that Aref should not learn of the illegal nature of the sting, would be exculpatory information which should have been disclosed to the court and would have been be discoverable as *Brady* or Rule 16 material. (Aref. Aff. Para. 31-32; 36)

6. Aref was convicted only for counts of the indictment that arose after the last conversation on June 10, 2004. This last June 10 conversation was conducted in a code ("chaudry" means "missile").[3] The government told the jury, and stated on pages 14, 40 and 84 of its brief to the Second Circuit, that Aref was given the meaning of the code word "chaudry" on February 12, 2004, the date that supposedly no recording was made.

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[2] The other few sentences which the government cited in its brief (p. 83) as establishing a connection between the loan and the sale of the missile do not in fact do so, and rely entirely on the one January 2, comment by Malik.

[3] During the June 10 conversation Malik offered to loan money to Aref, and said, "Because my business comes from selling ammunitions, you know…Chaudrys, we do that, that's where the business money comes from. I import them, I sell them and they give me money" (A-792). Aref made no comment to this. Later Malik said, "Remember that …it was a month ago we wanted to, that Chaudry was going to New York to make that money, but it didn't use. So, I, I, I, this, when it happens, I have to leave this country for two months, then, you know, I'll just go away. Aref responds three times, "No problem". Malik continues, "So, and then, two month I, I have to go, because if they use the Chaudry on 142, then I've got a problem." Aref responds in surprise that Malik has a problem and says three times that he [Aref] doesn't have a problem. (A-795)

However, these government claims were completely false. [4] No witness testified to having heard Aref told the meaning of the code on February 12, 2004 or on any other date. The fact that the government spoke in code to Aref on June 10, 2004, knowing that Aref was not aware of the code meaning, is an unmistakable sign of a frame-up. There can be no legitimate reason for this in a carefully scripted sting.

7. Moreover, the FBI would have immediately realized that since the tape fell from Malik in the car on February 12, 2004, they did not have proof (a tape) that Aref was ever told the meaning of the code. If this was a real sting and not a frame-up, the FBI would have certainly remedied this problem by explaining the meaning of the code to Aref at one of the subsequent recorded meetings, which were held before the June 10, 2004 conversation. The FBI did not do this – a clear sign that the case was a frame-up. One must view with some skepticism the FBI's claim that it was just a "coincidence" that the critical February 12, 2004 tape recording was "lost" on the very day when the FBI explained the meaning the code, and that the FBI, although realizing their error did not bother to tell Aref about the code meaning at a later date. It seems clear that the FBI never intended to give the meaning of the code to Aref, but instead pretended that the

[4] At GA 237 Agent Coll testified unequivocally that Malik told Aref the meaning of the code word on February 12, 2004, but then conceded that he was not at the meeting, could only hear a few isolated words like "chaudry" and "New York City" and "zero four four" over his wire (Kell) transmitter, and did not know who was speaking or to whom. He had to rely on Malik as to what was said at the meeting (A-720-723; GA 238 (721) Agent Coll testified, "Malik told me he told Hossain that; did you ask Aref if he understood that chaudry was going to be the code for the missile, and he responded yes, in substance" GA238; A-400-402). Thus Coll acknowledged that he was wrong when he initially testified that **Malik told Aref**. According to Agent Coll's revised testimony, Malik told Coll that **Hossain told Aref**. Even this double hearsay testimony was contradicted by a tape recording on February 3, 2004, when Aref was not present, in which Hossain denied telling Aref. (A-777).

meaning was given to Aref on the one day, February 12, 2004, when the meeting was supposedly not recorded.

8. This conclusion becomes even stronger when one considers that the only way the Government could prove whether Aref was told the code meaning on February 12, 2004 was by the testimony of the two participants at the meeting – Shaar and Malik. In fact at the trial, the Government did call both Shaar and Malik as government witnesses, but neither person was asked by the prosecution about whether Aref was told the meaning of "chaudry". This is shocking. It is one thing to call a witness who unexpectedly does not give the testimony that is expected. It is entirely a different matter to call the two key witnesses but not ask them the key question – was Aref told the meaning of the code? It is a clear admission by the government that it knew Aref was never told the meaning of the code on February 12, 2004; the government knew Shaar and even Malik would not support the government's lie. The fact that the FBI failed to explain the code to Aref, and then lied about it to the jury, and in their brief to the 2nd Circuit, (Gov. Brief p.14, 40, and 84), is the strongest possible indication of a frame-up. (Aref Aff. para.29-30; 43).

9. It seems likely that Aref's house was bugged by the government and that the government has a classified transcript of the supposedly unrecorded February 12, 2004 conversation. If the February 12 conversation shows that Aref was never told the meaning of the code word, then Aref could not have understood the coded conversation on June 10, 2004 – the only conversation that resulted in his conviction. The transcript of February 12, 2004 would be exculpatory to the defendants.(Aref. Aff. para 53-55)

10. Aref's 14 calls to the IMK headquarters were used by the government to allege that Aref used the telephone number to keep in touch with terrorists like Mullah

Krekar, and on this basis the prosecution was allowed by the court to call an expert to testify about how Mullah Krekar helped establish a terrorist organization Ansar Al-Islam. Aref asked for transcripts of the 14 calls as *Brady* material to show that the calls were innocently made to his friends and family. The government never denied having the transcripts or tapes of the calls but claimed the material was classified. The court did not order the material produced. Once again the defendants were denied exculpatory information that would have proved them innocent. (Aref Aff. para. 58-61)

11. Prior to the trial, the Court had numerous ex parte meetings with the prosecutor apparently with respect to classified material which the defense was not allowed to see, even though lawyers for the defendants had obtained clearance to see classified material. Secret evidence, apparently from warrantless wiretapping and electronic surveillance, dominated the trial and lead to statements to the jury from both the court and the prosecutor that "the FBI had good and valid reasons" to target Aref. Shamshad Ahmad who was sitting in court when these words were spoken was shocked:

The Second Circuit opinion never explained how such statements, which essentially signaled the jury to convict, were permissible. Moreover the Second Circuit permitted one or more secret briefs to be submitted to the court on appeal, and actually conducted a secret argument with only the prosecutor present. Again there was no explanation as to how secret briefs and arguments were permissible. The public perception of the trial is that the defendants did not have an opportunity to defend themselves against this secret evidence and were railroaded.

12. On appeal the Second Circuit opinion identified certain trial evidence which the court said was sufficient for the jury to find the defendants guilty. All of this

evidence related to the counts and dates for which the jury found Aref not guilty. None of the evidence cited by the Second Circuit related to the last conversation on June 10, 2004 which was the only conversation which lead to Aref's conviction. All of the evidence cited by the Second Circuit as sufficient for the jury to convict was in fact used by the jury to acquit. On what evidence therefore was Aref convicted? Did the government's lie about Aref being told the meaning of the word "Chaudry" on February 12, prompt the jury to convict him for the counts associated with the June 10 conversation? And did the Second Circuit refuse to cite the June 10 conversations as evidence sufficient to convict because the judges knew Aref was never told the code word? In the secret appeal brief and argument did the judges see a classified transcript of the supposedly unrecorded February 12, 2004 meeting and realize that Aref was never told the meaning of the code? Such questions and such discrepancies in the evidence add to the public perception that the defendants were railroaded. [5]

13. The "preemptive prosecutions" of Aref and Hossain are similar in design and effect to other prosecutions which the government has brought against many other Muslims, using agent provocateurs like Malik, to entrap Muslims who had no intention of engaging in criminal conduct. This pattern was used in the case of the Newburgh 4, the Ft. Dix 5, the Liberty City 6, the Hayats, and many other agent provocateur stings. Indeed, the preemptive prosecution of the Newburgh 4 used the same agent provocateur as in the Aref case – Malik, (Shahed Hussain, known as Maqsood in the Newburgh 4

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[5] The Second Circuit did refer obliquely to the June 10, 2004 conversation in a non sequitor rationale for the court not having to consider the "good and valid" targeting instruction to the jury. This makes the Second Circuit's avoidance of the June 10, 2004 conversation on the issue of sufficiency all the more inexplicable.

case). Thus it is easy for the public to see the Aref case as simply a formula used by the government to prosecute innocent Muslims in a program of preemptive prosecution.

14. The government justified its arrest of Aref in part on the grounds that a note book allegedly found in an alleged terrorist training camp in Rawah, northern Iraq, described Aref as "commander". After the Court directed that the prosecution turn over to the defense the page of the notebook that contained this information, the prosecution suddenly "discovered" that the word the government had translated as "commander" (Kak) was actually an honorific title meaning "brother", similar to the English equivalent "Mister". It was probably the most common word in the Kurdish language. *Rounded Up*, p. 67-68. It is one more indication that the prosecution was a frame-up in which translations, like other evidence, was manipulated by the government to result in a preemptive conviction.

15. The perception of a phony or fake prosecution was heightened when the government exaggerated the seriousness of its case, and made an excessive display of security concerns about the defendants to intimidate the public and the jury. Shamshad Ahmad describes this well in his book, *Rounded Up*, when he describes going to the bail hearing on August 10, 2004;

> On that Tuesday, as soon as I got out of my car in front of the courthouse, I was shocked. It looked like a military zone. Three policemen were sitting on horseback facing the entrance door, their left hands on the reins and their right hands on their pistols. Several police cars were parked near the courthouse, and the street corners were occupied by policemen hold pistols. Five cars were parked on each side of the building, security guards stood with the rifles and pistols drawn. I could also see sharpshooters on rooftops, telescopic rifles in their hands. I was sure there must be many undercover officers around, particularly in the crowd of about thirty reporters. Every parking spot was taken by media cars and satellite trucks. *Wow*, I thought*, what a drama, what a circus, what a show to fool*

> *everybody, what a waste of tax dollars! The feds have been secretly running after these two guys for a year, trying to entrap them without any concern about their supposed dangerousness or security risk – and today they want to tell the world that Aref and Hossain, who have been delivering pizza and driving an ambulette while minding their own business, have become such dangerous terrorists overnight that we need all this security to protect the public from them. Rounded Up* p. 53,

In the context of this particular investigation, where the central question was whether the target was even aware of the illegal nature of the sting, the only reason for such an overemphasis on security was to intimidate the public, the media and the jury pool into believing the Government had caught real terrorists intent on real terrorist plots. Grainy photographs of Malik holding the missile were provided by the government to the media with suggestions that Aref and Hossain were trying to buy the missile to launch their own attack against the Pakistani ambassador. Shamshad Ahmad writes of this:

> But I was also 100% sure that no jury would ever find him (Hossain) innocent after seeing this picture…I knew that in the recent past, the FBI had succeeded in bringing convictions in several sting operations that involved weapons or missiles. They supplied a fake or disabled weapon to their informant, who carried it or pretended to sell or buy or use it. As a result, as soon as the general public heard that a weapon was involved in a sting case, they immediately jumped to the conclusion that the accused was initiating the transaction and the informant was only watching from a distance and "informing" about it. Even reporters got carried away and reported the false information cunningly planned by the FBI, rather than analyzed the facts behind the plots and the tricks involved. This was exactly the case with the missile picture; people concluded that Hossain wanted to buy the missile or was somehow involved in dealing in weapons. *Rounded Up* p.48.

The government's attempts to manipulate public opinion and the jury pool, by creating fear of terrorist attacks that was wholly unwarranted by the facts of the sting, is yet another indication that the case was a frame-up and the defendants were railroaded.

These are all public perceptions of the Aref and Hossain trial that lead people to doubt the validity of the convictions. Amici believe that with so much evidence pointing to a

frame-up in the prosecution of Aref and Hossain, there will never be public acceptance of the conviction of these men without an independent review of their cases.

If the Aref/Hossain case, like other cases of preemptive prosecution, is not reviewed by an independent prosecutor, it will continue to poison trust between Muslims and the FBI. Trust between the FBI and the Muslim community is essential if real terrorists are to be identified and apprehended. But trust is destroyed when the FBI targets innocent Muslims and railroads them through the court with its preemptive prosecution program. Muslims continue to live in fear that the FBI, perhaps acting on a classified report from a surveillance program of dubious validity, may use the vast resources of the US government to target and convict them of terror- related crimes even though they had no intention of engaging in such crimes.

ARGUMENT

On July 10, 2009, Glenn Fine, the Inspector General of the Department of Justice issued a report entitled "Unclassified Report on the President's Surveillance Program", essentially calling for an independent review of the adequacy of discovery in all terrorism cases because of all the secrecy and confusion in the Department of Justice as to what information was exculpatory. The report stated as follows:

> The DOJ [Department of Justice] OIG [Office of Inspector General] reviewed DOJ's handing of PSP [President's Surveillance Program] with respect to its discovery obligations in international terrorism prosecutions. DOJ was aware as early as 2002 that information collected under the PSP could have implications for DOJ's litigation responsibilities under Federal Rule of Criminal Procedure Rule 16 and *Brady v. Maryland*, 373 U.S. 83 (1963).

Analysis of this discovery issue was first assigned to OLC [Office of Legal Counsel] Deputy Assistant Attorney General Yoo in 2003. However, no DOJ attorneys with terrorism prosecution responsibilities were read into the PSP until mid-2004, **and as a result DOJ continued to lack the advice of attorneys who were best equipped to identify and examine the discovery issues in connection with the PSP**

Based upon its review of DOJ's handling of these issues, the DOJ OIG recommends that DOJ assess its discovery obligations regarding PSP-derived information, if any, in international terrorism prosecutions. **The DOJ OIG also recommends that DOJ carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or Brady material was collected under the PSP, and take appropriate steps to ensure that it has complied with its discovery obligations in such cases.** In addition, the DOJ OIG recommends that DOJ implement a procedure to identify PSP-derived information, if any, that may be associated with international terrorism cases currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the government's discovery obligations under Rule 16 and Brady. (Report pages 18-19)

This report essentially stated that the President's Surveillance Program had never established procedures for ensuring that exculpatory information, obtained during classified surveillance, was made available for use in criminal cases, notwithstanding that the government has an absolute obligation under *Brady v. Maryland*, 373 US 83 (1983), and Rule 16 of the Federal Rules of Criminal Procedure, to make such exculpatory information available. It is well established that even if the exculpatory information is classified, the defendant is still entitled to the use of the information to establish his innocence. The defense cannot be put in a worse position because the exculpatory information is classified. *US v. Libby*, 576 F. Supp2d 20 (D. DC 2006); *US v. Dumeisi*, 424 F3rd 566 (7th Cir. 2005); *US v. Salah*, 462 F. Supp2d 915 (NDIL 2006); *US v. Moussaoui*, 382 F3rd 453 (4th Cir. 2004); *US v. Fernandez*, 913 F. 2d 148 (4th Cir. 1990)

According to the Inspector General's report, the Department of Justice has essentially been breaking the law with respect to discovery in "terrorism" cases, and the Inspector General recommended that the Department of Justice review prior cases to correct any violations. This recommendation fits the situation of the Aref and Hossain cases. Given the complexities of the cases, only the appointment of an independent prosecutor within the Justice Department to review the files and the classified information will fulfill the Justice Departments long delayed discovery obligations.

The government must look for exculpatory evidence in any agency that was involved in the prosecution. In US v. Ghailani, 2010 WL 653267 (SDNY 2010); _ F. Supp. _ (Jan. 21, 2010 SDNY), the Court held that the term "in the possession of the government" should include those agencies that "were sufficiently involved with the prosecution properly to be considered 'the government'" (Opinion at p. 6). In the present case that would clearly include the Department of Justice, the Offices of the US Attorney in Albany NY, the FBI, and the agencies who did surveillance on Aref including presumably the National Security Administration (NSA) and the President's Surveillance Program.

Since government officials told the New York Times (A- 93-94), that NSA warrantless surveillance helped to catch Yassin Aref, the NSA program was clearly involved in the prosecution of Aref. In addition other agencies may have been involved in monitoring Aref's 14 calls to Syria, and bugging of his house (including the conversation on February 12, 2004). Such other agencies would be part of the prosecution of Aref, and they should also turn over exculpatory information in their possession.

There are a number of issues involving exculpatory information presented in this petition.

1. In the Aref case, based on prosecution statements made after the trial, Aref has shown that the FBI may have tried to frame him. According to statements made by Agent Coll after the trial, the FBI decided not to show the missile to Aref because it was afraid it would "spook" him – that is the FBI was afraid that Aref would recognize a missile as something illegal and would withdraw, thus ruining the FBI frame-up. Memoranda of these FBI discussions would clearly be exculpatory if they indicated that the FBI tried to conceal the illegal plot from Aref.

2. The entire design of the sting in which Aref was given virtually no information about the plot in a manner that he could understand, suggests a frame-up. The fact that the government in a carefully scripted sting would create a code word and actually use it on Aref, but fail to give him the meaning of the code word (and later lie about it in testimony and in court documents) suggests a frame-up. The fact that the key sentence in the sting connecting the sale of the missile with the loan, was spoken in garbled language by Malik to Hossain after Aref was distracted by being given money to count, suggests a frame-up. Memoranda of the FBI strategy for the sting should indicate clearly if the FBI intended all along to conceal the illegal plot from Aref.

3. There is good reason to believe that a surveillance program targeted Aref's house and recorded the February 12, 2004 meeting at which Aref was supposedly told the meaning of the code word "Chaudry". If the classified recording indicated that Aref was

not told the meaning of the code word, then it would clearly be exculpatory. Aref could not have understood the June 10, 2004 meeting, the only conversation that resulted in his conviction, and the government statements indicating that he was told the meaning of the code would be false. (If the court ever previously reviewed this issue ex parte, the court may not have been aware of the circumstances that would make the February 12, 2004 recording exculpatory. The court may have thought that since Shaar and Malik were scheduled to testify about the meeting, the classified transcript would be cumulative and unnecessary. It was only after the government claimed that Aref was told the meaning of the code word at the February 12, 2004 meeting without any basis, and failed to even ask Shaar and Malik about this issue at trail, that the transcript would have become exculpatory.)

4. There is good reason to believe that transcripts or recordings exist for the 14 calls made by Aref to the IMK number. The Government has never denied it. Had these transcripts or recordings been produced, Aref could have shown that his calls were not for the purpose of keeping in touch with terrorists. This in turn would have prevented the government from introducing the highly prejudicial testimony from its "expert" as to Mullah Krekar and Ansar-al-Islam.

The failure of the Government to turn over exculpatory information may well result in a new trial or a dismissal of the charges. For example, on April 7, 2009 the Justice Department moved for dismissal of the charges in *US v. Theodore Stevens*, after recognizing its independent ethical obligation to review guilty verdicts, not just to

determine whether there was enough evidence as a matter of law to sustain the verdict, but to determine whether the prosecutors fulfilled their ethical obligation to provide justice, a fair trial, and exculpatory information. 593 F.Supp.2d 177 (D.D.C. 2009) In the *Stevens* case, the defendant, Senator Stevens, was convicted of Bribery after a jury trial. Following the conviction, the Department of Justice reviewed the file of the case and determined that notwithstanding evidence of the defendant's guilt, the prosecutors had failed in their ethical obligation to turn over exculpatory information. As a result the charges against Senator Stevens were dismissed.

Similarly an independent inquiry was conducted by the Justice Department in the case of *US v. Karim Koubriti, Abdel-Ilah Elmardoudi et al*. ("the Detroit Sleeper Cell case") and the terrorism convictions against the defendants were dismissed based on the misconduct of the prosecutor in failing to provide the defendants with exculpatory information which denied the defendants a fair trial. 336 F.Supp.2d 676 (E.D. Mich. 2004).

To Amice's knowledge, the Department of Justice has never implemented the recommendation of its own Inspector General, and has never reviewed any past cases (including the Aref and Hossain cases) to determine if the Department provided all required Rule 16 and *Brady* material to the defendants. Thus if the President's Surveillance Program secretly recorded the February 12 meeting at Aref's house, it is unlikely that the court or the prosecution ever knew about it or considered whether the recording would be exculpatory or not.

It is especially important that the court require the Department of Justice to implement the recommendation of its own Inspector General and provide for an independent review of the Aref/Hossain cases, because the "terrorism" cases referred to by the Inspector General in his report, for the most part, consist of defendant who were "preemptively prosecuted" – they were prosecuted to prevent them from having an opportunity to commit a crime in the future. Such "preemptive prosecutions" by their very nature create a substantial risk that innocent persons may be targeted and convicted. Thus it is imperative that required discovery be provided.

Where it seems clear, as it is here from the report of the Inspector General, the classified nature of some of the exculpatory information in the Aref case, from the circumstances of the Aref and Hossain cases, and statements made by the prosecutors themselves indicating that such discovery was not provided, the courts have a higher burden of scrutiny to ensure that innocent persons will not be convicted.

CONCLUSION

1. The Court should order the Department of Justice to implement the recommendation of its own Inspector General and "re-examine past [terrorism]cases to see whether potentially discoverable but undisclosed Rule 16 or Brady material was collected under the PSP [President's Surveillance Program], and take appropriate steps to ensure that it has complied with its discovery obligations in such cases." (Inspector General's Report, p. 18-19).

2. Alternatively, the Court could appoint an independent prosecutor from within the Department of Justice to review the Aref and Hossain file, including the various classified electronic surveillances programs that may have been directed against Aref and Hossain, to determine if the case files or the Surveillance Programs contain exculpatory information not properly disclosed to the court in the manner of the inquiry that was conducted in the Stevens case and the Detroit Sleeper Cell case.

3. Alternatively the Court should determine from the prosecution if there are tapes or transcripts of the February 12, 2004 meeting, and if there are tapes or transcripts of the 14 calls to the IMK office in Syria, and if there are memos in the FBI or prosecution files that discuss whether to show Aref the missile, and whether to tell Aref the meaning of the code word "chaudry", and the Court should review this material to determine if exculpatory material was withheld.

Respectfully Submitted,

Colin J. Donnaruma
Attorney for Proposed Amici
Bar Roll No. 513632
2682 New Scotland Rd.
Voorheesville, NY 12186
Tel: (518) 461-5702
Fax: (518) 765-0316