IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	Criminal No. 04 -CR-402 (TJM)
	)	
v.	)	**Government's Memorandum in**
	)	**Opposition to Motion to Vacate**
	)	**Sentence/Conviction Pursuant to**
YASSIN MUHIDDIN AREF,	)	**28 U.S.C. § 2255**
MOHAMMED MOSHARREF	)	
HOSSAIN,	)	
	)	
Defendants.	)	

This Memorandum is submitted in Opposition to the Motion To Vacate Sentence/Conviction Pursuant to 28 U.S.C. § 2255 filed by Yassin Aref ("Aref"). Aref filed this motion on July 12, 2013. Dkt. ## 696 & 697. This is his second such motion. On March 8, 2010, he filed a § 2255 motion, Dkt. # 618 (which included a request for detention of a material witness and for discovery), and a motion to conduct a "Stevens" review for misconduct, Dkt. # 620. On December 13, 2010, he filed a motion to amend his motion to add additional claims. Dkt. # 665. This Court denied all of the motions on the merits. *See* Dkt. # 632 (denying "Stevens" motion); Dkt. # 662 (denying request for detention of material witness and for discovery); Dkt. # # 680 (denying motion to amend); Dkt. # 682 (denying § 2255 motion).

Because this is Aref's second or successive § 2255 motion, this Court must transfer the motion to the Second Circuit in the interest of justice pursuant to 28 U.S.C. § 1631 without reaching the merits. The Second Circuit should deny the certification because, on the merits, the motion fails to satisfy the criteria for the filing of a second or successive motion set forth in 28 U.S.C. § 2255(h).

I. This Court Should Transfer The Motion to the Second Circuit Without Reaching the Merits Because This is a Second Or Successive Motion.

The habeas statute, 28 U.S.C. § 2255 "ensures every prisoner one full opportunity to seek collateral review." *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002) (quotation marks and citation omitted). As applicable here, that review must be sought within one year of when (a) the conviction becomes final, or (b) the facts supporting the claim could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f)(1), (4); *see Wims v. United States*, 225 F.3d 186, 188 (2d Cir. 2000) (explaining that "Section 2255(4) is not a tolling provision . . . Rather, it resets the limitations period's beginning date, moving it from the time when the conviction became final, see § 2255(1), to the later date on which the particular claim accrued."); *see also Quezada v. Smith*, 624 F.3d 514, 518 (2d Cir. 2010) ("AEDPA's one-year limitations period [is] applicable to collateral attacks filed by both state prisoners under 28 U.S.C. § 2254 and federal prisoners under 28 U.S.C. § 2255").

A second or successive § 2255 motion may be entertained only if it meets the additional stringent requirements set out in 28 U.S.C. §2255(h). Before a second or successive motion can be filed in a district court, "the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The court of appeals will certify the motion if it contains either "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense" or "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255(h).

Read in conjunction with AEDPA's statute of limitations, the exception for newly discovered evidence "tolls the deadline to one year from 'the date on which the facts supporting

the claim or claims presented could have been discovered through the exercise of due diligence.'" *United States v. Pollard*, 416 F.3d 48, 54 (D.C. Cir. 2005) (quoting 28 U.S.C. § 2255(4)). Thus, evidence that could have been obtained in connection with a prior § 2255 motion is not newly discovered. *Villanueva v. United States*, 346 F.3d 55, 60, 64 (2d Cir. 2003) ("alibi affidavits offered by [movant] do not constitute newly discovered evidence because they could have been obtained by [movant] prior to his first § 2255 petition"); *Corrao v. United States*, 152 F.3d 188 (2d Cir. 1998) ("The evidence for the ineffective assistance claim Corrao now asserts in his 1997 petition (the sentencing transcript and PSR) was certainly available at the time of his 1995 petition. Accordingly, we deny the motion for leave to file a successive petition.") Moreover, if the evidence does satisfy the newly discovered criteria, it must be of such weight that it shows "by clear and convincing evidence that but for that error no reasonable jury would have found him guilty." *See Quezada v. Smith*, 624 F.3d 514, 520 (2d Cir. 2010); *Villanueva v. United States*, 346 F.3d 55, 60 n. 1 (2d Cir. 2003) ('"there is no material difference between § 2254 and § 2255'" with respect to the gatekeeping requirements applicable to "second or successive" petitions under AEDPA) (quoting *Torres v. Senkowski*, 316 F.3d 147, 151 & n. 1 (2d Cir.2003)).

In this Circuit, the proper procedure when a second or successive motion under § 2255 is filed in the district court without authorization from the court of appeals is for the district court to transfer the matter to the Second Circuit in the interest of justice pursuant to 28 U.S.C. § 1631 without reaching the merits. *Corrao v. United States*, 152 F.3d 188, 190 (2d Cir.1998); *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir.1996); *Cuevas v. United States*, 2013 WL 460089 (S.D.N.Y. 2013); *United States v. Wint*, 2008 WL 4279499, at *3 (N.D.N.Y. 2008).

In *Corrao*, the Second Circuit identified the hallmark of a second or successive motion:

> Generally, a § 2255 petition is 'second or successive' if a prior § 2255 petition, raising claims regarding the same conviction or sentence, has been decided on the merits. *See Liriano*, 95 F.3d at 122. This remains true even if the latter petition purports to raise new claims. *See Triestman [v. United States*, 124 F.3d 361,] at 369 [(2d Cir. 1997)].

152 F.3d at 190; *Accord Carmona v. United States*, 390 F.3d 200, 202 (2d Cir.2004) ("A motion will be regarded as second or successive if a previous habeas petition filed by the movant challenged the same conviction or sentence and was adjudicated on the merits or dismissed with prejudice."); *Cuevas v. United States*, 2013 WL 460089 (S.D.N.Y. 2013) (where first § 2255 motion challenged conviction and sentence on merits, defendant "has had his one full opportunity to seek collateral review;" application transferred to Second Circuit to consider whether to issue order authorizing district court to consider motion).

Here, Aref is challenging the same conviction and sentence which he previously challenged in a prior § 2255 motion. Since that prior § 2255 motion was decided on the merits, the instant motion is a second or successive motion which must be certified by a panel of the Second Circuit. *See Johnson v. United States*, 2009 WL 3429679, at *2 (S.D.N.Y. 2009) ("The instant § 2255 motion is a second or successive motion, because Johnson's December 2002 § 2255 motion sought to upset the same conviction being challenged now, through his June 2009 § 2255 motion, and his first § 2255 motion was denied on the merits.") Therefore, this Court should transfer the motion to the Second Circuit in the interest of justice pursuant to 28 U.S.C. § 1631 without reaching the merits. *See United States v. Wint*, 2008 WL 4279499, at *3 (N.D.N.Y. 2008).

II. On the Merits, Aref Has Failed to Make the Showing Required for a Second or Successive Motion, and the Second Circuit Should Decline to Certify the Motion.

Aref has raised six points, each of which is addressed below.

A. Point One

Aref contends that the prosecution falsely represented to this Court and to the Second Circuit that Aref was Mohammed Yasin, an al Qaeda operative who was killed in 2010. Aref's conjecture that this occurred is made out of whole cloth. He has submitted no evidence – newly discovered or otherwise – that any such representation was ever made to this Court or to the Second Circuit. *Cf. Magnotta v. Berry*, 906 F.Supp. 907, 917 (S.D.N.Y. 1995) (in proceeding pursuant to 28 U.S.C. § 2254, "Petitioner's assumptions are no substitute for evidence.")

More importantly, this contention is false. The prosecutors in this case never mistook the defendant Yassin Aref for Mohammed Yasin, and never represented to this Court or to the Second Circuit that Yassin Aref was Mohammed Yasin.

B. Point Two

Aref asserts that this Court instructed the jury that the FBI had "good and valid reasons" to target Aref because it mistakenly believed that Yassin Aref was Mohammed Yasin, an al Qaeda operative who was killed in 2010.

Aref has submitted no evidence – newly discovered or otherwise – that this Court held such a mistaken belief, or that it gave the instruction in reliance on any such misidentification. On the contrary, the trial record shows that the decision to give the instruction had nothing to do with some alleged mistaken misidentification. The instruction was given at the request of the defense to avoid presentation to the jury of the "seven reasons" why Aref was targeted. Dkt. # 278. As the government stated in its trial brief, "this criminal investigation was initiated after

FBI had received a variety of information regarding possible links between Aref and terrorists in Iraq." *Id.* at 1. The trial memorandum described that information as follows:

> This information included that Aref's name and former telephone number in Albany were found in 2003 in three different suspected Ansar-al-Islam camps in Iraq: (1) in Sargat, Iraq, during the March 2003 exploitation of the Khurma SE facility; (2) in Rawah, Iraq in June 2003, following the capture of an insurgent camp, during which 80 insurgents were killed, and manuals, hundreds of weapons and thousands of rounds of ammunition were recovered; and (3) in a safe house in Mosul, Iraq in June 2003. Also, Aref's telephone toll records for his Albany, New York telephone reflected fourteen (14) calls between November 1999 and October 2001 to a number in Damascus, Syria, later confirmed to be a number for the Syrian office of the Islamic Movement in Kurdistan. A cooperating individual ("CI") had reported that in October 2001 this number was given to the CI so that the CI could report back to al Qaeda. In addition, a document on the letterhead of Islamic Central, Irbil, Iraq dated October 1999 introduced Aref as a representative, and Aref was associated with John Earl Johnson a/k/a Yaya, and with Ali Yaghi, two individuals with known terrorist sympathies.

Id. at n. 1.

Moreover, Aref has previously challenged the same instruction twice, on direct appeal and in his first § 2255 motion, and both times the challenge was rejected. *See United States v. Aref*, 285 Fed.Appx. 784, 792-93 (2d Cir. 2008) (rejecting challenge to "targeting instruction"); Dkt. # 682 at 16-17 (rejecting challenge in motion to amend his first § 2255 motion). Because this claim – that the targeting instruction was erroneously given – was presented in Aref's prior motion under § 2255, it must be dismissed. *See Gallagher v. United States*, 711 F.3d 315 (2d Cir. 2013) ("We must dismiss a claim that was presented in a prior motion under § 2255.")

C. Point Three

Aref contends that a recording exists of his February 12, 2004 meeting with co-defendant Mohammad Hossain, a friend of Aref's named Kassim Shaar, and the CW, and that the prosecution did not turn the recording over in discovery. Aref has submitted no evidence –

newly discovered or otherwise – which shows that a recording of this meeting exists. His speculation that the meeting must have been recorded is not evidence. *Cf. Magnotta*, 906 F.Supp. at 917 (in proceeding pursuant to 28 U.S.C. § 2254, "Petitioner's assumptions are no substitute for evidence.")

Moroever, this contention is false. There was no recording made of that meeting.

D. Point Four

Aref contends his conviction should be overturned because of "newly discovered" evidence from the Newburgh trial that might have been useful for impeachment. First, the allegation is made that "the defense learned from the Newburgh trial of some very significant impeachment material regarding Hussain – including the fact that he faced murder charges in Pakistan . . ." Dkt. # 697 at 11. This allegation was raised by Aref in 2010 and rejected by this Court in 2011:

> Aref asserts that the government violated its obligations under *Brady* and *Giglio* by failing to disclose that the government's confidential witness, Shahed Hussain a/k/a Malik ("Malik" or "the C.W.") was wanted for murder in Pakistan, which Aref contends bears on the CW's credibility. The government argues that the claim is without substance and, therefore, amendment in this regard would be futile. The Court agrees.

Dkt. # 680 at 3 (footnote omitted).

Because this claim – that a *Brady* violation occurred as a result of the prosecution's failure to disclose this information – was presented in Aref's prior motion under § 2255, it must be dismissed. *Gallagher*, 711 F.3d at 315. Furthermore, the implication that Aref and his counsel were unaware of this information at the time of the trial of this case is demonstrably false. As this court found in denying Aref's motion to amend his § 2255 motion (a motion that was filed in 2010):

> Aref bases this claim on the contention that Malik testified in *United States v. Cromite*, Case No. 09- CR-0558 (S.D.N.Y. 2009), another criminal case in which Malik served as a confidential witness, that he had been arrested for murder in Pakistan, that he fled the country in 1994 to avoid prosecution, and that he informed the United States government of his fugitive status. *See* Motion for Leave to Conduct Discovery, ¶ 3, p. 5 (citing Aref's Supplemental Affidavit), dkt. # 653.

Dkt. # 680 at 3., n. 1.

This Court found that there was no *Brady* violation because Aref was aware of the information before trial:

> First, the asserted facts do not amount to a Brady violation. **Aref has attested: "I informed [trial] counsel of a rumor that the informant Malik was wanted by Pakistani authorities for an alleged murder, and requested that my attorney investigate this information because it would have been essential information to present to the jury to show why Malik was assisting the government - i.e., to keep himself from being deported to Pakistan." Aref 03/08/10 Aff., ¶ 86, dkt. # 618. Because Aref and his attorney knew of the information, there was no Brady violation.** *See United States v. Paulino*, 445 F.3d 211, 225 (2d Cir. 2006)("[E]vidence is not considered to have been suppressed within the meaning of the Brady doctrine if the defendant or his attorney either knew, or should have known, of the essential facts permitting him to take advantage of that evidence.") (citations and internal quotation marks omitted).

Dkt. # 680 at 3 (emphasis added). This Court also noted three additional grounds for rejecting Aref's claim of a *Brady* violation:

> Second, the objective facts known to the prosecution at the time of Aref's trial do not support a Brady violation. The CW's 1994 Request for Asylum includes a handwritten narrative that explains that the CW joined a political party in Pakistan, MQM, as a worker, and that, after a change in power in 1990, "[a]ll leaders of MQM Party" and the party's workers "were thrown in prison" and the government "accused MQM of torturing, sexually molesting and killing the citizens and the opponents of MQM." *See* Attachment to Gov. Resp. to Mot. for Leave to Conduct Discovery, dkt. # 657, at 9. The CW's narrative describes events in May 1991 in which "15,000 workers were arrested including myself on [illegible] charges such as torture, sexuality, kidnaping + murders," *id.* at 10, and

that "[m]y father paid a bribe of 150 thousand rps to the head of Police station for my release." *Id.* The narrative further reports that in August 1994 the CW was "again arrested by the police and the army together. I was taken to the Army camp for introgration [sic] and the [sic] asked me to confess on the wrongdoing of Party police of kidnaping and torture." *Id.* at 11. The CW refused to confess, and instead asserts that "[m]y father again bribe [sic] the local police for my release around one hundred thousand Rupees." *Id.* at 12. As a result, the CW fled to the United States where he applied for, and was granted, asylum. The government has reported that it attempted to ascertain whether a warrant had been issued in Pakistan for the CW's arrest, but learned that there was no national criminal database such as those common in the United States. *See* Govt's 08/10/10 Opp. Under these circumstances, there was no Brady obligation to disclose the CW's pretextual detention in Pakistan because the CW asserted that he had been detained based solely on political considerations. Moreover, the fact that defense counsel, being aware of the allegation, chose not to pursue this area of potential impeachment at trial leads further to the conclusion that no Brady violation occurred.

Third, evidence of an arrest is not admissible on the issue of credibility, *United States v. Felix*, 221 Fed. Appx. 176, 178 (3d Cir. 2007) ("an arrest is not admissible" for purposes of impeachment), and even a conviction for murder generally cannot be used to impeach because conviction of such a crime does not "normally bear on a witness's reliability for telling the truth." *United States v. Miles*, 207 F.3d 988, 993 (7th Cir. 2000).

Fourth, any additional impeachment information, even if known by the jury, would not have changed the outcome of the proceeding and, thus, was immaterial. "Evidence of impeachment is material if the witness whose testimony is attacked supplied the only evidence linking the defendant(s) to the crime, or where the likely impact on the witness's credibility would have undermined a critical element of the prosecution's case." *United States v. Wong*, 78 F.3d 73, 79 (2d Cir. 1996) (citation and internal quotation marks omitted). The CW's testimony was, in all but one instance, supported by audio and video tapes that were admitted into evidence. The principal evidence against Aref came from these audio and video tapes of the numerous meetings with the CW. The CW's credibility was not seriously at issue because the government relied primarily on the tapes and not on the CW's recollection and veracity. *See id.* at 80 (impeaching evidence would not have altered trial's outcome where independent evidence corroborated cooperator's testimony that defendant participated in drug deal). Further, on both direct and cross-examination the government and

> Defendant elicited from the CW that he understood the government would "talk with a judge" "in the INS" so that "I will not be deported to Pakistan." Trial Transcript at 762; 791; 850- 51 (CW "hoping" not to go to jail and to be able to stay in United States). Moreover, the jury learned at trial that, prior to assisting in this investigation, the CW had assisted in other investigations in which eleven individuals were arrested, nine pled guilty to mail fraud, and two pled guilty to narcotics (heroin) violations. *Id.* at 908-09. "[N]ew impeachment evidence is not material, and thus a new trial is not required when the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable." *Wong*, 78 F.3d at 80 (citation and internal quotation marks omitted). Under these circumstances, amendment to add this claim would be futile.

Dkt. # 680 at 3-6.

Aref now adds two other items of evidence that he became aware of as a result of the Newburgh trial, which he contends would have been useful as impeachment. As indicated in footnote one of this Court's decision denying Aref's motion to amend, Aref was aware in 2010 that the CW had testified in the Newburgh trial and that efforts had been made to impeach him. But he did not try to add these items of evidence until he filed his current motion in July of 2013, and he is unable to show that the impeachment evidence, developed at the Newburgh trial, on which he now seeks to rely, could not have been discovered through the exercise of due diligence prior to July 2012. *See United States v. Pollard*, 416 F.3d 48, 54 (D.C. Cir. 2005). Furthermore, Aref has failed to overcome this court's ruling that any additional impeachment evidence would not have changed the outcome and was therefore immaterial. In any event, Aref cannot meet his burden of showing that such additional impeachment evidence would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found him guilty of the offense.

E. Point Five

In an apparent attempt to overcome procedural bars to this second or successive motion, Aref claims that he was actually innocent of the crimes of which he was convicted. *See Rivera v. United States*, 716 F.3d 685 (2d Cir. 2013) (noting that under some circumstances "actual innocence can serve as a 'gateway' by which courts may hear procedurally defaulted constitutional claims on the merits.") (citing *Schlup v. Delo*, 513 U.S. 298, 314–15 (1995)). Aref is not actually innocent. This was a sting case. The evidence established his guilt, the jury weighed it and found him guilty, and this Court and the Second Circuit upheld the verdict. The evidence demonstrated that Aref was guilty as charged.

Aref's principal contention – that he did not know that the CW was associated with a terrorist organization and that the money being laundered was proceeds of a missile sale to that organization -- is belied by the record. The following excerpts are taken from the government's brief on Aref's direct appeal to the Second Circuit, 2007 WL 6839847:

> The CW also told Aref that he worked with JEM,[Jaish-e-Mohammed (JEM) is a designated terrorist organization. GA311-12]] and asked Aref for his advice on working with JEM:
>
> CW: And uh, the second thing that, uh, as I told you that, uh, the other day and, uh, I showed you also, that, uh**, I help my, my brother Mujahideen with ammunition and stuff like that to fight the wars, Holy Wars**. And I don't know if I break American laws, but I do not break Allah's laws, Islamic laws, to help our brother Mujahideen. **And one of the groups that, uh, I am working with is Jaish-e-Mohammed, JEM**, Mulana, Azar Mohammad.
>
> YA: **That in the India?**
>
> CW: Yeah. **You know him, about him, that group?**
>
> **YA: I hear in the TV about him.**

CW: Okay. He's in Pakistan right now, and he's trying to liberate Kashmir from India. And, uh, he's been fighting the holy war for almost now, so many years and we're, we are trying to help him in that war. And this President Musharraf, the President of Pakistan, is, uh, against him, and, uh, against the Holy War because he's helping the Mushriq, uh,and uh, we are fighting him too. **Uh, that's why, the missile, that we sent it to New York City to teach Mu, uh, President Musharraf, the lesson to not to fight with us.** And I don't know how, how I do look in Allah's way. What do you think about that? I mean, I want to make my mind clear with God.

YA: Right brother.

CW: About JEM.

GA561 (emphasis added).

Aref recognized JEM as a terrorist organization, commenting that they "classificate that organization with the group which is they call terrorist group." GA562. Aref stated: "And I believe it is right for the Kashmirian people to have their Islamic law in their life and to don't be under the power of the people they worship the cow and this and that. As I believe in the Palestinian people, they have the right to have their freedom, to have their country, as I believe, I am Kurdish, for the Kurdish people too. So I believe so." *Id.* Aref also warned the CW about the danger of the CW's association with JEM:

YA: And now if they know any person**, he have link with those people** by giving them the money especial, cause now it is the best thing they do in Saudi Arabia, in Kuwait, and you've got all that, gulf, and Arab country, it is that, to find out those people, even if they give the zakat for these organization, **they take them to the jail and they say they support the what, the terrorism.**

Id. (emphasis added). Aref stated that it "was duty for every Muslim anywhere he can help any Muslim, especially they are needy for help,

especial if their situation like Palestine and Kashmir it is danger." *Id.* Aref advised the CW:

> YA: I believe if you know them, you trust them and you believe they are doing right, and you believe they are fearing Allah, and you believe they are working for Allah, **I believe it is wise for you to help if you can**. If you don't can, like me, you are yourself. **But if you help, especial that group, because now they have in the list, eh, you should to be very very careful, hundred percent. If not, they are going one day if they know**
>
> CW: I, I
>
> YA: If they know
>
> CW: **I send the missile to…**
>
> YA: **If they found anything. If they find any proof, they are going to tell you, you support the terrorism, and that's enough for them**, even they made the law during, again they, uh, the people in the Congress, they accept that law, they have the right to put the person in the jail without court without nothing, without any [unintelligble].

GA563 (emphasis added). Aref emphasized: **"And if they find any link between you and that group, you should to know, you are going to be in the trouble."** GA577. The CW understood that Aref was advising him to use the missile but not tell anyone. GA248-49.

On February 12, 2004, at Aref's house, the CW handed Aref $10,000 to count. GA181, 242-43. Hossain gave the CW a check payable to Hays Distributors for $2,000, GA623, an act of money laundering which is charged in Count 4.

This transaction, originally scheduled for the CW's office (where it would have been videotaped), was moved to Aref's house because **Aref had a dinner guest, an Iraqi named Kassim Shaar**. GA172, 182. **Shaar moved aside during the transaction, but he overheard the CW warn Aref and Hossain "there was an attack coming to New York**

City, a missile attack coming there." GA173-74 (emphasis added). **Shaar testified that Aref reacted by accusing the CW of taping him, and searched the CW for a tape recorder.** GA174-75. **The CW's warning "scared" Shaar**, GA174, **until after the CW left, when Aref told Shaar that the CW was joking.** GA177-79. Also at this meeting, the CW identified "chaudhry" as the code word for missile when all three (the CW, Aref and Hossain) were together. GA237-38, 241.[n. 12: No audio recording was made of this meeting because the CW's body recorder had fallen off when the meeting location changed and the CW drove to Aref's house. GA162

On March 2, 2004, the CW brought up with Aref his February 12 warning not to go to New York:

> CW: Well, I'm, because the, **the other day because I told you something, brother, in front of Kassim. I should not say you that do not got to New York City because of uh, of something happening to the Consulate you know.**
>
> YA: **Yeah, that's very dangerous.**
>
> CW: I told you and uh because then we, we have to change it because the Consulate didn't show up but that's another story. But the thing is that it's my duty to tell brothers to be safe, because, I, I come to your house, I eat, you know.

GA602 (emphasis added).

Aref in turn warned the CW not to discuss such things, and provided the example of the suicide bomber who doesn't even tell his own mother when, he is leaving on a suicide mission:

> YA: No, no, not point here. Maybe not right now. Maybe around ten thousand people they catch. How they get crazy. They catch this person. Maybe they try, how much they try with, with him. How much they give, how much they give him, maybe to take something out after this, when he go in the coma, to treat him, sometime they talk about to control their mind. They cannot bring out any information. Why?

> Because even that person, he don't know maybe his neighbor declined to, to do something that he don't know. Maybe his brother who use the phone, they live, they live together. His brother, he is planning to do something. We don't know. **In Palestine, a couple of time happen, there's a person he society says he bomb somebody. After that, this person, he just cry. His mom came out, she come, she say this morning, he told me my mom I'm going to my coach and I am going today to get my degree. He mean degree, something else, he mean he became martyr. Allah will give him the degree, but his mom, he don't understand. He say she believe really he is going to his normal . . . college and he bring the degree**.

GA603. Aref also warned the CW that "the person to, today he want to work. I believe he should to work very hiddenly, very secretly, without anybody know." GA604

On June 9, 2004, after the CW gave Aref $5,000 in cash, which Aref counted, Aref invited the CW to be his partner purchasing Hossain's pizzeria:

YA: Do you want to come in with us?

CW: Where yours partner, in the pizza?

YA: Yeah

CW: Anytime Brother

YA: Hamdullah [all praise to Allah].

CW: You need money, I am here brother.

GA610.

The next day, June 10, the CW agreed to the partnership, once again explaining the source of his cash:

CW: Okay, I have money, but I have money in a different forms, okay?

YA: Mmm.

CW: It's not, uh, I cannot, uh, wake up and say, here is twenty, thirty thousand dollars, here.

YA: Uh-huh.

CW: I don't have that much, okay? I have it through my business, okay, uh, through the business work I do. If I could give Mosharref [referring to defendant Hossain] fifty thousand, I can certainly give you fifty thousand dollars, too, you know? I can, that is, that's not even a problem. Because my business comes from selling ammunitions, you know?

YA: Mm-hmm

CW: Chaudhrys, we do that, that's where the business money comes from. I, I import them, I sell them, and they give me money. We I, I was expecting some money to come, but it has gone to the next week, uh, next month.

GA617.

Aref proposed that, as a down payment toward the purchase of the Hossain's pizzeria, the CW permit Hossain to keep $10,000 of the cash Hossain then owed the CW from prior transactions. GA618.

The CW also reminded Aref about the still impending attack in New York, and warned him that after the attack the CW would have to leave the country:

CW: Remember that, uh, you remember that, uh, it was a month ago we wanted to, that chaudhry was going to New York to make that money, but it didn't use. So I, I, this, when it happens, I have to leave this country for two months, and then, you know, I'll just go away.

> Aref: No problem, no problem, that's no problem.
>
> CW: So, and then, two month I, I have to go, because if they use the Chaudhry on 142, [n. 13 This refers to the location of the United States on First Avenue and Forty Second Street.] then I have got a problem.

GA620. Two additional money laundering transactions occurred after this exchange, on July 1 and on August 1, 2004. On each occasion, Hossain gave the CW a check payable to Hays Distributors for $2,000. GA 623. These deliveries of checks were acts of money laundering and of material support, which are charged in Counts 10-11, 18-19, and 26-27.

Aref testified at trial. He contended that (1) he never heard or understood the word missile; (2) he was told by the CW that ammunition meant toothbrush; (3) he thought "chaudhry" referred to a local physician; and (4) he thought that the CW could not pay taxes on cash and that the purpose of the transactions was to enable the CW to pay taxes. GA 329, 334, 356-60.

Aref explained that he made notes of words and their meanings, for example, when someone would say a word he did not understand, he would write it down. GA 353-54. In cross-examination, Aref was confronted with the word missile in his own handwriting in an entry that read "rocet = missle," GA645, but claimed he did not know when or why he wrote it. GA654-55. *2007 WL 6839847*.

Under the circumstances, there is no colorable claim that Aref was actually innocent.

F. Point Six

Aref was prosecuted in a sting case. His convictions for conspiracy and attempted money laundering are unassailable. To the extent that Aref claims he was targeted because the government mistook him for someone else, that claim is itself mistaken. *See supra* at 5-6.

III. Conclusion

This motion should be transferred to the Second Circuit in the interest of justice. The Second Circuit should decline to certify the motion, and instead, should order it dismissed. *See Legrano v. United States*, 513 Fed Appx. 6, 7 n 1 (2d Cir 2013) ("We note, however, that were we to construe Legrano's current petition as such a motion, we would deny relief on the ground that the claims raised in his petition do not rely on any 'new rule of constitutional law, made retroactive to cases on collateral review b the Supreme Court, that was previously unavialble' or any newly discovered evidence within the meaning of § 2255(h). See 28 U.S.C. § 2255(h) (providing that a successive § 2255 motion must rely on newly discovered evidence that would be sufficient to establish the movant's innocence or a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.").

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Respectfully submitted,
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