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

YASSIN AREF,

Petitioner, Case No. 1:04-cr-402

UNITED STATES OF AMERICA,

Respondent.

MOTION TO VACATE SENTENCE/CONVICTION
PURSUANT TO 28 U.S.C. § 2255

Yassin Aref, through the undersigned counsel hereby states as his Motion to Vacate pursuant to 28 U.S.C. § 2255 as follows:

1. This is a motion pursuant to 28 U.S.C. § 2255 to vacate a judgment of this Court convicting Petitioner-movant Yassin Aref of Counts1; 10-11; 12; 18-19; 20; 26-27 and 30. Petitioner was acquitted of Counts 2-9; 13-17; 21-25; and 28-29

2. Petitioner was sentenced to a term of imprisonment of fifteen years.

3. Petitioner appealed to the United States Court of Appeals for the Second Circuit, which affirmed the convictions in a Summary Order and accompanying Opinion on July 2, 2008.

STATEMENT OF FACTS

4. Petitioner Yassin Aref, was arrested on August 4, 2004 and charged with material support for terrorism, money laundering, and conspiracy charges arising out of an FBI “sting” targeted specifically at Petitioner Aref.

5. Petitioner now asserts that during the trial and the appeal, the prosecution secretly gave false and highly prejudicial classified information *ex parte*, both to the District Court, and also on the appeal to the Second Circuit, which falsely claimed that Petitioner was actually an Al-Qaeda agent named Mohammed Yasin. The prosecution knew or should have known that the information was false at the time that it made its *ex parte* submissions to the courts, and it has failed to disclose this error to the Courts and provide for dismissal of the charges or a new trial as the law would require. *It appears likely that Yassin Aref was a victim of the government's desperate search – in 2002 and 2003 - for any connection between Iraqis and Al Qaeda, no matter how far fetched.*

6. The prosecution also failed to disclose *Brady* material that would have fundamentally altered the outcome of the case. The prosecution failed to provide information that their confidential informant and key witness at the Aref trial, Shahed "Malik" Hussain, repeatedly committed perjury in his Bankruptcy proceeding between 2003 and 2006. The failure to disclose this *Brady* evidence hampered Petitioner in his ability to mount a defense. Moreover, Malik subsequently lied about his perjury in his Bankruptcy proceeding during his testimony for the government in the *United States v. Cromitie et al.* (hereinafter the "*Newburgh 4*" case) starting in August 2010, raising further doubts about his credibility at the Aref trial and the fairness of the Aref proceedings.

7. Also, the prosecution claimed that it did not have a transcript of the critical February 12th meeting at which Malik supposedly gave Aref the meaning of a secret code word that was later used at the key June 10, 2004 meeting leading directly to the only counts for which Aref was convicted. The defense now has reason to believe that the

government does have a transcript of the February 12th meeting which should have been disclosed as *Brady* material.

A. NEW EVIDENCE FROM FOIA RESPONSE SHOWS AREF WAS MISDENTIFIED AS MOHAMMED YASIN, AN AL QAEDA AGENT

8. In November, 2011, in response to a FOIA request, Petitioner received from the FBI certain files, which were almost entirely redacted, and excerpts of which are attached as Exhibit "A." However, many of the labels of the files were not redacted, and some contained the following caption:

"Yassin Muhiddin Aref, aka
Yasin Al-Barazengy [Aref's Iraqi tribal surname and alternate spelling of first name]
Mohammed Yasin
Yasen Aref [alternate spelling of first name]
IT-UBL/AL QAEDA" ("IT-UBL" denotes "International Terrorism-U[O]sama [B]in Laden –Al Qaeda.") (Emphasis Added)

9. It's very clear from this caption that the FBI thought Yassin Muhiddin Aref was Mohammed Yasin and linked him to Osama bin Laden and Al Qaeda. Before receiving this information in the end of 2011, Petitioner had no idea that the government believed he was an Al Qaeda agent. (Petitioner tried to expand the information by obtaining unredacted files, and tried to follow the government's directions for an administrative appeal by sending it $280 to obtain the materials, but has not received any more material and is unwilling to wait any longer to file this Petition). Here, for example, is the exact description of the earliest document in the FOIA file dated December 20, 2002:

Details: S) On 12/10/2002, SA [redacted] Albany Division, telephonically contacted writer. [redacted] advised that he has a [redacted] investigation on an Iraqi Imam (YASSIN MUHIDDIN AREF, aka YASIN AL-BARAZENGY, MOHAMMED YASIN, YASIN AREF; 199E-AL-45507) with alleged connections to Al Qaeda.

10. In fact there was an Al-Qaeda agent named Mohammed Yasin, who was assassinated by a missile in Gaza in 2010. A copy of an article describing Mohammed Yasin's death is attached as Exhibit "B." Mohammed Yasin was reputed to be a very dangerous Al-Qaeda agent. Newspaper stories describe him as a bomb making expert with two missing middle fingers who was responsible for a number of high level attacks, and who was on a number of most wanted lists as set forth more fully in paragraph--- of this petition. Petitioner, Yassin Aref, is still alive, and is not missing two middle fingers, and so clearly he cannot be Mohammed Yasin.

11. Petitioner asserts in an accompanying affidavit that he has never gone by the name of Mohammed Yasin and has never used an alias, nor was he ever involved in any way with Al-Qaeda or any other terrorist group. (Affidavit from Petitioner attached as Exhibit "C")

12. Although it is not possible to know the source of this misidentification because of the redactions in the file (as discussed below, Petitioner unsuccessfully attempted to get more and unredacted information from the FBI), Petitioner submits that the misidentification of Aref caused the case to become a priority in Washington, D.C. Letters found in the FOIA file from the FBI in Albany addressed to FBI Headquarters in Washington, and from the FBI director addressed to the U.S. Attorney General, copies of which are attached as Exhibit "D," underscore the high-level interest in the case—which was clearly based on the FBI's original misidentification of Yassin Muhiddin Aref as

Mohammed Yasin – an Al-Qaeda agent. Petitioner Aref was thus originally targeted based on the FBI erroneously linking him to Al Qaeda.

B. THE PROSECUTION FAILED TO DISCLOSE EXCULPATORY INFORMATION CONCERNING ITS KEY PROSECUTION WITNESS, SHAHED HUSSAIN

13. The entire sting targeting Petitioner centered around the government's confidential informant Shahed Hussain ("Malik") who conducted the conversations with Petitioner and his co-defendant while wearing a secret recording device. Hussain testified against Petitioner at the trial, and the defense attacked his credibility, but the defense was hampered in this because the government failed to turn over to the defense a wealth of exculpatory information showing that Shahed a long history of giving false testimony and performing illegal acts, all of which would have helped the defense conduct a better cross examination and prepare a better defense.

14. In January, 2002 Shahed Hussain was charged with multiple felonies as a result of his taking money to obtain driving licenses for those who had difficulty in passing the required tests. Soon after that, he began cooperating with the FBI against other members of that conspiracy. In 2003, he plead guilty to a felony under 18 USC 1028(a)(2) and soon after that he began working for the FBI in Petitioner's case.

15. In early 2003, Shahed Hussain filed for bankruptcy in the Northern District of New York. He filed papers under oath and testified in his Bankruptcy proceeding and his testimony and sworn statements were replete with false information and lies including the following:

a. He lied to the Bankruptcy Court by claiming that he filed bankruptcy because his house had burned down when in fact the house did not burn down until after

he filed for bankruptcy. (Excerpts from the Newburgh trial testimony are attached as Exhibit "E" and the page numbers therein are to the Newburgh trial transcript. N-1273 [1])

b. Despite having bought a Dodge Ram truck, a Chevy Tahoe and a BMW, all on May 8, 2006, he did not declare any of those vehicles in his bankruptcy petition to this Court. (Exhibit "E," N-1280)

c. It came out in the *Newburgh 4* case that while his bankruptcy case was pending, he received $500,000 from a trust fund and did not declare it. (Exhibit "E," N-1515)

16. In addition, during the course of his criminal proceeding he lied to the Probation Department in connection with his Pre-Sentence Report, both about his assets (he admitted that he lied to Probation and the sentencing judge about this), (1352), and about the deaths of his parents. (He told Probation his father had died in 1994, when in fact his father was still alive at the time). (Exhibit "E," N-1349, 1516-1517)

17. Moreover, Hussain was arrested on April 7, 2006 in Queensbury, New York, and was charged with writing a bad check under PL 195.05. This charge was still pending at the time of Petitioner's trial and was never disclosed to the defense. (Petitioner did not learn about this until it was disclosed during the *Newburgh 4* trial.)

18. Upon information and belief, before Petitioner's trial starting on September 13, 2006, the Prosecution was aware or should been aware of Hussain's perjury and false statements in his bankruptcy proceeding and to the Probation Department, as well as the pending charge, and the prosecution failed to disclose to Petitioner's defense this *Brady* material.

---

[1] Page Number are to the Transcript of the Shahed Hussain's testimony in the *Newburgh 4* case, excerpts of which are attached as Exhibit "E".

19. In 2010, Shahed Hussain testified as the government's confidential informant in the *Newburgh 4* case, and during this trial he discussed his prior lies and added some new ones:

a. He lied about his communications with his attorneys in his bankruptcy case appearing to claim at one point that he had not even met his attorney in the case. (Exhibit "E," N-1262-1264).

b. He acknowledged lying to the Bankruptcy Court by claiming that he filed bankruptcy because his house had burned down when in fact the house did not burn down until after he filed for bankruptcy. (Exhibit "E," N-1273)

c. He acknowledged failing to declare to the bankruptcy court, that he bought a Dodge Ram truck, a Chevy Tahoe and a BMW, all on May 8, 2006, (Exhibit "E," N-1280)

d. He lied to the Probation Department in connection with his PSR, both about his assets (he admitted that he lied to Probation and the sentencing judge about this. (1352), and about the deaths of his parents. (He told Probation his father had died in 1994, when in fact his father was still alive at the time. (Exhibit "E," N-1349, 1516-1517)

e. In Petitioner's case he claimed to speak five languages – in the Newburgh case he said he spoke three languages but then said he spoke 23 languages and dialects. (Exhibit "E," N-1292)

f. He lied when he told the Court in Peitioner's case that he had only received $32,000 for his work for the FBI in the Aref sting. In the Newburgh case he said he received $60,000 in this case. (Exhibit "E," N-1338)

g. He acknowledged that while he was in bankruptcy proceedings in this Court, he received $500,000 from a trust fund and did not declare it. (Exhibit "E," N-1515)

20. In the *Newburgh 4* case, Shahed Hussain's acknowledgment of perjury in his bankruptcy proceeding led the *Newburgh 4* judge to write a letter, (a copy of which is attached as Exhibit "F") to the United States Attorney for the Northern District of New York describing evidence that Hussain had committed bankruptcy fraud in this District.

21. In addition, Hussain testified at the *Newburgh 4* trial that he was wanted for murder in Pakistan, and that he told Agent Coll about the unresolved Murder charge. (Exhibit "E," N-1257) This information was also *Brady* material which was never provided to the defense in Petitioner's case.

22. Moreover, Hussain's lies and perjury in the *Newburgh 4* case was so extensive that the defense made a motion to dismiss the charges on the basis of Outrageous Governmental Misconduct including the prosecution's suborning perjury. Although the trial judge was very troubled by the issue she ultimately refused to dismiss the charges, and the issue of Outrageous Government Misconduct is now on appeal to the Second Circuit and has been pending there since oral argument on November 5, 2012. Petitioner waited to make this 2255 motion hoping to have a decision from the Second Circuit, but he is unwilling to wait any longer for a decision. If the Second Circuit finds that Hussain's perjury tainted the validity of the *Newburgh 4* case, it should affect the validity of Petitioners case as well.[2]

[2] As discussed below, in Petitioner's case the government relied entirely on the testimony of Hussain to establish that Hussain dropped his recording device just before the key meeting on February 12, 2004 at which Petitioner was supposedly told the meaning of the code. ("Chaudry means Missile"). Hussain claim this "accident" prevented him from making a recording of the key February 12 conversation. Since the jury convicted Petitioner only of the counts after the June 10, 2004 conversation when Shahed Hussain, for the first and only time, talked to Petitioner using the code word, it seems that the jury believed Hussain was telling the truth about losing the wire, and thus failing to record the crucial February 12 conversation in which Petitioner was supposedly given the meaning of the code. The new evidence from the Newburgh case showing that Hussain lied repeatedly, and compulsively, would have raised questions in the juries mind as to whether Hussain was truthful about losing the wire, or whether he was just creating an unrecorded opportunity to claim Petitioner was told about the meaning of the code when in fact he was not.

C. THE GOVERNMENT FAILED TO DISCLOSE THE EXISTANCE OF A TRANSCRIPT OF THE FEBRUARY 12, 2004 MEETING

23. One key issue in the entire case was whether Petitioner was ever told the meaning of the code word – chaudry means missile. Since Petitioner was convicted only for counts that occurred after the June 10, 2004 conversation, and the June 10, 2004 conversation was the only conversation conducted in code, the critical issue is whether Petitioner was ever told the meaning of the code. The government claimed that Petitioner was told the meaning of the code at the February 12, 2004 meeting but that no transcript was made of the meeting because the recording device "accidentally" fell off of Malik (unlikely as this "accident" may seem). However, based on the new information from the FOIA application, there can be little doubt that a recording of the February 12, 2004 meeting does exist. If the government believed that Petitioner was an Al-Qaeda agent, then it would be standard procedure to place secret recording devices in his house. The February 12, 2004 meeting was held in Petitioner's house and so there must be a recording of it. (It was a very small house).

24. On January 16, 2006, the New York Times published an article which quoted a spokesperson for the National Security Administration (NSA) as stating that the NSA surveillance program was effective because it had helped to catch an imam in Albany, NY specifically identified as Yassin Aref. (Article attached as Exhibit "G") Moreover the prosecution acknowledged at a side bar during the trial that Petitioner was at all times under electronic surveillance during the sting. (Excerpts from the trial transcript are attached as Exhibit "H,"- T-530-531) The Second Circuit dismissed Petitioners claim of being illegally under electronic surveillance by asserting that Petitioner had not shown a "colorable" basis to believe that he had been under electronic

surveillance at all – thus the court did not have to consider the issue of illegality. However, if we now add to the claim previously advanced, the fact that the government believed (or claimed to believe) that Petitioner was an Al-Qaeda agent, it seems clear that Petitioner was the subject of electronic surveillance and that Petitioner has shown a "colorable" basis for so believing.

25. After 9/11, the President of the United States instituted a secret surveillance program of possible Al-Qaeda agents, including suspects inside the U.S., called the President's Surveillance Program (PSP). In a report dated July 10, 2009, the Inspectors General of five clandestine agencies, including Glenn Fine the Inspector General of the Department of Justice, reviewed the legality of the President's Surveillance Program (PSP) at the specific request of Congress, and came to the startling conclusion that there was no mechanism to locate exculpatory or *Brady* material in the program. The report, found at http://www.justice.gov/oig/special/s0907.pdf, stated:

> "The DOJ OIG reviewed DOJ's handling of PSP information with respect to its discovery obligations in international terrorism prosecutions. DOJ was aware as early as 2002 that information collected under the PSP could have implications for DOJ's litigation responsibilities under Federal Rule of Criminal Procedure Rule 16 and Brady v. Maryland, 373 U.S. 83 (1963).
>
> Analysis of this discovery issue was first assigned to OLC Deputy Assistant Attorney General Yoo in 2003: However, no DOJ attorneys with terrorism prosecution responsibilities were read into the PSP until mid-2004, and as a result DOJ continued to lack the advice of attorneys who were best equipped to identify and examine the discovery issues in connection with the PSP.
>
> Since then, DOJ has taken steps to address discovery issues with respect to the PSP, which is discussed in the DOJ OIG classified report. Based upon its review of DOJ's handling of these issues, the DOJ OIG recommends that DOJ assess its discovery obligations regarding PSP-derived information, if any, in international terrorism prosecutions. ***The DOJ OIG also recommends that DOJ carefully consider whether it must re-examine past cases to see whether potentially discoverable but undisclosed Rule 16 or Brady material was collected under the PSP, and take appropriate steps to ensure that it has complied with its discovery***

> ***obligations in such cases.*** In addition, the DOJ OIG recommends that DOJ implement a procedure to identify PSP-derived information, if any, that may be associated with international terrorism cases currently pending or likely to be brought in the future and evaluate whether such information should be disclosed in light of the government's discovery obligations under Rule 16 and Brady."3 (Report p. 18-19; Emphasis Added)

It seems apparent that the government in the present case never checked with the PSP to determine if there was a transcript of the February 12, 2004 meeting.

26. If the government had produced such a transcript, Petitioner could have *immediately* shown Agent Coll's testimony to be erroneous when he asserted that Petitioner was told the meaning of the code at the February 12, 2004 meeting. And without the implication that Petitioner knew the code, it is highly unlikely that the jury would have convicted Petitioner for the counts following the June 10, 2004 meeting. The prosecution could also not have told the Second Circuit that Petitioner was given the meaning of the code at a meeting on February 12, 2004 (see pages 14,40, and 84 of the prosecution' appeal brief, attached as Exhibit "I,") when the transcript of the meeting disproved this.

27. The Court need only determine if the prosecution specifically asked the PSP if the PSP had a transcript of the February 12, 2004 meeting. If the prosecution did not make such a request, the Court should require that it be made now and the transcript produced since it constitutes *Brad*y material which was not disclosed.

---

[3] "Unclassified Report on the President's Surveillance Program," prepared by the Offices of the Inspector General, July 10, 2009, pp. 18–19, http://s3.amazonaws.com/nytdocs/docs/108/108.pdf

POINT I

THE GOVERNMENT SUPPLIED FALSE *EX PARTE* INFORMATION TO THE COURTS WHICH MISIDENTIFIED PETITIONER AS MOHAMMED YASIN OR AS AN AL QAEDA AGENT

28. Before the trial in 2006, the prosecution provided to the District Court a series of *ex parte* submissions, pursuant to the Classified Evidence Procedures Act, which the defense was not allowed to see. Copies of letters describing the fact of the *ex parte* submissions are attached as Exhibit "J". The defense objected to these submissions but was not permitted to know what they contained. (Despite having obtained a security clearance in order to see this material, I was not allowed to see it.)

29. Indeed, this Court went so far as to classify an Order denying a defense motion to suppress evidence and dismiss the indictment; the defense was not even allowed to know the basis on which its request was denied. (Exhibit "K")

30. After conviction and prior to sentencing, this Court requested that the government declassify some information previously given to him, presumably so that the judge could rely on it to justify the sentence he was about to impose. (See excerpts from Docket Sheet, entries 432 and 433 , attached as Exhibit "L") The prosecution responded in an *in camera, ex-parte* classified memorandum on February 9, 2007, and there was also a similar *in camera, ex-parte* Declaration in response from Willie T. Hulon, Assistant Director for Counterterrorism at the FBI. (Exhibit "L," entries 432 and 433.) On February 22, 2007 the Court issued an Order directing the government to "file a redacted document setting forth as much of the document as does not compromise legitimately classified national security information." (Exhibit "L" entry 439.) As far as the defense is aware, the government never filed any such document, and the Docket Sheet doesn't

seem to reflect any such filing. (The entire Docket Sheet was attached to Yassin Aref's Appendix to his direct appeal at A-1-61)

31. On appeal, the prosecution filed a public brief with the Second Circuit, but also filed a confidential *ex parte* brief that the defense was not permitted to see, as well as a top secret brief which came straight out of Washington and which even the local prosecutor was not permitted to see. (Exhibit "I" at 6) Then after the public argument, the defense was excused and the prosecutor was permitted a secret argument before the Second Circuit.

32. Upon information and belief, the prosecution claimed in the *ex-parte* submission of classified material this Court, and to the Second Circuit, that Petitioner was a secret Al-Qaeda agent who used the alias Mohammed Yassin. Upon information and belief, the material was given to this Court and the Second Circuit in order to establish that Petitioner's case was a national security matter, and that the courts should give deference to the Department of Justice (DOJ) in such matters not only as to evidentiary rulings, but also to convince the Second Circuit to overlook the lack of evidence in the case (see Point V below: "Petitioner is Actually Innocent").

33. By the time of the trial in 2006, the government was well aware, or should have been, that Petitioner, Yassin Aref, was not the same person as Mohammed Yasin. As shown in the following newspaper stories, by July of 2005 the U.S. and British Governments believed that the lead attacker for the London bomb plot, Mohammed Sidique Khan, was trained by Mohammed Yasin in Pakistan**.**

34. Thus Petitioner, Yassin Aref, who was in the U.S. , in Albany NY, without a green card, passport or traveling documents or of any way to get to Pakistan could not

be the master bomb maker Mohammed Yasin in Pakistan. Certainly the prosecution must have known, or should have known by the end of the trial in October 2006 that Petitioner was not Mohammed Yasin an Al-Qaeda agent.

35. Thus if the government continued to give *ex-parte* information to the court, or failed to correct prior erroneous information to the effect that Petitioner was Mohammed Yasin an Al-Qaeda agent, this information would have been given with the knowledge that it was false (or in reckless disregard for the truth) and, as discussed in the accompanying memorandum of law, would represent serious governmental misconduct, requiring a new trial or dismissal of the charges. In addition, as discussed in the memorandum of law, this would also constitute a *Brady* violation.

36. The articles in the British Daily Telegraph are as follows:

July 23, 2005: "Head 7/7 London Bomber Said to Have Been Trained in Explosives by Al-Qaeda Operative"
(http://www.historycommons.org/entity.jsp?entity=mohammed_yasin_1):
"The Telegraph reports that Pakistani officials believe Mohammed Sidique Khan, the lead suicide bomber in the 7/7 London bombings…spent much of his time during his trips to Pakistan with an al-Qaeda operative named Mohammed Yasin, a.k.a. Ustad Osama. Yasin is said to be an explosives specialist also linked to the Pakistani militant group Harkat ul-Jihad al-Islami (which in turn is related to the Harkat ul-Mujahedeen group). He is based in the training camps near the Afghan-Pakistani frontier and is reputed to be an expert at manufacturing "suicide jackets." Yasin was included on a Pakistani government list of 70 "most wanted" terrorists in December 2003. [DAWN (KARACHI), 12/31/2003; SUNDAY TELEGRAPH, 7/23/2005]"

July 24, 2005: "Pakistan: the incubator for al-Qaeda's attacks on London"
(http://www.telegraph.co.uk/news/uknews/1494715/Pakistan-the-incubator-for-al-Qaedas-attacks-on-London.html):
"ISI sources last week identified Kahn's contact as Mohammed Yasin, alias Ustad ("the teacher") Osama, an explosives specialist with Harkat-e-Jihad. A veteran of terrorist training camps along the remote Afghan-Pakistani frontier (he lost two fingers in the course of his work), he is in his 30s and reputed to be an expert at manufacturing "suicide jackets". Yasin, included on a list of 70 "most wanted" terrorists issued by Pakistani officials in December, is believed to have prepared British Muslims to fight in Afghanistan and Bosnia. It is now suspected that he may have trained Khan in how to make the sort of home-made bombs used in the London attacks."

March 18, 2009: "LeT, JeM not in Pak's most wanted terrorists list, Wednesday, March 18, 2009,13:40 [IST]" (http://z13.invisionfree.com/julyseventh/ar/t3076.htm), listing of wanted terrorists in Pakistan, with rewards offered; includes Mohamed Yasin, aka Usted Osama.

November 17, 2010: Mohamed Yasin…commander of the Army of Islam group in the northern Gaza Strip, is killed in Gaza City by Israeli (IDF) forces (http://www.globaljihad.net/view_news.asp?id=1754). He had been linked to Mohammed Sidique Khan, the lead suicide bomber in the 7/7 London bombings; "[a]mong other operations, [he] was also responsible for the abduction of British journalist Alan Johnston, who was held hostage by the organization for two months in 2007." (http://www.ynetnews.com/articles/0,7340,L-3986173,00.html)

37. As an alternative, Petitioner seeks to have the FOIA file declassified and/or unredacted so he can better argue that the Courts were provided with false information and that the government targeted the wrong person.

38. Petitioner also seeks to have this Court disclose sufficient information to the defense about the secret ex-parte submissions which the government made to both the District Court and the Second Circuit Court of Appeals, so that the defense can argue – at least with respect to any secret claim by the government that he was Mohammed Yasin, an Al-Qaeda agent – that the ex-parte information was false and prejudiced Petitioner's trial and appeal.

POINT II

THE FALSE EVIDENCE SECRETLY GIVEN TO THE COURT (THAT PETITIONER WAS AN AL-QAEDA AGENT) LED THE COURT TO TELL THE JURY THAT THERE WERE "GOOD AND VALID" REASONS FOR TARGETING PETITIONER, AND, GIVEN THE WEAKNESS OF THE CASE, IT IS LIKELY PETITIONER WOULD HAVE BEEN ACQUITTED IN THE ABSENCE OF THAT TARGETING INSTRUCTION

39. During the government's rebuttal this Court told the jury that the government had "good and valid" reasons for targeting Petitioner. This Court said:

"The FBI had certain suspicions, good and valid suspicions, for looking into Mr. Aref, but why they did that is not to be of concern of yours." (Exhibit "H,"T-1853).

40. Then during closing, the Prosecutor said to the jury:

"Judge McAvoy told you the FBI had good and valid reasons for conducting this investigation and the Government would not be permitted to put on its proof of its reasons because that's not an issue you are called upon to decide" (A-688-689). (Mr. Luibrand objected (Exhibit "H,"T-2046-2047).

41. Then, right at the beginning of the jury instructions, the Court said:

"There really isn't any question in this case as to the reason Mr. Aref was targeted by the FBI for these questions that he was asked. Those reasons were good and valid reasons based on suspicions that the FBI had. Beyond that, you can't consider any reason regarding that." (Exhibit "H,"T-2072)

42. These statements, made at the end of trial, just before jury deliberations, had the effect of having the judge endorse the prosecution case, and shifted the burden of proof to the defense[4]. It was likely the single most important element that made the jurors decide to convict Petitioner.

43. On appeal the Second Circuit attempted to defend this critical "targeting" instruction by explanations that relied on false "facts" and logically made no sense. The Court stated:

"Aref contends that the instruction shifted the burden of proof, as demonstrated by his acquittals on all but two substantive money laundering counts. We disagree. The two counts of conviction were based on the only two financial transactions following the CW's final reminder that his money came from selling weapons to mujahideen."

Aref additionally argues that the instruction was impermissible because Aref did not "open the door" to such evidence. But Aref's counsel said in the opening

[4] "A juror who spoke to the Times Union on the condition he not be identified said he had concluded Aref knew about the terrorism plot from private conversations with Hossain. But that assertion was never offered by the government at trial and it's improper for jurors to assume any facts."

> statement that "the government, before they begin, selects their person; they choose a person that they're going to try to put into a situation". Aref argues on appeal that the reference was to the careful selection of the informant rather than the defendant; but the court's inference was also available." *United States v. Aref*, 285 Fed. Appx 784, 792-793 (2nd Cir. 2008)

44. The Second Circuit's opinion has nothing to do with the legality of the targeting instruction or with it shifting the burden of proof to the Petitioner. The Court seemed to accept the premise that the targeting instruction could validate the FBI investigation and shift the burden of proof to Petitioner, but disregarded this result by misrepresenting facts to suggest that Petitioner's conviction was caused by factors other than the targeting instruction. (It was never Petitioner's argument that the targeting instruction was the sole factor in his conviction – only that it was a significant contributing factor.)

45. The Second Circuit's first rational was untrue - that the counts on which the defendant was convicted "followed the CW's final reminder (on June 10) that his [the CW's] money came from selling weapons to mujahedeen". Neither the word "weapons" nor "Mujahedeen" were used on that date as shown in the government transcript from that recorded conversation, attached as Exhibit "M." In that final conversation on June 10,2004, Shahed Hussain at one point said he made money by selling "ammunitions" (which is not illegal) and "chaudrys" (a code word for "missile" that Petitioner was never told about as discussed above).[5] (Exhibit "M" at 1) And even if he had been reminded

[5] Later Hussain said that since Petitioner had told him the FBI was watching him, this might be a problem. Petitioner responded by joking that then Hussain might be "danger" because, he said, "you look like danger." Petitioner said for himself, there was no problem if the FBI was watching him, since he wasn't doing anything that would concern them, and that was the end of the final conversation. (Exhibit "M" at 4)

that the CW made money selling weapons to mujahedeen, it would not in any way justify the Court shifting the burden of proof to Petitioner by vouching for the FBI's case. The two issues are simply not related.

46. Even Agent Coll conceded that the word "chaudry" would have stood for nothing on June 10 if Petitioner did not know what that word meant - and there was no competent evidence that Petitioner knew that. (Exhibit "H" at T-730)

47. The Second Circuit must have been aware that there was no evidence that Petitioner was given the meaning of the code, because the Court failed to mention the June 10, 2004 conversation at all in summarizing the evidence to sustain the jury's verdict – even though Petitioner was only convicted of the counts that followed the June 10, 2004 conversations. If Petitioner did not understand the meaning of chaudry he could not have received a reminder that Shahed made his money selling weapons to the mujahedeen. So in all respects this rational for uphold the targeting instruction was a perfect circle of illogic.

48. The Second Circuit also rationalized that the defendant "opened the door" to the targeting instruction by his opening statement, and that this finding was "also available[6]"(whatever this means) without deciding whether the targeting instruction was

---

[6] It was quite clear from context, that defense counsel was referring to the *choosing of Malik as the CW*. Defense counsel says:

> "Now about this case in particular, were talking about a sequence of meetings that happened after he arrives in the United States and begins presiding over the local mosque. This is a particular part of an investigation, and the Court instructed you about it, and Mr. Pericak talked about it; one way that law enforcement can proceed in a type of investigation is when they have somebody come to them and say, here's what I'm engaged in, I want to cooperate; and maybe they're already involved in some type of activity; and in that case the Government takes the witnesses, they find them.
>
> There are other cases, sting cases, like we're talking about here, where the Government, before they begin, selects their person; they choose a person that they're going to try to put into a situation; they choose, as Mr. Pericak told you, carefully. Agent

prejudicial and improper. In fact, the Court did not rule that Petitioner's opening statement "opened the door[7]". (Exhibit "H" at T-179). The Second Circuit was simply wrong to say otherwise. Thus the appellate court completely confused and misused the "opening the door" issue to avoid deciding the validity of the targeting instruction

49. It is submitted that the Second Circuit recognized that there was legally insufficient evidence to uphold the convictions, and recognized that the targeting instruction was improper and highly prejudicial, but as a result of the false *ex-parte* information that Aref was a secret Al-Qaeda agent, the Court decided to uphold convictions that otherwise would certainly have been reversed.

50. This Court only has to look at the secret briefs submitted by the government to determine if the prosecution presented this false information about Aref's identify. If the government made such an explosive false claim, there can be no doubt that it influenced both courts against Petitioner and requires a new trial or dismissal of the charges.

> Coll decided what facts to introduce and in what fashion. So keep in mind the agent not only controls the facts, but the choice of the actual person they put into the investigation..." (Exhibit "H," T-55)

[7] At some point, right before or during the government's rebuttal, there was a discussion in chambers which was not recorded. At that point this Court said that the door had been opened (but the basis for that finding is not clear) and, as described in Aref's Reply brief before the Second Circuit, at 6-11, the defense, rather than have the government put on evidence which the defense could not question, was forced to agree to the targeting instruction.

POINT III

THE PROSECUTION WITHHELD BRADY MATERIAL, INCLUDING EVIDENCE WHICH WOULD HAVE PROVED PETITIONER WAS NOT TOLD THE MEANING OF THE CODE WORD ON FEBRUARY 12, 2004

51. The government said that there was no recording of the February 12, 2004 meeting at which it was claimed Petitioner was s given the meaning of the code word "chaudry." This was because Shahed Hussain claimed that the recording device somehow "fell of his body" on that one crucial occasion.

52. However, based on the new evidence from the FOIA application, there can be little doubt that a recording of the February 12, 2004 meeting does exist. If the government believed that Petitioner was an Al-Qaeda agent, then it would be standard procedure to place secret recording devices in his house. The February 12, 2004 meeting was held in Petitioner's house and so there must be a recording of it. (It was a very small house).

53 On January 16, 2006, the New York Times published an article which quoted a spokesperson for the National Security Administration (NSA) as stating that the NSA surveillance program was effective because it had helped to catch an imam in Albany, NY specifically identified as Yassin Aref. (Exhibit "G") Moreover the prosecution acknowledged at a side bar during the trial that Petitioner was at all times under electronic surveillance during the sting. (Exhibit "H" at T-530-531). We know from the Inspector General's report, published after the trial on July 10, 2009, that the government was secretly providing electronic surveillance of suspected Al-Qaeda agents. We know that the Government believed Petitioner was a secret Al-Qaeda agent. And we know from the Inspector General's report that there was no mechanism for the Presidents

Surveillance Program to identify exculpatory or *Brady* material in individual cases. *The Inspector General has recommended that prior terrorism cases be reviewed to determine if exculpatory material from the PSP was obtain but not provided to the defense as discovery*. Petitioner's case is thus a perfect example of the need for a judicial review to determine if Petitioner was deprived of *Brady* material - specifically the transcript of the February 12, 2004 meeting.

54. The Second Circuit sidestepped Petitioner's claim of being illegally under surveillance by asserting that Petitioner had not shown a "colorable" basis to believe that he had been under surveillance at all – thus the court did not have to consider the issue of illegality. (*United States v. Aref*, supra, at 793) However, if we now add to the claim previously advanced, the fact that the government believed (or claimed to believe) that Petitioner was an Al-Qaeda agent, and the fact that the Inspector General's report issued in 2009 confirms that all suspected Al-Qaeda agents were put under surveillance, it seems clear that Petitioner was the subject of electronic surveillance and that Petitioner has shown a "colorable" basis for so believing.

55. The defense asked the prosecution repeatedly for all recordings made of Petitioner's statements and it never received a response as to whether the government had made such recordings. (See Exhibit "N," which includes the April 11, 2006 letter from Petitioner requesting these recordings; the June 12, 2006 Docket entry showing a "*Notice of Submission of Government's Ex Parte, In Camera, Under Seal Letter Response Regarding Defendant Aref's April 11, 2006 Letter Request for Discovery of Recorded Statements"*; this Court's Decision of July 6, 2006, and the August 18, 2006 renewed defense request on Pages 15-16 of the response to the prosecution's trial brief) As

discussed in the accompanying memorandum of law, under these circumstances, the defense is entitled to such a response. The Court never required the government to respond to the defense request in an unclassified filing, or to provide its response to security-cleared defense counsel.

56. Based on the above IG Report[8], it is submitted that the agency which installed the surveillance in Petitioner's apartment never disclosed to the prosecution that it had a transcript of the meeting because there was no mechanism in place to do that. The Court should obtain this transcript and determine if it supports Petitioner's contention that he was never told the meaning of the code. If he was not told, then the transcript is exculpatory evidence which should have been disclosed to Petitioner and which requires that a new trial be held or the charges dismissed.

POINT IV

THE NEW EVIDENCE FROM THE NEWBURGH TRIAL SHOWS THAT THE PROSECUTION FAILED TO DISCLOSE SIGNIFICANT IMPEACHMENT MATERIAL REGARDING SHAHED HUSSAIN, WHO COMMITTED PERJURY IN BOTH TRIALS

57. Petitioner was entitled to receive *Brady* material from the government detailing all of the lies that Malik told in his prior bankruptcy proceeding and his lies to the Probation Department who was preparing the Pre-Sentence Report. The government began to work with Malik as their confidential witness shortly after his arrest in January, 2002, and so the government was or should have been aware of the lies he had told in legal proceedings.

[8] On April 5, 2010, the Albany City government (Common Council) voted 10-0 on a resolution asking the Department of Justice to follow this IG Report and look into Petitioner's case and other similar cases where it appeared that exculpatory evidence had not been provided to the defense.

58. Malik continued to lie in his testimony in the *Newburgh 4* case, and his compulsive lies were so shocking that the judge in that case warned the prosecution that it needed to consider whether it was suborning perjury simply by putting Malik on the stand. (This perjury was a major issue in the Newburgh oral argument[9] – a decision on that appeal is still forthcoming.) His lack of credibility now destroys the integrity of the prosecution case against Petitioner and should result in a new trial.

---

[9] From the New York Jaw Journal: "Newman pressed Hickey hard on McMahon's finding that Hussain had committed perjury on the witness stand, especially when he insisted that the only time he made an "offer" to Cromitie was when they discussed the $5,000.
"The statement was false," Newman said, and he faulted the government for saying to the jury in closing argument "he had no incentive to lie."
Hickey got no further when he answered, "We believe lying requires you to know you are telling an untruth," and that Hussain never denied there had been other discussions about money.
But Raggi said "I always understood the government cannot allow false testimony to stand on the record."
http://www.newyorklawjournal.com/PubArticleFriendlyNY.jsp?id=1202577337724
From Courthouse News: "While a wiretap showed Hussein offering Cromitie $250,000, the informant testified that this was code for the cost of the operation, and that he really offered $5,000.

The defense called that explanation perjury, and the judges seemed to agree that Hussein was probably lying.

Hickey defended him as probably believing it was true, even if it was false.

"Isn't part of the government's preparatory obligation to help a witness undeceive himself?" Judge Raggi asked, provoking laughter.

Judge Newman was not amused.

"I don't want to play games with Your Honor," Hickey insisted. "I'm not trying to be cute."

"Was it true or false?" Newman pressed.

"It was inaccurate," Hickey responded, after several non-answers.

Losing his patience, Newman's voice rose as he asked, "Did you ever convey to the jury that what your star witness said was false?"

Judge Raggi chimed in, "How is it that the government got into this situation at all? How did the government allow him to get on the stand and testify that it was $5,000 when you had him on tape [saying $250,000]?"

The judges indicated that the fate of the appeal may hang on the deference courts give law enforcement agencies in cases involving plans for mass murder."
http://www.courthousenews.com/2012/11/06/52011.htm

POINT V

PETITIONER IS ACTUALLY INNOCENT

A. THE TRIAL

59. It is submitted that Petitioner is actually innocent. The FBI acknowledged at the outset that because of certain information, some of which was classified, it targeted Petitioner because he was a possible security risk. The FBI created a sting in which a government agent provocateur, "Malik" (Shahed Hussain), would pretend to be an arms merchant selling missiles to the a designated terrorism organization (JEM) and to assassinate the Pakistani ambassador to the UN in New York City. Malik would also pretend to launder the money made from the missile sale by making a loan of the money to a member of Petitioner's mosque, Mohammed Hossain, who was chosen by the FBI as the patsy. Petitioner's only role in this scenario was to gratuitously witness the loan to comply with Islamic requirements.

60. During various transactions involving the loan, Malik would make statements about the missile and the need to launder money. The prosecution's theory was that Petitioner should understand from Malik's comments that the loan was an illegal money-laundering operation from the sale of the missile. (For anyone who has gratuitously notarized a document for a friend, it may come as a surprise that random conversations surrounding the signing and witnessing of the document may confer criminal liability on the *notary*, but that was the FBI's theory.)

61. The prosecution acknowledged that Mohammed Hossain was not the target of the sting—Petitioner Aref was. Yet the FBI assigned such a minor role in the sting to Petitioner that it suggested the government did not intend to give him fair notice

of the plot, or a fair choice as to whether to participate in illegal conduct, the way real stings are supposed to provide such an opportunity.[10]

62. The evidence indicated that Petitioner, whose English was poor, did not understand the garbled statements of Malik during the loan transactions and was not aware that anything illegal was happening. Over the year-long sting, Petitioner never said or did anything to indicate that he was aware of any missile sale or money laundering, as clearly shown in the secret recordings made by the FBI of all but one of the conversations.

63. Additionally, the comments by Malik that were supposed to alert Petitioner to the illegal plot were but single sentences, mispronounced, slipped in when Petitioner was distracted, or could have been interpreted as a joke. It is clear that Petitioner never said or did anything illegal directly. The government's theory was that Petitioner said and did legal things (such as witnessing the loan), while secretly knowing that it served a larger illegal purpose (money laundering and material support for terrorism). The evidence did not support this theory.

64. Petitioner was involved in five significant conversations (December 10, 2003; January 2, 2004; January 14, 2004; February 12, 2004; June 10, 2004) with Malik (and on occasion Mohammed) while discussing or witnessing the otherwise apparently legal loan transactions. The counts of the indictment were arranged around these five

[10] In an article published after the trial in the Albany Times Union by Brendan Lyons (October 12, 2006), the article quoted an unidentified FBI agent (later identified as FBI Agent Coll) as saying that the FBI decided after a long discussion not to show a missile to Petitioner the way they showed a missile to Hossain (the co-defendant). Instead the FBI decided to show Petitioner the trigger mechanism of a missile which is hard to identify as anything dangerous. "If Aref saw the missile", the agent said, "he may have been *spooked*", suggesting that the FBI's goal all along was to prevent Petitioner from realizing that the transaction was illegal and withdrawing ('Spooking"). A copy of the Times Union Article is attached as Exhibit "O"

conversations. After the jury had considered all the evidence, they found Petitioner not guilty of the counts based on the first four conversations, and convicted him only of the counts coming after the fifth conversation, which occurred on June 10, 2004. Even the trial judge held that "Mr. Aref, while possibly aware of the criminal transaction for some time, did not knowingly, intentionally and criminally associate himself with it until July 1, 2004." (Exhibit "H," excerpt from sentencing transcript at 45). While Petitioner witnessed a loan payment on July 1, 2004, it is not clear why this Court believed that at *this* point, but not earlier, Mr. Aref had somehow "associated himself with the criminal transaction." The evidence did not substantiate this view.

65. As discussed above, this last conversation on June 10 involved a code word. Malik told Petitioner that he made money by selling "chaudries" to New York City, and that he could make Petitioner a loan too. (Exhibit "M" at 1) This comment obviously would not have meant anything to Petitioner or anyone else unless he knew that Malik had earlier told Mohammed (not Petitioner) that the word "chaudry" meant "missile". Agent Coll even admitted that if Mr. Aref did not know what the word "chaudry" meant, the June 10 conversation did not stand for much. (Exhibit "H" at T-730).

66. Thus a central question for the whole case is whether Petitioner was ever told the meaning of the code word "chaudry". Since Petitioner was acquitted for all of the counts arising before June 10, 2004, the question is whether he knew the meaning of the code sufficiently to understand the June 10, 2004 conversation. If he could not, then he should have been acquitted on the remainder of the sting counts.

67. Initially, lead FBI case agent Tim Coll testified that Malik told Petitioner the meaning of the word "chaudry" at a meeting in Petitioner's apartment on February 12, 2004 (Exhibit "H" at T-717). Agent Coll claimed that Malik was supposed to wear a wire to the meeting but it accidentally fell off and so the meeting was never recorded.

68. Later, under cross examination Agent Coll recanted, and claimed instead that *Malik* (a habitual liar) had *implied* to him that *Mohammed* (Petitioner's codefendant) had told Malik that Mohammed had told Petitioner of the code word. Agent Coll testified:

> "Malik told me he told [Mohammed]Hossain that; did you ask Aref if he understood that chaudry was going to be the code for the missile, and he responded yes, in substance" (Exhibit "H," at T-721).

69. This triple hearsay, made even vaguer by the statement "in substance," thus represented the *only* evidence that Petitioner had been told of the meaning of the code word "chaudry." Even this statement was contradicted by the co-defendant Mohammed who told Malik that Yassin Aref did not know about the plot. When Malik lied and said he told Aref, Mohammed said with great surprise, "Maybe he is not telling me, I did not tell him either". (Exhibit "M," at 5, excerpt from government transcript of December 3, 2003 conversation)

70. Significantly, when Malik testified, he never said that anyone told Petitioner the meaning of the code word, and he was not even questioned by the prosecution about whether Petitioner was told the code on February 12.

71. Moreover, Petitioner had a house guest present during Petitioner's February 12 meeting with Malik. This guest, Kassim Shaar, testified about the meeting and never said anything about being told the meaning of the word "chaudry". The

Prosecution never asked Shaar about whether Petitioner was told the meaning of the code at the February 12 meeting. Since the Prosecution had no way to prove that Petitioner was told the meaning of the code on February 12, 2004 except through the testimony of their two witnesses, Malik and Shaar, it is significant that the Prosecutor never asked either witness whether the meaning of the code was discussed at the February 12 meeting. This was an extremely crucial fact, and the Prosecution never even asked their two witnesses about it.[11]

72. Based on Coll's claims (first that Malik had told Petitioner the meaning on February 12, and later that Malik had implied that Hossain had told him about it) the jury might have been confused and believed that Petitioner knew the code, but legally there was insufficient evidence that Petitioner knew the code.

73. Significantly, in the Decision on the Rule 29 motion this Court stated, erroneously, as to Agent Coll having listened to the February 12 conversation, "Because this conversation was not in a language Coll understood, he was only able to testify to hearing certain words he did understand, such as 'chaudry.'" (Exhibit "P") (Of course it is clear that this conversation, like all the conversations involving Malik and Petitioner, was in English, albeit broken English on the part of Petitioner.)

[11] Agent Coll testified that he was listening to the February 12 meeting via a Kell transmitter while parked nearby. Initially Agent Coll testified unequivocally that Malik told Petitioner the meaning of the code of February 12. (Exhibit "H" at T-717). Then he acknowledged that he had to rely on Malik as to what was said at the meeting (Exhibit "H" at721-723). Coll then testified, "Malik told me he told Hossain that; did you ask [Petitioner] if he understood that Chaudry was going to be the code for the missile, and he responded yes, in substance". (Exhibit "H" at T-721). Thus Coll changed his testimony to indicate Hossain, not Malik, supposedly told Petitioner in a triple hearsay statement at some unknown time. This did not stop the government from citing in its briefs to the Second Circuit, Agent Coll's initial claim that Malik told Petitioner.

B. THE APPEAL

74. On appeal, the Second Circuit received the briefs of the government and the defense. (The prosecution misconstrued the evidence in its brief and said that Petitioner had been told the meaning of the code word at the February 12, 2004 meeting, citing Agent Coll's initial statement at GA 237 before he recanted it - See Exhibit "I" at 14, 40 and 84).

75. Then the government filed a secret brief, which the defense was not permitted to see. (Exhibit "I" at 6) The government also filed a top secret brief straight from Washington that even the local prosecutor was not allowed to see. (Exhibit "I" at 6) Then after oral argument before the court, the defense was excused and the prosecutor was permitted a secret argument before the court.

76. It is obvious that the government would have had no reason to file secret briefs with the Second Circuit about matters involving the sting, since most of the sting had been recorded and shown to the jury. The secret briefs must have involved assertions that Petitioner was actually a terrorist.

77. When the three Second Circuit judges wrote their opinion, they apparently realized that they could not sustain the conviction based on the last (June 10) conversation, because there was no valid evidence that Petitioner knew about the code. So in discussing the sufficiency of the evidence to sustain the conviction, the judges never mentioned the last conversation or the code, even though it involved the only counts for which the jury found sufficient evidence to convict.

78. Instead, the Second Circuit found that Petitioner could be convicted for the sting based entirely on evidence that had been presented to the jury concerning the first

four conversations—evidence which had already been rejected by the jury as insufficient. Petitioner was pronounced guilty by the Second Circuit based solely on evidence for which the jury had already found him not guilty. The Second Circuit said:

> "A. Money Laundering Evidence
> ***
> The evidence suffices to show that the CW represented to Aref that the money came from a missile sale: (1) the CW displayed the trigger mechanism to both Aref and Hossain and explained that he would receive payment for the missile only once his customers received the trigger; (2) Aref warned the CW to be careful, since "[i]f they find any proof, they are going to tell you, you support the terrorism"; and (3) the CW told Aref, "my business comes from selling ammunitions, you know?"
>
> The evidence also suffices to show that Aref intentionally concealed the source of the money. Aref himself articulated that the purpose of the transaction was the "sometimes you want to, what you say, legally you money in the business". And the obviously circular nature of the cash-for-check transactions further evidences that Aref intended to conceal the money's source.
>
> B. Material Support Evidence
> ***
> The evidence sufficed for a jury to conclude that Aref intended to aid in preparing a missile attack on American soil. The jury heard that, on January 14, 2004, the CW told Aref that the missile (whose proceeds were the subject of the money laundering scheme) was sent to New York, and on February 12, 2004, the CW told Aref (and Hossain) not to go to New York because of an impending missile attack
>
> C Conspiracy Evidence
> ***
> …[T]he evidence here shows that Aref served a vital role in the transactions, tantamount to that of a notary public. Aref was not merely aware of the illegal scheme – he participated in it." *United States v. Aref*, supra, at 789-790

79. All of the evidence cited above related to counts for which the jury acquitted Petitioner. Indeed none of the evidence cited by the Second Circuit occurred after July 1, 2004 – the date by which this Court decided that Petitioner must have somehow become involved in the criminal conspiracy.

80. Petitioner recognizes that his direct appeal has been exhausted and he cannot reargue its merits here. The above recitation is offered only to show that the evidence against Petitioner was extremely weak. It is submitted that the prosecution secretly persuaded the courts to defer to the prosecution on national security grounds, by claiming *ex parte* that Petitioner was in fact a terrorist who had to be convicted, even though the evidence given to the jury showed no such thing.

POINT VI

PETITIONER WAS PREEMPTIVELY PROSECUTED

81. At the time of Petitioner's arrest in 2004, then-Governor George Pataki issued a press release proclaiming that "Terrorists are living among us", which must have prejudiced the jury pool. Yet the prosecutor said in his summation, "We are not proving that Mr. Aref is a terrorist" (Exhibit "H" at T-2056).

81. After the jury trial was over, the prosecutors held a news conference. The press, who had first been told that terrorists were "living among us," and then told by the prosecutor that Petitioner was not a terrorist, was confused, especially since there was virtually no evidence that Petitioner had done or said anything illegal. One of the reporters asked the prosecutor whether in the end the government actually believed that Petitioner was a terrorist. The prosecutor responded:

> "We didn't have the evidence of that, but he had the ideology…. In order to preempt anything further we took the steps that we did…I would say that there is a concern that he is one of those people [who might support terrorist activity] based on all the evidence that was uncovered in Iraq and all the additional evidence that was uncovered subsequently and that the sting preempted anything that might have happened later on." (See transcript of Press conference attached as Exhibit "O" at 5-6)

82. This became the classic description of preemptive prosecution: targeting someone whose "ideology" (whatever that means) raised sufficient security concerns or suspicions for the government to incarcerate the target on a pretext or manufactured conviction.[12]

83. Since Petitioner's trial, many groups and authors have considered the concept of preemptive prosecution—the government's program to eliminate potential security risks by prosecuting targets with contrived, manufactured, or pretext charges. The concept is discussed in many scholarly books and articles about national security and the "war on terror," and Petitioner's case is frequently mentioned in connection with this discussion. One example is a December, 2011 Report by the Congressional Research Service, "*The Federal Bureau of Investigation and Terrorism Investigations,*" by Jerome

---

[12] Indeed, the FBI was quite open about having preemptively prosecuted Petitioner. As noted above, Agent Coll told a newspaper reporter after the conviction that there had been a lot of debate within the department about whether to show Petitioner the missile in the same way the missile had been shown to his co-defendant. (Exhibit "O" at 2) (Agent Coll later acknowledged that he was the source of the information, and documentation of that can be supplied upon request). In the end, according to the article it was decided to show Petitioner Aref only the handle of the missile, which was unrecognizable as military equipment, because the FBI was afraid that "If Aref saw the missile…he may have been spooked," in the words of Agent Coll, quoted in the article. In other words, if Petitioner saw the missile he would realize that something illegal was going on and would have withdrawn (been spooked), thus ruining the FBI's plan to preemptively prosecute him.

After the trial, a group of citizens including Lynne Jackson, met with the FBI to discuss with Agent Coll the widely held perception that Petitioner was railroaded. The meeting is described in the attached affidavit from Lynne Jackson, attached as Exhibit "Q". At that meeting Agent Coll acknowledged that he gave the quote to the newspaper that the FBI decided to show Petitioner only the missile handle because the FBI was afraid that if they showed him the whole missile he might be "spooked".

Also at the meeting, Agent Coll asked Agent Holstein to go to his office and bring out the missile "handle" that Petitioners was shown briefly at one meeting. Agent Holstein replied that he did not think he would recognize it. In other words the FBI decided to substitute for a missile that everyone would recognize, a handle which even the FBI agents were not sure they would recognize. This one comment speaks volumes about the lack of good faith with which the FBI conducted the sting.

P. Bjelopera, a specialist in organized crime and terrorism. A chapter entitled "Terrorism Prevention and Proactive Investigations" describes the use of preemptive prosecution.

84. A list of other such articles includes the following:

1. To Catch a Terrorist" by Petra Bartosiewicz, Harper's Magazine

http://harpers.org/archive/2011/08/to-catch-a-terrorist/

2. "NDAA: Pre-emptive prosecution coming to a town near you" by Charlotte Silver, Al Jazeera

http://www.aljazeera.com/indepth/opinion/2013/02/201321710236780782.html

3. "Manufacturing Terrorists" by Mike German, Book review of The Terror Factory: Inside the FBI's Manufactured War on Terrorism by Trevor Aaronson

http://reason.com/archives/2013/01/15/manufacturing-terrorists/print

4. "Deploying Informants, the FBI Stings Muslims" by Petra Bartosiewicz, The Nation

http://www.thenation.com/article/168380/deploying-informants-fbi-stings-muslims?page=full

5. "Liberty and Justice for Non-Muslims" by Andrew Rosenthal, New York Times
http://takingnote.blogs.nytimes.com/2012/03/30/liberty-and-justice-for-non-muslims/?pagewanted=print

Bending the law to preempt a target from remaining at liberty may possibly be good for national security, but it generates innocent prisoners and wrongful convictions.

85. Moreover, a recent scholarly book, "*Terrorism Since 911: The American Cases,*" edited by John Mueller, a professor at Ohio State University, discussed the preemptive prosecution of Yassin Aref. While Mr. Mueller is sympathetic to the government in many ways, and while the book argues that many of the people convicted in the cases he studied deserved to be convicted, he believes that Petitioner's case was an

exception, stating[13], "Unlike other cases where entrapment has been alleged, the defendants in this case never expressed any intent of engaging in terrorist activities. On multiple occasions, Aref and Hossain criticized involvement with terrorist groups and in terrorist plots..... It is not clear whether this is actually a terrorism case at all. ..."

---

[13] "...The exquisite and successful efforts of the FBI to manipulate two Albany Muslims into a terrorist plot, and then into a jail cell for 15 years, is best seen, perhaps, as a learning experience. Operating in 2004, in a highly pressured atmosphere in which it was generally assumed there must be dozens or even hundreds of active terrorist cells abroad in the land, the investigators, ardently looking hard for what they thought they ought easily and often to see, made much out of close to nothing. Although the Bureau has been entirely unwilling to admit that mistakes might have been made in Albany, as Michael Spinosi notes, it has perhaps made amends in other ways: procedures were tightened up in later years...

... Hossain was not seeking to change policy or get revenge against any transgression. He seemed to have nothing against the United States or Americans at all. Aref has much the same story. His motivation, if any could be labeled as such, would be something akin to helping the cause of a friend. Aref was brought into the fold of the operation as a witness to the loan exchange between Hossain and the informant.15 Aref, like Hossain, had no intention of fighting for this cause, or seeking glory. He was not trying to socialize himself into a group. He merely wanted to help a friend with a transaction. Neither Hossain nor Aref conveyed any hatred for, or the will to act against, American values or United States' policy.

... As far as terrorism, Aref seemed to never have had any notions of joining and engaging in the plots or acts suggested by the informant. Although throughout the operation Aref and Hossain got into debates with the informant over the motives and practicality of terrorist organizations, they never expressed any goals of their own, or agreed with the goals of those terrorist organizations.

... The goals with anything related to terrorism all concerned the FBI. Its goal was to take potential terrorist threats out of society. Applying preemptive tactics, it sought to ensure that nothing would happen in the future. In regards to Aref Hossain, the ultimate goal was to get to Aref....

... The government is said to have used the tactic known as preemptive prosecution in order to make sure that any terrorist deemed a threat, even if ultimately innocent, is put behind bars...

... It is understandable that the FBI wanted to make sure the safety of Americans was ensured, but this case in particular could have been handled much better.

... Unlike other cases where entrapment has been alleged, the defendants in this case never expressed any intent of engaging in terrorist activities. On multiple occasions, Aref and Hossain criticized involvement with terrorist groups and in terrorist plots...

... It is not clear whether this is actually a terrorism case at all. ...

... That the men were convicted, and that the government refuses to hear any appeals, seems to hint at an over-enthusiastic counter-terrorism campaign and a certain degree of paranoia. I fully support the government and the FBI in protecting the United States and trying to rid the free world of terror. Yet, in this case, it appears as though nothing was threatened." ("*Terrorism Since 911: The American Cases," http://politicalscience.osu.edu/faculty/jmueller/SINCE.pdf* at 107, 110, 115, 117-119)

86. The government erroneously believed that Petitioner was an Al-Qaeda agent named Mohammed Yasin, and it decided to neutralize him by setting him up in a preemptive sting operation. Surely there is no security interest involved in targeting and convicting the wrong person; and surely the Court system will still entertain an inquiry as to whether an innocent Petitioner was wrongfully convicted by a federal government overreaching its authority.

87. Petitioner's case is essentially two cases wrapped up inside each other. The public case claims Petitioner participated in a contrived sting. The jury acquitted Petitioner of all counts prior to June 10, 2004, and the Second Circuit, by failing to mention the counts after June 10,2004, essentially cleared him of the other counts because there was no proof he knew the code for the June 10 conversation. He should be a free man.

88. But Petitioner was convicted in the secret case wrapped up inside the public sting. In the secret case he was accused and falsely convicted of being an Al-Qaeda agent. He was never told about this secret case or given any opportunity to defend himself. Even today he has to learn about this secret case from crumbs of information that fall from the judicial table. It is time now for the court to give Petitioner an opportunity to confront the real case against him.

POINT V11

TIMELINESS OF PETITION

89. A motion to vacate must be generally be filed within one year after a Petitioner's conviction becomes final 28 U.S.C. §2255. However, if there is new evidence, such a motion may be filed later, though due diligence must be utilized. (In

addition, as argued in the accompanying Memorandum of Law, as Petitioner is arguing also that he is actually innocent, the time limits may not apply in any event.)

90. It was not until November 18, 2011, when he first received the above-described FOIA material, that Petitioner himself had any idea that the FBI thought he was an Al Qaeda agent.

91. Petitioner's attorneys did not learn of this information until a visit with Petitioner on December 31, 2011.

92. During that visit, Petitioner's Attorneys realized the significance of the material, but advised Petitioner to file an administrative FOIA appeal to try to get more of the material unredacted, and intended on filing a 2255 motion after that occurred.

93. However, as described in more detail in Exhibit "R," there followed a very confusing series of correspondence between Petitioner and various individuals at the FBI and the Department of Justice. The government accepted $280 from Petitioner which led him to believe that the government would process his appeal. It was not until late April, 2013 that undersigned counsel learned that the FOIA Appeals Department had decided that Petitioner had inadvertently failed to properly file his administrative FOIA appeal. At that point a decision was made to go ahead and file the 2255 motion, notwithstanding that the Second Circuit has still not decided the critical *Newburgh 4* case which would assess the credibility of Shahed Hussein.

CONCLUSION

94. This court could perhaps dismiss this 2255 motion on a technicality, pointing out that Petitioner has not established for certain that the prosecution told the court in secret submissions that Petitioner was an Al-Qaeda agent. (Of course Petitioner

cannot – the submissions were secret). Or the Court could claim that many objections were previously raised on appeal and rejected. (It is submitted that they were rejected for the very reason that the Court falsely believed Petitioner was an Al-Qaeda agent). Yet given the extraordinary nature of this case, the highly unlevel playing field, the ex-parte contacts and accompanying marginalization of the defense, the Court should bear a particular responsibility to deal fairly with Petitioner when he tries finally to confront the secret allegations against him.

95. In this case, it is easy to determine if the government targeted and convicted the wrong person. All the Court has to do is to see if, in *ex parte* submissions to the Court or to the Second Circuit, the government ever took the position that Petitioner was Mohammed Yasin, or an Al-Qaeda terrorist. If the government ever did that, then it was a knowingly false statement made by the government *ex-parte* to prejudice the court, and it requires a new trial or dismissal of the charges given the weakness of the case, Petitioner's actual innocence, the *Brady* violations, and the likelihood that Petitioner was preemptively prosecuted based on mistaken identity.

96. Moreover, this Court should follow the recommendation of the Inspector General of the Justice Department and specifically ask the prosecution if a classified transcript produced under the Presidents Surveillance Program exists for the February 12, 2004 meeting in Petitioner's home, where the prosecution, in briefs to the Second Circuit, claimed that Petitioner was told the meaning of the code. Production of that transcript will in all probability require a new trial or the dismissal of the charges.

97. In any event, a new trial is required here because of the government failure to provide *Brady* material to the defense concerning Shahed "Malik" Hussein's condition

as a pathological liar, and because Malik's lack of credibility undermines the integrity of the entire proceeding.

WHEREFORE, Petitioner requests that the Court enter an Order:

A. Unredacting the redacted portions of the file that was provided to Petitioner through FOIA

B. Providing the defense with a description of the classified material given to the District Court or the Second Circuit by the government which asserts that Petitioner was Mohammed Yasin or was associated in some manner with Al-Qaeda, Ansar-al-Islam, or other terrorist organization. The material should be of sufficient specificity so that Petitioner can rebut any allegations that he was a member of any terrorist organization.

C. Providing the defense with Brady and Rule 16 material not previously provided, especially material showing those occasions when Shahed Hussein lied, and a transcript of the February 12, 2004 meeting in Petitioners house that was recorded by the President's Surveillance Program.

D. Granting Petitioner a new trial

E. Dismissing the charges for prosecutorial misconduct.

Dated: July 12, 2013

Terence L. Kindlon
Terence L. Kindlon
Kindlon Shanks & Associates
Attorney for Petitioner
74 Chapel Street
Albany, New York 12207
518-434-1493