11-2763

To Be Argued By:
Samuel M. Braverman

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2763

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

REPLY BRIEF FOR DEFENDANT-APPELLANT LAGUERRE PAYEN

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Laguerre Payen.

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PRELIMINARY STATEMENT

Payen argues on appeal that (1) his motion for a judgment of acquittal should have been granted, as he was entrapped as a matter of law and there was no evidence of predisposition presented at trial, and (2) his motion for a mistrial should have been granted based on the jury's consideration and discussion of extra-record information that had been specifically excluded from evidence in this case. Payen adopts and joins in the arguments of his co-defendants James Cromitie, David Williams, and Onta Williams raised in their reply papers.

In its opposition brief, filed August 1, 2012, the Government argues that the district court properly denied the above-mentioned motions. As to the entrapment issue, the Government claims that Payen was not induced by the Government to commit the crimes at issue, as he was recruited not by the informant but by his co-defendant Cromitie, or that in the alternative, his ready participation in the so-called plot is itself evidence of his predisposition. As to the issue of the extra-record information, the Government claims that there was no actual evidence that the jury was exposed to the prejudicial information, or in the alternative, any extra-record information was helpful to the defense. For the reasons stated below, both of the Government's arguments are without merit, and Payen's appeal should be granted in its entirety.

DISCUSSION

I. THE RECORD IS DEVOID OF ANY EVIDENCE THAT PAYEN WAS PREDISPOSED TO COMMIT THE CRIMES AT ISSUE.

The essence of Payen's argument that he was entrapped as a matter of law is that there was sufficient evidence that he was induced by the Government's informant but there was no evidence of Payen's predisposition whatsoever presented at trial. The Government claims, without merit, that none of the defendants were induced to commit the crimes and that all of them were predisposed. The Government focuses its argument on its claim that Cromitie's behavior "was consistent with ideas that the defendants had possessed long before they met the CI." (Govt Brief at 42.) As for Payen, they have nothing to offer as to predisposition.

Contrary to the Government's claim, there is absolutely no evidence in the record, anywhere, of ideas that Payen possessed before he met the informant, nor was there any evidence that he had a pre-existing plan to commit the offense, nor was there any evidence that he has committed a similar act before. As to the question of a "ready response" to the inducement and offer of the informant, the only evidence at trial was that Payen had at least one conversation with the informant prior to Payen's first appearance on the video recordings because on the recording, Payen is heard to say (regarding compensation for the commission of

the offense) "like we spoke about before, I really appreciate your giving me this job." The allegations that Payen was predisposed to commit the crimes at issue because of views or philosophies that he possessed before he met the informant is constructed of whole cloth by the Government on appeal. In fact, the Government concedes that Payen was completely unknown to the informant until Cromitie introduced them (Govt Brief at 42-46). The Government further claims, erroneously and without support in the record, that Cromitie had a pre-formed design to commit the crimes in question. It then appears to attribute Cromitie's made-up terrorist background to the other co-defendants. It does not cite any evidence, anywhere in the record, to support the proposition that Payen was predisposed to commit the crimes in question. It cannot do so, as no such evidence exists. Payen claim of entrapment and the failure of the Government to produce evidence supporting "predisposition" (and indeed Onta Williams' and David Williams' claims as well) are independent of Cromitie's claim of lack of predisposition. Further, the Government's claim that "if Cromitie was predisposed, so were all the co-defendants" is spurious and with legal support. Therefore the unassailable conclusion is thus: that Payen was induced, but we know not how it was done because the Government offered no evidence whatsoever about how it was done; and that Payen ultimately agreed to participate, be we know not what

resistance was overcome and by what promises or threats because the Government offered no evidence whatsoever about how it was done. This is fatal to the Government's claim that the record is sufficient to defeat the Rule 29 motion.

Further, the Government relies on the defendants' willingness to go along with the proposed crimes as evidence sufficient for the jury to find predisposition. The record does not show an undisputed wholehearted willingness to participate; at best, it shows reluctance, persistence and hounding by the informant, and preying on the defendants' need for food and money. The record supports – in fact, compels – a finding that the defendants were entrapped as a matter of law and there was a failure to produce *any* evidence of predisposition.

II. THE RECORD IS CLEAR THAT THE JURY SAW THE EXTRA-RECORD EVIDENCE AND THAT THE DEFENSE WAS PREJUDICED BY IT.

The extra-record evidence at issue consists of transcripts of telephone calls made by Onta Williams and David Williams while they were incarcerated. In GX 290.1, Onta Williams tells an unidentified female that he was involved in the plot because he had been promised money. In GX 290.2, David Williams discusses the merits of his theory of defense – entrapment - with his father, and also mentions the money that the co-defendants had been offered to participate in the plot.

Neither of the transcripts had been introduced into evidence, and as to the David Williams conversation, the Court had held would not be allowed into evidence under any circumstance. They were included in the jury binders through the Government's negligence, and the jury brought their presence to the attention of the Court during deliberations. As previously discussed in Payen initial brief, the contents of the recording was clearly made known to the jury because it is the jury who announces it. To argue now as the Government does that the jury was not exposed to the extra-judicial material is absurd.

The Government's fallback argument that the jury's consideration of the Onta Williams transcript is actually helpful to the defense is without merit at best and disingenuous at worst. Under the Government's theory, the fact that Onta Williams had been offered money to participate in the plot underscores the defense of entrapment. By making this suggestion, the Government attempts to substitute its judgment for that of the defense and the trial court. The Government has gone beyond the suggestion, which it made before the district court, that the transcripts were harmless, and is now attempting to convince this court that the transcripts were in fact *helpful* to the defense. The defense, of course, never sought to have the transcripts introduced at trial, because they are not helpful to any of the co-defendants. Further,

In any event, the Government's argument simply does not apply to Payen, because the Onta Williams transcript neither involves Payen nor mentions him. It is not helpful to Payen's defense for the jury to know that Onta Williams received money for participation in the plot. At best, it is irrelevant to Payen's motive for involvement; at worst, it implies a sort of guilt by association that goes far beyond any such guilt established by the admissible evidence.

The David Williams tape undermines Payen's defense by David Williams speaking in disparaging terms about the merits of his defense.

It cannot be argued that Payen opened the door to any of the material, or that any of this material should be held against him because, as was argued below to the trial court, the potential admission of either of these tapes would never be admissible against Payen under *Bruton*. (*United Staes v. Bruton*, 391 U.S. 123 (1968)), and if they were admitted at all, Payen would have been entitled to a limiting instruction. Since this material was inserted into the jury process without limitation or argument, it is meritless to argue that Payen was not prejudiced by the improper disclosure.

It is the clear law of this Circuit that extra-record evidence is "presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Bibbins v. Dalsheim*, 21 F.3d 13, 16-17 (2d Cir. 1994). The Government attempts to

overcome this serious hurdle by arguing, under *United States v. Peterson*, 385 F.3d 127, 134 (2d Cir. 2004), and *Loliscio v. Goord*, 263 F.3d 178, 185 (2d Cir. 2001), that the prejudicial nature of the extra-record evidence was negated by the fact that, in the end, the defendants were convicted. The Government is wrong. Under the Government's theory, any Sixth Amendment violation that occurs during trial can be erased if the trial concludes in a conviction. This would allow unlimited introduction of unlimited, extraneous evidence that is subject to neither cross-examination nor the arguments of counsel. It is tantamount to dismissing the Federal Rules of Evidence. It would have the effect of rendering such a fantastical error "harmless" and in effect overruling Remmer and *Bibbons.* Such a line of reasoning is neither the letter nor the spirit of *Remmer* and *Bibbins*, nor adequately supported by any other Circuit, and this court should not adopt such an extreme standard here.

CONCLUSION

For the forgoing reasons, Payen's sentence should be vacated and the case remanded for a reduced sentencing to a lesser term of imprisonment consistent with the factors set forth in 18 U.S.C. §3553(a).

Dated: Bronx, New York
October 1, 2012

Respectfully submitted,

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Word Count Certificate

The undersigned counsel for Appellant Laguerre Payen, hereby certifies that the foregoing brief complies with the type-volume limitations as set forth in Rule 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure. The total number of words in the text of the foregoing brief (including headings, footnotes, quotations, but not including the table of contents and table of authorities) is 1,885 according to the word processing program used to prepare the brief.

Dated: October 1, 2012

Bronx, New York

s/Sam Braverman

Samuel M. Braverman