

11-2763-cr

**United States Court of Appeals
for the Second Circuit**

Docket Nos. 11-2763-cr, 11-2884-cr, 11-2900-cr, 11-3785-cr

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,

Defendants-Appellants.

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

CORRECTED BRIEF FOR DEFENDANT-APPELLANT ONTA WILLIAMS

FEDERAL DEFENDERS OF NEW YORK, INC.
APPEALS BUREAU
52 Duane Street, 10th Floor
New York, New York 10007
Tel. No.: (718) 407-7402

Attorney for Defendant-Appellant
ONTA WILLIAMS

DAVID A. LEWIS,
MARK B. GOMBINER,
Of Counsel

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
PRELIMINARY STATEMENT	3
STATEMENT OF FACTS	3
Introduction	3
The Confidential Informant, Shahed Hussain, and His "Handler," Special Agent Robert Fuller of the FBI	6
The Fruitless Investigation of the Newburgh Mosque from September, 2007, to June, 2008.	8
On June 13, 2008, Cromitie Approached Hussain, Upset About Killings in Afghanistan; By Hussain's Account, Cromitie, Speaking in an Arabic Accent, Concluded That He Wanted to Die in Afghanistan as a Martyr and, Vaguely, to "Do Something to America."	9
Cromitie's Background	11
The Subsequent Unrecorded Meetings Between June 23, and October 12, 2008	12
At the First Recorded Meeting, on October 12, 2008, Hussain Tries Repeatedly Incite Cromitie to Engage in Violent Jihad; Cromitie Is Not Interested.	13
On October 19 and 29, Hussain Pursues His Campaign to Make Cromitie a Jihadi by Telling Him that the Prophet Wanted the Jews "Eliminated;" Cromitie Disagrees and Makes Clear, Contrary to Hussain's Account of June 13, That He Did Not Want to Be a Martyr.	16

In Late October and Early November, Hussain Remains Unable to Convert Cromitie to a Belief in the Virtue of Jihad. 17

Hussain Convinces Cromitie to Attend a Muslim Conference with Him at a Philadelphia Hotel and Gets Cromitie to Begin to Talk of the Use of Explosive Devices; Cromitie Explains His Affection for Hussain. 18

Hussain's Failure to Get Cromitie to Act During the Month of December. 20

In Hussain's Absence, the FBI Does a Little Investigation and Doubts Cromitie's Veracity and Dangerousness; Fuller Nonetheless Obtains a Wiretap on Cromitie's Phone. 24

Cromitie Loses His Job; Hussain Loses What He Thought Was Secure Immigration Status. 25

Hussain Meets Cromitie in February and Convinces Him, After Initial Resistance, To Go to the Airport. . . 25

Cromitie Evades Hussain for Six Weeks and Tries Twice to Get His Job at Walmart Back. 27

Hussain Offers Cromitie \$250,000, in Addition to a BMW and Other Financial Inducements, Without Telling the Government. 28

At the Meeting of April 7, Cromitie Waffles About Whether to Join Hussain; He Chooses That Option Because He Needs Money and Hussain Makes Him Feel "Fine and Cool." 32

In May, Hussain Leads the Defendants Through the "Operation" the FBI Had Planned. 38

The Last Supper Before the Operation. 41

Shahed Hussain's Perjury 43

The Evidence That Hussain's Direct Testimony Was Perjurious, and That He Then Engaged in Perjurious Cover-Ups. 44

The Government's Summation 50

The Verdict 52

The Court's Ruling on the Defense Motion for a New Trial or a Hearing Based on Hussain's Perjury 53

The Court's Ruling on the Motion for Dismissal Based on Outrageous Governmental Misconduct 54

Sentencing 54

SUMMARY OF ARGUMENT 56

ARGUMENT

POINT I

The Government's Misconduct, Including, But Not Limited to, the Incitement of Criminal Acts by Arguing They Were a Religious Obligation, Exploiting the Love of a Defendant for the Government Informant, Violations of Law by the Informant, Offers of Extraordinary Financial Incentives, and the Government's Planning and Execution of the Entire Crime, Which Never Could Have Occurred Otherwise, Was Outrageous and Violated Due Process. 59

A. Due Process Bars a Conviction Based on Law Enforcement Misconduct So Extreme That It Violates the "Canons of Decency and Fairness" That Underlie Our System of Justice. 60

B. Converting the Defendants to the View That They Had the Religious Obligation to Engage in Terroristic Jihad Was Outrageous Governmental Misconduct With the Capacity to Lead Innocents into Crime. 62

C. The Government Committed Misconduct by Exploiting Cromitie's Love for Hussain to Draw Him Back Into Its Criminal Plan After He Had Abandoned It. 68

D. The Government Improperly Induced the Defendants to Commit Crimes by Deliberately Minimizing the Culpability of the Acts the Government Was Planning and Emphasizing the Minimal Degree to Which the "Lookouts" Would Be Involved. 72

E. The Government Manufactured Criminals Using Offers of Hundreds of Thousand of Dollars in this World, in Addition to Paradise in the Next. 74

F. The Misconduct of the Government's Informant in Making False and Misleading Statements to the Government Constitute Outrageous Misconduct and Advanced a Prosecution That Would Otherwise Never Have Occurred. 79

G. The Vulnerability of the Defendants Enhanced the Outrageousness of the Government's Conduct. 84

H. The Government Exercised Complete Control Over the Planning and Execution of the Crime, to the Near Total Exclusion of the Defendants. 85

I. The Government Involvement and Misconduct Was All the More Outrageous Because the Evidence of Predisposition is Weak, the Defendants Would Not Have Been Able to Carry the Crime out Alone, and It Is Highly Unlikely that Such Crimes Could Ever Have Occurred Without Government Intrusion. 87

J. The District Court's Opinion Denying the Defendants' Motion Was Deeply Flawed. 90

POINT II

A New Trial Should Be Granted Because Hussain Deliberately Lied to the Jury about Important Matters Affecting Both His Credibility and the Merits of the Entrapment Defense and Because the Government, Which Knew of This Perjury, Failed to Make it Clear to the Jury and, Worse, Relied on and Misleadingly Bolstered Hussain's Perjured Testimony. 92

A. Controlling Legal Standards 93

B. Hussain Committed Perjury on Multiple Occasions and the Prosecutors Knew, or Consciously Avoided Learning, That Fact. 94

C. Had Hussain’s Perjury Been Made Clear, There Was a Reasonable Likelihood That the Verdict Would Have Been Different. 97

POINT III

The Prosecutor’s Improper Vouching for Hussain’s Credibility Constituted Plain Error and, in Conjunction with the Prior Point and All Other Trial Errors in This Case, Creates Sufficient Prejudice to Require a New Trial. 103

POINT IV

Defendant Onta Williams Joins in the Arguments of the Other Defendants. 106

CONCLUSION 107

TABLE OF AUTHORITIES

CASES

Berger v. United States, 295 U.S. 78 (1935) 105
Cutter v. Wilkinson, 544 U.S. 709 (2005) 65
Drake v. Portundo, 553 F.3d 230 (2d Cir. 2009) 93, 94
DuBose v. LeFevre, 619 F.2d 973 (2d Cir. 1980) 93
Fromer v. Scully, 817 F.2d 227 (2d Cir.), vacated on other grounds, 404 U.S. 909 (1987) 65
Hampton v. United States, 425 U.S. 484 (1976) passim
Jacobson v. United States, 503 U.S. 540 (1992) passim
Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960) 60
Malinski v. New York, 324 U.S. 401 (1945) 59, 61, 62, 76
Morris v. Ylst, 447 F.3d 735 (9th Cir. 2006) 94
Napue v. Illinois, 360 U.S. 264 (1959) 93, 94

Perkins v. LeFevre, 642 F.2d 37 (2d Cir. 1981) 93

Pulido v. United States, 425 F.2d 1391 (9th Cir. 1970) 66

Rochin v. California, 342 U.S. 165 (1952) 59, 60, 61, 62

Sherman v. United States, 356 U.S. 369
(1958) 62, 66, 84, 86, 92

Standen v. Whitley, 994 F.2d 1417 (9th Cir. 1993) 101, 102

State v. Lively, 921 P.2d 1035 (Wash. 1996) 85

Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679
(1952) 65

United States v. Al Kassar, 660 F.3d 108 (2d Cir.
2011) 75, 78

United States v. Batres-Santolino, 521 F. Supp. 744
(N.D. Cal. 1981) 74

United States v. Boyd, 54 F.3d 868 (D.C. Cir. 1995) 104

United States v. Combs, 379 F.3d 564 (9th Cir. 2004) 104

United States v. Corcione, 592 F.2d 111 (2d Cir. 1979) 86

United States v. Cuervelo, 949 F.2d 559 (2d Cir.
1991) 61, 69, 71, 76, 92

United States v. Dyman, 739 F.2d 762 (2d Cir. 1984) 86

United States v. Freeman, 650 F.3d 673 (7th Cir. 2011) 95

United States v. Gendron, 18 F.3d 955 (1st Cir. 1994) 66

United States v. Harris, 997 F.2d 812 (10th Cir. 1993) 84

United States v. Martinez, 981 F.2d 867 (6th Cir. 1992) 104

United States v. Mosley, 965 F.2d 906 (10th Cir. 1992) 74

United States v. Myers, 692 F.2d 823 (2d Cir.
1982) 60, 75, 78

United States v. Nunez-Rios, 622 F.2d 1093 (2d Cir. 1980) 86

United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990) . . 104

United States v. Rahman, 189 F.3d 88 (2d Cir. 1999) 86

United States v. Richter, 826 F.2d 206 (2d Cir. 1987) . . 99, 104

United States v. Russell, 411 U.S. 423 (1973) 60

United States v. Schmidt, 105 F.3d 82 (2d Cir. 1997) 61, 76, 84

United States v. Seiyo, 514 F.2d 1357 (2d Cir. 1975) 93

United States v. Stofsky, 527 F.2d 237 (2d Cir. 1975) 94

United States v. Thickstun, 110 F.3d 1394 (9th Cir. 1997) 65

United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) 74

United States v. Wallach, 935 F.2d 445 (2d Cir. 1991) 95, 99, 106

United States v. Weatherspoon, 410 F.3d 1142 (9th Cir. 2005) 104

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 1001 56, 81, 82

18 U.S.C. § 1001(a) (1) 79

18 U.S.C. § 1114 passim

18 U.S.C. § 2332a(a) (2) (C) 3

18 U.S.C. § 2332g(a) (1) 3

18 U.S.C. § 2332g(b) (1) 3

18 U.S.C. § 2332g(b) (4) 3

18 U.S.C. § 2332g(b) (5) 3

18 U.S.C. § 3231 1

28 U.S.C. § 1291 1
Fed. R. Evid. 608(b) passim

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket Nos. 11-2763-cr, 11-2884-cr, 11-2900-cr, 11-3785-cr

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/ Amin, a/k/a Almondo,

Defendants-Appellants.

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

CORRECTED BRIEF FOR DEFENDANT-APPELLANT ONTA WILLIAMS

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of conviction entered in the United States District Court for the Southern District of New York (McMahon, J.) on July 8, 2011, based on a sentence imposed on June 29, 2011. Jurisdiction of the appeal is in this Court pursuant to 28 U.S.C. § 1291. Jurisdiction of this action was in the district court pursuant to 18 U.S.C. § 3231. Appellant filed a timely notice of appeal on July 15, 2011.

QUESTIONS PRESENTED

1. Was the government's misconduct, including, but not limited to, the incitement of criminal acts by arguing they were a religious obligation, exploiting the love of a defendant for the government informant, multiple violations of law by the informant, offers of extraordinary financial incentives, and the government's planning and execution of the entire crime, which never could have occurred otherwise, so extreme and outrageous that it violated due process?

2. Should a new trial be granted because the government's main witness deliberately lied to the jury about important matters affecting both his credibility and the merits of the entrapment defense and because the government, which knew of this perjury, failed to make it clear to the jury and, worse, relied on and misleadingly vouched for the witness's perjured testimony?

3. Did the prosecutor's improper vouching for its main witness's credibility constitute plain error which was highly prejudicial in conjunction with the government's knowing presentation of the witness's perjured testimony and requires a new trial?

STATEMENT OF THE CASE

PRELIMINARY STATEMENT

Onta Williams appeals from his conviction after trial 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 use 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, the Hon. Colleen McMahon, J., sentenced Mr. Williams to 25 years' imprisonment on each count to run concurrently, the mandatory minimum, five years' supervised release, and a \$700 special assessment. On appeal, this Court continued the Federal Defenders of New York, Inc., Appeals Bureau, as counsel to Mr. Williams under the Criminal Justice Act.

STATEMENT OF FACTS

Introduction

This is an extraordinary case. Shahed Hussain, a paid government informant, former fraud convict, and compulsive liar and perjurer, spent months unsuccessfully investigating a mosque in Newburgh, New York. In June, 2008, he met James Cromitie, a member

of the mosque, whom Hussain characterized as an anti-American and anti-Semite, but who had no prior history of terrorist inclinations or acts or associations with others who did. Nor did any of Cromitie's eventual co-defendants have any such background.

Hussain spent six months inciting Cromitie to violent terrorist activity and convincing him that it was his religious obligation to Allah to engage in violent jihad, which by the same reasoning was "legal." The actual recorded conversations show that Cromitie did not immediately volunteer for jihad. However, Hussain lavished attention, small money and favors, and the promise of larger gifts, on the lonely Cromitie, pretending to "love" him, and asking how much Cromitie loved him in return.

After six months of this, Cromitie began to agree in theory with Hussain that jihad was necessary, but did not devise any plan for jihad, nor did he take any concrete steps toward it. Hussain manipulated him into considering the government's plan, attacks on synagogues in the Bronx and Stewart International Airport in Newburgh, in mid-December, 2008, just before going away for two months. During his absence, Cromitie did nothing that Hussain had instructed him to do, and the FBI concluded that he never would, without Hussain.

Throughout this period, as well as long after, Hussain provided false and deceptive reports to the FBI. He greatly exaggerated Cromitie's propensity for and interest in terrorism and

did not mention financial incentives that he was offering Cromitie and any other recruits Cromitie might find. These reports violated federal laws against making false and deceptive statements to federal agencies.

Hussain returned in late February, 2009. He and Cromitie went to look at Stewart Airport, and then Cromitie refused to take calls from Hussain for six weeks. In early April, however, Cromitie did call Hussain, saying he had lost his job. Hussain, instructed by the FBI, acted upset that Cromitie had abandoned him and also renewed an offer of \$250,000 to do jihad. Cromitie was torn, but, he said, he wanted to do something with Hussain because, "When I'm around you ... everything is fine and cool."

Having been offered this astonishing amount of money, Cromitie then recruited three other "lookouts," as the FBI and Hussain had long been wanting him to do. He got the lookouts to come along by telling them the action was for Allah, and was "legit" or "legal," that no innocent people would be hurt, that they would be far away and their role minimal, and that they would be paid thousands and thousands of dollars.

The government then, as the district court found, manufactured every specific aspect of the crime, which the defendants could never have done without government aid. Those specifics greatly enhanced the seriousness of the crimes. On May 20, 2009, Cromitie placed what he thought were three bombs in two cars outside a

synagogue and Jewish center in Riverdale, the Bronx. He and the co-defendant "lookouts" intended to return to Newburgh, shoot two Stinger missiles at military cargo planes on the ground at the airport, and remotely detonate the bombs in Riverdale. At Hussain's signal, however, they were all arrested in Riverdale.

On appeal, appellant Onta Williams, joined by the other defendants, argues that the government's improper and unlawful investigation was outrageous and violated due process of all defendants. The defendants further argue that Hussain perjured himself at trial, as the district court found, that his perjury was material and known to the government, and that the government failed in its duty to correct Hussain's testimony and make clear it had been perjurious. Finally, appellant contends the prosecutors committed prosecutorial misconduct by vouching for Hussain's perjurious testimony, claiming that he would not lie because he could not afford a perjury conviction, which would result in his deportation.

**The Confidential Informant, Shahed Hussain, and His "Handler,"
Special Agent Robert Fuller of the FBI**

The two men who initiated and conducted the investigation in this case were Special Agent Robert Fuller of the Federal Bureau of Investigation and Shahed Hussain, a paid confidential informant who controlled many aspects of the investigation. Agent Fuller had been an FBI Agent for ten years, formerly with the terrorism unit in New York City responsible for international investigations of Al

Qaeda, but now in Goshen, New York, in the unit responsible for four upstate New York counties, including the City of Newburgh, "the saddest and most dysfunctional community in the Southern District of New York." Decision and Order Denying Defendants' Renewed Motion to Dismiss the Indictment Based on Outrageous Government Misconduct (Misc.Op.), SPA85; A84-85.¹

Hussain had immigrated from Pakistan, where he had pursued Islamic studies and a business degree. In the mid-1990's, he had been granted asylum by the United States based on a claimed threat of political persecution in Pakistan. A585-87. In 2003, he was convicted for a fraud, exploiting his position as a translator with the Motor Vehicles Bureau in Albany to provide false identifications or the answers to the driving tests to applicants for licenses. A574-75. He could have been removed from the United States, A588, but he cooperated with the government against his then-lover, on whom he blamed his participation in the fraud. A1074; A2056-57. From 2003 to 2006, when he was sentenced to time served, Hussain continued his cooperation in order to avoid any immigration consequences. A1137-38.

The government presented Hussain as a refugee from an oppressive regime and as a hard-working man who had climbed, from

¹ In his prior post, Fuller had worked with an informant who set himself on fire in protest in front of the White House. <http://www.washingtonpost.com/ac2/wp-dyn/A51575-2004Nov15?language=printer>. He had also worked at Bagram Air Force Base in Afghanistan. <http://www.cbc.ca/news/world/story/2009/01/20/khadr-hearing.html> .

a menial job, working 14 to 16 hours a day, to the ownership of two gas stations. In recent years, he said, he had earned money only from working as a confidential informant and from a hotel he now owned in upstate New York that had not made a profit for three years. A581.

In 2007, the FBI hired Hussain as a paid informant. He made about \$96,000 in the ensuing period from this case. A89. His continuing work with the government also assured that he would not be deported, a far more important matter to Hussain. A1281.

The Fruitless Investigation of the Newburgh Mosque from September, 2007, to June, 2008.

In September, 2007, Agent Fuller assigned Hussain to attend mosques in the area, and particularly the Masjid al-Ikhlās mosque in Newburgh. A260-61. Hussain changed his name to Mahsud, wore designer clothing and drove several fancy cars, including two BMW's and "Hummers," to attract attention as a "rich guy" to impress the mostly poor people who attended the mosque, and he got to know "everybody" there. A592, A1326. The FBI invested in renting a house on Shipp Street in Newburgh and outfitted it with video recording equipment to capture suspects' statements. A104-06. Hussain controlled the recording. A117-18.

Hussain talked to 20 or 25 of the 200 to 250 members of the Newburgh mosque whom he suspected might be radicals. A596. By June, 2008, the FBI had not opened a single "preliminary investigation" based on this investigation. A98.

Had the investigation ended, the question of Hussain's immigration status would again have arisen.

On June 13, 2008, Cromitie Approached Hussain, Upset About Killings in Afghanistan; By Hussain's Account, Cromitie, Speaking in an Arabic Accent, Concluded That He Wanted to Die in Afghanistan as a Martyr and, Vaguely, to "Do Something to America."

Hussain testified that on June 13, 2008, at the mosque, Cromitie joined him and two other men by his fancy car. Cromitie introduced himself as Abdul Rahman and said his father was from Afghanistan. A600-01. Hussain told Agent Fuller following the meeting, and testified at trial, that Cromitie had an Arabic accent. A600, A1330. This was a lie, as the later tape recordings attest. Neither native Afghans nor Mr. Cromitie speak Arabic. A1330, A1501.

According to Hussain, Cromitie remarked that Hussain's sandals were from "my country[]," A600, and said his father was Afghan, and he had been to Afghanistan several times. Hussain drove Cromitie home in his BMW. A601. Cromitie allegedly asked Hussain if he had seen the killings of "*mushriks*," infidels, in Afghanistan on television.² A603. Hussain asked Cromitie if he would like to go to Afghanistan and die like a martyr in battle, and Cromitie said he would like to, to go to Paradise. A603. Then, Cromitie allegedly pointed his index finger upward to the

² Cromitie never used the word "mushrik." Months later, he objected to Hussain's using the word, preferring the phrase, "people who don't believe yet." A3695-96.

sky, in a gesture used by "radical leaders" taking witness in front of Allah, A2189, and said he wanted "to do something to America." A604. He never used that gesture again.

Hussain presaged the crime the government would eventually manufacture by telling Cromitie about "a lot of military planes that was taking arms and ammunitions to Afghanistan and Iraq" from nearby Stewart International Airport. A604. Cromitie said, "These arms are going to kill Muslims." A604. Cromitie worked within a half-mile of the airport and had never been there. A226-28.

Additional evidence of what happened that day came from Cromitie's later recollections, captured on tape recordings. On November 29, staying with Hussain in a Philadelphia hotel, Cromitie recalled saying to Hussain, "[D]id you see what they did to my people over there? ... In Afghanistan," and he added, "Those motherfuckers" A3309. Cromitie did not say what else he had said, but he added, "Y]ou knew I wanted to get back. You knew I did." A3310 (emphasis supplied).

On May 1, 2009, Cromitie later described the event to the other defendants in Hussain's presence. He said Hussain had told him, "I got a plan. You gonna make some money out of it." A4159. But he told Cromitie, "[D]on't do it just for the money. But do it, also say, in the name of Allah." Id.

According to Cromitie, Hussain also said, "We ain't gonna hurt nobody," an odd comment at that time, if it was Cromitie who was

advocating terrorist action. In May, however, Cromitie, by then in agreement with jihad, told the others, "[T]hat's a good thing, 'cause they, they not about hurting women, children, and other men either. That's legit. You ain't gonna hurt nobody, that's legit." Id.; A1729-1731. Hussain said nothing to dispute Cromitie's version of these events. Id.

Cromitie's Background

The government knew nothing about Cromitie in June, 2008, and much of what Cromitie said about himself was not true. But many things were knowable, had the FBI investigated him.

At that time, Cromitie had no connections with Islamic radicals, terrorists or terrorist activity. Cromitie did have a criminal history as a low-level drug dealer. He held a job as a night-shift shelf-restocker at a nearby Walmart, making less than \$14,000 per year. A2450. He did not have a car and did not have a driver's license. A221-22. He did not have a passport and had never been out of the United States. A365. The FBI did not learn most of these facts for months.

Many things that Cromitie said about his life before this date were simply false. A362-70. He claimed that he had been in prison for 15 years for attempted murder of a drug dealer's child. He claimed he had participated in bombings of New York City police stations. He claimed his father was from Afghanistan and he had traveled there three times. He claimed he had stolen guns from

Walmart. He claimed he had incredible strength and could do 1000 pushups a day. A1402-03. None of these things was true, although it was not for months that the FBI checked and found they were false. A362-70; see Decision and Order Denying Defendants' Renewed Motion to Dismiss the Indictment Based on Outrageous Government Misconduct(Misc.Op.), SPA75; A4559.

The Subsequent Unrecorded Meetings Between June 23, and October 12, 2008

Following the June 13 meeting, Agent Fuller asked Hussein to become more "aggressive" with Cromitie. A2358. Hussain claimed that on June 23, at Shipp Street, where he did not activate the recording devices, A607-08, A1371, A2360, Cromitie allegedly said he "hated Jews and Jewish people and he was very much against the Jewish." A608. When Agent Fuller debriefed Hussain that same day, Hussain did not tell him about this statement. A1371, A2398; Misc.Op., SPA66. Hussain added that Cromitie said he hated American soldiers and would "kill the President 700 times because he's an antichrist." A608. He further testified that Cromitie wanted to "straighten out" after being involved in selling drugs and that he was trying to be a good Muslim by "praying five times a day." Misc.Op., SPA66; A609-10.

On July 3, Hussain claimed he told Cromitie that he was a member of an Islamic terrorist organization in Pakistan called Jaish-e-Mohammed (JEM) a group interested in doing jihad, holy war. Cromitie said that he wanted to join JEM and had no problem with

jihad. A612-13.

Hussain's claims that Cromitie was interested in engaging in jihad, or terror of any kind, much less of being a martyr in Afghanistan, are directly contradicted by the first recorded conversation on October 12, 2008, and subsequent conversations.

At the First Recorded Meeting, on October 12, 2008, Hussain Tries Repeatedly Incite Cromitie to Engage in Violent Jihad; Cromitie Is Not Interested.

After four months, Hussain finally began taping at least parts of their encounters. On October 12, Hussain recorded part of their meeting at a diner and hotel in Suffern, New York, where Cromitie was staying for work. A617; GX101, A2766ff. Before the meeting, Agent Fuller told Hussain to be "passive," in order just to confirm what Hussain had heard before. A156.

Hussain was not "passive." Instead, posing as an authoritative student of Islam, he told Cromitie that it was Cromitie's religious duty, demanded by the Prophet, to commit violence against non-Muslims and to engage in jihad, that bombing infidels was a good thing, and that Jews were evil and had reached too high and must be brought down. A1376-78. Hussain was the first to speak of killing. He spoke of events in Pakistan, where the *mushriks* were killing Muslims. Cromitie asked, "But what can we do?," even if they died trying, "it's not gonna change anything." A2774. Hussain told Cromitie that the teachings of the Prophet Mohammed, the *hadiths*, required Muslims to commit violence against the non-

believers. A1376-77; A2774.

Cromitie did complain of receiving what he thought was bad treatment from Jews in the area around Suffern,³ and Hussain prompted him, asking if this made him angry. Cromitie said it made him angry enough to "want to jump up and kill one of them," and that he had felt like killing one particular man. A2776-77. Cromitie rejected actual violence against Jews, and said simply, "But, I'm Muslim, *insha'Allah*, Allah will take care of it." Id.⁴

Hussain urged, "[I]f you really have to do something, you have to do something in jihad," Id. But Cromitie responded, "No," not just "because you are angry," because killing one person was "like killing the whole of mankind." Id. Hussain countered, "But if you're doing jihad, then,," Cromitie interjected, "It's *hamdulillah*," that is, "blessings of Allah," and Hussain confirmed, "*Alhamdulillah*." Id.; see A639. Cromitie concluded, "But that would have been out of anger. ..." A2778.

Hussain had to pursue his argument that jihad was necessary again, recalling a recent terrorist bombing of a hotel in Islamabad that was full of non-believers, and thus of "sin," *guna*, and

³ There is a large Hasidic population in the Suffern area, and Cromitie had no previous experience with such a group.

⁴ The district court's opinion is incorrect in suggesting that this statement was made in agreement with Hussain's succeeding exhortations of the need to bring down the Jews. Misc.Op., SPA 68 ("Cromitie responded in kind."). Cromitie's statements were different in kind from Hussain's, and they came before them. His later statements showed no agreement with Hussain's radical talk.

"Satan," *shaitan*. A1381. The "brothers" killed 170 people to "send a message," and they were "doing good, wonderful jobs, and I'm very happy with that," he said, and invoked the afterlife. A2779; A1381-82. Cromitie observed only that this life was "temporary." Id.

At trial, Hussain admitted telling Cromitie that such acts were required by Islam. A1382. As the district court found, Cromitie did not "react favorably" to this argument. Misc.Op. SPA68. Hussain then explicitly argued for the need to kill Jews. He quoted the *hadiths*, the teachings of the Prophet Mohammed, that "every evil in the world is because of the Jews." A2799; A1389-90. He again invoked the *hadiths*, saying that "if evil goes too high, then Allah makes ways to drop them. ... I think that evil is reaching too high at a point, where you, me, all these brothers, have to come up with a solution to take the evil down. That's how, it's the hadith." A2799-2800 (emphasis supplied). Cromitie added, "Somebody got to do something." What he was doing was to vote, for first time in his life, for Barack Obama, because "he's gonna do different." A2800. When they parted at the end of the day, Cromitie said, "I love you, brother," and Hussain answered, "I love you too, brother." A653; A2809.

Twelve minutes after this meeting, Hussain gave Agent Fuller a different version of events, and in it, he attributed his own vile words to Cromitie. Hussain did not tell Fuller, first, that

Hussain himself had introduced the topic of the hotel bombing in Islamabad. A321-22; A4593-95. Hussain attributed to Cromitie the view that the Islamabad bombing was a good thing; in fact, it was Hussain who said this. A322-23; A2779; A4595.⁵ Hussain also said Cromitie claimed he associated with a Muslim from New York City who hated Jews and who told Cromitie to come to him if he had any problems with Jews. A4595. Cromitie had said neither thing. A320; A2780-81. Agent Fuller claimed that, as he always did, he had reviewed the tape of the meeting and had never noticed these disparities. A325-26. Nor did he apparently notice, or care, that Hussain had violated his directions to be "passive."

Most importantly, however, Hussain told Fuller that Cromitie expressed the "desire to ... conduct jihad for an Islamic cause." A4595. This did not happen.

On October 19 and 29, Hussain Pursues His Campaign to Make Cromitie a Jihadi by Telling Him that the Prophet Wanted the Jews "Eliminated;" Cromitie Disagrees and Makes Clear, Contrary to Hussain's Account of June 13, That He Did Not Want to Be a Martyr.

At the next meeting on October 19, Hussain insisted on the religious obligation of Muslims to eliminate Jews, as commanded by Allah. Cromitie had complained, with crude stereotypes, that Jewish people did not want him to wait on them at his job at Walmart and that he did not understand their customs, which he

⁵ Hussain had an odd justification for lying about what had happened. It was on the tape, he said, so "it couldn't be a lie or the truth, sir. It is on the tape." A1385.

found strange. A2812-13. Hussain told him that "[the Prophet] has forbidden us to have these Jews, *Yahuds*, because they are responsible for all the evils of the world." Id. He admitted at trial that this meant that the Jews should be "eliminated" because they were evil. A1392. At the time, Cromitie disagreed with Hussain, answering, "I don't wanna go that far with him." A2813.

Hussain praised conduct for Allah that would take one to Paradise, and added that he could spend money for this. A1397-98. But when he twice asked Cromitie whether he wanted to go to Afghanistan in the "cause," Cromitie evaded his question and then said he did not want to go because of the dangers involved. A2819-20; Misc.Op., SPA69. This contradicted Hussain's story about what Cromitie had said in the Summer.

When they met ten days later, on October 29, Hussain again directly asked him what he would do "[i]f Allah ... asked for, for you to go to the jihad." Cromitie said he would have to "investigate" the matter. A2902.

In Late October and Early November, Hussain Remains Unable to Convert Cromitie to a Belief in the Virtue of Jihad.

Four meetings ensued on October 31, November 7, November 12, and November 14. Hussain pressed his effort to get Cromitie to commit to acting in the cause of Allah, saying "Allah has more work for you to do,"⁶ but this had no success. A3098. When Hussain

⁶ Cromitie had boasted that he had a "sutra team" or a "shura team," a sort of security squad or group of bodyguards, that

resorted to an explicit offer of guns and rockets, and an implicit offer of money, Cromitie rejected the offer, explaining his view of matter in personal terms, not terms of jihad. He would, he said, use his "fists before" he used a weapon, but if he lost with his fists, he would get a gun and use it. A3148. He had no interest in rockets or Hussain's plan.

Hussain Convinces Cromitie to Attend a Muslim Conference with Him at a Philadelphia Hotel and Gets Cromitie to Begin to Talk of the Use of Explosive Devices; Cromitie Explains His Affection for Hussain.

Hussain did succeed in getting Cromitie to join him at a conference of the Muslim Alliance of North America in Philadelphia on November 28 and 29. In Philadelphia, Cromitie was thrilled with the hotel. A3281 ("Unbelievable. Whoa! This is apartment!"). He and Hussain talked for hours. On their first day, Cromitie, who by that time regularly told Hussain, "I love you," see, e.g., A2768; A2809; A2903; A3091; A3095; A3182-83; A3194; A3205, explained his feelings:

You know brother, I am learning to trust, and I know you (UI). You're the first brother I ever trusted so far to any, go anywhere with. I don't even hang out with Muslims. I love hanging with you, brother, for real. You know what I'm sayin'. That's a good thing, that's, I, I don't have nobody up here to hang with like that. I love everybody. They're good, but they're not good like you, brother, you know. They don't do that. They don't that (Makes gesture on his heart).

Hussain was to investigate. But the members of the supposed team did not show up on October 29, when Cromitie said they would be there.

A3181. A little later, Cromitie elaborated, "I smile when I'm with you 'cause you crazy. You're like me, that's good." A3192.

Hussain did not love Cromitie. A1894. But he encouraged Cromitie's love, asking, "So, so tell me, brother. Tell me how much you love me." A3182. Cromitie said, "ain't no ... could really say." Id. Hussain said, "My brother. In the whole Newburgh (UI), you're the only brother that I hang." A3192.

On their second day there, Hussain asked if Cromitie and his "team" had ever "thought about doing something here," apparently referring to jihad. A3285. Cromitie, for the first time, warmed to the subject and said he had wanted to since he was seven, A3286, although he had not wanted to two months earlier and had not been a Muslim at age seven. Cromitie went on, recounting false stories of having bombed police stations, and offering the George Washington Bridge as a possible target. Everyone knew, he said that the best targets, the World Trade Center and White House, had already been hit. A3282; A3292-93. Hussain brought up recent events in Mumbai, India, where, he said, a hotel full of Jews and the "Jew Center" had been bombed. A3293-94. Cromitie preferred bridges, Hussain disagreed, and Cromitie suggested using an "ash can," a powerful firecracker he claimed to have thrown into a police station. A3295-96.

Hussain told Cromitie that his "people," the Jaish-e-Muhammad, wanted to do something. A3304. Cromitie did not even remember

what the JEM group was or whether they were Muslim, A3304, though Hussain had testified Cromitie had wanted to join the group on July 3. A612-14. Hussain added that "money is not the problem" for JEM, if he would do jihad. A3305. Hussain assured Cromitie, "I do not want in any sense, a criminal act," but rather a jihad. Cromitie repeated, "It's a jihadi. It's actually, it's legal. What we're doing is legal." A3312. Hussain confirmed, "In the name of Allah," and Cromitie said, "[T]hat's what makes it legal." Id.

In the course of all this, Cromitie told Hussain, "You don't have to give me a damn dime. You my brother. You show me love from day one ... and it wasn't because of something like that." A3309.

Hussain purposely turned the television to news of the Mumbai attacks which was covering the funeral of a rabbi who had been killed. Hussain was provocative, and said, "[T]hey can give [the rabbi] the purple heart, right?" A3316. Cromitie, following this lead, made his most strident remark to date, saying he hated Jewish "bastards," and he "would like to get a synagogue" in Brooklyn. Id.

Hussain's Failure to Get Cromitie to Act During the Month of December.

As a result of Hussain's prodding, on December 5, Cromitie said explicitly for the first time that jihad was desirable in America. A3449. But the district court specifically found that

although Cromitie uttered this and many similar "hateful" remarks, nonetheless, whenever Hussain asked him to act rather than talk, to "make a plan, pick a target, find recruits, introduce [Hussain] to like-minded brothers, procure guns, and conduct surveillance," Cromitie was willing to do none of these things. Misc.Op., SPA70; see A3504 (Hussain: "You've not started the first step brother"; "The first step has not been started. You know with the target, the recruiting and the codes."). During this period, the court also found, Hussain began offering Cromitie material rewards. Misc.Op., SPA70. Sometime in October or December, he promised to give Cromitie one of his BMW's, "a car Cromitie greatly admired," id.; A816-17; A911; A2233 ("in October"), along with cash incentives for doing jihad. Misc.Op., SPA70; A1487-88.⁷ At the end of December 17, after more than six months of Hussain's urging Cromitie to do these things, there was nothing but talk. Misc.Op., SPA70.

Although Hussain repeatedly urged Cromitie to choose a target, for example, Cromitie did not do so. Cromitie was hardly decisive, but he eventually mentioned vague ideas like an "oil thing," or a "gas thing," or a dam. A3483-85. He added what he himself thought were "crazy places" like the United Nations, the Empire State Building, and the Pan Am building. A3485-87. What is entirely

⁷ This may well have happened on December 5, where Hussain turns on the tape at Shipp Street with Cromitie saying, "I'm a get me a house too, Maqsood." A3415.

missing on December 5 and December 10 is any mention at all of targeting Jews, synagogues, or airports.

During this period, however, Hussain put increasing emphasis on the need to get recruits in addition to Cromitie. A3419 ("You said you have a team, and that's why we said okay."); A3452 ("you're gonna have to recruit people"); A3474 ("you said to me that you were the brains and the recruiter and everything okay? That's why we, we got into this business."); A3477 ("Mhmm, but I thought you had all the team and everything."). Cromitie was still lying about having a "Shura team." A3489. Finally, on December 17, Cromitie said Hussain spelled it out. Cromitie had no recruits although he knew there was "lots of money" for them. A3533. Hussain told Cromitie that though they were a team, the two of them were not enough. Cromitie needed to get "bodies." A3542-43. When Cromitie objected, he repeated "bodies ... B-O-D-D-double X-Y-Y..." Id.

For the whole month, there had been no mention of airports or synagogues or even Jews. But on the 17th, Hussain brought them into the conversation. When pressed to name a target, Cromitie, who had never liked Hussain's airport plan, offered the airport as a target because "that's the place you told me." A3536 (emphasis supplied).⁸

⁸ Indeed, as late as April 16, 2009, the choice of targets was not settled, and Cromitie was still saying that he did not want to do anything at Stewart Airport. A3759. Only the government had settled on this target.

Still, Cromitie thought they "need[ed] to scope out some places." A3537. And later, Hussain suggested a synagogue, saying, "[Y]ou said synagogue is a good one target, you said that." A3552. Cromitie expressed doubts, "I don't know about the synagogue thing," but Hussain responded with a noncommittal, or disapproving noise, and Cromitie added, "I don't know... I don't give a fuck if a bunch of Jews are in there.... but you said don't hurt nobody." A3556. Hussain said it was Cromitie's wish, and Cromitie, encouraged by Hussain, went on about the evil of Jews. A3556-57. Still, Cromitie said, "[W]e can go look at other stuff." A3580-81.

Hussain testified at trial that he was debriefed by Agent Fuller that same day. He told Fuller that when he entered the Shipp Street house they "discussed an unknown synagogue in the Bronx which would be a good target." A1504-05; GX3502-42. This did not happen. Even more egregiously, he told Fuller that Cromitie had said he could see planes from where he worked, and could shoot one down from there. A1504-05; GX3502-43. Cromitie had only grudgingly, at Hussain's instigation, mentioned an airport, and Hussain conceded that "[there's] nothing remotely like that on this 70-minute tape." A1505.

On December 17, Hussain left Cromitie, encouraging him to make plans, choose targets, recruit others, get a gun, and conduct surveillance. They said good-bye for what was to be a week but became months, and Cromitie said, "Give me some love brother.

That's word. That's my brother, brother." A3585. In more than two months, Cromitie did absolutely nothing.

In Hussain's Absence, the FBI Does a Little Investigation and Doubts Cromitie's Veracity and Dangerousness; Fuller Nonetheless Obtains a Wiretap on Cromitie's Phone.

Hussain said he would be out of the country for a week, but was gone for over two months. The FBI, finally doing some investigation, easily found, for example, that Cromitie had been lying about many things: he had not been in jail 15 years for attempted murder; he had not traveled to Afghanistan many times; he had not thrown bombs into police stations or cars in the Bronx. A362-70; A4559; Misc.Op., SPA67.

Fuller acknowledged to fellow agents that Cromitie "would not conduct anything without assistance from [Hussain]." A4573 (emphasis supplied). He told officials at Stewart Airport that Cromitie had a "future plan" for a "potential" attack, but that he "was unlikely to commit an act without the support of the FBI source." A4554 (emphasis supplied). And while Cromitie had a "desire" to form a "team," it did "not appear as though he has recruited anyone into the team." A4570. There were also concerns that this was a "sole source" investigation, relying on Hussain alone to too great a degree. A393-34.

On February 5, 2009, Fuller applied for a warrant authorizing a wiretap on Cromitie's phone. He claimed there was an "organization" engaged in carrying out a terrorist plot and that the wiretap

was necessary because "it would be extremely difficult, and dangerous [for Hussain] to penetrate the organization." See Affidavit in Support of Warrant Application, Exhibit A ¶40, Document 83. The district court later deplored the fact that the FBI had not done its own "due diligence" in the case at this point, that it had relied exclusively on Hussain, and that Hussain's falsehoods had been transmitted to the court that heard the warrant application. Misc.Op., SPA75.

Cromitie Loses His Job; Hussain Loses What He Thought Was Secure Immigration Status.

On February 18, 2009, Cromitie just stopped going to work because he "just didn't care about nothing." He was subsequently fired. A2442; A4485.

Hussain's problem arose when he was detained by immigration on his return to JFK Airport on February 20. He suddenly understood that he still faced immigration proceedings that might result in his removal. A1168-69. Agent Fuller secured his admission into the country, as he thereafter did every time Hussain went abroad. A1243. Hussain testified that the most important thing to him, even more important than money, was being able to remain in the United States. A1281.

Hussain Meets Cromitie in February and Convinces him, After Initial Resistance, To Go to the Airport.

Notwithstanding Cromitie's total inaction for the last two months and the FBI's realization that he was not dangerous without

the government's intervention, Fuller instructed Hussain to call him, and they met on February 23. A743. Cromitie said he was going to North Carolina, but Hussain said it was "written" by Allah that Cromitie would stay with him. A3587-88. Hussain said his people were "very happy" with Cromitie, A3595, but Cromitie asked why, since, "I ain't do nothing," and "I just dropped everything." A3595-96.

Hussain told Cromitie that he would be a good Muslim soldier and reminded Cromitie he had "talked about synagogues, remember?" A3595. He asked if Cromitie still wanted to "do it," and Cromitie said he "ha[d] to think about it." A3595.⁹ Hussain chided Cromitie for not doing anything while he was gone, and Cromitie agreed, "I just dropped everything." A3596.

Hussain told him that JEM was "willing to do anything" and that Cromitie would "be rewarded in both ways," A3602, both money and *Jannat*, Paradise. A745, A1514, A2364. And Hussain reiterated, "[I]t's not like a criminal act. It's a, it's a jihad act," A3602, a *sunnat*, an act done in the cause of Allah. A745.

Hussain urged Cromitie to "speed up the process," and asked him to get somebody from the mosque to help, but Cromitie said, "I'm not gonna involve nobody else," and, "Don't ask me to do that." A3610. Eventually, Cromitie could only conclude that,

⁹ Cromitie said this even after characterizing Jews as killers of Muslims and saying they were "mine." A3595.

"We'll come up with something." A3617. Hussain again brought up the Airport, and Cromitie agreed to look at it, if it involved hitting planes on the tarmac, not in the air. A3620. At the end of the day, Hussain suddenly asked, "The synagogue, where is it in Bronx or in Brooklyn?" Cromitie chose Brooklyn. A3623.

The next day, Hussain bought Cromitie a camera and took him to the airport. Cromitie imagined using a missile to hit planes on the ground, and they took some pictures. They talked about "lookouts," and Cromitie said since they were "talking money" he would probably get somebody." A3642, A3650. Cromitie agreed he would tell recruits that jihad came first, that "you looking not to hurt no one," and that "we're gonna take care of you." A3651. They would "just be a lookout. Nothing more, nothing less," like "you're not even there." A3646. It would be "like you're watching TV and you know what's going to happen...." A3646. He would offer lookouts \$25,000 to watch things from "20,000 miles away;" Hussain did not disapprove. A3655; A1536; see generally A1535-39. They agreed to meet the next day.

Cromitie Evades Hussain for Six Weeks and Tries Twice to Get His Job at Walmart Back.

On February 24, Cromitie saw a "target" for the first time; he did not meet Hussain the next day or later. Cromitie's wife said he had gone to North Carolina, but this was false, as Agent Fuller knew. A402-04. Hussain kept pursuing him, but did not speak to him until March 18, in a call made by Cromitie's wife; Cromitie

said he would return in a week. A4482-83.

After speaking to Hussain on March 18, Cromitie called Walmart twice, on March 23 and March 25, trying desperately to get his old job back. A2434-51. He failed. He did make \$60 by selling the camera Hussain had given him to use for surveillance on February 24. A2452-69.

Hussain Offers \$250,000, in Addition to a BMW and Other Financial Inducements, Without Telling the Government.

On April 5, 2009, Cromitie called Hussain. He said he had "been going through so much" and had quit his job. A4485. He added, "I have to try to make some money brother." A4486. Hussain did not know the phone was tapped and said, "I told you. I can make you 250,000 dollars, but you don't want it brother. What can I tell you?" Id. (emphasis supplied). Cromitie answered, "Okay, come see me brother. Come and see me." Id.

When the government learned of the \$250,000 offer, Hussain told Agent Fuller that it was not an offer of money. It was just a reference to the total cost of buying bombs and missiles; Fuller and the government initially adopted this view. A384; A773. Later, at trial, Hussain explained that the words "250,000 dollars" had been a "code." A2246. It was a code "because we have discussed 9/11's operation" and it "gave a wrong impression." Id. "I meant it as a code," he insisted, "I still believe it was a code." Id.

After trial, Judge McMahon found that Hussain had offered

\$250,000, and that his denials of this had been material perjury. Misc.Op., SPA136.

The first offer of \$250,000 had not been recorded, and Hussain made others as well; he controlled the recording equipment and had many conversations that were not on tape. He did not tape his offer of a BMW automobile to Cromitie in October, 2008, that came to light only accidentally in a taped telephone conversation of May 1, 2009.¹⁰ A2233. And, although Hussain said there were "repeated discussions" of this offer, none is on the tapes. A817; A1652; A1737-38; A4499.¹¹ Similarly, there had been an offer of a brand new Mercedes, worth \$70,000, to Onta Williams before he joined the group, that was referred to on April 28 in Hussain's presence, but that was not originally recorded. A874; A2221-26.¹²

Hussain never acknowledged offering money to the defendants

¹⁰ On redirect examination, Hussain admitted the offer was made as early as October. A2233. Some other statements, before the defense allegations of perjury were made, suggested it was in December.

¹¹ The offer must have been quite specific. On May 1, 2009, Cromitie said, "[O]ne more day I supposed to get my car." Hussain replied, "*Insha'Allah* you'll get your, you're getting your car brother. The Beamer." Cromitie proclaimed his trust in Hussain and said, "I love you to death, brother." A4499. Hussain responded in kind, "I love you to death too brother." Hussain did not tell the government of the offer of the BMW until May 27, 2010, during preparation for trial. A1740.

¹² Such offers started even earlier. Cromitie had recalled that on the very first day he had met Hussain, Hussain had told him, "You gonna make some money out of [my plan]," of which there was also no record. A4159.

except at "one time," on May 19, at the last supper before the "operation," when he specifically offered each man \$5000. A1788-89; A1847-49; A1860.¹³ The other apparent offers of money were not real because they were not specific, were made by Cromitie in Hussain's presence, but not by Hussain, or were not really understood by the defendants as real offers of money. See 815-16; A957-59; A1489; A2238.

On the recordings, Hussain set out other financial incentives for Cromitie and the lookouts. By the time of his meetings at the end of February, when he and Cromitie discussed giving \$25,000 to a possible "lookout," Hussain said he had "created the impression" that Cromitie would receive "a lot of money," and it is not clear all these offers were taped. A815; A1648-49; A1514; A2244-45. On April 7, in another call he did not know was recorded, Hussain told Cromitie the "brothers" were paying for an all-expense-paid, two-week vacation to Puerto Rico for Cromitie and his family. A4489; A3763; A1956-68. On April 16, he confirmed that Cromitie would be getting enough to buy a brand new car like the cars of Hussain's that Cromitie admired, at a cost of from \$30,000 to \$78,000 dollars. A1649; A3784. On the same day, he offered to buy Cromitie, who had worked as a barber and dreamed of having his own business, a barbershop worth \$70,000. A3758; A813; A1636. And on

¹³ Appellant uses the term "operation," in lieu of "mock operation," for the events of May 20 as a matter of brevity. The latter term should be understood each time the former is used.

April 19, he told Cromitie that his "brother" would make "[Cromitie] the happiest man on Earth." A4494.

Similar incentives were offered the others both implicitly and explicitly. Besides Onta Williams's Mercedes, Cromitie had been talking of offering recruits a "lot of money" since December, 2008, with Hussain's clear approval. A3533; A1487-88; A3651; A3690; A1535-39; A3777.

On November 13, 2009, during pre-trial discovery proceedings, Fuller interviewed Hussain specifically to determine just what "gifts or any items of value" had been "promised and/or provided" the defendants. A4600. This was in response to a defense request for Brady material, prompted by references to such offers on the tapes and to the government's ensuing representation to the court that it would "make inquiries to ascertain whether there were money offers or inducements made that the confidential informant is aware of, or that the agent, or case agents, are aware of, even if they are not written down somewhere or recorded." Tr. of Pre-Trial Conference, September 19, 2009, pp.16-17 (emphasis supplied). On November 13, when asked about these things, Hussain told Fuller of 25 instances in which he had bought drinks or restaurant meals for the defendants, had paid Cromitie's rent twice, had paid for Laguerre Payen's meals, had paid for Cromitie's trip to the Philadelphia conference, and had promised Cromitie's wife a coat and given his grandson \$20. He said that on May 19, he had

promised the defendants each \$5000 as airfare or bus fare and food and lodging to allow them to get away. A4600-05. He and the government steadfastly maintained that this was the only offer the defendants had ever received; the government deliberately did not record the "last supper" at which the offer was made. A1788-89; A1847-49; A1860.

In his statement to Fuller, Hussain did not include any of the lavish promises -- valuable cars, a quarter-million dollars, Caribbean trips -- and some lesser ones, that he had made to the defendants.

Hussain stoutly denied making any offers to the defendants except the offer of \$5000 each in "get-away money," on May 19, at the last supper conversation that Fuller and Hussain decided would not be recorded. A815-16; A957-59; A1567; A1787-89. Hussain also thought that his telling people they would get money did not count as real offers because the defendants "had never ever followed up the offers I would give them, because they did not believe in that offers." A2238; see A814, A2374-75.

At the Meeting of April 7, Cromitie Waffles About Whether to Join Hussain; He Chooses That Option Because He Needs Money and Hussain Makes Him Feel "Fine and Cool."

Before the meeting on April 7, Agent Fuller knew that Hussain had a "close and personal relationship" with Cromitie. A4570. He instructed Hussain to act "upset" that Cromitie had not kept in touch with him. A85. He also told Hussain to stop calling for

"recruits" or "bodies" and just say he was seeking "lookouts." A1951.

At the meeting, Cromitie was distraught, "What I'm a do with my life now?," he said, and repeated, "Huh, what I'm a do with my life now?" A3695. Hussain acted "upset" complaining that Cromitie had "vanished" and said that "everything [is] ready brother," that the "missile and the pack" were ready. A3698. Cromitie was reluctant and objected that they had no others to help, and Hussain countered that they needed only some "lookout guys." A3698.

Cromitie could not decide what to do. A3699-3700. He said, "[O]ne minute I'm going for the job and the next minute I wanna do this right here with you." A3700. He explained, "When I'm around you ... everything is fine and cool, but as soon as I get with Wal-Mart, or try to do something with Walmart I get fucked up." Id.

A bit later, Hussain said that his "brothers" had been happy and enthusiastic and made everything ready, and he had put his own "life on the line" with them. He wished he had known Cromitie was not interested "because you were the one I was trying," and it was "my life, ya know." A3715-16. Cromitie asked Hussain not to put that burden on him. Id. He weakened, saying he just did not want anyone to get hurt, but then, after being led by Hussain to suggest killings, said he didn't care if a "whole synagogue of men" was taken down. They agreed to meet again on Friday. A3716-17.

From this point, Agent Fuller testified, he was in control of

what Hussain, Cromitie, and the "lookouts" who later appeared were doing. A228. He had selected the Riverdale area in the Bronx as one target, and Hussain had, of course, been talking to Cromitie about Stewart Airport for nearly a year. Having developed this plan, Fuller decided there should be three fake bombs, or IED's, used and had them constructed by a fellow agent, who decided the size and nature of the charge they would contain. Fuller provided disabled Stinger surface to air missiles, highly technical devices that required training to use. He provided two storage facilities for these devices, one in New Windsor, New York, the other in Stamford, Connecticut, a considerable distance away, to take the defendants across state lines. Hussain did all the driving because none of the defendants had a car, or even a license. Fuller provided the money for the purchase of a gun.¹⁴ He provided cell phones, rental cars, cameras, and all the paraphernalia of the supposed operation. See A211-34. The defendants did not provide any of these items, and did not even conceive of most of them, except those already suggested by Hussain. At each stage, Hussain was in control of anything, large or small, necessary for the operation and led the defendants through the plan, even when, occasionally one defendant or another objected.

On April 10, Hussain picked up Cromitie, and David Williams,

¹⁴ The agents' idea was that a gun charge against Cromitie was insurance against the investigation "going south." A391-92.

called "Daoud," was there, without apparent explanation. Most of the day was not recorded. A1902. The three went to the Walmart to buy a camera and then to Agent Fuller's targets in Riverdale in the Bronx. They saw the Riverdale Temple on Independence Avenue and a Jewish Center that ultimately became targets. A795. They went back to Newburgh, stopping at Stewart Airport. A157-58; A162-63; A800. They took some pictures, the purpose of which, except as evidence at trial, was never explained. David Williams said little, and at the end of the meeting, Cromitie told Hussain that he was not part of the operation. A801.

On April 16, Hussain and Cromitie went to a park, and Hussain testified that they talked about "recruiting, planning, money strategy and arms." A804-05; A811. Hussain said they had three targets. Cromitie said he had only one and that he did not want to do the "rocket." A3759.

They also talked about money. Hussain offered Cromitie the barber shop and said that afterwards Cromitie would "have enough to do what you have to do." A3759. Cromitie said that, if David Williams joined, he would give Williams part of the money he would be getting, but Hussain said Williams would get "separate money." A3763. Cromitie asked, "Where do we get our money?" and "How will we know where to go if we need money?" Id. Hussain put him off. Id.

Cromitie expressed reservations about David Williams as part

of the operation. David was "not careful" and he "slip[ped] a lot"; Hussain agreed, "Stupid David." A3743; A3746.

The next day, April 17, the men met, studied maps, and made codes, such as "mangoes" for guns, which also could be "beans," which could also be missiles. A3808, A3858. On April 23, Hussain and Cromitie met with David Williams, who agreed to join the group. Cromitie said he had explained everything to David, and he was "just like me." A3843. Hussain insisted that this must be for Allah, that he could not join for money, only for Allah and the jihad. Cromitie added, "Right, you really is legit." A3834-37. Williams said he understood "perfectly." Cromitie said, "[T]hey givin' us money anyway." A3835.

On April 24, at Stewart Airport, they inspected a small hill, which Hussain had been coached to call the "grassy knoll" in honor of the Kennedy assassination, A1682, and which had a good view of enormous C-5 cargo planes. The discussion contemplated hitting a plane on the ground, and David Williams insisted that they act late at night when no one would be there. "We want to just destroy property, we don't want to take no lives." Cromitie agreed. A3927.

On April 28, there were meetings in Hussain's car and later at the house on Shipp Street. Cromitie told Hussain he had two more "brothers." A3969. Cromitie made clear that he had told them that they must participate for jihad, not money; they could "use the

money though." A3971. In the car, the three men were joined by Onta Williams, called "Hamza," and later, at the house, Laguerre Payen, sometimes called Amin, was there. Neither man had any history of involvement in terrorism or Islamic fundamentalism.¹⁵ A175.

At the house, with all in attendance, they discussed the proposed operation. Cromitie explained that the lookouts would be "nowhere in sight."¹⁶ A4079. Hussain mentioned the C-5 planes, and Cromitie emphasized, it was about "nothing but military people," and "We know what time they leave and everything." A4080.¹⁷ Hussain said they were doing jihad, and there was nothing wrong with this: "Prophet Mohammed did jihad. He fought five wars, so there's nothing wrong with [Islamic] wars." A4082. Hussain conceded that he was "pretending to be very knowledgeable about what the Prophet Mohammed did and what Islam requires." A1708.¹⁸

Later, Cromitie told Hussain that he was worried about Payen,

¹⁵ On April 30, Cromitie and David Williams went to Brooklyn and successfully bought a gun which remained in the custody of the FBI and was never used.

¹⁶ Hussain added later, "Your job is lookout. You don't meet us. We don't meet you." A4084.

¹⁷ Cromitie said no one would be hurt because they would not be there, and "we set it up that way;" they were "just sending a message...." A4086.

¹⁸ When Payen admired and said he wanted a particular car during the meeting, Hussain assured him, "Jaish-e-Mohamad take care of you, okay?" A4114.

who seemed a little "slow." A3972. Hussain replied, "Okay. He's a lookout. That's all we need, is a lookout." Id.

In May, Hussain Leads the Defendants Through the "Operation" the FBI Had Planned.

With a date of May 20 ultimately set for the operation, there were six meetings recorded in May. Not recorded were a large part of May 1, none of May 15, none of the last supper on May 19, and the portion of May 20 showing the actual arrest. A1902-03.

On May 1, the men bought cell phones, went to prayers, and they discussed buying a gun. They went to the airport and everyone went up the "grassy knoll" except Payen, who wandered about like a lookout. They practiced their escape to a nearby hotel, and discussed the role of lookouts. A897-906. Back at Shipp Street, the men tried to figure out how the telephones worked. A906.

That night, Hussain, in order to stall the date of the operation, called Cromitie with the "good news" he was going to Florida to get "the money." A4497. Cromitie reminded him that he was supposed to get his BMW the next day, but Hussain put him off. A4499; A912. Cromitie passed on the word to Payen and Onta Williams that the "cash rolled in." A4502; see A4503-04.

The next Wednesday, May 6, as Hussain had arranged, he took the men to Stamford, Connecticut where the dummy IED's and one dummy missile, all that Fuller could command, were stored. Immediately the men realized that several unmarked police cars were following them, and they stopped in a parking lot, just before

Interstate 84, for 15 minutes. Hussain convinced them to proceed on the highway; they saw the cars again. Hussain pulled off to a Dunkin Donuts; the police followed into a lot next to it. After 20 minutes, Hussain got back on Interstate 84, and, when they saw the police again, he crossed the median and turned back to Newburgh, where he found the opportunity to call Fuller and warn him off. Onta Williams had to leave to pick up his child from day care, but Hussain convinced the rest to set off again. A912-18.

At the Stamford warehouse, Hussain demonstrated in about 45 minutes how to use the fake IED's and the single deactivated Stinger missile that Fuller had been able to procure at the time. A925; A1760; A1764-67. Hussain trained the men to use the Stinger missile by having them put it on their shoulder and look through the sight. Hussain, and not the defendants, did everything else at the training.

In the discussion between Cromitie and Hussain that followed, Cromitie pointed out that the men had "money problems." A4200. "[T]hey don't have any jobs. . . or anything," he went on, and they think "the brother can give us some money . . . for our families." Id. Hussain said he could help them. A4200-01.

Because Onta Williams had not been "trained" and photographed with a Stinger missile on his shoulder, Agent Fuller had Hussain take the men to the storage unit in New Windsor to show him the Stingers and IED's. A197-98. Back at Shipp Street, Hussain

suddenly said that "we should take one plane from the air." A4276. David Williams objected, "You said you didn't want to hurt nobody, why you hitting it in the air? There's people in there." A4277. He added, "Ain't nobody not going to have to murder." Id. Cromitie agreed, "I don't wanna hurt nobody like that, but I just want to take the planes out." Id. This was why, David Williams and Cromitie agreed, it was best to do the action very late, "when nobody is really ... ain't nobody around." Id.

On May 12, Agent Fuller developed a specific, written plan for the next day, May 13. A4561. Hussain would drive the men from Newburgh to Riverdale to conduct "operational surveillance," then drive them to Stamford to pick up a second fake Stinger, and finally to transport the Stinger to the storage unit in New Windsor. Id. Hussain was in control of everything, see A199-200; A1840-41; A1843, but made a pretense that Cromitie was in charge. Even Cromitie wondered about this, asking, "[W]hy you keep saying that?" A4404; see A199-200; A1840-41; A1843.

The meeting two days later, on May 15, was not recorded. Payen joined them and asked about money. A955. Hussain told the men, as he and Fuller had planned, that there were UPS boxes containing their money, and they would get keys to the boxes at the operation. Id. According to Hussain, no specific amount of money was mentioned and the men were "happy." A956.

The Last Supper Before the Operation.

May 19 was the day before the "operation." The next day, the 20th, Hussain was to take the men Riverdale, where they would be arrested by about two hundred state and local police officers and FBI agents, assisted by a commensurate number of unmarked police vehicles, a flatbed truck, two airplanes equipped with high technology spying equipment, and crime scene investigators, all awaiting their arrival. A339-43; A964.

The night before, Hussain decided he would take the defendants out to a last supper. A957-58. Fuller had authorized Hussain to offer them \$5000 each. At supper, Hussain claimed, he told them that the UPS boxes would contain that amount as "get-away money." A958-59. Fuller had decided that this offer should not be recorded. A957; A1787-88. According to Hussain, the men "felt very happy." A959.

On May 20, the FBI's plan was to have the men pick the three bombs up and bring them to the Riverdale. A964. The FBI had changed the plan of placing the bombs outside the synagogue and community center. Now, one would be placed in a rented Pontiac near the synagogue and the others in a Mazda near the center. A964-65. The men were told that the bombs could be detonated by calling from a cell phone at any time after a timer, set for three hours, had run to zero. Id. The men would return to Newburgh, shoot the two missiles at the airplanes on the tarmac, ignite the

bombs with their cell phones, and flee. Id.

On their way down from Newburgh, the defendants were supposed to prepare the bombs by hooking a few wires to each pack of explosive. Hussain kept trying to direct them, saying it was "so easy" and "very easy," but Cromitie and the others could not do it. A4459. Hussain, running late, had to park for 13 minutes and connect the wires himself. A1874-81.

The group arrived in Riverdale about 8:30 p.m. and found the two cars, the Pontiac and Mazda, placed there by the FBI for their use. A981-82. At each step of the process, Hussain had to direct the defendants. A1891-92. Cromitie even had to be told how to use the Pontiac key fob to open it. A1893-94.

As Cromitie left, Hussain once again said to him, "Love you." A4476; A1894.

When Cromitie returned from the Pontiac, Hussain asked if he had turned the bomb on. Cromitie said, "Holy shit. I forgot to turn it on!" A1895; A4477. Hussain told him it would work anyway. Id. Hussain then showed him in detail how to set the other two bombs. A1898. After Cromitie left, Hussain could no longer see Cromitie, but Onta Williams came up and said Cromitie could not open the rear hood of the Mazda. A986. Hussain's walkie-talkie could not call Cromitie, but Williams's could, and Hussain told Cromitie just to put the bombs in the back seat. A986-87.

The men rejoined at Hussain's car. Hussain gave the signal,

and the SWAT team descended on them, breaking the car's windows and hauling the men out. A987-89.

Shahed Hussain's Perjury

In his direct testimony, the government had Shahed Hussain describe his life history, presenting himself as a struggling but honest businessman who had made a minimal amount of money from the FBI for his services as a paid informant -- just \$92,000 over the past three years. Hussain declared that he had paid taxes on every penny he received. Otherwise, Hussain had earned money only from his "hotel business" which was "not good" and had "not turned a profit yet in three years." A581.

The government also elicited from Hussain a harrowing story of his persecution and eventual flight from Pakistan. A585-87. According to Hussain, between 1992 and 1994, he had falsely been arrested three times in Pakistan, the last two times on charges of the same murder. On both occasions of his arrest for murder, Hussain testified, he had been tortured. A584-86. In 1994, he was tied to a chair for three days and cut on his wrist by his interrogators, leaving a scar. A586. The prosecutor had Hussain dramatically display this supposed badge of cruelty to the jury. A586.

After securing his release, Hussain and his family fled. They entered the United States illegally in December, 1994, and Hussain applied for and received political asylum based on his

supposed persecution. A572; A581-82.

Finally, the government questioned Hussain about his prior conviction on federal fraud charges, on which he was sentenced in 2006. A573-78.

The Evidence That Hussain's Direct Testimony Was Perjurious and That He Then Engaged in Perjurious Cover-Ups.

The Presentence Report that was prepared for Hussain's sentencing in 2006 belied much of his direct testimony about himself, including the basis for his asylum application.¹⁹ This evidence was not admissible for the jury to consider, of course, Fed. R. Evid. 608(b), but Hussain responded to cross-examination about discrepancies between the Report and his sworn testimony. On cross-examination, Hussain adhered to the story of his torture and flight from Pakistan in late 1994. His presentence report stated, however, based on his statements to a probation officer before sentencing, that he had been living in Glens Falls, New York, from early 1994 until October, 1995. A1021-22; A1042. And when the sentencing court had specifically asked him if there were errors in the presentence report, he said there were none.

To cover up the lies in his asylum application, Hussain

¹⁹ The defense challenged far more aspects of Hussain's background than can be summarized here. They include his probable bankruptcy fraud, his lying about his substantial wealth to the District Court for the Northern District of New York, and so on. Hussain obfuscated these issues all in the same way that he did the ones we discuss here. The result made a difficult knot for the jury to untie.

claimed the contradictory statements in the presentence report were "mistakes," and he created a great web of lies to explain why, when asked at sentencing if there were any errors in the report, he had said there were none. His basic story, which became more embroidered as he went on, was that the FBI had hired his lawyer, Fred Ackerman, that he had only learned from an FBI agent a week before sentencing that Ackerman represented him, A2091, that he did not meet Ackerman until the very day of his sentencing, that he never had a chance to review the report, A1043-45; A1825, and that Ackerman told him to "lie" and to tell the sentencing judge that he had reviewed that Presentence Report even though he had not seen it. A1828. This story, in all its complexity, contained a half-dozen to a dozen different instances of perjury.

The defense confronted Hussain with prior statements in the proceeding in which he knew Ackerman's name eight weeks before sentencing. A2092-94. Hussain maintained until the last, however, that he never knew met Ackerman before his sentencing, and that if Ackerman said anything different, it would be wrong. A2093; A2096.

During trial, the defense offered to produce testimony by Mr. Ackerman that Hussain had personally retained him, they had met many times, he had previously represented Hussain in civil matters, that between 2004 and 2006, he saw Mr. Hussain a number of times, that Mr. Hussain paid him in installments, and that prior to sentencing he reviewed the PSR with Mr. Hussain "line by line."

A1689-90. Ackerman would also deny that he advised Hussain to lie to the sentencing judge about any matter. Id. The defense invited the government to speak to Mr. Ackerman to verify this. A2170-71. None of this evidence was admissible under Rule 608, of course.

The government apparently did no investigation of the matter, such as calling Ackerman or asking the FBI if it had hired Ackerman for Hussain. Instead it simply argued that Hussain's testimony was "explicable by poor recollection." Government's Memorandum of Law in Opposition to Defendant's Post-Trial Motions (GM), Document 161, at 77. The district court disagreed, finding that "Hussain lied about issues relating to his representation" by Mr. Ackerman. Decision and Order Denying Defendants' Post-Trial Motions (N.T.Op.), SPA135-36.

A similar issue arose when the defense inquired how Hussain, on his meager income, could afford a fleet of expensive automobiles, and why he had not declared them on his financial affidavit to the Probation Office. Hussain responded that "some of the cars were gifted to me." In particular, he claimed that former Pakistan Prime Minister Benazir Bhutto had given him a Mercedes-Benz. A1132. Hussain testified that Ms. Bhutto had given him a 2000 Mercedes in 2002 or 2003 when she was staying at the Ritz Carlton in New York City. A1133; A1304. Hussain described in great detail an invitation he and his son received to visit Ms. Bhutto at her hotel in New York. He stated that when his son, Shayar Hussain

told her he was 17, she gave "40,000 to my son, cash, to buy the car." A1304. According to the story, his son had asked Ms. Bhutto what kind of car he should buy, and she suggested a Mercedes. She told his son to just send her a picture of the car he wanted, and she would send the money. Hussain registered the Mercedes in Albany under his own, or his wife's name. A1305.

Hussain later testified that his son actually received the Mercedes in 2005, not 2002, a necessary change, since he was only 15 years old in 2002. A1355-56.

On further examination, despite his earlier elaborate tale about Ms. Bhutto choosing a Mercedes, Hussain changed his story again and now said that his son had personally purchased a different car in 2005 or 2006. A2295. He received the money from Ms. Bhutto's husband, Asif Ali Zardari, the current President of Pakistan, via a wire transfer from "Best Homes" (a company Hussain said was located in Dubai and owned by Zardari). The car his son bought with the money was not a Mercedes, but a Cadillac Escalade. A2346-50. Hussain claimed that his son, just turned 17, purchased the Escalade without his knowledge, while Hussain was in Tennessee, so he did not know it was not a Mercedes. Two months after his son bought the Escalade, he exchanged it for a Mercedes. "When I came back, he had a Mercedes. That's why I assumed he had bought a Mercedes. I did not even know about the Escalade." A2346. Although he had just said he didn't even "know about the Escalade,"

and had never seen it, he admitted that he had registered the very same Escalade in November, 2006, in Tennessee. A2353; A2379-81.

The defense offered, on its post-trial motion, that it could, absent the strictures of Rule 608, have presented documentary evidence that there was no record that Shayar Hussain had purchased any car in New York or Tennessee before 2010 and that Shayar did not even have a driver's license between 2005 and 2008. Hussain had received title to, and registered the Escalade in August, 2006; he did not obtain title to the 2000 Mercedes until 2007. Both cars were registered in his name. In addition, the proceeds of the supposed gift of \$40,000 from Zardari's supposed account had been withdrawn in thirty small, varying increments over two weeks in February, 2006, and paid to local businesses, such as hardware stores and the like. None was used to purchase a car. Defendant's Reply Memorandum on Motion for a New Trial(Reply), Document 164, at 8-9.

The government argued that Hussain was telling the truth. GM 68, n.11. The district court, however, found that "[h]e lied when he testified that he had been gifted a Mercedes-Benz by Benazir Bhutto during a meeting at the Ritz-Carlton hotel." N.T.Op., SPA136.

The district court noted that these were just "examples" of Hussain's lies, which in turn were "designed to cover up lies he told in the past." N.T.Op., SPA135. It did not rule on the other

allegations of such lies, primarily relevant to Hussain's credibility. Those lies concerned 1) Hussain's receipt of hundreds of thousands of dollars from Pakistan, for which he gave conflicting explanations (this evidence was relevant to whether he had committed bankruptcy fraud and other crimes), 2) lies concerning the facts he submitted in support of his immigration application for asylum, 3) lies concerning his date of entry into the United States, and 4) lies that he had paid all his taxes. See N.T.Op., SPA134.

The defense also complained of the apparent perjury in two quite material assertions Hussain had made. At trial, defense counsel argued for a hearing, noting that Hussain's testimony that the mention of \$250,000 was just a "code" was perjurious. A1689; see Defendant's Motion for a New Trial, Document 160, at 27. The second was his testimony that the only monetary offer he ever made to the defendants was an offer of \$5000 each on May 19th at the unrecorded last supper. Id.

The court explicitly found Hussain's testimony about both of these material matters was perjurious. There was "no doubt in [its] mind," the court stated, "that Hussain perjured himself at trial in connection" with both these pieces of testimony. N.T.Op., SPA136.

The defense had raised the issue of Hussain's perjury repeatedly during the trial. See, e.g., A1344-45; A1414-19; A1689-

90; A1700-01. The Court specifically cautioned the government about its obligation to investigate and not to present perjured testimony. A1790-94. There was a considerable delay, for this reason, before the government presented its final redirect testimony, at which point it had the opportunity to correct Hussain's perjury.

On redirect, the government did not correct any of Hussain's statements. It addressed the \$250,000 offer by again eliciting Hussain's perjurious testimony that this was a "code," although a bad code. A2246-47. It did not correct Hussain's testimony that the only monetary offer he had ever given was on May 19, which, he had insisted was the "one time" and the "only" time, he had ever offered money. A1788-89; A1847-49; A1860. As to the other evidence of offers beyond the sole supposed offer of \$5000 on May 19, it elicited Hussain's testimony that these were not real offers, because the defendants "had never ever followed up the offers I would give them, because they did not believe in that offers." A2238.

Instead of acknowledging any of Hussain's false testimony, the prosecutor had Hussain proclaim his lack of any reason to lie. It asked Hussain whether he had any "reason to lie to this jury." A2205. Hussain replied, "Absolutely not, sir." Id.

The Government's Summation

On summation, the first words out of the government's mouth

were a quote from Shahed Hussain, "James Cromitie said he wanted to do something to America." A2471. After surveying the "crime", the government eventually turned to the entrapment defense with a simple argument. There was no inducement because the defendants were ready to commit the crime before there were any offers made to them. The whole crime, every detail of it, was James Cromitie's idea because he had come up to Hussain and said, "I want to do something to America." A2485.

The government further endorsed Hussain's testimony about the \$250,000: "The CI told you that it was a code for the cost of the operation. The CI also told you that it was a lousy code for the costs of the operation." A2482.

As to the other defendants, the government argued, "none of the defendants were induced by the CI to do what they did, not directly, and not indirectly, and because there is no evidence of inducement, there is no entrapment in this case." A2487. The government relied on Hussain's testimony on redirect examination that he had never "convinced these four defendants to do anything." A2488. And it argued that there was "no evidence that Cromitie discussed money with the three other defendants." A2486.

The defense summations contended that Hussain was not a credible witness and cited, inter alia, the many implausible stories he had told on cross-examination.

In rebuttal, the government fully adopted Hussain's testimony

that the only offer to the defendant's had been \$5000 on May 19. It reminded the jury of Fuller's testimony that he had offered payment of \$5000 and that Hussain testified that was what he had done. It concluded: "There is no evidence that the CI offered anything more than \$5,000. There is no reason why he would have." A2503.

In addition to relying on Hussain's testimony, the government endorsed his credibility. It first derided the defense cross-examination about Hussain's prior lies as a "distraction, pure and simple." A2498. This was an attempt to "divert your attention to things about the CI's past that have nothing to do with the issues you need to decide at this trial. That stuff is just noise. Block it out." Id.

Hussain, urged the government, had no reason to lie and a powerful motive to tell the truth. That motive was his knowledge that he would be prosecuted and deported if he committed perjury. "The CI learned he had an immigration problem, as I mentioned. And the last thing he would want to do is lie. Not to Agent Fuller, not to the prosecutors, not to the jury, because he said he knew a perjury conviction would mean a one-way ticket back to Pakistan. He did not want that." A2499.

The Verdict

After several days of deliberation, the jury found Cromitie and David Williams guilty on all counts. It acquitted Onta

Williams and Laguerre Payen of one count, attempted murder of officers and employees of the United States, but convicted them of all the other counts including conspiracy to murder such officers and employees. A2636.

The Court's Ruling On the Defense Motion for a New Trial or a Hearing Based on Hussain's Perjured Testimony

The defense moved for a new trial based on the prosecution's knowing presentation of perjured testimony. Notwithstanding several findings of material perjury by Hussain, noted above, the court denied the defense motion for a new trial or a hearing on the matter. The basis for this decision was essentially threefold. First, the court found that Hussain's lies had been exposed to the jury. It noted, however, that although Hussain occasionally conceded a lie, he minimized all of them. N.T.Op., SPA138.

Second, it found that the government acted appropriately in leaving these lies in the record and not correcting them, since it did not "compound" them by rehabilitating him. N.T.Op., SPA139. The court did not note that, on redirect examination and in summation, the government had explicitly relied on the most material perjury the court identified and vouched for Hussains's credibility.

Finally, the court held that Hussain's credibility was essentially irrelevant because in the tape of November 29, Cromitie had admitted that he "raised the subject of getting back at the United States," at the first meeting with Hussain on June 13, 2008.

Id. at 140. It also held that Hussain's testimony had nothing to do with the other defendants. Id.

The Court's Ruling on the Motion for Dismissal Based on Outrageous Governmental Misconduct

The court also denied the defendants' motion for dismissal based on governmental misconduct. It held that none of the actions that induced Cromitie's crime singly or together was conscience-shocking. Misc.Op., SPA76. It did acknowledge some things "decidedly troubling about the Government's behavior." Id. at 83. These were 1) that Hussain did not infiltrate a criminal enterprise, since there was none until he got there, 2) the government's participation was not limited; it was the instigator of all activity right up until the last moments of the conspiracy, and 3) it took the government nine months to make Cromitie a "committed and enthusiastic participant." Id. at 84. In the end, however, the court held that the fact that Cromitie, having resisted Hussain for eight months, finally succumbed, eliminated any possibility of outrageous misconduct. Id. at 85.

Sentencing

At the joint sentencing of Cromitie and David and Onta Williams, the court made several important observations. It found that Cromitie was incapable of committing any act of terrorism because "real terrorists would not have bothered with a person who was so utterly inept, and ... only the government could have made a terrorist out of ... a man whose buffoonery is positively

Shakespearean in its scope." A2715-16. As to David and Onta Williams, the court found the evidence suggested that they were more dangerous than Cromitie. A2716. But, "[n]onetheless," the court found, "I believe beyond a shadow of a doubt that there would have been no crime here except the government instigated it, planned it, and brought it to fruition." A2716.

The court rejected giving Cromitie a longer sentence than the others because "[h]e was not the leader or organizer of this operation." A2718. It held that the 25-year mandatory minimum sentence was sufficient, and a longer one entirely unnecessary, to protect the public and deter others of their kind. A2718-19.

The court sentenced all defendants to the 25-year mandatory minimum. A2719-33.

SUMMARY OF ARGUMENT

I. The government violated the defendants' right to due process by the outrageous conduct to which it resorted in the course of its investigation. This misconduct took many forms. First, the government convinced defendant Cromitie against his initial inclination that he had an actual religious obligation to engage in violence, and that the violence was thus "legal;" the other defendants were induced by the same means. Second, the government relied on the coercive effect of pretended love and companionship that it exploited to create the crime. Third, the government constantly minimized the culpability of what its recruits were to do, even as it, as the actual planner of the crime, devised means to make it appear far more serious than it had pretended. Fourth, the government offered the defendants hundreds of thousands of dollars in this world, as well as Paradise in the next, as inducement to the crime. Fifth, it found men particularly vulnerable to its proselytization and its blandishments of what to them must have seemed unimaginable wealth, men who were unsophisticated, poor, and subject to the government informant's substantial persuasive powers.

That the government ever proceeded to manufacture this crime was a direct result of a sixth area of misconduct, multiple crimes committed by its informant, Shahed Hussain, who, in multiple violations of 18 U.S.C. § 1001, lied to agents and prosecutors

about the culpability of the suspects and concealed from them his incitement of criminal acts and the extraordinary financial inducements he was offering.

Seventh, that the government planned and manufactured the crime itself, there can be no doubt. The FBI case agent conceded, and the district court found, that the government controlled each step of the operation.

Eighth, these facts are all the more outrageous because, unlike many cases that raise this issue, the evidence of predisposition here was weak. And, ninth, without the government creating the crime, as the district court found, it never would have, or could have, occurred.

Under this unique combination of circumstances, the misconduct here is sufficiently extreme and outrageous that it violates due process, requiring reversal of the defendants' convictions.

II. The Court should vacate the conviction and reverse for a new trial, or remand for a hearing, because, as the district court found, the prosecution's main witness repeatedly perjured himself at trial as to facts material to his credibility and to facts important to the merits of the entrapment defense. The government knew or consciously avoided knowing that Shahed Hussain was lying as to matters of his own credibility as well as matter directly material to the defense in the case. The government did nothing to

correct Hussain's perjured false statements or make clear that his testimony was perjurious. Indeed, it relied on and vouched for his testimony. Had the government fulfilled its obligation to make clear the aspects of Hussain's testimony that were perjured, there is at least a reasonable likelihood that the verdict would have been different.

III. The government vouched for the credibility of Hussain in a way that has long been condemned, by arguing that he would not lie, since a perjury conviction would have grave consequences for him. This kind of vouching has long been clear error in this and other circuits. It is particularly odious in this case because, although the district court has explicitly found that Hussain committed perjury in multiple respects, the government has taken no action to prosecute him. The government's claim that he was running any risk by lying was entirely spurious. While this error was not objected to, it is plain error that, in conjunction with the government's knowing presentation of Hussain's perjured testimony, and with other trial errors in the case, creates enough prejudice to require reversal.

ARGUMENT

POINT I

The Government's Misconduct, Including, But Not Limited to, the Incitement of Criminal Acts by Arguing They Were a Religious Obligation, Exploiting the Love of a Defendant for the Government Informant, Violations of Law by the Informant, Offers of Extraordinary Financial Incentives, and the Government's Planning and Execution of the Entire Crime, Which Never Could Have Occurred Otherwise, Was Outrageous and Violated Due Process.

This is an extraordinary case in which the government manufactured criminals as well as serious crimes of terrorism. It manufactured terrorists over a period of many months, from men who had never engaged in, been associated with, nor demonstrated any interest in terrorist activity in their prior lives. The government's inducements to the defendants were improper, the government's agent repeatedly violated the law, and the government itself was the sole actor that planned the entire event, and was essential to its being executed. The "crime" here was one, as the district court found, that could only have been perpetrated by the government. A2716. The combination of factors here "offend[s] those canons of decency and fairness" upon which our criminal system rests. Rochin v. California, 342 U.S. 165, 169 (1952), quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945).²⁰ Accordingly, the defendants' convictions should be vacated and the indictments

²⁰ Malinski, which Rochin quoted, added, "These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." 324 U.S. at 417.

dismissed.

A. Due Process Bars a Conviction Based on Law Enforcement Misconduct So Extreme That It Violates the "Canons of Decency and Fairness" That Underlie Our System of Justice.

The Supreme Court indicated nearly forty years ago that there could be cases where the conduct of law enforcement agents would constitute a violation of "that 'fundamental fairness, shocking to the universal sense of justice' mandated by the Due Process Clause of the Fifth Amendment," and that in such an "outrageous" case, the government would be barred from obtaining a criminal conviction. United States v. Russell, 411 U.S. 423, 431 (1973), quoting Kinsella v. United States ex rel. Singleton, 361 U.S. 234, 246 (1960).

Subsequently in Hampton v. United States, 425 U.S. 484 (1976), although three justices of the Court would have held there was no such due process right, the remaining five members, by differing rationales, disagreed.²¹ In the "decisive"²² opinion in the case, Justice Powell observed that due process meant "fundamental fairness," and the Court had often had to make "judgments as to when such fairness has been denied an accused in light of all the circumstances." Hampton, 425 U.S. at 495 n.6 (Powell, J., concurring). There was no "sharply defined standard" for making such judgments, Justice Powell added, citing Rochin v. California,

²¹ Justice Stevens took no part in the case.

²² United States v. Myers, 692 F.2d 823, 837 (2d Cir. 1982).

342 U.S. 165, 169-72 (1952), which describes due process violations as those that "offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." 342 U.S. at 169, quoting Malinski v. New York, 324 U.S. 401, 416-17 (1945).²³ In the case of "police overinvolvement in crime," Justice Powell added, law enforcement conduct must reach a "level of outrageousness before it could bar a conviction." Hampton, 425 U.S. at 495 n.7.

This Court has recognized the due process defense based on misconduct by law enforcement and has noted that ordinary examples of such misconduct would involve physical abuse or physical and psychological coercion. United States v. Schmidt, 105 F.3d 82, 91 (2d Cir. 1997). But the Court also recognized that in "rare" cases different or less extreme conduct would violate due process. Id. In United States v. Cuervelo, 949 F.2d 559, 568 (2d Cir. 1991) (reviewing "de novo"), for example, the Court remanded for a hearing on whether a government's inducement of crime by instigating a sexual relationship with the accused violated due process. And in Schmidt, 105 F.3d at 91, the Court noted that "respect for due process would create serious concern were sting operations designed to ensnare people who may suffer from mental illness."

²³ Malinski, which Rochin quoted, added, "These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia." 324 U.S. at 417.

Other courts, cited below, have singled out additional factors, present here, as being among those that raise due process concerns.

In this case, "in light of the surrounding circumstances," Hampton, 425 U.S. at 492 (Powell, J.), including improper and powerful inducements, numerous criminal violations committed by the government informant in the investigation, the total involvement of the government in designing both plan and execution of the crime, the questionable degree of predisposition of any of the defendants, and the improbability that this crime or any like it could have occurred without government action, the government misconduct here was so serious that it violated the "canons of decency and fairness" on which our system of justice rests. Rochin, 342 U.S. at 169, quoting Malinski, 324 U.S. at 416-17. The defendants' convictions must be reversed and the case dismissed.

B. Converting the Defendants to the View That They Had the Religious Obligation to Engage in Terroristic Jihad Was Outrageous Governmental Misconduct With the Capacity to Lead Innocents into Crime.

There is no doubt that the government²⁴ engaged in proselytizing James Cromitie to convert him from a moderate, if angry, Muslim, to one committed to violent terrorism in the name of

²⁴ Hussain was, as a paid informant, an agent of the government. Even in the case of a regular, but unpaid, informant, the Supreme Court has held, "The Government cannot disown [the informant] and insist it is not responsible for his actions. Although he was not being paid, [he] was an active government informer who had but recently been the instigatory of at least two other prosecutions." Sherman v. United States, 356 U.S. 369, 373-74 (1958).

religion and that it then used Cromitie to convince the other defendants of that view. It took six months to convince Cromitie, against his initial disinclination, that it was his religious obligation to engage in jihad and that doing so was not a "criminal act." Such means are well beyond the permissible act of giving a person the "opportunity" to commit a crime, see, e.g., Jacobson v. United States, 503 U.S. 540, 552 (1992), and are by themselves so outrageous as to violate due process.

It became clear on October 12, 2008, when recordings were first made of Hussain's statements to James Cromitie, that Cromitie had no commitment to a view that Islam required him to engage in jihad. In the October 12 tape, Cromitie's concern was not jihad, or any kind of terrorism, but with his own anger at individual Jews. He believed, however, that Allah would deal with this situation and that doing violence out of anger alone was improper, because killing one person was "like killing the whole of mankind." A2778. It was equally clear, however, that Hussain, playing a man learned in Cromitie's religion, persistently sought to change Cromitie's view and to make a jihadi of him. As early as June, 2008, Hussain had told Cromitie that jihad was a "good thing" in the "name of Allah" and, as Cromitie paraphrased him, "legit." A2779; A4159. On October 12, their first recorded meeting, Cromitie had not yet adopted this view, for Hussain had to argue repeatedly to him that jihad was an obligation, that it was a

religious duty to commit violence against infidels, that the Prophet's teachings, the *hadiths*, required the Jews to be brought down, and that Muslim bombers in India were doing "good." A2778. The district court specifically found that Cromitie "did not react favorably" to Hussain's argument for jihad, although he did make anti-Semitic statements. Misc.Op., SPA68. Hussain repeated similar arguments on October 19 and on October 29, but Cromitie disagreed with him when he advocated killing all the Jews, or, when Hussain asked if he would participate in jihad, said only that he would have to "investigate" the matter. *Id.* at 69.

Hussain persisted, and on November 29, in a Philadelphia hotel, he made it clear that his "brothers" wanted jihad. He asserted that jihad was "not in any sense, a criminal act." A3312. By now, Cromitie had begun to internalize Hussain's view of Islam, and when Hussain insisted that jihad would be "in the name Allah," Cromitie appeared to agree, "[T]hat's what makes it legal." A3312. At some point soon thereafter, Cromitie finally became converted to the radical Islamic message that Hussain had at first failed to impose on him. He explained to all the other defendants in May, 2009, that because what they were doing was "in the name of Allah" and they weren't "gonna hurt nobody," the plan was "legit." A4159.

Manufacturing a crime by converting a person to the view that his religion requires, and rewards, the commission of that crime is nothing less than outrageous. First, it closely implicates the

right to the free exercise of religion, which may not be impaired by government interference. Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (free exercise clause "requires government respect for, and noninterference with, the religious beliefs ... of our Nation's people"); Fromer v. Scully, 817 F.2d 227, 229 (2d Cir.) ("an individual's belief is beyond governmental intrusion;" emphasis in original), vacated on other grounds, 404 U.S. 909 (1987). And it cuts close to the borders of the establishment clause as well, by allowing the government to adopt and teach, for its purposes, a particular, violent religious view. Zorach v. Clauson, 343 U.S. 306, 314, 72 S.Ct. 679 (1952) ("Government may not undertake religious instruction.")

The Supreme Court has recognized the dangers of similar, though less egregious, government conduct when it has found entrapment as a matter of law. In Jacobson, 503 U.S. at 552, the government induced violation of law "by waving the banner of individual rights and disparaging the legitimacy and constitutionality" of anti-pornography laws. The Court found that this exerted "substantial pressure" on the defendant to commit a crime. The Ninth Circuit has concluded that such a tactic was "improper," United States v. Thickstun, 110 F.3d 1394, 1397-98 (9th Cir. 1997), and the First Circuit has noted that urging a defendant to commit a crime "as a matter of principle" lies far outside ordinarily permissible means, such as simply offering an opportunity to engage

in crime; such tactics constitute, under Jacobson, an "improper inducement." United States v. Gendron, 18 F.3d 955, 963 (1st Cir. 1994).

Promoting the notion that committing a crime is actually virtuous is equally improper. Thus, in Sherman v. United States, 356 U.S. 369, 376-78 (1958), the informant's plea that getting him drugs would reduce his suffering led to a finding of entrapment as a matter of law. Playing on the defendant's inclination to do a good deed, to "alleviate pain and suffering," Pulido v. United States, 425 F.2d 1391, 1393 (9th Cir. 1970), was an improper "enticement." The government should not be in the business of convincing people that crime is a good and virtuous thing, for such inducement has the capacity to draw well-meaning people into crime.

The appeal to religion is even more likely to draw people with good intentions into crime. Such an appeal invokes a higher law, the very word of God. The force that religion has in people's lives is enormous. Zorach, 343 U.S. at 313 ("we are a religious people"). Moreover, what is a "correct" religious view is not a matter of objective decision, and to allow government agents to manipulate religious doctrines as part of their armory would, even leaving aside the First Amendment, intolerably broaden their powers. The danger that fundamentally well-intentioned people, upset by what they believe are violations of deep moral principles, can be turned to violence by government-sponsored religious

persuasion, is simply too great to tolerate.

Because this case involves the "war on terror" and a relatively unfamiliar religion, it is important to note by a more general example the mischief that allowing inducement by religious persuasion can do. To allow religious proselytization as a tactic in criminal investigation would, for example, allow government informants to join a religious group that believes that abortion is murder and that millions of babies are murdered annually, and, as Mr. Cromitie vaguely believed about the deaths of innocents in the war in Afghanistan, that "something should be done." To allow government agents to encourage such people to believe that God requires that they engage in terroristic violence -- bombings of clinics or killing of doctors -- would be outrageous. There are almost certainly some poor dupes, wanting to do well by engaging in what an agent persuades them is the lesser of evils, who could be enticed in this way, but that is something the courts should not allow. In fact, of course, that is what happened here, and it was outrageous; the Court should not allow it in this very case.

While this argument has relied primarily on evidence about Cromitie, it applies equally to the three other defendants. In the first place, of course, this outrageous prosecution was made possible only by such improper means, and the other defendants would not be here but for them. See, below, p.89. But in addition

to that, Cromitie explicitly said he made a religious appeal to recruits, and he did so in fact. David Williams told Hussain that the religious aspects of the mission had been fully explained to him. Hussain told all the defendants that there was "nothing wrong" with religious war in the name of Allah. A4082; A1698-1709. Cromitie, quoting Hussain, later explained this again when they were all together. And the defendants proclaimed their religious motivations. See, e.g., A3841 (D. Williams: "It's for Allah, so there's nothing really I can say."); A4314 (Payen: "I'm doing this for the sake of Allah"; O. Williams: "I'm doing it for the sake of Allah.") There is, however, no evidence whatsoever that, before they were approached by Hussain and Cromitie, any of these men believed that Islam required participation in jihad or that doing violence in the cause of Allah was, as they were told, "legal" or "legit." There is no reason to believe that any of these men became a jihadi "independent" of the religious views propounded by Hussein. See Jacobson, 503 U.S. at 550.

C. The Government Committed Misconduct by Exploiting Cromitie's Love for Hussain to Draw Him Back Into Its Criminal Plan After He Had Abandoned It.

Hussain's eventual success in getting Cromitie to accept his view of the virtues of jihad, and then to participate in jihad, was a product of Cromitie's love for Hussain. Hussain and the FBI shamelessly cultivated and exploited this factor. This Court has recognized that the inducement of criminal acts by using a sexual

relationship could constitute "outrageous" conduct, even in the face of overwhelming proof of predisposition. United States v. Cuervelo, 949 F.2d 559, 561, 567 (2d Cir. 1991). The principle behind this recognition in Cuervelo is that it would be outrageous to convict someone induced into crime by a government agent posing as a lover, who was merely exploiting the suspect's love for him. See id. at 567. The intense relationship gave Hussain another means by which to manipulate Cromitie, with the approval of Agent Fuller, into carrying out jihad, at the very point when Cromitie had abandoned any such plan.

The government knew that Hussain had a "very close and personal relationship" with Cromitie. A4570-71. There is no doubt that, in some very real sense, Cromitie loved Hussain. He said so nearly every time they met. See, e.g., A2809; A2851; A2903; A3095; A3153; A3181; A3192; A3236; A3309; A3335; A3585; A3615; A3690; A3692; A3707; A4196; A4334; A4381; A4499. Hussain regularly reciprocated, see, e.g., A2809; A2903; A3095; A4205; A4476, although this was a sham. A1894.

When Cromitie said "I love you" to Hussain, it was no mere pleasantry. He explained what he meant in the Philadelphia hotel on November 28, just before he first agreed with the principle of jihad. He told Hussain he was "the first brother I ever trusted so far" that he would "go anywhere with." A3181. He didn't "hang" with any other Muslims, but, he said, "I love hanging with you,

brother, for real." Id. He didn't have anyone else to "hang with like that." He loved everybody, of course, "but they're not good like you, brother, you know. They don't do that. They don't that (Makes gesture on his heart)." Id. He added later, "I smile when I'm with you 'cause you crazy. You're like me, that's good." A3192.

Hussain flirted with Cromitie: "So, so tell me, brother. Tell me how much you love me." Id. Cromitie said, "ain't no ... could really say." Id. Hussain flattered him: "My brother. In the whole Newburgh (UI), you're the only brother that I hang." Id. The next day in Philadelphia, Cromitie recalled that Hussain had "show[ed] me love from day one." A3309.

Hussain encouraged Cromitie to adopt the custom of kissing as they came and went. See A4197 (Hussain: "When you get out you have to give me a kiss, okay?"); A3965 (Hussain: "Give me a kiss, brother."). And, on May 20, as Cromitie left to put a "bomb" in the first car, Hussain said, unprompted, "Love you." A4476; A1894.

The government knew that Hussain could use this relationship to manipulate Cromitie. Indeed, this relationship was one part of the bait that Hussain and Fuller used to draw Cromitie back into the conspiracy after he had abandoned it. Agent Fuller directed Hussain to use his influence over Cromitie, to act "upset," in order to jump-start the moribund investigation on April 7. Hussain did, and it worked. Hussain complained to Cromitie he had

"vanished," just when everything was ready. Hussain said he had put his "life on the line" with his brothers in Pakistan, suggesting he might be in physical danger if Cromitie failed him. Cromitie was ambivalent at first. He said he might just take a job to get some money. Then he explained the decisive point:

[O]ne minute I'm going for the job and the next minute I wanna do this right here with you. And then the next minute I go you know what, this is bullshit. I can make money with the brother here, or I could go here and make money....and anytime I go here I get fucked. You know? When I'm around you and everything is fine and cool, but as soon as I get with Wal-Mart, or try to do something with Walmart I get fucked up

A3700 (emphasis supplied). The false relationship that made Cromitie feel that everything was "fine and cool" helped bring him back to the government's scheme and created this crime.

This is precisely the kind of outrageous conduct that the Court envisioned in Cuervelo - the encouragement and use by the government of an intense personal relationship solely to manufacture a crime. It meets the criteria that Cuervelo set out as significant: that the government used the relationship, that it used it "to achieve governmental ends," that it occurred during the investigation, and that it was "entwined with the events" of the crime charged. Cuervelo, 949 F.2d at 567.

But for this relationship, it is likely that Cromitie would not have believed that jihad was required of him as a religious obligation in the first place, or would not have taken up Hussain's scheme again in April, once he had abandoned it. Without the love

that Hussain pretended to have for Cromitie, and that Hussain fully exploited, this supposed crime would never have occurred. This was outrageous.

D. The Government Improperly Induced the Defendants to Commit Crimes by Deliberately Minimizing the Culpability of the Acts the Government Was Planning and Emphasizing the Minimal Degree to Which the "Lookouts" Would Be Involved.

The due process claim here is one that involves "fundamental fairness," Hampton, 425 U.S. at 494 n.6 (Powell, J.), and two inducements the government offered to obtain the participation of the "lookouts" impinged directly on the fairness of the prosecution. The government intended from the very beginning to manufacture an attack on Stewart International Airport which would involve "rockets." A604; A3146-47. And on this basis, the government would charge the defendants with a crime carrying a mandatory 25-year sentence. But Hussain lured Cromitie, and Cromitie, following his lead, lured other participants, into the plan by insisting both that it was designed so innocent people would not be hurt and so that the "lookouts" would have only a minor and distant role in the whole events. This was grossly unfair.

From the very beginning in June, 2008, Hussain told Cromitie that his plan did not involve hurting anyone. A4159. In February, 2009, when Cromitie first began to seek "lookouts," he told Hussain he would tell them, "[W]hen you do this, you, you looking not to hurt no one." A3651. Cromitie then went out to find lookouts on this basis. On the first day all the other defendants were

present, Cromitie said that the action at Stewart Airport was about "nothing but military people," and "We know what time they leave and everything." A4080 (emphasis supplied). He reiterated that "ain't nobody getting hurt" because, "Nobody's gonna be there anyway. 'Cause the way we do it, we set it up that way. You know, you just sending a message, did you get that?" A4086 (emphasis supplied). That these representations were meaningful is clear. When Hussain suggested shooting down a plane in the air, David Williams objected, "You said you didn't want to hurt nobody, why you hitting it in the air? There's people in there." A4276 (emphasis supplied). He added, "Ain't nobody not going to have to murder." A4277. Cromitie agreed they should act very late, "when nobody is really ... ain't nobody around." Id.

At trial, however, the government introduced evidence showing that, contrary to Cromitie's statements in Hussain's presence, there were people at the airport all night. The government argued that, for this reason, the defendants must have intended to murder them. A2474.²⁵

In addition, the "lookouts" were also assured that they would play little role in the crime. Cromitie explained how he would get them. He would say, "you just be a lookout. Nothing more, nothing

²⁵ The government also made the plan to place ball bearings in the bombs at the synagogue, making them anti-personnel devices, and, against the defendants' original plan, had the bombs placed in cars, which would spray chunks of metal in all directions, as the government's video at trial then showed.

less. It's like you're not even there. It's like you're watching TV and you know what's going to happen...." A3646. He would offer lookouts \$25,000, just to watch things from "20,000 miles away." A3655; A1536; see generally A1535-60. He told Hussain he was telling people "you don't even have to touch anything. You just watch." A3698. Hussain approved this approach.

This approach was designed to draw people of low culpability, and quite possibly low intelligence, into a very serious crime. That approach, particularly in connection with the appeal to religious obligation and to enormous financial incentives, is plainly outrageous.

E. The Government Manufactured Criminals Using Offers of Hundreds of Thousand of Dollars in This World, in Addition to Paradise in the Next.

Hussain's strategy was to offer "reward[s] in both ways," the religious reward of Paradise and the earthly reward of great riches. A1775; A3602. He did indeed offer the latter, though he and the government both denied this. Other courts have recognized that extraordinary financial motives or pressures may constitute, or add to, extreme misconduct violating due process. United States v. Mosley, 965 F.2d 906, 912 (10th Cir. 1992) ("[v]ery large financial inducements by government agents" can contribute to outrageousness finding); United States v. Twigg, 588 F.2d 373, 380-81 (3d Cir. 1978) (defendant drawn into drug manufacture by debt owed to dealer); United States v. Batres-Santolino, 521 F.

Supp. 744, 749, 752 (N.D. Cal. 1981) (offering opportunity to make "a fortune" conditioned on first dealing in cocaine contributed to outrageous misconduct). Two cases in this Court have rejected claims that offering financial inducements constituted outrageous conduct, see United States v. Al Kassar, 660 F.3d 108, 121-22 (2d Cir. 2011); United States v. Myers, 692 F.2d at 837-38, but the facts in those cases were far different from the facts here, where huge amounts of money were offered to poverty-stricken men. The coercive effect of the immense financial offers to the defendants here was far in excess of that in either Al Kassar or Myers.

The Court in Al Kassar did use unusually broad language in suggesting that financial coercion did not constitute outrageous misconduct, but this cannot be read to mean that such considerations are never relevant under a due process analysis. 660 F.3d at 121-22. There the Court relied entirely on its prior decision in United States v. Myers, 692 F.2d 823, 837-38 (2d Cir. 1982). Myers considered the claim of the impact of financial circumstances, but enunciated no broad holding that this factor was irrelevant; it specifically based this portion of its decision on "the facts of these cases." Id. Had the Court in Al Kassar intended to broaden the decision in Myers to say that financial considerations are never appropriate under due process, it would surely have explained what it was doing, and given the basis for that expansion and the due process principles on which it relied. Moreover if it

intended to limit due process violations to cases of physical or mental abuse, it would have been in conflict with Schmidt, 105 F.3d 82, and Cuervelo, 949 F.2d 559, which it did not purport to be limiting.

In any event, such a rule would reduce the due process defense simply to the duress defense, a far narrower approach than that taken by Justice Powell's decisive decision in Hampton. 425 U.S. at 494 n.5 ("A fair system of justice normally should eschew unbending rules ..."). Indeed, no such narrow rule could survive under due process analysis, which is based on all the circumstances, id. at 492 (Powell, J.), and which cannot be reduced to any set of "prescriptions" like those in a "pharmacopaeia." Malinski v. New York, 324 U.S. at 417.

In this case, the financial incentives waved in front of the defendants were powerful inducements. From the outset, Hussain was generous with material things. He took Cromitie and the others to eat and drink at every occasion. He opened his wallet to Cromitie. A2806 ("if you need something brother call me"); A2920 ("If you need money come to me"); A3118 ("if you need money, I can give you money"); A3109 ("my money is your money brother"). He paid Cromitie's rent and gave Payen money for food. He provided David Williams with train fare to see his baby in Brooklyn. His financial gifts were constant, and were plainly intended to bend the defendants to his will. He went even beyond this, however,

promising Cromitie that he would make him the "happiest man on Earth," and that he and any recruits he found would get "a lot of money." A815; A1648-49.

This was, however, only the tip of an iceberg, the bottom of which Hussain kept well concealed. When he knew he was recorded, he made only non-specific references to money, but when he was not, or did not know he was, he offered extraordinary incentives. In October, 2008, he promised Cromitie a BMW automobile that Cromitie fancied and said he discussed this many times that are not recorded. Similarly Cromitie mentioned that Onta Williams was to get enough money to buy a brand-new Mercedes, worth about the same. Hussain offered Cromitie \$60,000 to open a barber shop, an all-expense paid two-week vacation in Puerto Rico, and, as the district court specifically found, \$250,000 in cash, on at least two occasions. N.T.Op., SPA136.

This was not the end of it. Cromitie believed that even after the end of the operation, he would be able to come back for more money. On April 16, he asked Hussain, "How will we know where to go if we need money?" A3763. He expected that the goose would lay not only one golden egg, but more, when he needed more.

Hussain claimed that he never really made these offers, and the government agreed. As to the \$250,000 their joint theory was that the words were just a "code." Alternatively, since the defendants were never recorded discussing the offers again, they

were not real. The district court rejected these arguments, N.T.Op., SPA136, and rightly so. The defendants expected to be paid handsomely. Cromitie called Payen and Onta after Hussain pretended to be getting the money to say that the "cash rolled in." A4502; see A4504. And the absence of any further mention of some of the offers in the recordings means nothing. Hussain never recorded specific offers, and those we know of came to light only by accident. For example, Hussain admitted he had often discussed the offer of the BMW with Cromitie, but it was mentioned only once in a chance recording. The actual evidence showed that the defendants relied on substantial offers of money now, with the possibility of more continuing into the future.

The coercive power of these offers was formidable. The district court found that they constituted an "almost irresistible temptation." Misc.Op., SPA85. These men were poor. Cromitie was living on about \$14,000 a year when he was working, and currently he wasn't working. He pleaded for money for the other defendants saying they had "money problems" and needed it for their families. He got money from Hussain for rent and groceries, and Payen got money for food. This case is nothing like United States v. Myers, 692 F.2d at 827 (\$50,000 bribe to Member of Congress), or United States v. Al Kassar, 660 F.3d at 116 (actual profit to substantial business concern unclear, but down payments of about \$270,000 made). This case involves the offer of riches beyond anything the

defendants could even imagine and the prospect of more in the future. This plainly had an improper coercive effect, which in combination with the other factors here, amounted to outrageous misconduct.

F. The Misconduct of the Government's Informant in Making False and Misleading Statements to the Government Constitute Outrageous Misconduct and Advanced a Prosecution That Would Otherwise Never Have Occurred.

The district court found that the government, rather than engaging in a diligent investigation of its own, relied instead on reports from its informant, Shahed Hussain, to decide whether James Cromitie posed any real danger. Misc.Op. SPA75. And the court found that Hussain's reports were often untrue. Id. The Court specifically found that "Hussain had lied to his FBI handlers - or at a minimum omitted to tell them about certain matters that were germane to this case." N.T.Op., SPA137.

The record confirms that Hussain gave reports to government agents that violated 18 U.S.C. § 1001(a)(1) by falsifying, concealing and covering up material facts. Hussain gave reports in which he lied about what did happen at his meetings with the defendants, and he covered up the improper ways in which he was pursuing the investigation. These reports, to which the government gave undue weight without any independent investigation, resulted in a prosecution that might otherwise never have been brought, but that Hussain needed for his own purposes. In addition, the government, by failing to monitor Hussain, and by giving him

substantial control over where meetings were held and whether they would be recorded, damaged the defense in ways that simply cannot be repaired. Hussain's conduct, and the government's lack of the least diligence in monitoring it, were truly outrageous.

At the beginning, Hussain told Agent Fuller that when he met Cromitie on June 13, 2008, Cromitie had an Arabic accent. This was false. The only conceivable motive for this lie was to assure that there would finally be an investigation instituted. And it calls into serious question the truth of the rest of the story of that day.

When Agent Fuller heard the first recording of Cromitie, made on October 12 and revealing no Arabic accent, he did not reconsider Hussain's veracity, as he could have. Nor did Fuller notice that Hussain's report of the conversation that day was full of significant lies. A326. Hussain told Fuller that Cromitie spoke about terrorist bombings by Muslims in Islamabad and also that he "suggested the Muslims were doing good things." A4595. In fact, it was Hussain alone who raised the subject and said the bombers were doing "good, wonderful jobs." A322-23; A2779. Hussain also said Cromitie associated with a Muslim who "expressed his hatred of the Jews" and who said that if there were any "problems" with them, to contact him. A4595. This suggested that Cromitie was part of a group of people with interests in violent terror. On the tape, however, Cromitie had mentioned the man but said neither that he

hated Jews nor offered to deal with Cromitie's problems with them. A320; A2781-82.

Hussain's illicit program was to make Cromitie appear more radical than he was. In pursuing this aim, his most offensive lie was reporting that Cromitie expressed the "desire ... to conduct jihad for an Islamic cause." A4595. Nowhere on the tape did Cromitie say that. At most, Cromitie addressed his anger at individual Jews. As to that, he said Allah would take care of it and that Allah had said it was wrong to act violently out of anger. A2777.

In addition, Hussain violated Fuller's order to be "passive" in the conversation. He repeatedly incited Cromitie to engage in jihad, and he omitted these material facts from his report. These violations of orders and concealment of facts constituted violations of 18 U.S.C. § 1001, having the capacity to affect the course of the investigation.

At the next turning point in the case, Hussain again falsely reported what was going on. By December 17, as the court found, the investigation was going nowhere - there was no plan, no target, and Cromitie had done nothing. During December, Hussain kept prodding Cromitie to choose his own "targets," and Cromitie never mentioned Jews, synagogues or Stewart Airport. During the December 17 meeting, however, Hussain finally raised these questions himself. Under Hussain's influence, Cromitie, who had never wanted

to attack Stewart Airport, grudgingly mentioned it after Hussain's prodding. And Cromitie expressed no interest in synagogues, until Hussain raised the subject.

Hussain lied about the events to Fuller. He said, "Upon entering the residence, CROMITIE discussed an unknown synagogue in the Bronx, which would be a good target." A4551. In fact, Cromitie never mentioned any synagogue, until Hussain directly asked him about one much later, and no Bronx synagogue was ever discussed. Id. Hussain tried to beef up Cromitie's hesitant comment about Stewart Airport by telling Fuller the blatant lie that Cromitie said he could see the airplanes from his work and could shoot one down from there. Id. At trial, Hussain conceded Cromitie made no such statement.

These reports to the FBI consistently concealed and covered up what was going on by misleadingly implying that Cromitie was the moving party in real plans to bomb a synagogue or an airport. This was simply not so. As the December tapes show, even when asked for "targets," Cromitie never volunteered these sites until after his friend Hussain had suggested approval of them. Even then, Hussain had to keep reminding him what the "plan" was. Hussain's reports consistently distorted the truth about what was happening.

Hussain further concealed the quite material fact that he was offering outrageous material incentives to Cromitie and the lookouts. He was expected to get authorization for, or report,

such offers, as he did with respect to the alleged \$5000 offers on May 19. But he consistently concealed them. He never received authorization for the financial gifts and promises he made, recounted at pp. 28-32 above, and he deliberately hid the most extravagant ones -- promises of cars, a business, a vacation trip, and a quarter-million dollars -- never mentioning them in his reports. The government did not become aware of these unauthorized inducements until long after the defendants had been arrested.

By January, 2009, some in the FBI questioned the viability of this prosecution. Even Fuller thought it was necessary to get the defendants to buy a gun, as insurance in case the case "went south." A400-402. But, as the district court found, the government did not do "due diligence" to make sure the investigation was well founded, and relied heavily on Hussain's views. Misc.Op., SPA75. Had it been aware of, or cared about, Hussain's lies, concealments, and violations of its rules, it is more than likely that this prosecution would never have been brought.

Finally, the government's failure to monitor Hussain or conduct its own independent investigation compounds the prejudice to the defendants. The government was on notice of Hussain's unreliability as early as October 12, when the tape first showed Hussain's lies. At that point, letting him handle the entire investigation without double-checking his, or Cromitie's, dubious claims was itself reckless. Giving someone who was clearly lying