11-2763-cr(L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

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

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR DEFENDANT-APPELLANT JAMES CROMITIE

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

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-against-	:	11-3785-cr (con)
	:	
JAMES CROMITIE, DAVID WILLIAMS,	:	
ONTA WILLIAMS and LAGUERRE PAYEN,	:	
	:	
Appellants.	:	
	:	

BRIEF FOR DEFENDANT-APPELLANT JAMES CROMITIE

PRELIMINARY STATEMENT

James Cromitie (hereinafter "Appellant" or "Cromitie") appeals from a judgment of the United States District Court for the Southern District of New York (Honorable Colleen McMahon, United States District Judge), convicting him of one count of conspiracy to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C) (Count One of the Indictment), three counts of an attempt to use a weapon of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C) (Counts Two through Four), one count of conspiracy to acquire and use anti-aircraft missiles in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(1), (b)(4), (b)(5) and (c)(1) (Count Five), one count of an attempt to acquire and use anti-aircraft

missiles in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(1), (b)(4), (b)(5) and (c)(1) (Count Six), one count of a conspiracy to kill officers and employees of the United States in violation of 18 U.S.C. §§ 1114 and 1117 (Count Seven), and one count of an attempt to kill officers and employees of the United States in violation of 18 U.S.C. §§ 1114 and 2 (Count Eight). Upon such convictions, Appellant was sentenced to a term of 25 years imprisonment on each count, all such terms to run concurrently.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction of this federal criminal prosecution pursuant to 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, 18 U.S.C. § 3742, and Fed. R. App. P. 4, this appeal is taken as of right for review of an otherwise final sentence imposed in violation of law. Sentence was imposed on June 29, 2011 (JA.2654)[1], and a final judgment was entered on July 8, 2011 (SA.170). A notice of appeal from the final judgment was timely filed on July 11, 2011 (JA.2762).

[1] References to material in the Special Appendix and Joint Appendix submitted by the parties are cited herein as "(SA.__) and "(JA.__)" respectively.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The issues presented for review in this brief are as follows:

1. Did the district court err in denying Cromitie's post-trial motion to dismiss the indictment upon the grounds that he was entrapped?

2. Did the district court err in denying Cromitie's post-trial motion to dismiss the indictment upon the grounds that government misconduct deprived him of his Due Process rights?

Appellant also has joined in the issues presented and arguments made by his co-appellants in their briefs, as permitted by Rule 28(i), Fed. R. App. P.

STATEMENT OF THE CASE

This is an appeal of a judgment of the United States District Court for the Southern District of New York (Hon. Colleen McMahon presiding), convicting Appellant James Cromitie of multiple counts of conspiracy and attempts to commit purported acts of terrorism. Pursuant to that judgment, Cromitie was sentenced to 25 years imprisonment for each count, with all such sentences running concurrent to each other.

James Cromitie and his co-defendants David Williams, Onta Williams and Laguerre Payen, were arrested on May 20, 2009, as a result of an elaborate and prolonged FBI sting operation. They were charged in a complaint with Conspiracy to Use Weapons of Mass Destruction in the United States in connection with an alleged plot to destroy military aircraft and place explosive devices at synagogues, and with Conspiracy to Acquire and Use Anti-Aircraft Missiles, in violation of 18 U.S.C. §§ 2332a(a)(2)(C) and 2332g(a)(1), (b)(1) and (b)(5) respectively. On June 2, 2009, an indictment was filed charging the defendants with eight offenses, identified above in the Preliminary Statement. (JA.65). Cromitie and his co-defendants pleaded not guilty to those charges.

Following the government's production of discovery, the defendants filed pretrial motions to dismiss the indictment as a result of government misconduct and to dismiss certain counts of the indictment as defective. Those motions were denied. (SA.3). In addition, the district court declined to issue an order regarding the government's obligation to produce Brady material in response to a defense motion for such an order on the grounds that such material was being improperly withheld from the defense. A subsequent defense motion to suppress wiretap evidence similarly was denied. (SA.21).

After motions were decided and after an adjournment necessitated by the government's belated request to review additional files and produce Brady material therein, the case against Cromitie and his three co-defendants proceeded to trial, starting with jury selection on August 19, 2010. On October 18, 2010, after eight days of deliberations, the jury returned verdicts of guilty as to all counts against all of the defendants, except that co-defendants Onta Williams and Laguerre Payen were found not guilty as to Count 8 (alleging an attempt to kill officers and employees of the United States). (JA.2636).

Following trial, defendants filed motions for acquittal and for a new trial in the interests of justice based on jury issues, and they renewed their motion for a dismissal of the indictment based upon government misconduct. Those motions were denied by the district court in lengthy written decisions. (SA.89, 61).

On June 29, 2011, the district court denied defense motions based on sentencing entrapment and manipulation. (SA.143). It then proceeded to sentence James Cromitie to 25 years imprisonment on each of the eight counts of conviction, each such term to run concurrently with the others. He also was sentenced to a term of supervised release of five years and the mandatory assessment of $100 per count. (JA.2654). A judgment was filed on July 8, 2011, incorporating those terms. (SA.170).

Cromitie filed a notice of appeal from the above judgment on July 11, 2011. (JA.2762). He is now imprisoned at FCI Ray Brook and serving the sentence that was imposed on him.

STATEMENT OF FACTS

On June 13, 2008, a paid government informant named Shahed Hussain met James Cromitie in the parking lot of Cromitie's place of worship, the Masjid al-Ikhlas Mosque in Newburgh, New York. Hussain, a convicted felon, was working for the FBI and was sent "to the Mosque to attempt to interact with other individuals of FBI counter-terrorism investigations." (JA.98). Instead of meeting such individuals, he met Cromitie, a Walmart employee who was unknown to the FBI and not involved in any terroristic activity whatsoever. (JA.100-101). Hussain claimed that Cromitie expressed grievances against Jews and the United States, and thereby attracted the attention of Hussain and his FBI handlers. Over the course of numerous meetings over the ensuing eleven months and after repeated promises of large amounts of cash and other rewards, such as $250,000, a paid vacation to Puerto Rico, a barbershop and a BMW, Hussain managed to turn Cromitie from a generally angry but ill-informed hustler, with a history of drug dealing but no violence, into a would-be terrorist, prepared to place would-be explosives in synagogues in Riverdale and fire would-be Stinger missiles at military aircraft at Stewart Airport. Cromitie and three other individuals, David Williams, Onta Williams and Laguerre Payen, were arrested for those would-be crimes on May 20, 2009.

The crimes for which they were arrested, and later convicted, were all the result of an elaborate government sting operation. From the very beginning of this case until the end, the "crimes" were conceived, initiated, planned and entirely controlled by the FBI, and no one was ever in any danger, except perhaps Cromitie and his acquaintances as they were being worked and drawn into the plot manufactured for them by the government, acting through its informant Hussain.

The FBI Sting Operation

In June, 2008, Hussain had been to the Masjid al-Ikhlas Mosque approximately a dozen times at the FBI's direction. (JA.98). On June 13, James Cromitie encountered him in the parking lot after services and introduced himself as "Abdul Rehman." (JA.100, 597). According to Hussain, in this unrecorded meeting Cromitie, supposedly in an Arabic accent (JA.600), provided a mostly fictional description of his own background, in addition to the fictional name he gave Hussain. Hussain of course lied to Cromitie as to his identity, claiming to be a wealthy Pakistani businessman and Islamic scholar named "Mahsud Tariq." In this mendacious conversation in which each party told practically nothing but lies to the other, Cromitie also supposedly commented on killings in Pakistan (JA.603), after which Hussain led him into a discussion of military operations

being supported at a nearby air base. (JA.604). Hussain also claimed that, in this conversation, Cromitie said that he wanted to die "like a shahid," a soldier in jihad or warfare (JA.603), and that he (Cromitie) wanted "to do something to America." (JA.604).[2]

At subsequent meetings that summer with Cromitie sought by Hussain, also unrecorded by the FBI, Cromitie reportedly expressed disdain toward Jews, America and President Bush. (JA.608). According to Hussain, Cromitie at one point said that he wanted to kill the President 700 times "if Allah doesn't kill him" because of Muslim deaths and because the President was an "anti-Christ" (Id.), an odd epithet in context to be sure. Cromitie reportedly then added that if Allah did not kill him, one of his "brothers" would. (Id.) Cromitie then launched into a completely made-up story of shooting a drug-dealer's son (JA.608-609), and also at some point fabricated a tale of firing gas bombs into NYPD police stations. (JA.370). At a July 3 meeting, Hussain claimed to Cromitie that, in addition to being a rich businessman with an extensive knowledge of Islam, he also happened to be a member of a terrorist organization based in Pakistan called "Jaish-e-Mohammed" (JeM) (JA.611), which was fighting in Afghanistan and Pakistan,

[2] A detailed, chronological summary of Hussain's conversations with Cromitie is contained in the brief submitted by Appellant Onta Williams.

and told Cromitie he could join when Cromitie expressed an interest in the organization. (JA.613). By Hussain's account, Cromitie did not ask why JeM would be interested in the likes of him or how it was possible that he could become a member of JeM so easily. Obvious fabrications passed frequently in both directions between Hussain and Cromitie without question or comment. Neither was interested in truthful conversation or in learning who the other person really was.

Cromitie continued to fabricate his own background with transparent lies, including a claim that his father was Afghani (JA.663) and a claim that he stole guns from Walmart (JA.3205) despite the fact that the Walmart where he worked did not sell guns and had not for many years. (JA.2436-2437). Cromitie also claimed to have a "sutra team" at his command. (JA.668). Nevertheless, despite these ridiculous claims, the FBI decided to open an investigation of Cromitie although it had done nothing to attempt to verify any of Cromitie's stories of travel to Afghanistan, his parentage, or his violent criminal history, all of which was false and rather obviously false. The FBI did learn that Cromitie had no connections to any known terrorist groups. (JA.110).

After opening its investigation, the FBI began recording the meetings between Hussain and Cromitie on October 12, 2008. The statements of Cromitie, as recorded, had a distinctly different tone and content than the statements of Cromitie, as reported by Hussain to his FBI handlers. For example, on October 12, Cromitie displayed an unfamiliarity with jihad (JA.2778) and informed Hussain that he was trying to deal with his anger through Islam. (JA.2777). He stated he watched the violence that was happening in Pakistan, but did not know what he could do that would make any difference. As significant was what Cromitie did not say: nothing about going to Afghanistan, or dying like a martyr, or hating America, or joining JeM. He expressed anger over disrespect he perceived from individual Jews, and that it made him want to kill "but I'm a Muslim, insha' Allah, Allah will take care of it." (JA.2777). In fact, Cromitie seemed to reject the very notion of jihad: "If you and me was to die today trying to do something ... it's not gonna change anything 'cause they'll still do more." (JA.2774).

In subsequent meetings, Hussain kept prodding Cromitie and bringing up the subject of jihad, and cited the hadiths of Mohammad that required violence and cited the Marriott bombing in Pakistan as an example. Cromitie had no reaction to that and, although Cromitie felt he had been slighted and disrespected by Jews in

the past and asserted a desire to kill one, he stated that his faith would let him deal with it. At their recorded meeting on October 19, Hussain stated to Cromitie that according to Mohammed, Jews were responsible for all of the evil that exists and should be eliminated. Cromitie still did not take the bait, and disagreed saying "I don't wanna go that far with him." (JA.2813). And when Hussain asked Cromitie about doing something for Allah, Cromitie's recorded response was "Like what?" (JA.2829) and he stated, contrary to his earlier supposed statements, that he did not want to go to Afghanistan. (JA.2823). In fact, every time Hussain proposed that Cromitie engage in some jihadist act, Cromitie refused to commit to it and stated he would have to investigate it. (JA.2902). It is apparent through these conversations that it was not Cromitie who originated or pushed the idea of a terrorist act; rather, it was Hussain. They also discussed the prospect of Cromitie selling drugs when he expressed dissatisfaction with his employment at Walmart. (JA.690-691).

During their meetings through December, 2008, Cromitie made some bigoted, ignorant remarks to Hussain, primarily about Jews. Hussain tried repeatedly to get Cromitie to act on those remarks - such as by coming up with a plan to kill Jews, identifying a target, recruiting others to the plan, acquiring guns,

conducting surveillance. (JA.2931, 3046, 3211, 3238, 3285, 3504). Cromitie, for his part, did absolutely nothing. He said:

> "Yeah but it's not easy, bro. How do you start something like that? ... That's not my mission. Just like you said, Allah makes things happen." (JA.3504).

When Hussain criticized Cromitie for his inaction, Cromitie acknowledged he had done nothing and stated that "maybe it's not my mission then. Maybe my mission hasn't come yet." (JA.3504). In November, Hussain arranged for Cromitie and him to attend an Islamic conference in Philadelphia, which consisted of a series of workshops led by imams and scholars concerning Islamic studies. (JA.697). On the way to the conference, Hussain brought up the subject of a recent terror attack in Mumbai, India, but Cromitie had not heard about that either. (JA.699).

In December, 2008, it became clear to Hussain that his promises to Cromitie of paradise would not be enough, and he began to dangle more earthly rewards before Cromitie, such as cash and a BMW. On December 18, 2008, Hussain left the country for Pakistan and England, telling Cromitie he would be away for a couple of weeks and that he needed to talk to his terrorist organization JeM and come up with a plan. In fact, Hussain was on personal business (JA.742) and did not return until February 20, 2009. (Id.)

During Hussain's absence, Cromitie again did absolutely nothing. When Hussain questioned him about it after Hussain returned to the United States in February, Cromitie replied "I just dropped everything." (JA.3596). The FBI also concluded during this time that Cromitie, if left alone, posed no threat. In a meeting with TSA officials at Stewart Airport on December 31, 2008, during Hussain's absence, the FBI advised TSA that "Cromitie was unlikely to commit an act without the support of an FBI source [Hussain], who will accompany Cromitie upon conducting the surveillance." (JA.4554). The FBI finally also discovered that Cromitie's fantastic tales of family connections and travel to Afghanistan and of a violent criminal past were pure hokum. (JA.363-369). Cromitie, it seems, was willing to say anything that Hussain might want to hear and would not let the truth get in the way. For Cromitie, acting on those statements obviously was another matter.

After his return, Hussain reported to Cromitie that JeM wanted to proceed with the plan. (JA.3602). Hussain continued to press Cromitie for action and dramatically escalated the promises of material rewards. He promised Cromitie

"alot of money," (JA.815, 1648) as much as $250,000,[3] as well as cash for the lookouts Cromitie was supposed to recruit. (JA.3762-3763). Other rewards were promised by Hussain as well: vacations (JA.1956-1957, 4489), cars (JA.816, 3784), a barbershop (JA.3758), and always cash (JA.3765, 3777, 3794, 4486). Cromitie at last appeared to buckle under the pressure and agree to go along with Hussain's plan. (JA.3610). On February 24, 2009, Hussain gave Cromitie $200 to purchase a digital camera at Walmart (JA.750) and then drove Cromitie - who had neither a car nor a driver's license - to Stewart Airport on a "surveillance" mission. (Id.).

However, as soon as Cromitie seemed to yield, he disappeared from Hussain. For six weeks, from February 25, to April 5, 2009, he avoided all contact with Hussain. Cromitie claimed to be in North Carolina in order to avoid Hussain, although the FBI knew - through its wiretaps - where Cromitie really was - at home in Newburgh. (JA.404). Needless to say, during this period Cromitie again did nothing to advance Hussain's plot. In fact, Cromitie did the opposite when he

[3] Hussain was not authorized to make such an enormous offer. He also turned off the recording device he controlled when he made it and fabricated a lie about the offer when questioned about it at trial (JA.773, 1576), which the trial court found to constitute perjury. (SA.136). However, he was recorded on April 5, 2009, reminding Cromitie of the offer in a wiretapped conversation (JA.4486) that Hussain did not know was being recorded. (JA.1572).

sold the digital camera that Hussain had purchased for him to take surveillance photos. Cromitie netted $50-$60 for the camera (JA.2455-2456), which seemingly was worth more to him than the camera or any other part of Hussain's plot. Also during this period, Cromitie was fired from his job at Walmart for absenteeism, tried and failed to get it back, and was unemployed. (JA.2440, 2446). Hussain made constant efforts to reach Cromitie during this period. (JA.770-771).

As his finances evaporated, Cromitie became desperate. On April 5, he contacted Hussain and told Hussain he was broke and needed to make some money. (JA.4486). Two days later, Cromitie stated that he did not want anyone to get hurt (JA.3716), but he was willing to go forward in Hussain's plot. Hussain, still ratcheting up the pressure, told Cromitie that his (Hussain's) life was in danger if no action were taken (JA.3715) and, in the same conversation, challenged Cromitie's manhood (JA.3696), and hinted that harm could come to Cromitie too if nothing were done. (JA.1607). Hussain continued to promise lavish material rewards for Cromitie and anybody else Cromitie could recruit.

After Cromitie agreed to go along with the plot, he brought in an acquaintance David Williams after Williams was released from Rikers Island Correctional Facility, and on April 10, Williams accompanied Hussain and

Cromitie on a trip first to Walmart so Hussain could buy another camera for Cromitie to replace the one Cromitie sold, then to Riverdale and Stewart Airport to check out those locations. (JA.790-800). Some time thereafter, Onta Williams and Laguerre Payen became involved also. (JA.863-864). Recorded calls between the co-defendants reveal how significant Hussain's promises of cash, cars, and vacations were to them. (JA.4510). Hussain in fact began to dole out modest amounts of cash to them for cell phones, rent, meals, groceries, and other incidental expenses, always with the promise of much more to come when the "mission" was complete. Hussain gave $200 to Cromitie twice during this period. (JA.902, 944-945).

Hussain drove the defendants to Brooklyn to purchase a handgun after at least a dozen requests by Hussain for Cromitie to acquire a gun and after Cromitie somehow failed to find one for sale in Newburgh. (JA.886, 894). Hussain also drove the defendants to a storage facility in Stamford, Connecticut on May 6, 2009, for the ostensible purpose of allowing them to inspect the "bombs" to be detonated at the synagogues and the "Stinger missile" to be fired at military aircraft and moving the "weapons" to a storage facility near Newburgh. The weapons were fake and provided by the FBI, but the real reason for the trip from

New York to Connecticut, i.e. to establish federal jurisdiction, was not fake. (JA.989).[4] On that occasion, Hussain announced that the Riverdale operation would be a car bombing and that the "bombs" would be placed in cars parked by JeM near a synagogue and a Jewish community center. (JA.928-929). On May 13, Hussain and the defendants returned to Connecticut to pick up another fake Stinger missile. (JA.944).

As the day for the plot to unfold approached, Hussain told Cromitie and Payen that he had put their money in commercial UPS mailboxes and that he would give them the keys on the day of the operation. (JA.955). On May 19, Hussain told the defendants each would get $5,000 and it would be in their UPS mailbox. (JA.958-959, 1858-1859).

Finally, on May 20, 2009, Hussain drove the defendants and the fake "weapons" to Riverdale and, just before they arrived, handed over four UPS mailbox keys to them. (JA.1884). Despite the planning, discussions and practice that previously occurred, Cromitie proved unable to arm the "bombs" and then

[4] The real reason Stinger missiles were involved in the sting at all, i.e. to manipulate the defendant's sentence to include a 25-year minimum, was not fake either. The district court so found, but imposed the 25-year sentence anyway. (SA.143).

placed one without turning the timer on, and could not open the trunk of one of the JeM cars where the "bomb" was to be placed, leaving it on the back seat instead. (JA.986, 1875, 1895). The other three defendants got out and supposedly served as "lookouts" and stood where Hussain told them to stand. (JA.1891). When the defendants returned to Hussain's car after the fake bombs had been placed, they were arrested and then thrust by law enforcement and local politicians into the national spotlight as would-be terrorists who had been foiled.

At trial, long after this toxic burst of publicity, Hussain acknowledged that the defendants were acting out fictional roles as if it was a movie script. (JA.883, 1714). None of the weapons was real. None of the purported acts of terrorism was real. At the trial, and on this appeal, it is clear what is real: not terrorism, but the issues of entrapment, the proper limits of the government's treatment of its citizens, and its authority to manufacture crime where none existed and never would have existed.

The Indictment

Following their arrest, the defendants were presented on May 21, 2009, on a complaint and were detained. (JA.12, 13). On June 2, 2009, an eight-count indictment (JA.65) was filed against them charging as follows:

Count One charged the defendants with Conspiracy to Use Weapons of Mass Destruction within the United States, in violation of 18 U.S.C. § 2332a(a)(2)(C);

Count Two charged the defendants with an Attempt to Use Weapons of Mass Destruction within the United States, as to the Riverdale Temple at 4545 Independent Avenue, Bronx, New York, in violation of 18 U.S.C. § 2332a(a)(2)(C);

Count Three charged the defendants with an Attempt to Use Weapons of Mass Destruction within the United States, as to the Riverdale Jewish Center, 3700 Independent Avenue, Bronx, New York, in violation of 18 U.S.C. § 2332a(a)(2)(C);

Count Four charged the defendants with an Attempt to Use Weapons of Mass Destruction within the United States, as to the New York Air National Guard Base, Newburgh, New York, in violation of 18 U.S.C. § 2332a(a)(2)(C);

Count Five charged the defendants with Conspiracy to Acquire and Use Anti-Aircraft Missiles, in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(1), (b)(4), (b)(5) and (c)(1);

Count Six charged the defendants with an Attempt to Acquire and Use Anti-Aircraft Missiles, in violation of 18 U.S.C. §§ 2332g(a)(1), (b)(1), (b)(4), (b)(5) and (c)(1);

Count Seven charged the defendants with Conspiracy to Kill Officers and Employees of the United States, in violation of 18 U.S.C. §§ 1114 and 1117; and

Count Eight charged the defendants with an Attempt to Kill Officers and Employees of the United States, in violation of 18 U.S.C. §§ 1114 and 2.

The indictment also contained a forfeiture allegation.

The defendants were arraigned on the indictment on June 2, 2009, and entered pleas of not guilty.

Pretrial and Trial Proceedings

The defense filed motions prior to trial, including motions to dismiss the indictment based on government misconduct and to suppress wiretap evidence pursuant to Franks v. Delaware, 438 U.S. 154 (1978). Cromitie also sought dismissal of Counts Five and Six as duplicitous and Count Six as failing to allege essential facts. In two written decisions, the district court denied all of the defendants' pretrial motions. (SA.21 as the defendants' Franks motion and SA.3 as to the remaining motions).

The case proceeded to trial, commencing August 19, 2010. The government's case consisted principally of the testimony of case agent Robert Fuller of the FBI and of the confidential informant Shahed Hussain, as well as the recordings obtained by Hussain and by wiretap of the defendants. Substantial questions arose during the testimony of Hussain as to his lack of truthfulness and the government's response thereto, although the district court denied post-trial defense motions for a mistrial on that ground. (SA.134). The government also called as witnesses at trial various FBI agents, NYPD detectives, an Air Force official and a paralegal from the United States Attorney's Office, all of whom had supportive roles in the FBI's sting operation or in the preparation of the case for

trial. After the government rested, the defendants moved for a judgment of acquittal under Rule 29, Fed. R. Crim. P., but the district court denied that as well.

Cromitie called as a witness Michelle Jacobsen, a Walmart personnel manager who testified that Walmart in Newburgh ceased selling firearms long before James Cromitie came to work there (contradicting one of Cromitie's claims to Hussain that he had stolen guns from Walmart) and the circumstances of Cromitie's loss of employment at Walmart in March, 2008, for "job abandonment." Cromitie also called Jose Sanchez, an acquaintance of Cromitie, who bought the digital camera from Cromitie that Hussain had given him and paid Cromitie fifty or sixty dollars for the camera. Cromitie and the remaining defendants then rested. There was no government rebuttal case.

The case then proceeded to closing arguments and the district court's instructions to the jury. On its eighth day of deliberations, the jury returned its verdict: it found all the defendants guilty of Counts One through Seven and defendants Cromitie and David Williams guilty of Count Eight. Defendants Onta Williams and Payen were acquitted of the charge in Count Eight.

Post-Trial Motions and Sentencing

After the trial concluded, the defendants submitted additional motions. In one submission, the defendants moved for a post-trial judgment of acquittal under Rule 29 based upon entrapment of the defendants, for a new trial under Rule 33 based upon the government's failure to investigate and correct the perjury of its main witness Shahed Hussain, and for a new trial based upon the improper excusing of a seated juror and the exposure of the remaining jurors to a government transcript of a recording not in evidence. The district court denied these motions in a written decision. (SA.89).

The defendants also renewed their motion to dismiss the indictment based upon government misconduct. In a separate decision, the district court denied that motion also. (SA.61).

Prior to sentencing, the defendants also filed motions based on sentencing entrapment and sentencing manipulation. The district court denied the entrapment motion. As to the manipulation motion, the court concluded that the "missile" element of the case had been introduced by the government in order to secure a sentence with a mandatory minimum of 25 years. The Court nevertheless concluded it was powerless to impose a sentence below that level in view of the

verdicts of guilty returned by the jury. That motion therefore was denied. (SA.143).

With all of their motions denied, defendants Cromitie, David Williams and Onta Williams appeared for sentencing on June 29, 2011. The district court entertained additional defense arguments as to sentencing entrapment and manipulation but adhered to its decision to deny the defense requests to dismiss or to sentence the defendants below the mandatory minimum. The court then proceeded to sentence each of the defendants to a term of imprisonment of 25 years, a term of supervised release of 5 years, and a special assessment of $100 for each count of conviction.[5] (JA.2640).

A judgment reflecting the sentence imposed on James Cromitie was filed on July 8, 2011. (SA.170).

James Cromitie filed a notice of appeal on July 11, 2011. (JA.2762). He presently is serving his sentence at FCI Ray Brook, located in Ray Brook, New York.

[5] Defendant Payen was sentenced separately on September 7, 2011, and received the same sentence.

ARGUMENT

"The essence of what occurred here is that a government, understandably zealous to protect its citizens from terrorism, came upon a man both bigoted and suggestible, one who was incapable of committing an act of terrorism on his own, created acts of terrorism out of his fantasies of bravado and bigotry, and made those fantasies come true."

Those were the words of the district court, spoken at James Cromitie's sentencing (JA.2710) and spoken after presiding over extensive pretrial and post-trial proceedings, as well as the trial itself. In one succinct sentence, the court placed its finger on the two issues Cromitie seeks to raise in his appeal: (1) that he was entrapped; and (2) that the government's conduct toward him was fundamentally unfair and deprived him of his Due Process rights.

I. JAMES CROMITIE WAS ENTRAPPED.

From the opening bell at the trial, James Cromitie contended that he was entrapped. That was his defense and the basis upon which he urged the jury to find him not guilty. By its verdict, the jury disagreed with the defense, and the trial court subsequently denied Cromitie's post-trial motion under Rule 29 that was premised upon his entrapment defense.

Cromitie submits that the trial court erred in denying his motion and that it should have found, based on the record developed at trial, that James Cromitie was entrapped as a matter of law.

A. The Legal Standard.

It has long been established that the government may not originate a criminal design, implant in an innocent person's mind the disposition to commit the crime, and then induce its commission so that the government can prosecute that individual. Sorrells v. United States, 287 U.S. 435, 442 (1932). By such conduct, the government oversteps the line between setting a trap for the "unwary innocent" and the "unwary criminal." Sherman v. United States, 356 U.S. 369, 372 (1958). Unless the individual is predisposed to commit the crime for which he was arrested, the government may not induce him to commit it and obtain a lawful conviction. Further, that predisposition must have existed before and independently of the government's efforts directed at the individual.

Entrapment is an affirmative defense. United States v. Williams, 23 F.3d 629, 635 (2d Cir. 1994). As this Court has allocated the respective burdens of proof, the defendant bears the "relatively slight" burden of demonstrating that the

government initiated, or induced, the crime. Once that burden has been satisfied, the burden shifts to the prosecution to prove, beyond a reasonable doubt, that the defendant was predisposed to commit the crime for which he is being prosecuted. United States v. Brand, 467 F.3d 179, 189 (2d Cir. 2006); United States v. Bala, 236 F.3d 87, 94 (2d Cir. 2000).

To meet its burden of proving predisposition, the government may establish it with evidence of

> "(1) an existing course of criminal conduct, similar to the crime for which the defendant is charged,
>
> (2) an already formed design on the part of the accused to commit the crime for which he is charged, or
>
> (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement."

United States v. Brand, 467 F.3d at 191; United States v. Valencia, 645 F.2d 1158, 1167 (2d Cir. 1980); United States v. Viviano, 437 F.2d 295, 299 (2d Cir.) cert. denied, 402 U.S. 983 (1971). The government must also prove that the defendant was disposed to commit the criminal act before he or she was first approached by government agents, Jacobson v. United States, 503 U.S. 540, 549 (1992), thus

putting the "pre" in predisposition. As the Jacobson court put it, the defendant's predisposition must be "independent and not the product of the attention that the Government had directed at [the defendant]." Id. at 550.

Cromitie understands that a reviewing court, in evaluating a challenge to the sufficiency of trial evidence, generally is required to view the evidence in the light most favorable to the government.[6] United States v. Gagliardi, 506 F.3d 140, 149 (2d Cir. 2007). Nevertheless, he contends that, under any view of the evidence in this case, he was induced by the government to commit a crime that he was not predisposed to commit. In other words, Cromitie was entrapped.

B. Application of Standard to this Case.

Cromitie easily carried his "relatively slight" burden of showing inducement by the government. The treasures and promises of Paradise dangled in front of him like a carrot by the informant were more than sufficient. Cromitie also submits that the government failed to show that he was disposed to commit the crimes he was accused of before the government turned its attention to him.

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[6] To the extent the government's case at trial relied upon the testimony of its informant Hussain, any advantage it gains from this view of the evidence should be tempered by the fact that the district court found that Hussain perjured himself repeatedly at trial. (SA.135-136).

(1) Cromitie Was Induced.

Although the government at trial did not concede the issue of inducement, it probably should have. It was clear enough that Cromitie's generalized anger was directed, or manipulated, over time by the informant to embrace the idea of jihad. Cromitie, to be sure, eventually came to the idea, but it originated with the informant, not with Cromitie. In denying Cromitie's post-trial motion under Rule 29, the district found that "all facts pertinent to conviction were uncontested, except one - whether the defendants were predisposed, before they encountered Hussain, to commit the heinous acts they were obviously prepared to carry out." (SA.94). Clearly, there was more than enough evidence in the record of inducement to meet the defendant's burden.

That there was some evidence that "the government initiated the crime," Brand, 467 F.3d at 190, is hardly open to dispute. In United States v. Sherman, 200 F.2d 880, 883 (2d Cir. 1952), the court noted that inducement included "soliciting, proposing, initiating, broaching or suggesting the commission of the offense charged." In other words, it must be shown that it was the government that "got the accused in motion." Id.

Hussain said that he encountered an angry James Cromitie when they first met. According to Hussain, Cromitie even allowed that he wished "to do something to America" for its participation in wars in Muslim countries. It is important to note that this conversation was not recorded and, based on his record of lying at the trial, Hussain's word for anything cannot be trusted. Nevertheless, even by Hussain's account, there was no talk by Cromitie of violence or jihad against Jews or American military facilities or of bombs or missiles. It was Hussain who gradually introduced these goals to Cromitie, along with an opportunity to "make some money out of it." (JA.1729). What originally had been a quest by Cromitie to "straighten out" and "be a good Muslim" (JA.4591-4592) turned in time, and at the government's urging, into something else altogether.

It was Hussain, not Cromitie, who claimed to be a member of a terrorist organization, Jaish-e-Mohammed (JeM), to have trained in Islamic studies, and to have studied terror tactics and studies. It was Hussain who told Cromitie about the killing of Muslims in Pakistan by "infidels" ("mushriks"). When Cromitie did not bite at this provocation, Hussain went on to tell him about the hadith - Mohammedan teachings that permitted or even required Muslims to

commit violence against non-believers. Cromitie still was of the view that, despite his anger, his faith as a Muslim would help him deal with it. "Allah will take care it." (JA.2777). Hussain was relentless, however, in pushing on Cromitie the notion that killing for the sake of Allah was required and that "you have to do something in jihad." Hussain endorsed jihad over and over to Cromitie but could not move him to action. Hussain eventually told Cromitie that he (Hussain) could get guns, missiles and rockets for the jihad. (JA.3146-3147).

In an attempt to motivate Cromitie after promises of reward in Paradise alone had failed, Hussain tried other bait. He began to offer Cromitie money, lots of it and on numerous occasions, up to an amount as fantastically high as $250,000. Eventually, the offers of money and material reward, as well as the promise of spiritual reward, led Cromitie to agree to Hussain's plan of jihad. But it was mostly for the money.

In every sense, the government's informant Hussain set Cromitie in motion. He proposed jihad, the targets, the means, the reasons, the rewards, and he relentlessly pursued Cromitie and offered him a variety of inducements until Cromitie agreed to the plan. Cromitie may have been angry with Jews or with America, if Hussain is to be credited at all, but he did not initiate the crimes for which he and his co-defendants came to be charged.

Instead, as the district court stated at sentencing, the initiating force for this crime came from the government and that force induced James Cromitie's ultimate decision to participate.

(2) Cromitie Was Not Predisposed to Commit The Crime of Conviction Before He Met Hussain.

Once evidence of inducement has been shown, it becomes the government's burden to establish predisposition beyond a reasonable doubt. A defendant is predisposed to commit a crime if he is "ready and willing without persuasion to commit the crime charged and awaiting any propitious opportunity to do so." United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995); United States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993)(internal quotes omitted). In the first place, the record shows that, whatever else may be said about Cromitie, his participation in Hussain's plan was decidedly not "ready and willing without persuasion."

Further, and most significantly, the government is required to show that a defendant was disposed to commit the criminal act before first being approached by government agents. Jacobson v. United States, 503 U.S. 540, 549 (1992). In other words, there must be proof that the predisposition was

independent and not the product of the government's attention directed at the defendant. Id. The government's case against Cromitie failed in this regard too.

This failure of proof comes into sharper focus in considering each of the ways predisposition may be shown. It is well-established that the government may prove predisposition by evidence of:

> "(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement."

United States v. Brand, 467 F.3d 179, 191 (2d Cir. 2006), United States v. Salerno, 66 F.3d at 547. None of these alternative avenues of proof accurately reflects Cromitie's circumstances before he met Hussain or, in the case of the third alternative, Cromitie's response to Hussain, which was a "not-ready" response. Put simply, he was not predisposed to commit the crimes for which he was charged.

(a) Existing and similar course of conduct.

There was no proof at trial - none - that James Cromitie was engaged in any conduct before he met Hussain that was remotely similar to the crime for which he ultimately was charged. That crime, it is well to remember, involved a plan to place bombs in cars near synagogues and shoot missiles at military aircraft. Cromitie had no record of violence and had not previously engaged in any such conduct before his relationship with Hussain, or in any conduct even remotely similar. In fact, it could not be shown that he even possessed the idea of committing such a crime (cf. Brand, 467 F.3d at 194), let alone that he possessed any capacity to do it (cf. Salerno, 66 F.3d at 547-548). The district court, in denying Cromitie's post-trial motion based on government misconduct, wrote that

> Indeed, after reviewing the record yet again, I am left with the firm conviction that if the Government had simply kept an eye on Cromitie, and moved on to other investigations, nothing like the events of May [20], 2009, would ever have occurred. (SA.84).

It is sufficient to close this alternative that Cromitie was not engaged in an existing course of criminal conduct similar to that for which he was charged. That he never had, and that he never would have except for Hussain's intervention, both

speak to a clear absence of predisposition and close off this alternative and the next alternative as well.

(b) An already formed design to commit the crime.

Another alternative avenue of proof for the government to establish predisposition is to show that, prior to the government's investigation, there was "an already formed design on the part of the accused to commit the crime for which he is charged." Brand, 467 F.3d at 191. In Brand, the defendant was charged with interstate travel for the purpose of engaging in illegal sexual activity with a minor. The court found a number of events, such as chat-room activity and acquisition of child pornography, that were "prior to, and were independent of, any contact by government agents, as required under Jacobson. Id. at 194-195 (emphasis in court's decision). Based on those events, the court concluded that the jury had ample basis to conclude that Brand was predisposed to commit the crimes charged. (The court also noted his "ready response" to the inducement, which would have satisfied the third alternative). There are no similar prior and independent events in Cromitie's case that would establish an already formed design to commit the crimes for which he was charged.

It is significant that this avenue requires proof of a design to commit the crime charged, not just expression of a desire to do some generalized, unspecific act. Cromitie and his co-defendants were charged with plotting to set off explosives at synagogues and to fire missiles at military planes at Stewart Airport. The record is devoid of any statement, act or event that shows Cromitie held a desire to commit those crimes, or anything like those crimes, before he met Hussain. The district court placed significance upon a supposed statement by Cromitie, at one of their early meetings, that he had an idea of "doing something to America." (SA.96). Even if Cromitie said such a thing, which is by no means clear,[7] it comes nowhere close to establishing, beyond a reasonable doubt, a design to commit the charged crimes. The Court in Jacobson was clear that "evidence that merely indicates a generic inclination to act within a broad range, not all of which is criminal, is of little probative value in establishing predisposition." 503 U.S. at 550. The words attributed to Cromitie, even if they were his, could hardly be more generic or occupy a broader range.

[7] Cromitie also said at another point that the plan emanated from Hussain, not from him. (JA.4159).

The district court relied on other statements made by Cromitie, later in his relationship with Hussain, that were less generalized and closer in description to the crimes he was charged with in the indictment. (SA.98-99). However, those statements were in no way made prior to and independent of the government's involvement with him, nor could it be said that, whenever they were made, they reflected an already formed desire on his part, before and independent of Hussain, to commit the charged crimes. In fact, to the contrary, those statements were made well after the government's sting operation of Cromitie had begun and were uttered during the course and as a result of that operation, not before and independently of it. They simply do not provide any proof under Jacobson of predisposition.

The district court failed to follow the requirement of Jacobson v. United States, 503 U.S. at 549, 550, that the government must prove, beyond a reasonable doubt, that the defendant was predisposed to commit the criminal act prior to first being approached by government agents and that his predisposition was independent of the attention that the government directed at him. This failure led the court to an erroneous conclusion, reached in denying Cromitie's post-trial Rule 29 motion, that Cromitie had already formed a design to commit the crimes

for which he was charged before the investigation of him began. However, to the extent that Cromitie ever formed such a design, it was formed after the investigation began and as a result of the investigation, not prior to and independent of it. In fact, the district court actually acknowledged as much:

> There is not the slightest doubt in my mind that James Cromitie could never have dreamed up the scenario in which he actually became involved. And if by some chance Cromitie had imagined such a scenario, he would not have had the slightest idea how to make it happen. (SA.103).

It makes no sense to say that Cromitie, on the one hand, had an already-formed design to commit the charged crimes and, on the other hand, he could not have even dreamed up those crimes. There is simply no support for the finding of an already-formed design to commit these crimes, prior to and independent of Hussain's efforts, that was proven beyond a reasonable doubt.

(c) Ready response.

The third alternative avenue for the government to prove predisposition is to show a defendant's "willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the

inducement." Brand, 467 at 191; United States v. Brunshtein, 344 F.3d 91, 101-102 (2d Cir. 2003). The cases decided under this alternative make clear that "ready" nearly equates to "prompt," or agreeing to the inducement at the earliest opportunity. In Jacobson, 503 U.S. at 550, the Supreme Court noted that had the agents simply offered the defendant the opportunity to order child pornography, and the defendant - "who must be presumed to know the law - had promptly availed himself of this opportunity," it is unlikely that an entrapment defense would have warranted a jury instruction. See also United States v. Brand, 467 F.3d at 194 ("prompt response"); United States v. Harvey, 991 F.2d 981, 992 (2d Cir. 1993)("prompt acceptance"); United States v. Valencia, 645 F.2d 1158, 1168 (2d Cir. 1980)("agreeing with [the informant's] plan when first proposed"). Indeed, it is the very promptness of the response that provides its relevance to the issue of disposition, prior to and independent of government influence. A belated, or "not ready," response cannot be divorced from government influence and thus lacks any relevance to the issue of predisposition.

The district court did not rely on this alternative in its finding of predisposition, and for good reason. Cromitie's response to Hussain's inducements, which were constantly being ratcheted-up, was anything but ready or

prompt. In fact, it was more akin to the defendant's response in Jacobson, whose resistance buckled "only after the Government had devoted two and one-half years to convincing him" to break the law. 503 U.S. at 553. In Cromitie's case, it took months of prodding by the informant and promises of spiritual reward and earthly treasure to prevail upon Cromitie.

As Cromitie pointed out in the district court, his agreement to participate in Hussain's proposed plan was not prompt. It took months and months from the time of their first contact to get Cromitie to agree to the "mission" manufactured for him in every detail by Hussain. Although he at times voiced verbal enthusiasm, he did not agree to participate in the plan, did nothing to further it, and in fact sought to avoid Hussain altogether for an extended period. This was not temporary reluctance, or "a transient manifestation of unease," Salerno, 66 F.3d at 548. It was, by any measure, a lack of a "ready response."

It was only when his circumstances changed and the promises of material wealth became too much for Cromitie to resist that he assented to the plan. Cromitie was without work at that point, was poor and desperate for money. See United States v. Kessee, 992 F.2d 1001 (9th Cir. 1993). At that point, he yielded to the inducements he was being offered and agreed to the terrorist plan.

The district court stated that there was no "ready response" and that Cromitie was not "responding" at all, if the idea for jihad emanated from him. (SA.102). The court found, when viewing the evidence most favorably to the government, the idea for committing jihad was Cromitie's. (Id.). With all due respect, Cromitie submits that there is no reasonable view of the evidence that permits the view that Cromitie came up with the plan for the crimes charged, or held an already-formed design to commit them. The plan came from the government and its informant Hussain. Nor is there any reasonable view of the evidence that Cromitie provided a ready response to the inducement.

Indeed, the district court did not and could not find that Cromitie provided a ready response to Hussain in its conclusion on the issue of predisposition. There was no such response from Cromitie.

* * *

As in Jacobson, James Cromitie was persuaded over an extended period and manipulated in a variety of ways, until he at last agreed to commit a crime he was not predisposed to commit. The Court in Jacobson concluded that the prosecution failed to prove the defendant's predisposition existed before, and existed independently of, the attention the government directed at him. Likewise, it

cannot be said that Cromitie's decision to enter into Hussain's criminal plan was "the product of his own preference and not the product of government persuasion." United States v. Williams, 705 F.2d 603, 618 (2d Cir. 1983). To the contrary, government persuasion had everything to do with that decision and compels the conclusion that Cromitie was indeed entrapped.

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

Separate from the issue of entrapment, this Court should have serious concern over the government's conduct that was directed at James Cromitie. That conduct was relentless and aimed at ensnaring Cromitie in a crime he would not have committed if the government had left him alone. It was as dubious legally as it was morally, and the courts, our institution of justice, should not be made available to endorse such conduct by affirming a conviction based on it.

A. The Legal Standard.

It is well-established that the concept of fairness embodied in the Due Process guarantee protects individuals from government action that is "fundamentally unfair or shocking to our traditional sense of justice." United

States v. Schmidt, 105 F.3d 82, 91 (2d Cir. 1997), citing Kinsella v. United States, ex rel. Singleton, 361 U.S. 234, 236 (1960). The Supreme Court suggested, in United States v. Russell, 411 U.S. 423, 431-432 (1973), that a situation could arise 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," although it did not find Russell to be such a case. This Court in Schmidt recognized this quoted language to be one way a due process violation could be established, Schmidt at 91, but recently seemed to hold that it is the only way to establish a due process violation on this ground. United States v. Al Kassar, 660 F.3d 108, 121 (2d Cir. 2011). However, if that was indeed the holding in Al Kassar, it misconstrues the precedential authorities to which it cites.

In Al Kassar, the Court held that a due process violation on the ground of government misconduct requires a showing of conduct that is "so outrageous that common notions of fairness and decency would be offended were judicial processes invoked to obtain a conviction." Id. In support of that rule, the Court cited Schmidt, but the formulation of due process as set forth in Schmidt was not

so restricted.[8] The Al Kassar decision also relied on the decision in United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999), and on a footnote in a concurring opinion by Justice Powell in Hampton v. United States, 425 U.S. 484, 495 n.7 (1976). Both Rahman and Hampton were cases in which the defendants alleged over-involvement by law enforcement in the criminal activity. The allegation of over-involvement, according to Justice Powell in Hampton, required proof of "a demonstrable level of outrageousness." Hampton, id.; see also Rahman, 189 F.3d at 131. Importantly, neither of those authorities held that a due process violation could only be established by outrageous police over-involvement.

Neither did the Supreme Court in United States v. Russell, supra, another case cited in Al Kassar, require outrageous police over-involvement in order to establish a due process violation. Russell focused on police infiltration of drug rings and procurement of a difficult-to-obtain ingredient by the undercover as part of insinuating itself into the ring. The Court found no due process violation, noting the drug ring's "unlawful present practices" that pre-dated the

[8] In Schmidt, this Court held that the concept of fairness embraced by the due process guarantee is violated by government action that is fundamentally unfair or shocking to our traditional sense of justice or conduct "so outrageous" that common notions of fairness and decency would be offended by invoking judicial processes to obtain a conviction of the accused. 105 F.3d at 91.

government's investigation and the government's "limited participation" in those practices. 411 U.S. at 432. Neither such circumstance existed in the FBI sting operation here: there was no pre-existing unlawful conduct, nor could the government's participation be described in any sense as "limited." Thus, in Russell, there was no police over-involvement. Here, there was.

Cromitie submits that, while police over-involvement alone may establish a due process violation if it is severe enough, there are other ways to establish such a violation. To be sure, he argued in the district court and argues here that there was government over-involvement in his case, and that it was outrageous, but he also points to other significant factors in his case that combined with each other and with the government's over-involvement to deprive him of due process. It has been held that a defendant advancing such a due process claim bears a "very heavy burden," Al Kassar at 121; Rahman at 131, and that "such a claim rarely succeeds." United States v. LaPorta, 46 F.3d 152, 160 (2d Cir. 1994). Indeed, it has never succeeded in this Circuit, raising the possibility that perhaps the bar has been set too high for defendants, or too low for law enforcement.[9] Cromitie

[9] Such claims have on occasion succeeded in other circuits. See, e.g., United States v. Lard, 734 F.2d 1290, 1296-1297 (8th Cir. 1984); United States v. Twigg, 588 F.2d 373, 381 (3d Cir. 1978).

respectfully suggests that a clear statement of the standard may have a salutary effect in this regard.

This Court has also stated that "the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it 'shocks the conscience.'" United States v. Chin, 934 F.2d 393, 398 (2d Cir. 1991). This determination is to be made without regard to the extent that such conduct led the defendant to commit his crime. Id. However, the Chin decision's stated standard for a due process violation rested upon the Supreme Court's decision in Rochin v. California, 342 U.S. 165, 172 (1952). The facts in Rochin were far more egregious than in Chin and involved brutal force by police officers in an attempt to extract suspected drugs from the defendant's mouth, followed by an involuntary "stomach pumping" procedure at a local hospital. The Rochin court found that these actions were "too close to the rack and the screw to permit of constitutional differentiation," id., and that it was "conduct that shocks the conscience." Id. However, the Rochin court did not purport to set this as the standard for future due process claims of this sort. To the contrary, it recognized that a precise, all-encompassing standard could not be set.

> Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a 'sense of justice.'

Rochin, 342 U.S. at 173. Conduct evoking the rack and screw certainly offends a sense of justice, but other actions and procedures do as well.

Cromitie submits that his due process claim should be measured by and viewed through the lens of fundamental fairness. Indeed, the Supreme Court has noted that "due process has to do with the denial of that fundamental fairness, shocking to the universal sense of justice. It deals neither with power nor with jurisdiction, but with their exercise." Kinsella, supra at 246. Further, this articulation of the standard is consistent with that in Schmidt, supra at 91.[10] Cromitie submits that the record discloses that, in the totality of circumstances presented here, the government's actions directed at him were fundamentally unfair, and therefore inconsistent with his due process rights under the Fifth

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[10] The Twigg decision also rested on a finding that the defendant had not been accorded "fundamental fairness" without labeling law enforcement's actions as "outrageous" or "shocking." It quoted with approval Justice Powell in Hampton that "[t]he fact that there is sometimes no sharply defined standard against which to make these judgments [regarding denial of due process] is not itself a sufficient reason to deny the federal judiciary's power to make them when warranted by the circumstances." Twigg, supra at 381.

Amendment. The district court erred in denying Cromitie's post-trial motion based on due process, and that decision is reviewable de novo on appeal. Al Kassar, 660 F.3d at 120-121.

B. Application of Standard to this Case.

Turning to the record, the facts of this case disclose how far the government's actions deviated from a standard of fundamental fairness and how much they offended that "sense of justice" identified by Justice Frankfurter in Rochin, supra, 342 U.S. at 173. While no brute coercion or physical invasion was applied to Cromitie as found in Rochin, a number of other factors were. Cromitie submits that those factors, singly and especially in combination, deprived him of his right to due process under the Fifth Amendment.

Below is a discussion of the actions by the government that deprived Cromitie of that right.

(1) Government Over-Involvement.

In this case, the government manufactured the crime of conviction. Through its informant Shahed Hussain, the government came to know James Cromitie as, at worst, a poor, angry and bigoted loudmouth. Had it bothered to

check, the government would also have known that Cromitie was a liar and that his tales of international travel and acts of violence were pure fiction. What he was not was a terrorist, yet he was convicted as if he were one by the time the government was done with him.

Through patient, skilled manipulation, the government accomplished its purpose. After listening to Cromitie's ranting about Jews and his resentment of the disrespect they showed him, Hussain introduced the concept of jihad into their discussions. It was Hussain who introduced the subject of Jaish-e-Mohammed to Cromitie. When Cromitie allowed as he would like to join, Hussain's response was: "I said okay, and you can join Jaish-e-Mohammed." (JA.613). It is hard to imagine any terrorist organization easier to join than Sam's Club, but of course none of the conversations between Hussain and Cromitie had any basis in reality. The unreality of the conversation matches the unreality of Hussain's plot. It was all a "sham operation" and Cromitie was unwittingly "acting in a play," as the district court found. (JA.2715). Hussain, on the other hand, was not unwitting but cunning, and he led Cromitie through every step Cromitie took. Hussain even described one meeting with Cromitie as "perfect out of a movie script." (JA.883, 1714).

In baiting the trap, Hussain pressed and badgered Cromitie to join him in jihad, to pick targets to attack, to recruit others, to procure weapons, to conduct surveillance. Even as the rewards promised by Hussain (discussed below) graduated from ethereal to material and from lavish to extraordinary, he could not get Cromitie to act. Cromitie's inaction could have been the product of conscience or a lack of interest, or a lack of know-how despite his big talk, or something else, but the significant fact is that he did not act. In response to Hussain's evident frustration with him, Cromitie replied at one point: "Maybe it's not my mission then. Maybe my mission hasn't come yet." (JA.3504).

What is clear is that the government's mission was Cromitie. As the religious invective and promised rewards from Hussain escalated, there came a point when Cromitie became desperate and finally succumbed and agreed to Hussain's plan of jihad. Cromitie's assent, however, provided no expertise or usefulness to the plan, and the government and its informant still had to do everything, even with Cromitie in tow. In service of its mission, the government, did the following:

— devised the "jihadist" plan;

— identified the "targets" of the fake plot, the Riverdale synagogues and military aircraft at Stewart Airport;

— supplied the "weapons" (fake bombs, fake Stinger missiles);

— supplied the facilities needed for the plot, such as a "safe" house in Newburgh and the storage facilities;

— supplied the equipment needed such as cameras (Cromitie sold the one given to him when he needed a quick $50), rental cars and cell phones;

— provided all of the necessary transportation since none of the defendants had a driver's license, much less a vehicle to drive;

— provided "code words;"

— provided maps;

— provided training on the use of the "weapons;"

— provided assembly of the fake bombs when Cromitie proved to be incapable of following instructions on how to do it; and

— paid for every single item of expense, including rent, groceries, meals, and other personal expenses, for Cromitie and the other defendants.

Cromitie could never have provided these things on his own, nor could he have figured any way to get them. As the district court concluded, he would not have known what to do or had a clue as to what he needed, much less how to get it, even if he were inclined toward this "jihad" mission. But, no worries, it was all provided for him by the ever helpful and resourceful Hussain.

The government's involvement in the crime of conviction was everything; it conceived, instigated, planned, trained and supplied - everything. Adjectives such as "extensive," Schmidt, 105 F.3d at 92, and "elaborate," United States v. Myers, 692 F.2d 823, 837 (2d Cir. 1982), do not properly describe that involvement. In every sense, the government designed and manufactured the whole crime.

This case differs in important ways from Rahman and Schmidt, in which the Court found the government's conduct was within constitutionally acceptable boundaries. In Rahman, the defendants were already advancing a conspiracy and had resources and expertise to complete it without the government's help. 189 F.3d at 131. In Schmidt, the criminal plan originated with the defendant and she supplied the detailed instructions to carry it out. In both cases, the entry of a government informant was intended not only to gather evidence but to prevent a real crime, involving death and destruction, from taking

place. Nothing remotely similar could be said about the present case. Nor is this case at all like Al Kassar or Myers where the government simply provided an opportunity for the defendants to commit the crimes for which they were convicted, even if the ploys were elaborate or the engagement prolonged.

Most comparable to this case are the decisions in United States v. Lard, 734 F.2d 1290 (8th Cir. 1984), and United States v. Twigg, 588 F.2d 373 (3d Cir. 1978). In those cases, government agents set up the defendants in the illegal activity and then walked them through the activity until the crime was completed. Both courts concluded that the government's conduct had not been aimed at discovery or suppression of illicit dealing in firearms in Lard and drugs in Twigg. Rather, that conduct generated new crimes by the defendants merely for the sake of pressing criminal charges against them. The Twigg court stated: "Fundamental fairness does not permit us to countenance such actions by law enforcement officials and prosecution for a crime so fomented by them will be barred." Id. at 381. The government's conduct here was of a like nature: it created a new crime and that crime was pursued for the sake of pressing charges against Cromitie and the others. Further, like Twigg and Lard and unlike Rahman/Schmidt/Al Kassar/Myers, there is no reason to believe the crime ever would have or could

have been committed in the absence of the government's conduct. The government seemed to know that even during the sting operation (JA.4554) and the district court, after listening to the evidence at trial, certainly knew it. (SA.84).

This Court has stated that "generally" or "ordinarily," official misconduct must involve coercion or violation of the defendant's person in order to be considered "outrageous." Al Kassar, 660 F.3d at 121; Schmidt, 105 F.3d at 91. But coercion or personal violations have never been held to be a sine qua non, not in Russell, or Rochin, or in any other case, and Lard, Twigg and this case demonstrate why. It is possible that the government's conduct can be so pervasive and all-encompassing that it creates a new crime, and a new criminal, that would not have existed without that conduct and should be condemned even if it did not involve coercion or a personal violation. Cromitie submits that the concept of due process should be supple enough, and not constricted with "fixed technical content" (Rochin, 342 U.S. at 170), to identify such cases when they arrive in court and to reject them.

(2) Extraordinary and Persistent Inducement.

In addition to its manufacture of every aspect of the crime of conviction, the government through its informant Hussain promised Cromitie a

treasure chest to get him to go along with it. Some of the promises were a cynical manipulation of Cromitie's religious beliefs (discussed in (3) below) and all of them were directed at a man of limited intellect and even more limited means (discussed in (4) below). Taken as a whole, these factors along with the relentless pressure and extraordinary and persistent offers of material wealth wore on Cromitie until his resistance was overcome and he agreed to participate in the government's plan.

Probing for any inducement that would work, Hussain tried a variety of them on Cromitie over the months of their interactions. Hussain repeatedly assured Cromitie of reward in Paradise if he went along with the proposed jihad. At other times, Hussain told Cromitie that Hussain's life was at risk if the plan was not carried out (JA.3715). He challenged Cromitie by stating he might have scared Cromitie (JA.3696) and even made veiled threats against Cromitie and his family.[11] None of these prods seemed to have the desired effect on Cromitie. They did not move him to action.

[11] Hussain stated that he told Cromitie that he had promised his terrorist colleagues in JeM that he would complete the mission with Cromitie, that he had given them his word, and that these colleagues were willing to "kill people" and "cut people's heads off." (JA.1611).

It was in the offer of material goods that Hussain eventually hit the sweet spot. Over time, the following were offered to Cromitie, all at least once and some on numerous occasions:

— Repeated offers of "a lot of cash" (JA.1869);

— An all-expenses paid vacation to Puerto Rico (JA.1956-1957, 4489);

— Enough cash to do "whatever you want to do" after the vacation (JA.3759);

— Cash to buy a brand new car (JA.3784);

— A BMW automobile (JA.817);

— A Mercedes-Benz for co-defendant Onta Williams (JA.874);

— A barbershop for Cromitie, whose only skill was barbering, worth $60-70,000 (JA.3758);

— Cash to pay for the co-defendant lookouts so Cromitie would not have to pay for them himself (JA.3762-3763);

— Spending money and payment for meals and other personal expenses, such as rent, food, cell phone cards, and cab fare (JA.824, 899, 1835); and

— $250,000 in cash[12] (JA.4486).

Remarkably, over a period of some six weeks, i.e. from February until April, 2009, even these promised rewards did not move Cromitie to act. It seems that, to paraphrase Winston Churchill, if you wanted nothing done at all, Cromitie was the man for the job.

In April, 2009, everything changed. As the district court noted, and attached great significance to in denying Cromitie's post-trial motion, Cromitie eventually rose to take the bait. In fact, the district court called it "the single most damming fact about Cromitie: when the Government had all but lost interest in the man, he came back to Hussain." (SA.81). Cromitie called Hussain on April 5, 2009, after six weeks of avoiding Hussain, and met with him on April 7. However, during that six-week hiatus, Cromitie had been fired from his job at Walmart and could not get it back. Running out of money and desperate, the wealth and rewards that had been promised him by Hussain took on a new allure for Cromitie. This was the flowering, however belated, of the poisoned seeds that Hussain had planted. Further, Hussain's efforts to connect with Cromitie during

[12] Apparently, this offer by Hussain was not authorized by his FBI handlers. Hussain manipulated his recording device and lied on the witness stand to attempt to evade the import of this offer. (SA.136).

the six-week period bordered on manic: he contacted James' wife, he made "many trips" to James' home, he tried "many times" to call James, he left "many, many voice mails." (JA.770-771). There was no reason for Cromitie to think Hussain had lost interest in him, as the district court suggested. Quite the contrary, and there was no reason for Cromitie to think that Hussain's offers of wealth were not still available to him.

Once he was hooked, Cromitie became a more enthusiastic presence to the operation, although he still had no knowledge, expertise or resources to contribute. In fact, it was his very lack of resources that led him back to Hussain. Cromitie had been fired from his job in the hardware department at Walmart in Newburgh and had failed to get it back. As the district court noted, he was broke and desperate for money - even selling the camera Hussain bought him so Cromitie could take surveillance photos at Stewart Airport. (SA.73). The camera netted him $50 or $60. Poverty and desperation finally drove Cromitie to reach for the rewards he had been promised if he joined in Hussain's plan.

No case has been found where the number and size of the inducements were so extraordinary as this case or offered over so extended a period. The decision in United States v. Al Kassar, 660 F.3d at 122, appears to

reject the notion that "even extremely large financial inducements" could ever rise to the level of a due process violation. This pronouncement was based on United States v. Myers, 692 F.2d at 837-838 (2d Cir. 1982) which, along with United States v. Williams, 705 F.2d 603, 620-621 (2d Cir. 1983), involved the Abscam sting operation of members of Congress willing to accept substantial bribes. But the nature of the target in those cases, as compared to Cromitie, makes all the difference in the world.

> We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator.

Williams, 705 F.2d at 620. Suffice it to say that Cromitie had none - as in zero - of that experience and sophistication.

There is no logical reason why the size of an inducement, as well as the multiplicity of the offers and the persistence of those offers over time, should not be considered in this case against this defendant. Cromitie lacked everything a Senator is supposed to have, including experience, sophistication, intelligence, and resources. When he became desperate, Cromitie succumbed and did what his heart had clearly been telling him not to do - he reached out for Hussain and Hussain's promise of material reward. The many, persistent and extraordinarily

lavish offers of material reward were too much and, when he had no money, he was unable to resist them any longer.

(3) Exploitation of Cromitie's Religious Beliefs.

Of all the troubling aspects of the government's sting operation, and there are many, one of the most unsettling was its shameless exploitation of religion to lure Cromitie into participation in the concocted plot. The informant Hussain cynically pretended to be a religious man, knowledgeable and trained in Islam. Approaching Cromitie at a mosque in Newburgh, Hussain learned that Cromitie was seeking "Islamic guidance" (JA.4592) and wanted to "straighten out" and "be a good Muslim." (JA.4591-4592). To be sure, Hussain claims that Cromitie professed anger toward the United States and a disdain of Jews, although he did not describe much in the way of a personal basis for those feelings even if he did have them. In any event, Cromitie was hopeful that Allah would "take care of" his feelings. Instead, Hussain took care of them, by feeding Cromitie's irrational, uninformed anger and doing so in the name of religion.

Hussain exploited Cromitie's hope of religious salvation and quest for "Islamic guidance" just as effectively as the needs of the drug addict

hypothesized in the Williams finding that the Abscam sting "involved neither pressure nor persistent exploitation of personal weakness, as might occur if an agent preys upon an addict's need for narcotics", 705 F.2d at 620. The government's intruding into Cromitie's religious beliefs and twisting those beliefs as part of a campaign to get him to commit a crime, in the name of that religion no less, was reprehensible and an "egregious invasion of individual rights." United States v. Rahman, 189 F.3d at 131. Such cynical manipulation of a defendant's beliefs recalls Jacobson: "by waving the banner of individual rights and disparaging the legitimacy and constitutionality of efforts to restrict the availability of sexually explicit materials, the Government not only excited petitioner's interest in sexually explicit materials banned by law but also exerted substantial pressure on petitioner to obtain and read such material as part of a fight against censorship and the infringement of individual rights." 503 U.S. at 552. Hussain pounded into Cromitie the idea that jihad and killing were his duty as a Muslim and the highest form of praise to the Prophet. Cromitie, whom Hussain met at a place of worship and who had been seeking "Islamic guidance," was given the wrong directions.

The closest Second Circuit precedent is United States v. Cuervelo, 949 F.2d 559 (2d Cir. 1991). In Cuervelo, the defendant contended that a federal drug enforcement agent seduced her and then played on their romantic involvement to get her to participate in a narcotics conspiracy. Although the jury rejected defendant's entrapment defense, the Second Circuit remanded the case for a hearing on the issue of governmental misconduct. It held that "sexual entrapment" might violate due process, even if aimed at a predisposed target. The Court held that the defendant might prevail if she could show that (1) the government either consciously used sex as a "weapon in its investigatory arsenal, or acquiesced in such conduct for its own purposes after learning that such a relationship existed," (2) the "agent initiated a sexual relationship ... to achieve governmental ends," and (3) the amorous relationship took place during the period covered by the indictment and was related to the charged conduct. Id. at 567.

If one substitutes religious manipulation for sexual manipulation, the factors enumerated in Cuervelo are present here. First, at a minimum, the government - which was contemporaneously listening to each of the recorded meetings - acquiesced in Hussain's repeated efforts to convince Cromitie that committing violence against Jews and Americans was his sacred duty as a good

Muslim, would fulfill Mohammed's teachings, and would ensure him a place in Heaven. Second, Hussain obviously used this invocation of religion as a principal means for convincing Cromitie to commit criminal acts. Indeed, it was the very justification by Hussain for those acts. And, third, Hussain's religious preachings to Cromitie were inextricably intertwined with every phase of the investigation.

The district court, in denying Cromitie's post-trial motion, discounted this argument by finding that this ruse was not "any more reprehensible than others employed by Government agents in the past - ruses that have played on vulnerable aspects of a defendant's character, such as poverty, drug addiction or sexual attraction." (SA.79). But this was different. Even if he did not coerce them, Hussain implanted and fed and, ultimately, exploited Cromitie's misguided religious views and used them as a wedge. Instead of straightening out Cromitie through Islam, Hussain succeeded in twisting him further with a distorted version of Islam, until Cromitie's confused religious fervor, poverty, and the offer of rewards all reached critical mass. This was not just a ruse. This was a level of exploitation of religious belief that is just as dangerous and inimical to due process as any kind of psychological coercion. It should be similarly rejected by this Court.

(4) Targeting a Vulnerable Defendant.

In United States v. Schmidt, 105 F.3d 82, 92 (2d Cir. 1997), the Court expressed concern and a willingness to consider whether the government had undertaken an elaborate sting against a defendant "who had at least a colorable claim of mental illness and was, at the time of the government operation, in the mental observation unit at Rikers Island." The Schmidt court concluded, however, that the evidence of the defendant's mental illness at the time of the offense was equivocal at best and that none of the government's actions in that case deprived the defendant of her due process rights. Nonetheless, the opinion suggests that a vulnerable or disadvantaged defendant may stand in a different position than, for example, a United States Senator, at least when evaluating the government's conduct toward that defendant.

Cromitie makes no claim that he was mentally ill. Nevertheless, it is impossible to look at his circumstances and not conclude that he was more vulnerable and more disadvantaged, and thus more likely to fall prey, than other targets of reported government sting operations. If the Court is willing to consider the individual circumstances of a defendant in assessing the government's actions, then Cromitie's circumstances are worthy of consideration.

Besides being a man beset by confusion and anger, for which he sought religious guidance, as discussed above, Cromitie was an "impoverished man" from "the saddest and most dysfunctional community in the Southern District of New York." (SA.85). Cromitie was of a piece with that community. He tried to distinguish himself to Hussain by inventing biographical facts - by connecting himself with Afghanistan and by inventing past acts of violence to make him seem more consequential than he was, but these lies were as transparent as they were ridiculous. Cromitie, whose intellectual limitations were on full display in the hours of recorded conversation played at the trial, could not even tell a believable lie or one that would stand up to the most cursory check, if anyone cared enough to check.

In truth, Cromitie was a drug dealer, one who was operating at a low level and who had been caught and convicted over and over. He was no more successful at his other occupation of working at a local Walmart. He was fired from that job on March 7, 2009 for "job abandonment," and he tried but failed to get his job back. Without that source of income, minimal though it was, Cromitie soon was "broke and desperate for money." (SA.73). In an act that at once revealed his character, his desperation, and the importance he attached to his "mission" for Hussain, Cromitie sold the digital camera for $50 that Hussain had

bought for him so that Cromitie could take surveillance photos. To this man, the offers of vast material wealth, including $250,000 in cash, cars, vacations, and his own business, must have been and eventually were too much to resist when circumstances rendered him desperate for money.

Targets who are young, or weak, or poor, or mentally ill, or drug-addicted, intellectually limited, or compromised in some other way, deserve added consideration as the Schmidt court suggested. Their vulnerability may render government action constitutionally unacceptable that would pass muster if directed against someone else. If the defendant is overwhelmed by the government's action, especially if the defendant is particularly vulnerable or susceptible to that action, the Court should examine the government's conduct all the more closely to determine if it comports with fundamental fairness. In James Cromitie's case, it did not.

* * *

As a final consideration in the Court's evaluation of the government's conduct, it is worth trying to assess what would have happened in the absence of that conduct. In Cromitie's case, it is easy. The district court was firmly convinced that

> if the Government had simply kept an eye on Cromitie, and moved on to other investigations, nothing like the events of May [20], 2009, would ever have occurred.

(SA.84)(Emphasis added). This finding distinguishes Cromitie's case from others in which sting operations have been approved. Those other cases involved ongoing conspiracies (Rahman), or defendants with already formed criminal plans (Schmidt), or criminals in search of an opportunity that the government provided (Al Kassar; Abscam cases). None of those scenarios was present here. Instead, here it took a massive government involvement, extraordinary and persistent inducement, exploitation of religious beliefs and an impoverished and vulnerable defendant to bring about the events of May 20, 2009. Without all of that effort from the government, the would-be crimes of May 20 never would have occurred, nor would anything like them have occurred on any other date. There is just no chance that a real terrorist would have had any interest in Cromitie. James Cromitie was convicted as a would-be terrorist only because the government made him into one. He was not and never could have been a real terrorist.

At Cromitie's sentencing, the district court noted that this case was sui generis and stated that "I have never heard anything like the facts of this case. I don't think any other judge has ever heard anything like the facts of this case."

(JA.2710). Most unique and most troubling were the government's actions in this case that cannot be squared with the constitutional requirements of fundamental fairness and due process. James Cromitie deserved better. Our nation and all its citizens deserved better. It is to be hoped that, once justice is done for James Cromitie, no other judge will ever have to hear anything like the facts of this case.

CONCLUSION

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

Appellant James Cromitie also adopts and joins the arguments of his co-defendants to the extent that those arguments are applicable to his case. Fed. R. App. 28(i).

DATED: White Plains, New York
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Respectfully submitted,

CALHOUN & LAWRENCE, LLP

BY: _____

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

Attorneys for Defendant-Appellant
JAMES CROMITIE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA	:	Docket No. 11-2884-cr
-against-	:	
JAMES CROMITIE,	:	
Appellant.	:	

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 14,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect Version X4 in 14-point Times New Roman.

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January 30, 2012

Clinton W. Calhoun, III
Attorney for Defendant-Appellant
JAMES CROMITIE