11-2763-cr

Docket Nos.: 11-3785-cr (Con), 11-2884-cr (Con), 11-2900-cr (Con)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

APPELLEE,

-against-

JAMES CROMITIE, a/k/a Abdul Rehman, a/k/a Abdul Rahman, DAVID WILLIAMS, a/k/a Daoud, a/k/a DL, ONTA WILLIAMS, a/k/a Hamza, LAGUERRE PAYEN, a/k/a Amin, a/k/a Almondo,

DEFENDANT-APPELLANT.

APPEAL FROM A FINAL JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT LAGUERRE PAYEN

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JURISDICTIONAL STATEMENT PURSUANT TO FRAP 28(a)

This is an appeal from a final judgment of conviction, after a jury trial, imposed on September 7, 2011 in the United States District Court for the Southern District of New York (McMahon, J.). Jurisdiction of the appeal is in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Jurisdiction of this action was in the district court pursuant to 18 U.S.C. § 3231. Timely notice of appeal was filed on September 15, 2011. The index was sent to this Court by the district court on September 15, 2011. Samuel M. Braverman was continued as appellate counsel pursuant to the Criminal Justice Act.

QUESTIONS PRESENTED

1. DID THE GOVERNMENT FAIL TO MEET ITS BURDEN TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANTS DAVID AND ONTA WILLIAMS AND LAGUERRE PAYEN WERE PREDISPOSED TO COMMIT THE CRIMES AT ISSUE?

2. DID THE DISTRICT COURT ERR IN DENYING THE APPELLANTS' MOTION FOR A MISTRIAL BASED ON THE JURY'S CONSIDERATION OF EXTRA-RECORD EVIDENCE?

PRELIMINARY STATEMENT

On June 29, 2011, judgment was entered against James Cromitie, David Williams, and Onta Williams (with Appellant Laguerre Payen hereinafter referred to as "Appellants") by the United States District Court for the Southern District of New York (McMahon, J.) convicting them, upon a jury verdict, of seven counts of conviction: one count of a conspiracy to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C), three counts of attempt to used weapons of mass destruction in violation of the same section, 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), one count of attempt to acquire and use anti-aircraft missiles also in violation of the preceding sections, and one count of Conspiracy to Kill Officers and Employees of the United States in violation of 18 U.S.C. §§ 1114 and 1117. Appellants James Cromitie and David Williams were also convicted of attempt to kill officers and employees of the United States in violation of 18 U.S.C. § 1114. The District Court (McMahon, J.) sentenced them each to 25 years incarceration, 5 years post release supervision, and a $100 special assessment on each count to run concurrently.

On September 7, 2011, judgment was entered against Laguerre Payen by the United States District Court for the Southern District of New York (McMahon, J.) convicting him, upon a jury verdict, of seven counts of conviction: one count of a

conspiracy to use weapons of mass destruction in violation of 18 U.S.C. § 2332a(a)(2)(C), three counts of attempt to used weapons of mass destruction in violation of the same section, 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), one count of attempt to acquire and use anti-aircraft missiles also in violation of the preceding sections, and one count of Conspiracy to Kill Officers and Employees of the United States in violation of 18 U.S.C. §§ 1114 and 1117. The District Court (McMahon, J.) sentenced to 25 years incarceration, 5 years post release supervision, and a $100 special assessment on each count to run concurrently.

On September 15, 2011, the appellant Payen filed a timely notice of appeal of the aforementioned judgment by the United States District Court for the Southern District of New York.

STATEMENT OF FACTS

1. Predisposition

Shaheed Hussain, a Pakistani national with an extensive criminal background, was working for the FBI as a confidential informant.[1] His goal was to "locate disaffected Muslims who might be harboring terrorist designs on the United States." (May 10 Order at 4.) In June 2008, Hussain encountered Cromitie, a former petty drug dealer and Wal-Mart employee, at the Masjid al-Ikhlas Mosque in the impoverished community of Newburgh, New York. (Id. at 3.) Over the course of the next several months, Hussain engaged Cromitie in extensive discussions about the possibility of "do[ing] something to America" in the name of Islam. (Id.) Hussain motivated Cromitie with promises of a BMW and as much as $250,000 in cash in exchange for participation in a jihadist venture. (Id.) The discussions between Hussain and Cromitie, most of which were presented at trial in audio- or videotaped form, are full of "hate-filled rants against Jews and the United States military." (Id.)

1 Appellant Payen joins in and incorporates by reference all the arguments and statements of facts of Appellants James Cromite, David Williams and Onta Williams, as if they were set forth fully herein. The facts relevant to the specific arguments of Appellant Payen are set forth here for the convenience of the Court. References will be made to the trial transcript ("T. at ___"), the Joint Appendix ("A. at ___"), the summary of the facts in the trial court's Decision and Order Denying Defendants' Post-Trial Motions, filed May 10, 2011 (the "May 10 Order") and the October 14, 2010 order (the "October 14 Order").

Cromitie, "was desperately poor, accepted meals and rent money from Hussain, [but] he repeatedly backed away from his violent statements when it came time to act on them." (Id.) In fact, in February 2009, Cromitie dropped out of sight for six weeks, during which time he refused to take Hussain's calls or to have anything to do with Hussain. (Id. at 4-5.)

At the beginning of April 2009, however, after he had lost his job and was in desperate financial straits, Cromitie reappeared and contacted Hussain again. (Id. at 5.) He told Hussain that he needed money, and he recommitted to the "mission." (Id.) The record does not include any evidence of when, how, or by whom the other Appellants were approached, or whether they participated readily or, like Cromitie, hesitated until they were offered substantial financial inducements. However, by the end of April, the other Appellants had agreed to assist in the mission. (Id.)

Thereafter, the FBI created fake explosive devices and a fake Stinger missile and placed them just over the state border in a warehouse in Connecticut. (Id.)[2] Hussain drove the Appellants everywhere: to the warehouse to "inspect" the phony ordnance, to purchase illegal handguns, to scout out the chosen targets, and to "training" exercises at which the Appellants were instructed in how to arm and

2 The location of the warehouse was chosen by Hussain so that the Appellants would need to cross an interstate border to pick up the devices, thereby federalizing their criminal activity. Id.

plant explosive devices and how to shoot Stinger missiles. (Id.)[3] On May 20, 2009, Hussain drove the four men from Newburgh to the Bronx, where, with the other Appellants acting as lookouts, Cromitie planted the fake explosive devices at the Riverdale Temple and the Riverdale Jewish Center. (Id.) All four men were immediately arrested. (Id.)

The trial court held, in its May 10 Order, that the record supported the jury's finding that the Appellants had been predisposed to commit the crimes of which they were convicted. In doing so, the court applied an incorrect standard of law, misconstrued existing law, and used facts not in the record to support its conclusion. This Court is urged to reverse the May 10 Order and remand the matter to the trial court with instructions to grant the Appellants' Rule 29 motion for judgment of acquittal.

Extra-Record Evidence

Exhibit 290.1-T is a transcript of a May 29, 2009 prison telephone call in which Onta Williams succinctly and explicitly explains how and why he came to be involved in the bombing plot. Exhibit 290.2-T is a transcript of a June 7, 2009 prison telephone call that contains discussions of defense strategy which are

3 The trial court noted that Hussain had to "arm" the fake bombs, because, despite the carefully orchestrated "inspection" of the "ordnance" and extensive "training," Cromitie could not figure out how to do it. Id. at 6.

privileged as to all the Appellants. In the call, David Williams suggests, inter alia, that entrapment is a bogus defense concocted by "the lawyers." The Government presented both exhibits to the defense on August 19, 2010.

On August 23, 2010, the first day of jury selection, the transcripts were discussed in court for the first time. Counsel for Laguerre Payen, noting the damning inferences that could be drawn from them, moved to suppress both exhibits, or if denied, sought a limiting instruction for his client in the event the recordings and transcripts were admitted (T.268). On the following day, August 24, before the court could read into the record its decision granting the motion and suppressing Exhibit 290.2-T (the David Williams call), the Government withdrew its application to admit the tape and transcript of that call, but stated that it still intended to admit the tape and transcript of Exhibit 290.1 (the Onta Williams call) (October 14 Order at 4). The trial court agreed to admit these materials with a "limiting instruction" (T.276).

The recording of the Onta Williams call was introduced during the testimony of Heather Alpino, a paralegal in the United States Attorney's Office. The Government offered Exhibit 290.1-T, the transcript of the call, "solely" as an "aid" to the jury in their consideration of the tape (T.640). The trial court allowed the transcript to be placed before the jury, but with the "same caveat" that the transcripts were "not the evidence in the case" (T.639-40).

Subsequently, the Government chose not to introduce the recording of the Onta Williams call. Accordingly, the Government should have removed the copy of the transcript from each juror's binder, where it had been placed in anticipation of its use during deliberations. Prior to the commencement of deliberations, the parties agreed on the exhibits that had been admitted and were to be made available to the jury. The Government and the defense each made lists of their respective exhibits; neither Exhibit 290.1-T nor Exhibit 290.2-T were included on the Government's list. Thus, the defense was unaware that the transcripts had not been removed from the jurors' binders.[4]

On Friday, October 8, at approximately 2 P.M., the jurors sent an "urgent" note to the court, expressing their concern that one of the jurors had found Exhibit 290.2-T in her binder (October 14 Order at 1). The jurors had been discussing Exhibit 290.1-T, which was the last document in each juror's binder, when Juror #1 realized she did not have a copy of the document under discussion, but instead had a copy of 290.2-T (October 14 Order at 4). Another juror confirmed the discrepancy, and the jury sent its note to the trial court asking for clarification as to what it should do. (Id.)

4 The defense did not have an opportunity to inspect the binders prior to deliberations, as the actual binders had been in the jurors' possession since the beginning of the trial. The trial court observed that it did not appear that the jurors had looked at the binders prior to the commencement of deliberations. (October 14 Order at 4, 9.)

The trial court conducted a voir dire of each juror to ascertain who had seen what. (Id. at 5.) Several jurors claimed to have looked at 290.1-T, with varying degrees of comprehension as to its contents. (Id.) Notably, it is undisputed that the jurors had all discussed Exhibit 290.2-T and that the discussion of that Exhibit – which had been withdrawn from the Government's case and which the trial court had determined to be inadmissible - had "lasted for an indeterminate period." (Id. at 4.) All defense counsel joined in a motion for a mistrial, and the court adjourned for the weekend.

When proceedings resumed on Tuesday, October 12, 2010, the court read the jurors a curative instruction, telling them that they must disregard completely anything they saw in the two transcripts, and that they must not "think about them or mention them again" as deliberations continued. (Id. at 11-12.) After the instruction was given, defense counsel renewed the motion for a mistrial.

In the October 14 Order, the trial court denied the motion as to all Appellants. The court noted that the Government was entirely at fault for, in the first instance, placing documents known to be in dispute into the juror's binders prior to the conclusion of the trial, and, in the second instance, for failing to remove them prior to deliberations. (Id. at 9.) The court also assumed, for purposes of deciding the motion, that the forbidden materials had been "seen" and "absorbed" by the entire jury. (Id.) Though the court did not see any evidence of

deliberate misconduct by the Government, it noted that "the prosecution plainly did not pay sufficient attention to this critical administrative matter." (Id. at 10.) Nonetheless, the court concluded that none of the defendants had demonstrated actual harm as a result of the jury's consideration of the extra-record materials. Specifically, the court held that its curative instruction "was sufficient to ameliorate any possible prejudice from the portion of" Exhibit 290.2-T that the jurors had seen. (Id. at 14.) The court also concluded that because, in its view, neither Onta Williams nor James Cromitie suffered any prejudice as a result of the consideration of Exhibit 290.1-T, none of the defendants, including Payen, were entitled to anything more than a general curative instruction. (Id. at 23-24.)

SUMMARY OF ARGUMENT

1. Appellants seek reversal of the trial court's denial of their motion for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure. Specifically, they urge this Court to reverse the jury's rejection of their entrapment defense. Viewing the evidence at trial in its totality, in a light most favorable to the government, and drawing all inferences in favor of the prosecution, no rational trier of fact could have rejected the Appellants' contention that they were entrapped by the government's conduct in this case. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Gaines, 295 F.3d 393, 299-300 (2d Cir. 2002).

2. In addition, Appellants seek reversal of the trial court's denial of their motion for a mistrial based on the jury's consideration and discussion of extra-record information that had been specifically excluded from evidence in this case. The extra-record information considered by the jurors consisted of the transcripts of two prison telephone calls, designated Government Exhibits 290.1-T and 290.2-T, made by Onta Williams and David Williams. The trial court should have declared a mistrial because the jurors' consideration of these transcripts, which were highly probative and seemingly incriminatory, violated the Appellants' Fifth Amendment right to have their cases decided solely on the evidence admitted at

trial and their Sixth Amendment right to have the jury consider only information subject to cross-examination and the arguments of counsel. The trial court denied the motion for a mistrial in a Decision and Order entered October 14, 2010 (the "October 14 Order").

ARGUMENT

POINT I

THE GOVERNMENT FAILED TO MEET ITS BURDEN TO ESTABLISH BEYOND A REASONABLE DOUBT THAT APPELLANTS DAVID AND ONTA WILLIAMS AND LAGUERRE PAYEN WERE PREDISPOSED TO COMMIT THE CRIMES AT ISSUE

It is well settled that the government may use undercover agents to enforce the law. Jacobson v. United States, 503 U.S. 540, 548 (1992). "In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." Id., citing Sorrells v. United States, 287 U.S. 435, 442 (1932).

The defense of entrapment, long recognized by the United States Supreme Court, operates as protection against government overzealousness in cases involving undercover agents. The entrapment doctrine forbids the punishment of an otherwise innocent defendant whose alleged offense is the result merely of the "creative activity" of government agents. Sorrells, at 451.

To make out a defense of entrapment, a defendant must first establish by a preponderance of the evidence that the government induced the crime. The burden then shifts to the government to establish *beyond a reasonable doubt* that the defendant was predisposed to commit the crime. United States v. Al-Moayad, 545

F.3d 139, 153 (2d Cir. 2008) (emphasis added); United States v. Brand, 467 F.3d 179, 189 (2d Cir. 2006) ("If a defendant presents credible evidence of government inducement, then the prosecutor must show predisposition beyond a reasonable doubt"); United States v. Salerno, 66 F.3d 544, 547 (2d Cir. 1995).

There is no dispute in the instant case regarding the issue of inducement. As the trial court readily acknowledged, "[i]t is beyond question that the Government created the crime here." May 10 Order at 44. It is undisputed that Hussain sought out Cromitie in his house of worship and repeatedly solicited him, with offers of large amounts of cash and goods, to participate in the phony jihadist venture. It is also undisputed on the record that Cromitie initially refused to entertain Hussain's criminal plan. He acquiesced only when he had lost his job and became desperate for the financial inducements that Hussain had offered. Finally, there is no dispute on the record *whatsoever* that the other Appellants were induced to participate by offers of cash and other material rewards. The sole issue here is whether the Government was able, at trial, to demonstrate the Appellants' predisposition beyond a reasonable doubt. Because the Government was unable to do so, this Court must reverse.

The controlling United States Supreme Court case on the issue of predisposition is Jacobson, *supra*. In Jacobson, the petitioner had in the past ordered and received through the mail magazines that depicted nude preteen and

teenage boys. Id. at 542. At the time, the receipt of such magazines was legal, but shortly afterward Congress passed the Child Protection Act of 1984, which criminalized the knowing receipt through the mails of such materials. Id. The Government obtained Jacobson's name from the mailing list of the publisher from whom he had ordered the original magazines, and it pursued him by mail for over two years, pretending at times to be such organizations as the "American Hedonist Society," "Midlands Data Research," and a civil rights lobbying organization called "Heartland Institute for a New Tomorrow." Id. at 543-45. Though Jacobson resisted the Government's efforts at first, he finally placed an order for illegal pornography through a U.S.-government-operated phony Canadian publisher called the "Far Eastern Trading Company." He explained that he had ordered the materials because the Government had finally succeeded in piquing his interest, and he wanted to see what the material was. Id. at 546-47. Upon his receipt of the materials, he was arrested, and he was ultimately convicted of violating the Child Protection Act of 1984. The Eighth Circuit affirmed, concluding that Jacobson had not been entrapped as a matter of law. Id. at 547-48.

The United States Supreme Court reversed, holding that the Government had not established beyond a reasonable doubt that Jacobson had been disposed to commit the criminal act "*prior to first being approached by Government agents*." Id. at 549 (emphasis added). The Court stated that

> Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner – who must be presumed to know the law – had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction…
>
> But that is not what happened here. By the time petitioner finally placed his order, he had already been the target of 26 months of repeated mailings and communications from Government agents and fictitious organizations. Therefore, although he had become predisposed to break the law by May 1987, *it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at petitioner* since January 1985.

Id. at 550 (citations omitted, emphasis added).

The Supreme Court's holding in Jacobson is clear: predisposition may be shown by a defendant's "promptly availing himself" of a criminal opportunity presented by a Government agent, but it may not be established by a defendant's capitulation after years of dogged pursuit. Moreover, regardless of when predisposition behavior occurs, it must be *independent and not the product of government attention.*

Nevertheless, as the trial court in the instant case noted, the Courts of Appeals have struggled to apply Jacobson consistently to the fact patterns that have arisen since.[5] This Court, in struggling wrestling with Jacobson, has recently set out three

5 Some Courts of Appeals have interpreted Jacobson as permitting the use of conduct occurring after the inducement as evidence of predisposition. See, e.g., United States v. Nguyen, 413 F.3d 1170, 1178 (10th Cir. 2005) ("inferences about predisposition may be drawn from events occurring after the two parties

possible ways in which the Government can satisfy its burden of demonstrating predisposition. The Government may show:

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

Al-Moayad, *supra*, at 145.

In the instant case, the Government has conceded, and the trial court found, that there was no evidence whatsoever to support a finding of predisposition under the first two prongs of Al-Moayad. The Government relied solely on the third prong; that is, it alleged that it had demonstrated the Appellants' predisposition beyond a reasonable doubt because of their "ready response to the inducement." In other words, the Government argued that the Appellants were predisposed to commit the crime simply because they committed the crime once they were

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came into contact"); United States v. Squillacote, 221 F.3d 542, 566 (4th Cir. 2000) (though evidence of predisposition must generally predate the first contact with the government, the prosecution can show predisposition by offering evidence of "independently motivated behavior that occurs after government solicitation begins"); United States v. Gendron, 18 F.3d 955, 964 (1st Cir. 1994) (where the defendant responded "with enthusiasm" to repeated government initiatives, jury could have found predisposition beyond a reasonable doubt, since defendant "would have responded affirmatively to the most ordinary of opportunities").

induced by the Government. Such an argument is unsustainable under both Jacobson and the subsequent law of this Court.[6]

This Court's leading post-Jacobson case on the issue of predisposition is Brand, *supra*. In Brand, the defendant had logged into an online chat room from his home in New Jersey and attempted to make plans with 13-year-old girls to meet them in New York City for the purpose of engaging in sex with them. Unbeknownst to Brand, the "girls" with whom he had been chatting were actually government agents and a civilian working for the government; when he arrived at the designated meeting spot, he was immediately arrested. A search of his car yielded condoms and sexually suggestive photographs of underage girls. Id. at 185-86. Brand claimed entrapment at trial, and the Government conceded inducement. The contents of Brand's car, along with his "ready response" to the Government's inducement, served as evidence of his predisposition to commit the crime.

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6 The trial court was clearly confused about how to apply Jacobson and its Second Circuit progeny to the facts of this case. While the court ultimately agreed with and found for the Government, it seemed to interpret Jacobson as allowing only pre-inducement actions as evidence of predisposition:

> There is absolutely no doubt that the defendants committed the charged crimes. The entire episode was monitored and filmed by law enforcement agents. 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.

May 10 Order at 6 (emphasis added).

The use of the phrase "obviously prepared" by the trial court is troubling because it seems to assume the answer to the very question to be decided. There is no evidence whatsoever on the record that any of the Appellants were prepared to commit the crimes at issue before being approached by Hussain.

On appeal, Brand contended "that the government's evidence was insufficient as a matter of law to establish that he was predisposed to commit the offense charged independent of the government's actions." Id. at 190. He pointed out that Jacobson required any evidence of predisposition to be independent of government action. Id.

This Court affirmed Brand's conviction. In doing so, it noted that

> Because we are bound by the [Supreme] Court's holding in Jacobson, Brand is correct in pointing out that the government's reliance on certain evidence of acts that occurred *after* Brand's initial contact with government agents is misplaced. This evidence would not be probative of "petitioner's state of mind *prior* to the commencement of the Government's investigation."

Id. at 192. However, this Court went on to distinguish Brand from Jacobson by pointing out that Brand had made the initial contact with the "girls" he hoped to meet by logging into an online chat room with a suggestive name; that Brand had admitted using the chat room in the past to engage in sexually explicit conversations with girls as young as ten years old; and that Brand had admitted to receiving and viewing images of child pornography over the internet. "All of these events occurred *prior* to, and were *independent* of, any contact by government agents, as required under Jacobson. Based on these circumstances, the jury could rationally find that Brand was predisposed to commit the crimes charged." Id. at 194-95.

As an aside, this Court also noted that Brand had not hesitated at all in response to the government inducement. His "ready response" to the "girls" he met online, along with his affirmative planning of the logistics of the in-person meeting and his showing up at the appointed time and place, established that he was "ready and willing without persuasion and…awaiting any propitious opportunity to commit" the crime with which he had been charged. Id.; see United States v. Mayo, 705 F.2d 62, 67 (2d Cir. 1983) (quoting United States v. Sherman, 200 F.2d 880, 882-83 (2d Cir. 1952)).

The trial court in the instant case "[r]ead Brand to suggest that Jacobson does not bar reliance on [behavior that occurs after government contact] where predisposition is proven on a theory of 'ready response to inducement.'" May 10 Order at 44. Even assuming that this reading of Brand is correct (although it is not), it is of no avail to the Government here as there is no evidence whatsoever that the Williamses and Payen were "predisposed" to commit the crimes at issue:

> Here, by contrast we have no idea what happened at those first fateful meetings – no direct evidence of how readily David Williams, Onta Williams and Laguerre Payen responded to the approach and solicitation of a Government agent. We do not know whether these defendants "jumped at the opportunity" that was presented to them as soon as the topic was broached, as was the case in Brand. We have no idea whether their enthusiasm for the mission … was "unhesitating" from the very beginning. We do not know how much convincing it took to get an affirmative response or what inducements were offered to induce their participation.

Id. at 29-30.

Moreover, this case is distinguishable from Brand on the basis of a complete lack of evidence about the Williams' and Payen's "pre-existing attitudes and prejudices." Id. at 30. Brand initiated the contact with the government agents in his case, and he took the initiative in setting up the proposed meeting. His car contained child pornography and condoms, physical evidence that he was inclined and prepared to commit the crime.

Here, the Government did not present any evidence *at* all that the Williamses or Payen had any pre-existing associations or ideations, or history that would suggest a predisposition to commit the crimes with which they were charged. They were not shown to have any contacts or associations with groups that advocated terrorism or violence against the United States Government. They were not shown to have possessed any literature, personal writings, computer files, or computer-usage histories that reflected such plans, and searches of their homes yielded no weapons, no bomb-making materials, and no literature about making or using bombs or weapons. The trial evidence even made clear that the Appellants were *incapable of carrying out the arming and placement of the phony bombs without Hussain's substantial assistance*.

In short, this case represents precisely the type of government overreaching that the Supreme Court warned against in Jacobson. David Williams, Onta Williams, and Laguerre Payen[7] were not shown to have engaged in any behavior that was *independent and not the product of government attention.* The Government originated this criminal design and then implanted it in the minds of the Appellants. There is no evidence at all that the Williamses were anything but unwilling, unwary participants. The law and the facts compel a reversal of the trial court's finding on this point.

7 Because the facts differ slightly with regard to the appellant Cromitie, his appellate counsel is addressing his entrapment issue separately. It is the position of all of the Appellants, however, that they were entrapped because the Government presented no evidence of predisposition at trial.

POINT II

THE JURY'S CONSIDERATION OF EXTRA-RECORD MATERIAL DEPRIVED PAYEN AND THE OTHER APPELLANTS OF THEIR FIFTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL

The Sixth Amendment to the United States Constitution requires that juries in criminal trials base their verdicts solely on the evidence developed at trial. "Trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, or cross-examination, and of counsel." Turner v. Louisiana, 379 U.S. 466, 472 (1975); see also Lolisco v. Goord, 263 F.3d 178, 185 (2d Cir. 2001) ("[A] criminal defendant's Sixth Amendment rights are implicated when a jury considers incriminating evidence that was not admitted at trial").

Moreover, a jury's consideration of extra-record evidence denies a criminal defendant due process under the Fifth Amendment. The Due Process Clause of the Fifth Amendment guarantees a defendant's right to a jury "capable and willing to decide the case solely on the evidence before it." United States v. Olano, 507 U.S. 715, 738 (1993), *quoting* Smith v. Phillips, 455 U.S. 209, 217 (1982).

There is no dispute in the instant case that the jurors were exposed to extra-record evidence and that the mistake was clearly the Government's. See October

14 Order at 9-10. There was no way the defense could have prevented the jurors' viewing of the disputed transcripts, nor did the defense ever have the opportunity to refute, before the jury, the issue of the content of the transcripts. Nevertheless, the trial court, in denying the defendants' motion for a mistrial, based its decision on *the defendants'* failure to establish that they were prejudiced by the jurors' exposure to the transcripts.

It has been clearly established by both the United States Supreme Court and this Court that jurors' exposure to extraneous information gives rise to a presumption of prejudice. Remmer v. United States, 347 U.S. 227, 229 (1954); Bibbins v. Dalsheim, 21 F.3d 13, 16-17 (2d Cir. 1994). "This presumption, however, may be overcome by a showing that the extra-record information was harmless." United States v. Peterson, 385 F.3d 127, 134 (2d Cir. 2004) (internal quotation marks omitted).

Given this standard, and the facts of this case, it cannot possibly be said that the jurors' exposure to the exhibits in question was harmless. In fact, it is difficult to imagine a situation more harmful to Payen than the jurors' exposure to this material. The unadmitted May 29, 2009 transcript is the only direct information the jury has seen regarding the inducements offered to Payen and the other Appellants (besides Cromitie), and their initial responses thereto. All of the admitted evidence bearing on this point against Payen is limited to inferences

drawn from his conduct and statements *after* he became involved in the plot. Indeed, his entire defense strategy was based on the assumption that there would be no admitted evidence bearing on his response to the offered inducements. Had defense counsel at trial known otherwise, his strategy would have been different. He would have cross-examined the witnesses testifying against Payen with regard to the transcript's content, and he would have mentioned the transcript in his closing argument. Unfortunately, he was denied the opportunity to do so because the transcript was never admitted into evidence, and he had no reason to believe the jurors would see and "absorb" it. Moreover, Exhibit 290.2-T, which refers to the defense strategy of entrapment as a made-up excuse, goes to the heart of the case and is devastating to all of the defendants. It cannot possibly be interpreted otherwise.

In United States v. Camporeale, 515 F.2d 184 (2d Cir. 1975), this Court reversed a conviction based on similar circumstances. In that case, the defendant had been charged with perjury in the grand jury. Though the parties had agreed that the incriminatory portion of the grand jury transcript should be redacted, the court clerk supplied the deliberating jurors with an unredacted copy. Shortly thereafter, the jurors returned a guilty verdict. Unlike in the instant case, there was no evidence as to whether the jurors had read the transcript.

This Court reversed because it concluded that the presence of the unredacted transcript in the jury room could not be considered harmless. As the trial turned on the credibility of the defendant's grand jury testimony, the jury's exposure to the defendant's criminal record "could well have led it to resolve the issue against him." Id. at 188. See also United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (holding that prejudice was likely where a juror was exposed to press reports, outside of the trial record, that another person not on trial had admitted to the offense in question and had stated that he had committed it with "another police officer"); Bulger v. McCray, 575 F.2d 407 (2d Cir. 1978) (upholding a grant of a writ of habeas corpus where jurors received extra-record information contradicting the defendant's alibi defense, leading to a "significant possibility of prejudice").[8]

Finally, it is noted that the court's weak curative instruction does not ameliorate the situation, because there was no alternative to a mistrial here. As defense counsel noted in their original motion, the trial court cannot inquire as to how reading or discussing the transcripts at issue may have affected a juror's view of the case. Any such inquiry could fatally compromise the integrity of further

8 Other federal trial courts have taken a similar approach to, and a strong stand against, jurors' consideration of extra-record information. In July 2011, in a sensational case presenting issues remarkably similar to those presented here, Judge Walton of the United States District Court for the District of Columbia granted a mistrial in favor of perjury defendant and well-known baseball star Roger Clemens, where the Government had "accidentally" exposed the jury to a highly prejudicial but extra-record transcript of comments tending to show Clemens' guilt. "Judge Declares Mistrial in Roger Clemens Perjury Case," *Los Angeles Times*, July 14, 2011 (http://articles.latimes.com/2011/jul/14/news/la-pn-clemens-mistrial-20110714).

deliberations. Cf. United States v. Cox, 324 F.3d 77, 84 (2d Cir. 2006) ("[W]hile a court looking into juror misconduct must investigate and, if necessary, correct a problem, it must also avoid tainting a jury unnecessarily"). Moreover, it is not clear whether an inquiry during deliberations as to a juror's subjective reaction to extra-record information could ever be proper. See Bibben v. Dalsheim, 21 F.3d 13 (2d Cir. 1994) (in a post-trial inquiry into a juror's exposure to extra-record information, inquiry about juror's subjective reaction to extra-record information is prohibited).

Although jurors are generally presumed to follow a court's limiting instructions, the presumption is overcome "where there is an overwhelming probability that the jury will be unable to follow the court's instructions *and the evidence is devastating to the defense*." United States v. Becker, 502 F.3d 122, 130 (2d Cir. 2007) (emphasis added). See also Camporeale, supra, at 188 ("Even if counsel had objected [to the jury's receipt of the unredacted transcript] prior to the rendition of the verdict, any interrogation by the court regarding the jury's possible consideration of the objectionable matter would only draw attention to it or lead the jury to suspect that it must contain material adverse to the defendant").

In conclusion, the Government's gross negligence in exposing the jury to the extra-record evidence in question unfairly tainted the jury and deprived Payen and

the other defendants of their Fifth and Sixth Amendment rights to a fair trial. The trial court's failure to grant the Appellants' motion for a mistrial must be reversed.

CONCLUSION

For the forgoing reasons, appellant'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
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This Brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7)(B) because this Brief contains 6,298 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)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point Times New Roman type font.

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