11-2763

To Be Argued By:
ADAM S. HICKEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2763

UNITED STATES OF AMERICA,

Appellee,

—v.—

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

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

James Cromitie, David Williams, Onta Williams, and Laguerre Payen appeal from judgments of conviction entered on July 8, 2011 (in the case of Cromitie and the Williamses) and September 13, 2011 (in Payen's case), in the United States District Court for the Southern District of New York, following an eight-week trial before the Honorable Colleen McMahon, United States District Judge, and a jury.

Indictment 09 Cr. 558 (CM) was filed on June 2, 2009, charging all defendants in eight counts. Count One charged the defendants with conspiring to use weapons of mass destruction within the United States, in violation of Title 18, United States Code, Section 2332a. Counts Two, Three, and Four charged the defendants with attempting to use weapons of mass destruction within the United States, in violation of Title 18, United States Code, Section 2332a. Counts Five and Six charged the defendants with conspiring and attempting, respectively, to possess and to use anti-aircraft missiles, in violation of Title 18, United States Code, Section 2332g. Counts Seven and Eight charged the defendants with conspiring and attempting, respectively, to kill officers and employees of the United States, in violation of Title 18, United States Code, Sections 1114, 1117, and 2.

Trial commenced on August 23, 2010, and ended on October 18, 2010, when Cromitie and David Williams were convicted on all counts, and Onta Williams and Laguerre Payen were convicted on Counts One through Seven.

On June 29, 2011, Judge McMahon sentenced Cromitie, David Williams, and Onta Williams principally to 25 years' incarceration, to be followed by five years' supervised release. On September 7, 2011, Judge McMahon sentenced Payen principally to 25 years' incarceration, to be followed by five years' supervised release.

The defendants are currently serving their sentences.

Statement of Facts

A. The Government's Case

The defendants were arrested after an eleven-month undercover investigation that began when Cromitie approached a confidential informant in the parking lot of a mosque and said that he wanted to "do something to America" to avenge the treatment of Muslims worldwide and to die as a martyr. After extensive planning and preparation to attack a Jewish community center and synagogue in Riverdale and a military base, reflected in dozens of hours of recorded meetings, the defendants were arrested. Their arrests occurred right after they placed three bombs armed, they thought, for remote detonation, and just before they could travel to Stewart Air National Guard Base, to fire Stinger missiles at military planes. And although the informant played the role of a terrorist recruiter, the investigation established that the defendants were ready and willing participants, predisposed for the asking to commit a terrorist attack on religious centers and a U.S. military installation.

The Government's case at trial consisted principally of video and audio recordings of the defendants' statements and conduct and testimony by two witnesses, a confidential informant ("CI"), Shahed Hussain, who was working for the Federal Bureau of Investigation ("FBI"), and his handler, Special Agent Robert Fuller. Other law enforcement and military witnesses provided corroborating details, such as surveillance videos and photographs of those meetings, which depicted the defendants surveilling their targets and moving the weapons, and expert testi-

mony concerning the probable effects of detonating the intended devices.

1. Cromitie Approaches the Informant

By June 2008, the CI had for several months been attending services at the Masjid Al-Ikhlas mosque in Newburgh, New York. During that time, the CI had met and talked to most of the mosque's attendees and developed relationships with some of them. (Tr. 669-70).* The FBI did not open an investigation on any of those individuals. (Tr. 139-42).

On June 13, 2008, the CI was approached outside the mosque by a group that included a man who introduced himself to the CI as "Abdul Rahman." (Tr. 675). The man, who said his father was from Afghanistan, remarked that the CI was wearing "[his] country's sandals." (Tr. 678). The CI did not know him; only later did he learn that the man's name was James Cromitie. (Tr. 683). The CI offered to drive Cromitie home, and during their conversa-

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* "Tr." refers to pages of the trial transcript after voir dire, beginning on August 24, 2010, unless otherwise indicated; "[Date] Tr." refers to a pre-trial or post-trial transcript of a proceeding taking placing on the date indicated; "A." refers to pages of the Joint Appendix, filed by the defendants; "Sp.A." refers to the defendants' Special Appendix; "GSA" refers to the Government's Supplemental Appendix; "[Name] Br." refers to the brief filed on behalf of a particular defendant on appeal; and "Dkt. No." refers to the docket number of an item filed in the District Court.

tion, Cromitie brought up "the killings of . . . the infidels in Pakistan." The CI asked Cromitie if he had considered traveling to Afghanistan, and Cromitie replied that he would love to, that he wanted "to die like a *shahid*," a martyr. Raising his finger in the air, Cromitie said, "I want to do something to America." (Tr. 681-82; A. 4541). In all his prior encounters as an informant, at that mosque and elsewhere, the CI had never heard anything like that before. (Tr. 2452).

The CI met with Cromitie three more times that summer. Cromitie made clear his hatred of Jews and of U.S. military policies pertaining to Afghanistan and Iraq, which were, in his view, designed to harm Muslims. (Tr. 686). He said, for example, that he wished he could kill the President "700 times," because he was the "anti-christ." (Tr. 686; A. 4545). Subsequently, acting on the FBI's instructions, the CI told Cromitie during one of those meetings that he was a representative of a terrorist group in Pakistan, Jaish-e-Mohammed; he gave Cromitie some information about the group; and he asked Cromitie whether he would consider joining. Cromitie said he would. (Tr. 688-91; A. 4548-49). Based on Cromitie's statements and his apparent seriousness of purpose, the FBI opened a preliminary investigation of him in September 2008 and began consensually recording Cromitie's meetings with the CI. (Tr. 310-11).

2. Cromitie Reiterates Talk of Violence

Between mid-October and mid-November 2008, the CI conducted eight consensually recorded meetings with Cromitie under the supervision of the FBI. Consistent with the CI's descriptions of their earlier, unrecorded meetings,

Cromitie elaborated — sometimes in long, uninterrupted speeches — on his hatred of "infidel" people and governments. For example, during their first recorded meeting, Cromitie complained about slights he received from Jewish people in his hotel that made him "want to jump up and kill one of them." (GSA 12).*

In subsequent meetings, Cromitie told the CI explicitly that wanted to kill Jews and take other violent action. Cromitie had "zero tolerance for people who disrespect Muslims." (GSA 32). Referring to those who would impede the Islamic prerogatives of Muslim Americans like himself — a group Cromitie referred to as those who think of "us as terrorists"— he posited that they would "die trying to take it from us." (GSA 26). Elaborating on this point, Cromitie referred to the terrorist attacks of September 11, 2001 and suggested that Muslims in America were capable of following suit:

> [A]ll these planes and everything . . . they can do it. Believe me. If, if the Muslims was to want the United States down, believe me, we can do it. With the regular Muslims here, all somebody has to do is give a good

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* The Government introduced full-length recordings and rough transcripts of those recordings at trial (which are contained in the Joint Appendix), but it played only excerpts of those recordings for the jury, and the transcripts of those excerpts (indicated by an "E" in the exhibit number) reflected substantial refinement. (Tr. 637-38). The Government's Supplemental Appendix contains the transcripts of excerpts that are cited in this brief.

> *fatwa* to the brothers and let, make sure they understand. You, they taking down our Islamic countries. What do we do to make that stop? So, we start taking something down here. You understand what I'm saying?

(GSA 29-30). Cromitie left little doubt where he stood on his own personal obligation to take violent action for the cause of Islam: "When the call come[s], I'm gonna go, 'Allahu akbar,' and I'm gone. There's nothing no one can do. I'm gonna go all the way. There's no, no turn back." (GSA 38). Moreover, Cromitie claimed that he was part of a violent group of Muslims he called a "sutra team," which purchased guns and trained for jihad. The CI repeatedly asked for information about Cromitie's "sutra team" and wanted to meet the members, though he never did. (Tr. 745-51).

At the FBI's direction, the CI explored whether Cromitie was a person who would act on his violent thoughts, or just the proverbial talker. To do this, the CI probed Cromitie with questions and interposed comments, all designed to stimulate pertinent conversation and reveal the scope of Cromitie's intentions and capabilities. At times, for example, the CI would ask Cromitie whether Jews made him angry (GSA 12), or agreed with Cromitie's hatred of Jews (GSA 17-19), or suggest that Muslims died at the hands of nonbelievers overseas (GSA 8). At one point, the CI asked Cromitie: "[H]ow do you sleep, brother? I mean how do people, Muslims, sleep knowing that the, the cause is there, and, and, and Muslims are being killed?" (GSA 27).

The CI also asked direct questions about Cromitie's intentions. He asked, for example, whether Cromitie was willing to die for "a cause" (GSA 15), and whether Cromitie would perform jihad if Allah asked (GSA 37). Cromitie avoided direct responses but did not shy away from the subject. On one occasion, for instance, he expressed reluctance to answer — "Okay brother, where you going with this?" — but invited future inquiry by suggesting that such a discussion was premature: "you can't learn me in one month"; "some things take time." (GSA 45). Cromitie went so far as to tell the CI not to worry, they were "on the same page." (GSA 46). Another time, Cromitie diverted to more general discussion of his violent past, explaining how he once threatened to bomb a U.S. Army recruiting office in response to comments of a recruiting officer that he perceived to be anti-Muslim. (GSA 52).

3. The Conference in Philadelphia

During their meetings in October, the CI invited Cromitie to be his guest at a conference in Philadelphia sponsored by the Muslim Alliance of North America ("MANA"). Cromitie expressed interest in attending and eventually agreed to go. (Tr. 761-62, 765-66). The conference was held from November 28 to November 30, 2008. (Tr. 181-82; GX 401). The CI drove Cromitie down and back and also paid for his hotel room in Philadelphia. (Tr. 182-83). There was a recording device in the CI's car and in his hotel room, where he and Cromitie had extended discussions on each of their two nights in Philadelphia. (GX 108, 108A, 109).

The recorded conversation on the ride to Philadelphia covered many topics, including Cromitie's claim that he stole guns from Walmart (where he worked) and was moving them to a safer storage place. (GSA 61-62, 64-65). At one point early in the ride, the CI called Cromitie's attention to terrorist bombings of Western and Jewish targets in Mumbai, India, which had occurred just two days before, and he later suggested to Cromitie that Jaish-e-Mohammed, the CI's terrorist organization, was involved in the attacks. (Tr. 776, 786).

Much later in the ride, Cromitie started a subtle conversation about forming a team to carry out an unspecified act of violence. (Tr. 778; GSA 69). Cromitie raised the subject by reflecting on his disagreement with the manner in which some Muslims practiced the religion in America. "We're gonna be in a lot of trouble on the day of judgment," Cromitie said. (GSA 69). When the CI asked why, Cromitie explained, "Because the brothers are doing stuff now that's not Islamic," lamenting that some of the brothers were not properly following Islam, trying to "alter it, change it." (*Id*.). Cromitie, however, considered himself to be part of a group of "real Muslims" who were "not gonna let it happen," even if they had to "go another route." (*Id*.). The CI asked whether Cromitie could do this on his own, and when Cromitie suggested that "one guy" was not enough, the CI said that a "whole setup" was needed for this unspecified endeavor. (GSA 69-70).

Cromitie's agreement led to a discussion of the importance of having a team, a team for which the two key ingredients, as the CI put it, would be "money" and "brains." (GSA 70). Refining the point, Cromitie agreed

that if you have a "listening team" and "if you have the brains and the money, then you can put the team together." (GSA 71). Cromitie added: "The funny thing is, I have the brains. I just don't have the money." (*Id.*). Taking the cue, the CI responded: "The funny thing is I have the money." (*Id.*). They laughed and Cromitie said, "two brains is better than one." (*Id.*). After a short interruption, so that the CI could take a call on his cell phone, Cromitie volunteered: "I got this feeling I'm gonna . . . run into something real big. I'm gonna take it easy. I'm just thinking." (GSA 72). When the CI inquired further, Cromitie said, "I'm just thinking that, I'm gonna try to put a plan together." (*Id.*). The CI asked what kind of plan, to which Cromitie said, "I don't know yet. I'm gonna put a good plan together." (GSA 72-73). The CI responded: "May Allah be with you and Allah find you the way . . . ." (GSA 73). Later that night, when he came to the CI's hotel room, Cromitie suggested that people he knew would be interested in buying weapons from the CI. (GSA 59-60).

The next night — their second in Philadelphia — Cromitie came to the CI's hotel room, told the CI that he wanted to carry out a terrorist operation and identified potential targets, including a synagogue. The conversation started when the CI asked whether Cromitie "and [his] team" ever thought of "doing something here" in the United States. (GSA 76). Cromitie said, "Listen, my team never think of that. I do." (GSA 77). He said he was "way ahead" of the CI, and that he (Cromitie) had been "wanting to do that since [he] was 7." (*Id.*). Cromitie wanted to set an example because America was "still trying to play us [Muslims]," and gave a warning: If "you don't want to calm down, America? Okay. Maybe we need to give you

something else. This time a little bigger." (GSA 93). Cromitie said he wanted to "do bigger now" than an "ashcan" bomb — an explosive strong enough to "blow out half of that wall," which he claimed he long ago got away with throwing into a police precinct in the Bronx, while "a thousand people" walked down the street. (GSA 86-87). The CI asked whether an imam would provide a fatwa to sanction the operation; Cromitie gave a disjointed response but implied someone would. (GSA 89-91). Cromitie added, however, that either way he was going to "make some type of some noise . . . to let them know." (GSA 91). Although Cromitie said that he did not want anyone to die in the operation and that he "would feel sorry for the innocent ones," sometimes "shit happens." (GSA 99).

The CI asked Cromitie to identify the targets he wanted to hit, to which Cromitie responded that the "best target was hit already," presumably referring to the World Trade Center; he then settled on the White House. (GSA 84). When the CI asked what targets Cromitie preferred in the New York area, Cromitie said he always wanted to "hit the bridge" between New York and New Jersey. (GSA 84-85). The CI was skeptical, saying, "You can't take a bridge down with a rocket launcher." Cromitie responded: "Don't judge the book by its cover. Don't never say, of course not, you can't take the bridge down." (GSA 86). Later, as they watched television coverage of the aftermath of the Mumbai attacks, the CI pointed out that a Jewish center was bombed, prompting Cromitie to comment:

> The Jewish guy. Look at the Jewish guy. You're not smiling no more, you fucker. I

> hate those bastards. I, no disrespect, but I ain't never thought I can hate someone. I hate those motherfuckers. Those fucking Jewish bastards. . . . I'd like to get one of those. I'd like to get a synagogue. Me. Yeah, personally.

(GSA 103). Cromitie said that if the CI got the equipment, his team would make something happen. (GSA 94). He also expressed interest in joining the CI's organization, Jaish-e-Mohammed. (*Id*.)

The CI warned Cromitie that he should not go forward with an operation unless Cromitie wanted to do it. (GSA 96). He also warned Cromitie that any brothers recruited by Cromitie should participate only for the cause of jihad, and not for any money they might be paid by his terrorist organization; to emphasize the point, the CI exclaimed that this would be "for jihad." (GSA 96-97). Cromitie said that the CI did not have to give him a "damn dime" to do this. (GSA 98).

4. The December Meetings

In December 2008, upon their return from Philadelphia, the CI conducted three consensually recorded meetings with Cromitie, during which they started to plan a terrorist operation. Cromitie's will to carry out the attack was clear, but his ambition was not matched by the operational skill to plan it. As Cromitie himself recognized, if he was "going to be the commander" of the operation, he would "need a lieutenant" to put the nuts and bolts together. (GSA 126).

During those meetings, Cromitie and the CI discussed the weapons that they could use, including bombs made with C-4 explosives, which the CI said he could acquire from a contact in Connecticut. (GSA 117). Cromitie once asked, "how far does a rocket launcher hit?" and was pleased when the CI said approximately 300 yards, because Cromitie deemed that sufficient range to permit a clean getaway. (GSA 121-122).

They also discussed targets. Cromitie mentioned an oil refinery in Liberty, New York, and recalled previously thinking that if he were to "blow that place, the President would be pissed . . . off." (GSA 116). Cromitie preferred something "huge" in Manhattan, like the United Nations or the Pan Am building, or a football stadium. (A. 3486-87; GSA 117). When the CI suggested finding a "military target," Cromitie thought of the military base at Stewart Airport, where there were "some big [military] planes" and "regular people in regular clothes" can "walk on that base." (GSA 141). But the "synagogue thing" was Cromitie's preference, and he did not "give a fuck if a bunch of Jews are in there" when he "let [the bomb] off." (GSA 149).

Cromitie's chief concern was not getting caught, or as he termed it, his and his team's "safety." (A. 3430-33; GSA 121, 138). Cromitie and the CI agreed that "safety" was contingent on having a good plan and recruiting a good team. (GSA 142). Cromitie was not immediately successful on either front, however. With respect to recruiting, Cromitie reached out to a number of Muslim "brothers" who were unwilling to participate, even when Cromitie offered them money from the CI's terrorist

organization. (GSA 145-47; Tr. 816). The CI pressed Cromitie to recruit others, explaining that it would be difficult for Cromitie to carry out the operation by himself. Cromitie understood, but described how people would "freeze" on him — meaning that "brothers" who were always ready for a street fight would shy away from something of this magnitude and personal risk. (GSA 132). Cromitie's attempt to recruit one person, named Haroon, was particularly unsuccessful, resulting in Cromitie being threatened by one of Haroon's relatives — and cursed at by his mother — for trying to recruit Haroon to "terrorist acts." (Tr. 811-12; A. 3461-64, 3467-73, 3480).

Nor was Cromitie able to craft an operational plan, despite his expressed desire to participate in one. The FBI wanted to see whether Cromitie could devise a plan on his own, so the CI was, at first, passive on the subject — offering, for example, "if you think you can make a good plan . . . I can hear that. I can go with that plan." (A. 3420). But, while Cromitie assured the CI that he was trying to make a plan, he provided no coherent operational steps forward. (GSA 126, 127). The CI was left to ask, "where do we go from here brother?" and what he should tell Jaish-e-Mohammed, the terrorist organization. (A. 3493; GSA 133-34).

Cromitie's confidence waned to the point of wondering whether this was really his "mission," and he admitted to the CI that he even sold two ounces of cocaine, which they had previously agreed Allah forbids. (A. 3504, 3507). The CI remained passive. When Cromitie said he was going to try "one more move," the CI said: "It's up to you brother. It's your game, brother. It's your ballgame, brother." (GSA

135). Cromitie conceded that he might have to drop the whole thing, and the CI said that would be "perfectly fine." (GSA 136-37).

Cromitie continued to meet with the CI, however. The FBI told the CI to suggest operational steps to help assess whether Cromitie lacked the will to go forward or simply the capacity to design the plan. (Tr. 186-87). The CI suggested to Cromitie that they do operational surveillance of potential targets, and Cromitie not only agreed that he "need[ed] to scope out some places," but he also specifically suggested they "go to that Stewart Airport and ride around and see." (GSA 141-42).

The surveillance did not go forward as planned, however, because the CI left the country for personal reasons. The CI told Cromitie that he had to go to Pakistan to inform Jaish-e-Mohammed about Cromitie's operation and that he would return in a matter of weeks. (Tr. 819). However, the CI would not return to Newburgh until late February 2009.

5. The First Surveillance at Stewart Airport

In late February 2009, the CI met with Cromitie on successive days. On the first day, Cromitie overcame second thoughts about the operation that had arisen during the CI's absence, and on the second day, they performed operational surveillance at Stewart Airport. Their interactions on both days were consensually recorded. (GX 114, GX 115, GX 115A).

At first, Cromitie was deflated. When the CI asked Cromitie whether he still wanted to attack a synagogue,

Cromitie said that he figured everything had gone "down the drain" when the CI did not return as scheduled. "I just dropped everything," he said. (GSA 152). But Cromitie was not having moral qualms about the operation: movies he had been watching, which he believed had unfairly portrayed Muslims, made him "want[] to do everything," including an attack to teach the Jews a lesson: "That's mine," Cromitie said. (GSA 150-51).

Cromitie still believed a team was required, but he was now afraid to approach people about the operation. "I don't even ask nobody about that no more. 'Cause I don't wanna ask the wrong person. . . . But, we need somebody else. Do you have somebody else?" he asked the CI. (GSA 156). Cromitie complained that the people he knew were not up to the task at hand, and he asked the CI whether associates from Jaish-e-Mohammed could come to America from Pakistan, to work in the plot. (GSA 162). The CI discouraged Cromitie from thinking that was possible but told Cromitie that he would be "rewarded in both ways" for the operation, by which he meant spiritual fulfillment from Allah and financial support from the CI's terrorist organization, Jaish-e-Mohammed. (GSA 158; Tr. 822).

After about 30 minutes of conversation, Cromitie agreed to go forward with the surveillance, as he had six weeks before, even if it meant going forward with the operation alone, although that was not his preference. (GSA 163-64). Cromitie made a point to say that he had not been "enticed" by the CI, and that the decision to move ahead was his and his alone:

> You can't make me do anything . . . . I mean, you're my brother. I love you, but you can't make me do anything. . . . So this right here, if I'm doing something, it's because I wanted to do that for so long, myself, because I know it a be right. You understand? So you have nothing to say about that. Before I met you, I already told you already. . . . So you have, you didn't cause anything. When on the day of judgment, Allah wanna say, "Ah, yes[,] Maqsood, you enticed Abdul Rahman to do that." No! I would be the truth on that day. No! You gave me my own will. You gave me my own mind setting, Allah. "I did that on my own. See? . . . . I will say [to Allah] I did it on my own. He [the CI] just helped me when I asked for it." And I did it for you [Allah]."

(GSA 166-67). But when the CI pressed Cromitie to come up with a plan, as he had in December, Cromitie pushed back: "Maqsood, you just got back here," he said. "Slow down for a second," he told the CI. "Breathe! . . . I need you to breathe." (GSA 168-69). They finalized a plan to conduct surveillance the next day, however, and the idea of attacking planes while they sat on the tarmac at Stewart Airport excited Cromitie. (GSA 170-71 ("I wanted to see that place," he said. "That'll be a real firework. I'm laughing because I really wanna get away with it.")).

The next day, the CI drove Cromitie around the perimeter of Stewart Airport, showing Cromitie where the

military planes were located as they discussed ways to blow them up with Stinger missiles. Cromitie took pictures with a camera that CI had purchased for him at Walmart. (Tr. 827, 840). He was excited about the prospect of attacking the planes he saw at the airport, and resolved to ask another man to be a lookout. (GSA 174-78). Cromitie suggested to the CI that he would offer up to $25,000 for a friend of his, a man named "Chase," to be a lookout. (Tr. 841; GSA 176). But Cromitie was also obviously still nervous about getting caught. (GSA 176 ("You know, that's the whole key, don't do it if you're worried.")).

6. Cromitie's Six-Week Disappearance

On the morning of their surveillance at Stewart Airport, Cromitie had told the CI that he would be going away for a period of about a month to work in a Walmart in North Carolina. (Tr. 826). And notwithstanding his excitement during their meeting, Cromitie avoided the CI for weeks thereafter. He cancelled their appointment to conduct more surveillance, telling the CI to "[J]ust ease," and the CI responded, "As you wish brother . . . whatever you say." (GSA 500). Cromitie stopped returning the CI's telephone calls, feigning that he was still out of state. (Tr. 844-48). However, based on a court-ordered wiretap on Cromitie's phone, the FBI knew Cromitie was still in Newburgh, dealing marijuana and small amounts of cocaine. (*E.g.*, GSA 502). Initially, Agent Fuller sent the CI to look for Cromitie, either at the mosque or at Cromitie's house. But Cromitie was persistently evasive (and even had his girlfriend pretend to be unable to reach him). (GSA 501). When the CI managed to reach Cromitie by phone through his girlfriend on March 18, Cromitie

assured the CI he would be back in Newburgh in a week or so. (A. 4483). The CI left Cromitie a voice mail message on March 20, but then, at the FBI's instruction, stopped trying to reach him. (GX 508; Tr. 445-46, 2498-2500). Two weeks then passed without contact between the two men — the longest since their surveillance on February 24.

On April 5, 2010, Cromitie called the CI. During the call, Cromitie made excuses for being out of touch and said he was meeting his girlfriend's cousin, a man named "Des." Then, the following exchange occurred:

CROMITIE: Yeah I have to, I have to try to make some money brother.

CI: I told you, I can make you 250,000 dollars, but you don't want it brother. What can I tell you?

CROMITIE: Okay, come see me brother. Come see me.

CI: So when? When?

CROMITIE: When you want to come and see me?

CI: Yeah, you have to tell me the time, because when I come there, you're not, not there, you know.

They agreed to meet two days later, on Tuesday, April 7. (A. 4484-87). At trial, the CI explained that Cromitie's reference to meeting "Des" revealed that he was selling drugs to make money and that when the CI mentioned $250,000, he was referring to the cost of the operation,

alluding to their discussion, months earlier, that the September 11 attacks cost $500,000 to plan. (Tr. 850, 2513-14; GSA 129).

At their meeting two days later, the CI chastised Cromitie for his disappearance. He told Cromitie that Jaish-e-Mohammed had secured the weapons for the operation and that they were "packed and ready." (GSA 179). The CI said he had given his brothers in the organization his word that the operation would go forward, and the CI suggested that his life would be in danger if the plan went astray. (GSA 181). The CI then asked Cromitie directly, "Can we do it, or can we not do it?" (*Id.*). Cromitie remained concerned about getting caught and emphasized the need to "get in . . . and get out." (GSA 182). They discussed the need for a concrete plan and additional people to serve as lookouts. (GSA 183-84). At various points, however, Cromitie suggested that perhaps he would undertake a smaller operation by himself, blowing up a synagogue, even if it were filled with men. (GSA 180, 182, 189). Cromitie explained to the CI that the attack on the World Trade Center "was nothing," compared to a surprise attack on "spots like synagogues." (GSA 186). By then end of their meeting, Cromitie had recommitted himself unequivocally, stating that "this conversation [is] finished," and agreeing to perform surveillance of synagogues with the CI later that week. (GSA 194).

7. Cromitie Finds His Lieutenant

Later that same day, Cromitie told the CI over the phone that he had something important to discuss when they next met, and he obliquely suggested he had found

another member for their team, his "Muslim brother," a man named "Daoud," although he would not say more over the phone. (A. 4490). On April 10, 2009, when the CI arrived to pick up Cromitie to perform surveillance of synagogues, Cromitie introduced the CI to "Daoud," the defendant David Williams. (Tr. 867-68). An intercepted call between the two men revealed that Cromitie had met David Williams no later than March 22, 2009. (GSA 509).

All three men drove to the Riverdale section of the Bronx (a neighborhood selected by the FBI), where they cased and photographed two potential targets on the same street: the Riverdale Jewish Center and the Riverdale Temple. (Tr. 872, 875-77; A. 4528 (surveillance photograph)). Although there was no explicit discussion of the purpose of their trip, David Williams expressed neither surprise nor concern as Cromitie and the CI took photos of synagogues, and Williams himself referred to the potential targets as "joints." (Tr. 872-73, 876-77).

The CI and Cromitie did not meet again with Williams until April 23, 2009, because Williams was briefly detained on a criminal charge for an unrelated offense. (Tr. 882, 886). At the second meeting, Williams said he understood "this is jihad." (GSA 218). The CI explained that their activities were funded by his terrorist organization, Jaish-e-Mohammed. (GSA 219-20). The CI also took pains to clarify that, although David Williams would be compensated for his participation, including, for example, with money that would allow him to flee the state after the operation, the CI was only looking for men who were committed to jihad, not those who were only doing it for the money, and Williams stated that he understood this

from Cromitie. (GSA 219 ("I understand perfectly . . . He told me," referring to Cromitie.)). When the CI asked Williams whether he had any questions, he replied, "It's for Allah, so there's nothing really I can say." The CI and Cromitie both assured Williams that he was free to leave anytime he wanted. (GSA 223).

The discussion then turned to the operational plan, and David Williams and Cromitie bumped fists when the CI described the range from which the IEDs could be detonated. (GSA 225). When Cromitie suggested that David Williams would not need to worry about the Stinger missile and the planes, because the CI and Cromitie would handle that, David Williams contradicted him and suggested he wanted to be involved with that aspect of the plot, too. (GSA 225-26). When the CI suggested they could either leave town or stay in Newburgh after the operation, both men unequivocally said they preferred to stay. (GSA 226-27).

Cromitie said they would be better off "if we could get one more man." (GSA 227). When Cromitie bragged about being able to recruit David Williams by himself (and suggested that the CI ought to recruit someone else from the mosque), David Williams interrupted to make a point of how easy it was for Cromitie alone to recruit him. (GSA 237). Cromitie admonished the other men to think about their mission like a job, "as it's every day going to work," and he suggested they visit Stewart Airport again, to case that target. (GSA 230-31, 238).

The next day, April 24, 2009, David Williams accompanied the CI and Cromitie to Stewart Airport to conduct operational surveillance. When the CI parked at the spot

that he and Cromitie had selected for shooting the Stinger missile at the military planes, Williams asked Cromitie for the camera, took a series of pictures of the planes, contemplated the setting, and then announced that the spot was no good. (GSA 240-42). Williams explained why the spot was not "safe," *i.e.*, why they would get caught there, and described why the missile should be fired from the other side of the runway. (GSA 241-47). Cromitie quickly agreed. (GSA 246). The CI drove to another spot in the general vicinity that Williams preferred (one of several spots preselected by the FBI), and everyone agreed that the new spot was perfect. (GSA 253, 267).

Williams also focused on their getaway plan. (GSA 252). As they timed the drive from the new spot, Williams noticed a Marriott hotel and suggested that they get rooms to hide out there after the attacks. (GSA 256). Cromitie liked the idea. (GSA 256, 267-68). Williams compared the two parts of the operation, seeing the synagogue attack as "smooth," but referring to Stewart Airport as the "tricky one." (GSA 262). During their meeting, David Williams made a number of other observations geared toward operational security, for example, that the airport's control tower was probably staffed 24 hours daily after the attacks of September 11, 2001 (GSA 243); that they should use a "hoopty" (an old car that could be abandoned without being missed after the operation) rather than a rental car, because "somebody gonna have to put their name on that rental" (GSA 260-61); and that they should stage a lookout down the road at the airport, near the Marriott hotel, to alert them if the police were coming (GSA 263).

8. Cromitie Forms the Full Team

In less than a week, Cromitie and David Williams recruited two others to the plot, their co-defendants Onta Williams and Payen (*see* GSA 512 (David Williams to Cromitie: "[C]all Maqsood. Tell him I got the other brother. . . . I got my Muslim brother. . . . I got another brother. You know what I'm saying? That's with it," referring probably to Onta Williams), and on April 28, 2009, Cromitie introduced the two new members of the team. (GXs 121, 121A). All four defendants, and the CI, met that evening to discuss the plot. (A. 3967-4062). In the hour-long meeting, mostly Cromitie spoke, describing the operation, why they would be safe, and why, in his view, it supported the cause of Islam. (*E.g.*, GSA 280, 289-90). The oration was designed to convince the two new recruits to join the team, but it also explicitly provided that either man was free to leave if he wished. (GSA 286). David Williams spoke at various points in the meeting, mainly with respect to operational details, and the CI was largely silent, except for an occasional interjection about the plot and a longer explanation of his connection to Jaish-e-Mohammed. (GSA 288-89). By the end of the meeting, all defendants understood they would be bombing two Jewish targets in Riverdale and shooting Stinger missiles at military planes on the tarmac at Stewart Airport. (GSA 286-87). While there were questions about the plans, no defendant expressed moral uncertainty about going forward or doubt about the purpose of the mission, which was, as Cromitie described, to "send a message"; and no one flinched when the CI said he represented a Pakistani-based terrorist organization committed to waging violent jihad against America in retaliation for the treatment of

Muslims overseas. (GSA 288-89).

During the meeting, Onta Williams listened intently and studied maps of Riverdale and Stewart Airport that were laid out in front of him. (GSA 294, 300, 302). At one point, he disagreed with the notion of fleeing to the hotel after the attack at Stewart Airport ("[T]hat's the first place they gonna go."). (GSA 304). And at the end of the meeting, when asked what he thought, Onta Williams concurred with the plan:"[A]s long as the people doing what they supposed to be doing, keeping the brothers' heads up, you shouldn't have no problems at all." (GSA 309). During the same meeting, Payen concentrated on his own role as lookout, asking questions and repeating the code words he was responsible for, and occasionally making suggestions. (GSA 281-82, 297-98, 311). Later, as the CI drove Payen to his home, he asked whether the defendant knew that this was a jihad operation and that it must be kept secret; Payen answered in the affirmative. (*See* GSA 312 ("I know. I know what time it is.")).

9. Defendants' Efforts to Acquire Handguns

Early in the investigation, Cromitie claimed he owned and sold firearms. (GSA 39, 64-65). Following instructions from Agent Fuller to seize opportunities to take contraband off the street, the CI offered to buy whatever guns that Cromitie had for sale, and he asked Cromitie to ask to find guns for sale by others, which, the CI said, they could use for their operation. (Tr. 756, 843-44; GSA 67; GX 216-T). All four defendants would try to set up gun deals; David Williams succeeded.

On April 23, 2009, when the CI met with David Williams for the second time, the CI asked Williams and Cromitie whether they wanted to carry a handgun during the operation. Cromitie was not sure, but Williams did. (GSA 235). The CI then asked Williams whether he could get three guns, and Williams said he would "go see him today," referring to a gun dealer. (GSA 236). On April 30, 2009, Williams drove with the CI and Cromitie to Brooklyn, where Williams took $900 of the CI's money from Jaish-e-Mohammed, went into an apartment building, and came out with a Lorcin 9-millimeter semiautomatic pistol and five 9-millimeter bullets. The CI took the gun and gave it to the FBI. (Tr. 215-20; 961-72; A. 4522; GSA 332-34; GX 441 through GX 442). When, for example, the CI had expressed concern about the transaction and, at the FBI's instruction, nearly cancelled the meeting, and when, the CI insisted they leave after the dealer shorted them by providing only one gun, rather than wait for the second one, Cromitie and David Williams both complained that he was not trusting their judgment. (Tr. 964-65; GSA 324-26, 329, 336-39).

Payen attempted to set up gun deals from the moment he joined the team on April 28, 2009. On April 29, 2009, he called Cromitie to say that he had found a potential seller. (GSA 514). On May 1, 2009, he took the CI to an apartment of a person whom Payen said was willing to sell guns, but there was no answer when they knocked on the door. (Tr. 977-78, 1007). On April 28, Onta Williams got into the back seat of the CI's vehicle, and before even being introduced to the CI, Onta Williams made a call on his cell phone to buy guns, saying he needed "two of them ASAP." (GSA 323). Cromitie had tried to buy guns

throughout the investigation. He told the CI he had lined three guns up for purchase right before the CI unexpectedly left town in December 2008 (A. 3591); in February, he called associates to ask if they knew where he could buy a gun (GXs 214-T, 215-T, 219-T, 220-T); and as late as May 15, Cromitie tried to buy three guns from another potential seller (Tr. 1031-33).

10. Additional Surveillance at Stewart Airport

On May 1, 2009, the CI drove the four defendants to Stewart Airport to conduct more surveillance. (Tr. 975, 978). Onta Williams and Payen saw for themselves the hill that David Williams and Cromitie had previously chosen as the location to shoot the Stinger missiles from, and all four defendants agreed that was the best location. (Tr. 978-79). During their surveillance, Payen kept a lookout for the police. (Tr. 979). Then the group tested how quickly they could escape to the Marriott hotel, where they planned to hide right after the attack. (Tr. 979). Onta Williams and Payen also saw the nearby intersections where they would be posted as lookouts. (Tr. 980). After the surveillance, they met at the CI's undercover residence to review the plan in detail during a meeting that lasted more than an hour. (Tr. 982; GX 123). During that meeting, David Williams and Cromitie discussed putting nails in a homemade bomb and the sounds they would make, zipping through the air, after the bomb exploded. (GSA 343).

11. Securing the Weapons

On two separate days in May, the defendants drove

with the CI to Connecticut to acquire the "weapons" for the operation: three bags containing improvised explosive devices ("IEDs") — comprised of a total of 112 pounds of inert C-4 explosive and ball bearings — and two Stinger surface-to-air missiles ("SAMs") with night-vision scopes. (A. 4519, 4520; Tr. 2748-49, 2754-56). The CI said the devices were provided by Jaish-e-Mohammed, but they were actually from the FBI and fully disabled. (Tr. 224-28, 1006). The devices were waiting for pick-up at a warehouse in Stamford that the FBI had pre-selected, and the CI and defendants transported them to, and placed them in, a storage locker in New Windsor, New York (also pre-selected by the FBI), for safe-keeping until the day of the operation. (Tr. 224-28).

Specifically, on May 6, 2009, the CI drove Cromitie, David Williams and Payen to the Stamford warehouse to pick up the three IEDs and one SAM. (Tr. 989-97). Inside the warehouse, the CI taught the three defendants how to operate the weapons. Cromitie and Payen took turns with the SAM on their shoulder, in firing position, as the CI explained the steps necessary to launch the missile. (GSA 370-82). Then the three defendants helped load the weapons into the CI's vehicle and off-load them into the storage unit in New Windsor. (A. 4523-24; Tr. 1002-05). After securing the weapons in the storage unit, the defendants celebrated, hugging each other and the CI, and chanting "Allahu Akbar." (Tr. 1004, 2524).

When they met with Onta Williams later that night, Payen explained how to fire the Stinger missile; he and Cromitie also bragged about how eager they were to handle the weapon. (GSA 368-69; Tr. 1006-07). Three

days later, on May 8, 2009, the CI showed Onta Williams the weapons and demonstrated for him (and again for the other defendants) how to operate the IEDs and the SAM. (Tr. 1027-30; GSA 385-87, 402, 409-12). At the same time, the defendants expressed excitement over the fact that ball bearings were contained in the IEDs and over the sheer quantity of C-4 explosive. (GSA 409-11).* During their discussion, Cromitie said blowing up the buildings in the Bronx was "a simple job"; he was more worried about the "planes." David Williams agreed. (GSA 396 ("That's what I'm worried about. . . . I don't care about the city thing.")). Onta Williams concurred, saying, that the Bronx building operation was "adolescent." (*Id.*). That night, they agreed that the attacks would take place on May 20, 2009. (GSA 413-15).

At the end of the meeting, Cromitie made a request on behalf of the group: for "rent money" that would save them from being "put out of [their] house[s]" before the operation. However, Cromitie emphasized that the operation was "not about money. It's about Jaish-e-

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* As proof of the would-be consequences of the defendants' intentions, the Government introduced evidence of a demonstrative test of devices identical to the ones the defendants thought they would detonate, comprised of 30 bricks of C-4 explosive and a fragmentation sleeve. (GSA 411-13). Expert testimony, a few still photographs, and a video recording of the test established the size and scope of the explosion and the lengths to which debris would have been thrown. (Tr. 2759-68; GX 321 through GX 331).

Mohammad." (GSA 417-18; *see also id.* ("I ain't asking for no ten thousand dollars")). Cromitie argued that he should be paid something, however, given the amount of time and effort they were putting into the operation, when he could be working a different job, like selling marijuana. (GSA 418). Cromitie, David Williams, and Payen all argued that they were taking a great risk in helping the CI and his organization, because they could be caught and unable to support their families. (GSA 419-20).* The CI said he would talk to the members of his organization and get back to them. (GSA 420). After discussing their request with Agent Fuller, on May 19, the CI then told the defendants that they would be paid $5,000 each after the operation was completed, and they accepted this proposal. (Tr. 1018-19, 1032-34).

On May 13, 2009, all four defendants traveled with the CI to Riverdale, to conduct operational surveillance of the two targets there, and then went to Stamford to pick up the second SAM, before returning to New Windsor, to secure it in the storage locker. (Tr. 1022-24, 1027-30). During the recorded meetings, they discussed the logistics of the operation and the roles of the look-outs (GSA 424-37,459-61); the timing and greater risk

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* For example, Onta Williams stated, "I'm doing it for the sake of Allah. I mean, the money, the money helps, but I'm doing it for the sake of Allah." The money was for "bills," "to take care of . . . normal lives." (GSA 420). Cromitie said he would do it for free, and David Williams agreed, but Cromitie wanted to "make sure my family alright while I'm doing it." (GSA 421).

of the Stewart Airport operation (GSA 438-56); and how to use the Stinger missiles (GSA 457-58). During the entire time the defendants were handling, transporting and learning how to operate the IEDs and SAMs, not once did any of them hesitate or express uncertainty about moving ahead with the plan.

12. The May 20, 2009 Operation

As referenced above, the defendants and the CI had selected May 20, 2009, to be the date of the operation. (GSA 414-15). The night before the operation, the CI took the defendants out to dinner, and at that point specified that each defendant would receive $5,000 from his terrorist organization after the operation was concluded; each accepted that offer without complaint. (Tr. 1035-37). After dinner, they conducted a final surveillance of the Stewart Airport and then returned to the CI's undercover home to review the operational plan for one last time. That meeting was largely run by Onta Williams, who, among other things, changed where the lookouts would wait near the airport. (Tr. 1033-42; GSA 462-79).

In the early evening of May 20, 2009, the defendants drove with the CI to the New Windsor storage unit, where they picked up the three IEDs, and headed to Riverdale. (GX 128). During the conversation in the car ride, which was recorded, there was not much conversation among the defendants. (A. 4438-81). In Riverdale, David Williams was the first to get out of the CI's vehicle, at his predetermined lookout location near the corner of Independence Avenue and 246th Street (A. 4517), followed by Onta Williams and then Payen at their respective locations farther south on Independence Avenue, near the Jewish

Community Center (Tr. 1048-49, 1201-03; GSA 1). The CI then circled the car back to 239th Street, where he stopped. (Tr. 1203). Only Cromitie was with him at this point, along with the three IEDs. (Tr. 1203). The FBI had parked cars on the street in front of each target location. (Tr. 1201-03). The CI had the keys to those cars, a Pontiac and a Mazda, and he gave the keys to Cromitie. (GSA 488-89). According to the predetermined plan, Cromitie took one of the IEDs and placed it in the trunk of the Pontiac car, parked in front of the Riverdale Temple. (A. 4606). Cromitie then returned to the CI's vehicle, got the other two IEDs, and placed them in the back seat of the Mazda, which was parked in front of the Riverdale Jewish Center. (A. 4518; Tr. 1207; *see generally* Tr. 1041-51, 1201-08; GSA 480-96).

Cromitie, Onta Williams and Payen all got back into the CI's vehicle. (Tr. 1208-09). At that point, the defendants expected to pick up David Williams, who was one block away, drive to New Windsor to get the SAMs, and go to Stewart Airport to fire the SAMs at military airplanes while remotely detonating the IEDs. (Tr. 1209). Instead, at that moment, the defendants were all arrested. (Tr. 1208-10).

B. The Defense Case

Cromitie's counsel called two witnesses. The personnel manager at Walmart, where Cromitie had worked, testified that Walmart stopped selling long guns (rifles or shotguns) in 2006, *i.e.*, long before Cromitie said he had stolen guns for resale, and that Cromitie stopped showing up to work without explanation on February 18, 2009 (around the time intercepted calls described above showed active drug

dealing) and was fired two weeks later for "job abandonment." (Tr. 3036, 3039-41). Cromitie's neighbor, Jose Sanchez, also testified that Cromitie had sold him the camera that the CI had purchased to conduct surveillance in February. (Tr. 3054-55).

C. The Charge, Deliberations, and the Verdict

On September 29, 2010, when the Government rested its case, the defense moved under Rule 29 for a judgment of acquittal, on the ground that the record revealed entrapment as a matter of law. (Tr. 2998). The Court denied the motion, finding that the issue raised questions of fact suitable for a jury. (Tr. 3009-11).

On September 30, 2010, the defense rested. During the charge conference that day, the Government objected to various aspects of the District Court's instructions, including its instruction advising the jury that it could reject all of a witness's testimony if it found it false in any material respect. (Tr. 3080-81, 3464-65). The defense objected to the Court's entrapment charge, principally because it did not include the following language regarding "positional predisposition" drawn from a Seventh Circuit case:

> [I]n determining whether the government has proved predisposition beyond a reasonable doubt, you should consider whether the defendant was so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to

> commit the crime some criminal would have done so.

(Tr. 3114-23, 3498; Dkt. No. 148). The government opposed that language. Although the District Court rejected the defense's proposed language, it did advise the jurors that the "present physical ability" of a defendant was relevant to the question of predisposition, and they could consider it. (Tr. 3488).

After closing, the jury was charged and began its deliberations on October 6, 2010. (Tr. 3501). The jurors deliberated for eight days, over nearly two weeks, sending a number of notes with questions. As discussed in more detail below, on the third day of deliberations, October 8, 2010, the jury alerted the District Court that it had discovered in some of its binders two transcripts of telephone calls that were not in evidence, GX 290.1-T and 290.2-T (A. 4512-16). The District Court questioned the jurors in open court before sending them home for the weekend. (Tr. 3593-3639). The defendants moved for a mistrial over the weekend, and the Court denied the motion, finding that the potential for prejudice was slight, given the contents of the transcripts and the jury's limited exposure to them, and that any prejudice could be cured with an instruction. (Sp.A. 37-60 (Decision and Order Denying Defendants' Motions for a Mistrial, Dkt. No. 145 (Oct. 14, 2010)); Tr. 3642). The District Court did, however, excuse one juror who indicated uncertainty about her ability to follow the court's instructions to disregard those materials. (Tr. 3654, 3668). The remaining eleven jurors deliberated nearly another week before reaching a verdict on October 18, 2010. (Tr. 3704-14).

D. Post-Trial Motions and Sentencing

After trial, the defense moved to set aside the verdict and for a judgment of acquittal or, in the alternative, for a new trial, on grounds there was insufficient evidence of predisposition, that the government failed to correct what it called the CI's perjury, and because of the jury's exposure to extraneous material. The defendants also renewed its pre-trial motion to dismiss the indictment on the ground of outrageous government misconduct. (Dkt. Nos. 157-60).

The Court denied the motions in two written opinions. The Court found that the evidence was "more than sufficient to establish Cromitie's predisposition beyond a reasonable doubt," including evidence that the basic idea of a terrorist plot originated with Cromitie and his statements to the effect that he had been wanting to do something violent in that vein long before he met the CI. *United States* v. *Cromitie,* No. 09 Cr. 558 (CM), 2011 WL 1842219, at *5 (S.D.N.Y. May 10, 2011). As to the other three defendants, David Williams, Onta Williams, and Payen, the District Court found that there was sufficient evidence of the "readiness" of their response to the inducement to commit jihad for a jury to conclude they were predisposed, because of the circumstantial evidence that they quickly accepted the proposal to commit the charged crimes and because of how enthusiastically they accepted it. *Id*. at *19-21,*23-24.

Although the District Court found, over the Government's objection, that the CI had committed perjury at trial, it "disagree[d] . . . that the Government failed in its obligation to be candid with the jury and the court." (*Id*. at

*25). To the contrary, the District Court found no indication of prosecutorial misconduct. (*Id*. at *26-*27). It found, not only that the jury was sufficiently apprised of what the District Court called the CI's lies, but also that, "on the one and only point that mattered — predisposition — [the CI]'s credibility ended up being immaterial," because recorded evidence established the defendants' predisposition. (*Id*. at *27). Finally, as to the jury's exposure to extraneous material during deliberations, the District Court denied the new trial motion for the reasons stated in is prior decision. (*Id*. at *28).

In a second opinion addressing the motion to dismiss the Indictment, the District Court "eas[ily] conclude[d] that the Government committed no outrageous misconduct." *United States* v. *Cromitie,* 781 F. Supp. 2d 211, 221 (S.D.N.Y. 2011). It also found that "[n]o view of the evidence, even the one most favorable to the defense, supports a finding of undue pressure or duress." *Id*. at 223. As the District Court reasoned, the defendants "participated willingly and enthusiastically in a plot to commit unimaginably heinous crimes rooted in bigotry and hatred — crimes that would have resulted in the loss of innocent life and the unwarranted destruction of property had they been real. Cromitie participated in that activity of his own free will, and he equally willingly procured the participation of others." *Id.* at 226. As to the other defendants, "[n]ot a scintilla of evidence suggests that [they] were coerced, pressured or manipulated." (*Id*. at 228).

Following an investigation, the U.S. Probation Office issued pre-sentence investigation reports reflecting a total adjusted offense level of 43, a criminal history category of

VI, and a Guidelines sentence of life imprisonment for each defendant. The Probation Office recommended sentences of 35 years for David Williams, Onta Williams, and Payen, and 40 years for Cromitie. The defendants challenged a number of aspects of the Guidelines calculations and also moved the District Court to sentence below the mandatory minimum term of imprisonment of 25 years, applicable to Counts Five and Six, based on theories of sentencing entrapment and sentencing manipulation. (Dkt. Nos. 177, 180, 181, 182). The District Court issued two written decisions rejecting the defense's challenges to the pre-sentence reports, *see United States* v. *Cromitie*, No.09 Cr. 558 (CM), 2011 WL 2693293 (S.D.N.Y. June 29, 2011), and denying defense motions, *see United States* v. *Cromitie*, No. 09 Cr. 558 (CM), 2011 WL 2693297 (S.D.N.Y. June 29, 2011). On June 29, 2011, the District Court sentenced Cromitie, David Williams, and Onta Williams to the mandatory minimum of 25 years' imprisonment. Although the District Court imposed the mandatory minimum sentence, it did not hesitate to "condemn" the defendants for their "horrifying" hatred and the "odious crime" they committed. (A. 2711-12). Finally, on September 7, 2011, Judge McMahon sentenced Payen principally to 25 years' incarceration. (A. 2753).

ARGUMENT

POINT I

The Evidence Was More Than Sufficient to Sustain the Defendants' Convictions

On appeal, as they did below, the defendants challenge the sufficiency of the evidence that they were not entrapped. This argument should be rejected. During the defendants' two-month trial, the jury saw and heard hours of the defendants' recorded interactions with the CI and each other, reflecting their enthusiasm for the intended crimes and complete absence of any moral hesitation. Accordingly, and when all rational inferences are drawn in the Government's favor, the evidence was, as the District Court properly found, more than sufficient to find that the defendants were not entrapped.

A. The Defendants Were Not Entrapped

1. Applicable Law

a. Sufficiency of the Evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States* v. *Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States* v. *Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Specifically, the Court "must view the evidence in the light most favorable to the government, crediting every inference that could have been drawn in the government's favor, and deferring to the jury's assessment of witness credibility and its assessment of the weight of the evidence," *United States* v. *Chavez*, 549 F.3d 119, 124 (2d Cir. 2008)

(citations, brackets, and internal quotation marks omitted), and it must affirm a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); *see also United States* v. *Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (stating that the Court may overturn a jury's verdict only if the evidence supporting the verdict is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt" (internal quotation marks omitted)). Moreover, in reviewing the record, the evidence must be analyzed "not in isolation but in conjunction," *United States* v. *Diaz*, 176 F.3d 52, 89 (2d Cir. 1999), and "the government's proof need not exclude every possible hypothesis of innocence." *United States* v. *Desimone*, 119 F.3d 217, 223 (2d Cir. 1997) (citation and internal quotation marks omitted).

A defendant's knowledge and intent may, like any element of a crime, be established through circumstantial evidence. *See, e.g.*, *United States* v. *Gordon*, 987 F.2d 902, 906-07 (2d Cir. 1993); *see also, e.g.*, *United States* v. *Santos*, 553 U.S. 507, 521 (2008) (observing that "knowledge must almost always be proved . . . by circumstantial evidence"); *United States* v. *Rodriguez*, 392 F.3d 539, 544 (2d Cir. 2004) (stating that "the government is entitled to prove its case solely through circumstantial evidence"). Additionally, a conviction may be sustained on the basis of the testimony of a single witness, "so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *United States* v. *Diaz*, 176 F.3d at 92 (internal quotation marks omitted). "Any lack of corroboration of a [witness's] testimony goes merely to the weight of the evidence, not

to its sufficiency, and a challenge to the weight is a matter for argument to the jury, not a ground for reversal on appeal." *Id*. (internal quotation marks and brackets omitted).

b. Entrapment

When a jury rejects a defendant's entrapment defense at trial, he cannot prevail on appeal "unless he was entrapped as a matter of law, *i.e.*, he has proven that: (1) the government originated the criminal design, (2) the government suggested the design to the defendant and induced him to adopt it, and (3) the defendant had no predisposition to engage in the criminal design prior to the government's inducement." *United States* v. *Al Kassar*, 660 F.3d 108, 119 (2d Cir. 2011).

A defendant asserting an affirmative defense of entrapment must first present "credible evidence of government inducement," *United States* v. *Bala*, 236 F.3d 87, 94 (2d Cir. 2000); *see also United States* v. *Williams*, 23 F.3d 629, 635 (2d Cir. 1994), which is to say, "evidence that a government agent took the first step that led to a criminal act," *United States* v. *Salerno*, 66 F.3d 544, 548 (2d Cir. 1995), or "set the accused in motion," *United States* v. *Brand*, 467 F.3d 179, 190 (2d Cir. 2006) (internal quotation marks omitted), by, for example, "soliciting, proposing, initiating, broaching or suggesting the commission of the offence charged," *United States* v. *Sherman*, 200 F.2d 880, 883 (2d Cir.1952). But as this Court has explained, "[t]o satisfy the burden on inducement, a defendant cannot simply point to the government's use of an undercover agent or confidential informant. While stealth and strategy . . . and artifice and stratagem may be

employed to catch those engaged in criminal enterprises, that the government employed either does not necessarily mean that it was the government that initiated the crime." *Brand*, 467 F.3d at 189-90 (internal quotation marks, brackets, and citations omitted).

If a defendant meets his burden of showing the Government induced him to commit the offense, the Government bears the burden at trial of proving beyond a reasonable doubt that the defendant was predisposed, *United States* v. *Bala*, 236 F.3d at 94, which the Government may do through three kinds of proof (in the Second Circuit): "(1) an existing course of criminal conduct similar to the crime for which [the defendant] is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." *United States* v. *Al-Moayad*, 545 F.3d 139, 154 (2d Cir. 2008) (quoting *United States* v. *Valencia*, 645 F.2d 1158, 1167 (2d Cir. 1980)). Above all, the touchstone is whether the Government has induced an "otherwise innocent" person to commit the charged crime. *Sorrells* v. *United States*, 287 U.S. 435, 448 (1932).

2. Discussion

Measured against these principles, the evidence was more than sufficient to support the jury's rejection of the entrapment defense. As discussed below, there was an abundance of evidence supporting the jury's conclusion that the defendants committed the charged crimes, not because they were pressured, persuaded, or enticed by the CI, but because bombing synagogues and firing Stinger

missiles was what they wanted to do and, at least in Cromitie's case, was consistent with ideas that the defendants had possessed long before they met the CI. Indeed, the evidence of the defendants' conduct in the plot — most of which was recorded on videotape (*see, e.g.*, GSA 2-6) — easily supported the jury's conclusion that the defendants were not entrapped, either because they were not induced or because they were predisposed to commit their crimes.

a. The Defendants Were Not Induced

At trial, there was more than sufficient evidence that the charged crimes were Cromitie's idea and that it was Cromitie who recruited the other participants. The evidence demonstrated that Cromitie was the one who first approached the CI (*see* Tr. 675-83), and who first discussed taking violent action (*see, e.g.*, Tr. 681 (wanting "to die like a *shahid*, a martyr"); Tr. 682 (wanting "to do something to America"); Tr. 686 (wanting to kill President Bush "700 times"); GSA 24 ("I will kill ten *Yahudis* before I even think of killing one Muslim")). Indeed, the recorded conversations reflect that, as early as October 2008, Cromitie contemplated a 9/11-style attack in the United States (*see* GSA 29-30 ("I always say to myself, if the Muslims attack the World Trade Center or the Pentagon, all these planes and everything, if the Muslims want the United States down, they can do it. . . . [W]e can do it. . . . [A]ll somebody has to do is give a good *fatwa* . . . .")), and that he was personally ready to take action (*see* GSA 30 ("[T]hey taking down our Islamic countries. What do we do to make that stop? So, we start taking something down here.")).

Contrary to the defense claims, many of the CI's comments early in the case were responsive to subjects raised by Cromitie as opposed to remarks made to Cromitie in the first instance. (*See, e.g.*, GSA 12 (Cromitie stating that he should have killed the "Jewish guy" in his hotel, prompting the CI to warn him against taking violent action grounded in anger: "[I]f you really have to do something, you have to do something in jihad."); GSA 36-37 (Cromitie stating that he is the "same way" as Bin Laden "here in America," prompting the CI to ask: "If Allah . . . asked . . . you to go . . . to the jihad, would you say *Allahu akbar*?")).* And in later meetings with the CI, Cromitie became increasingly specific about his intentions. For example, in a conversation that took place on their trip to Philadelphia in November 2008, Cromitie reiterated that Muslims had "to go another route" (GSA 69), and discussed recruiting a team and making a plan (GSA 70 ("anybody can put the team together" but the key is "mak[ing] it work"); GSA 72 ("I'm gonna try to put a plan together")). Indeed, the next night, Cromitie identified his preferred targets as U.S. military planes (GSA 78 (discussing "taking out one of these American planes")) and synagogues (GSA 103 ("I'd like to get a synagogue. Me. Yeah, personally.")), adding that he had wanted to conduct such an attack "since [he] was 7" (GSA 77); that other

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* Indeed, many of those early discussions culminated in nothing more compelling than a question from the CI. (*See, e.g.*, GSA 25 ("I always think about going for . . . . a cause of Islam. Have you ever thought about that, brother?"); GSA 44 ("[D]id you ever try to do anything for the cause of Islam?")).

targets he had considered were the White House and bridges between New York and New Jersey (GSA 84-85); and that he had "to make some type of noise" in order to make America "calm down" (GSA 91, 93). In this same conversation, Cromitie also referred back to his earliest conversation with the CI:

> You already seen I had some issues with this world over here. So, and you know I would do something to get back at them. Yeah, I would. So you already knew I was like that. *It wasn't you who was talking to me, I talked to you about it. When we first met in the parking lot, I talked to you about it.* I said, "Did you see what they did to my people over there?" You said, "Yeah." I said, "In Afghanistan," . . . .

(GSA 98 (emphasis added)).

After these conversations, Cromitie searched for others to help carry out the plot. (*See, e.g.*, GSA 126 ("If I'm gonna be the commander of this joint, I need a lieutenant."); GSA 133 ("I wanna recruit the guy, I wanna get some guy, . . . let me just try one more thing, Hakim.")). Eventually, Cromitie found David Williams (*see* A. 4490 ("The brother Daoud said *salam alaykum* too"); Tr. 866-81 (Cromitie and Williams surveying synagogues in Riverdale on April 10, 2009); A. 4521 (FBI surveillance photograph of the same)), and then either he or David Williams recruited Onta Williams and Laguerre Payen (*see* GSA 314 (Cromitie: "We got, I got two more brothers, Hak.")). The CI did not know who any of these people were before Cromitie introduced them to him. (Tr. 866-67,

941, 2533).

Based on this evidence, a jury rationally could have determined that the charged crimes were Cromitie's idea. Cromitie sought out the CI, specified from the outset that he wanted to attack America, and then identified military planes and a synagogue among his targets. Any follow-up remarks by the CI, designed to probe Cromitie's attitudes, lack the specificity to constitute "soliciting, proposing, initiating, broaching or suggesting the commission of the offense." *United States* v. *Dunn*, 779 F.2d 157, 158 (2d Cir. 1985) ("[I]nducement refers to the Government's initiation of the crime and not to the degree of pressure exerted." (internal quotation marks omitted)). Similarly, because Cromitie had long maintained that he would need a team of individuals to conduct an attack, and because it was Cromitie, not the CI, who located the other defendants and brought them into the plot, a rational jury could have concluded a Government agent did not "g[i]ve [any] defendant the idea to commit the crime, either directly by inducing him to commit that crime, or indirectly by causing another person to induce the defendant to commit the crime." (Tr. at 3486 (jury charge)); *see United States* v. *Toner*, 728 F.2d 115, 126-27 (2d Cir. 1984) (defendant seeking to benefit from derivative entrapment must show "the government's inducement was directly communicated to the person seeking an entrapment charge"); *United States* v. *Myers*, 692 F.2d 823, 840 n.13 (2d Cir. 1982) ("Government responsibility has been rejected where the circumstances showed [that] . . . an agent induces a middleman to commit a crime, and the middleman, responding to the pressure upon him, takes it upon himself to induce another person to participate in the crime.").

Finally, insofar as the defendants claim that they were not acting of their own free will, their recorded interactions with the CI contradict such a claim. (*See, e.g.*, GSA 101 ("I do not want to force you guys . . . into doing something."); GSA 223 (CI stating to Cromitie and David Williams: "I'm not recruiting you. I'm not giving you anything except Allah. . . . [Y]ou don't want to do it, you can walk out, brother."); GSA 300 (defendants declining to abandon the plot when Cromitie invited them to speak up if they "feel that there's something wrong"); GSA 340 (same after Cromitie said, "[Y]ou still got time, you can change your mind if you want.")).

For these reasons, there was sufficient evidence that would allow a reasonable jury to find that the defendants were not induced, because what came to fruition in the Bronx on May 20, 2009 started with Cromitie, not the CI.

b. The Defendants Were Predisposed to Commit the Crimes

The evidence of the defendants' predisposition was also more than sufficient to support the jury's rejection of the entrapment defense. As the District Court properly found, and as discussed further below, Cromitie had "an already formed design . . . to commit the crime for which he is charged." *United States* v. *Al-Moayad*, 545 F.3d at 154 (internal quotation marks omitted). Further, and in any event, all defendants demonstrated "a willingness to commit the crime . . . charged as evidenced by [their] ready response to [any] inducement." *Id.* (internal quotation marks omitted).

All four defendants repeatedly and without hesitation met with a person they thought was a real terrorist. (*See, e.g.*, Tr. 691 (CI explaining his affiliation with Jaish-e-Mohammed to Cromitie); GSA 50-51, 55 (same); GSA 220 (same as to Cromitie and David Williams); GSA 288-89 (same as to all four defendants)). Without any sign of reluctance, the defendants (1) planned what they expected would be a real terrorist attack to destroy buildings and planes and kill people (*see, e.g.*, GX 129 (planning session at Shipp Street house with Cromitie and David Williams on April 23, 2009); GX 121A (planning session at Shipp Street house with all defendants, on April 28, 2009); GX 123 (same on May 1, 2009); GX 125A (same on May 8, 2009); GX 127 (same on May 19, 2009)); (2) repeatedly scouted out targets to attack (*see, e.g.*, GX 115 (Cromitie at Stewart Airport on February 24, 2009); GX 117 (Cromitie and David Williams on Independence Avenue in Riverdale on April 10, 2009); GX 120 (Cromitie and David Williams at Stewart Airport on April 24, 2009); Tr. 978-81 (all defendants at Stewart Airport on May 1, 2009); GX 126 (all defendants on Independence Avenue in Riverdale on May 13, 2009); Tr. 1037-40 (all defendants at Stewart Airport on May 19, 2009)); and (3) eagerly handled, transported and learned how to operate what they believed were real weapons of mass destruction, including three bombs and two Stinger missiles (*see, e.g.*, GX 124 (CI's demonstration of operation of bombs and missiles in Connecticut warehouse); GX 124A (transportation of three bombs and one missile to storage facility); GX 470-E1 (CI's demonstration of missile); GX 125A-E2 (CI's demonstration of bomb); GX 126 (transportation of missile to storage facility)). Most significantly, beyond

planning and preparing, the defendants actually planted bombs on the street and were prepared to shoot missiles at military planes. (*See* GX 128 (recording the events of May 20, 2009)). As such, a rational jury could have easily found that the defendants' response to any inducement was a "ready" and "willing" one.[*]

The defendants' predisposition was confirmed by their own statements during the course of these events. With respect to Cromitie, his statements demonstrated his own predisposition to commit the charged crimes by reflecting:

- his desire to conduct a terrorist attack, including on the very targets on which the plot ultimately focused, *i.e.*, military planes and a synagogue;[**]
- his excitement about the attacks as the plot progressed;[***]

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[*] Indeed, the Model Penal Code recommends that the entrapment defense should "not [be] unavailable when causing or threatening bodily injury is an element of the defense charged." Model Penal Code § 2.13(3).

[**] *See, e.g.*, Tr. 682 (wanting "to do something to America"); GSA 29-30 (contemplating some type of 9/11-style attack in the United States if someone "give[s] a good *fatwa*"); GSA 30 (need to "start taking something down here"); GSA 69-70 (need "to go another route," and put a team together); GSA 78 (desire to "tak[e] out one of these American planes"); GSA 103 ("I'd like to get a synagogue. Me. Yeah, personally.").

[***] *See, e.g.*, GSA 125 ("But you just don't wanna hit the building [with a missile], you wanna hit where the

- his indifference to the serious injury and death that was likely to result;*
- his long-standing desire to carry out the attacks, which stemmed, not from anything said by the CI, but from anti-American views he held long before he met the CI (and which reflected a commitment to seeking violent revenge against Jews and the U.S. military to redress what he

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main gas . . . where we get a big pow."); GSA 170-71 ("If we could just hit those planes that's sitting there . . . . Wow, that'd be some real . . . ."); GSA 175 ("Imagine if we hit all the planes in one spot. . . . [T]hey'll all blow because they close to each other and they all got gasoline.");GSA 186 ("You think the World Trade Center was something? That was nothing. . . . When you hit those spots like synagogues . . . that bothers them."); GSA 273 (while looking at military planes on the tarmac: "Won't be flying no more time soon."); GSA 281 ("I'm not hesitating. . . . I'm just going all out."); GSA 446 ("That's what I'm trying to hit, the motherfucking planes.").

* *See, e.g.*, GSA 149 ("I don't give a fuck if a bunch of Jews are in there. I will let it off."); GSA 182 ("I don't care if it's a whole synagogue of men."); GSA 405 ("I wouldn't give a fuck if someone [is] in [the planes] . . . . [Y]ou don't have no right being there. This was the wrong time."); *see also* A. 3432 ("Some people gonna be in the wrong place at the wrong time. Shit happens. You know? . . . I'll say Allah forgive me, but this is what happens.").

perceived as their mistreatment of Muslims),[*] and a more general commitment to terrorism;[**]

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[*] *See, e.g.*, GSA 32 ("So, don't be surprised if one day you might see me in handcuffs again. . . . I have zero tolerance for people who disrespect Muslims. Zero."); GSA 40 ("I am an American soldier. . . . [B]ut not for America."); GSA 91-93 (wanting "to make some type of noise" to make America "calm down"); GSA 108 ("[S]omebody need to send one . . . great big message, bigger than the World Trade Center . . . ."); GSA 119-20 (recalling speech in which an imam discussed doing jihad in America and stating: "Something like that has to be done. I agree with the brother."); GSA 178 (referring to the military planes at Stewart: "They bringing 'em [troops] over there [Afghanistan] to do damage to us. So, if they don't have the planes to carry 'em over there, you can't do too much damage.").

[**] *See, e.g.*, GSA 24 ("[S]ome of us would rather fall before we let you take a bad stand on us. I'm sorry; I'm just one of those brothers."); GSA 25 ("Sometime we got to go answer the enemy in a different way."); GSA 26 ("[S]omeone gonna die trying to take it from us."); GSA 46 ("Have I ever did something for the cause of Allah? We on the same page."); GSA 75 ("I want a Pakistanian wife that . . . [will understand] if her husband ever had to do jihad . . . ."); GSA 77 (wanted to conduct terrorist attack "since [he] was 7"); GSA 84-85 (considered targets such as the White House and bridges between New York and New Jersey); GSA 98 ("You already seen I had some issues with this world over here. So, and you know I would do something to get back at them. Yeah, I would.

- his readiness and willingness to commit the charged crimes, in contrast to other people who resisted his recruiting efforts,* and as demonstrated by his frequent boasts to the CI.**

So you already knew I was like that."); GSA 107 (referring to Bin Laden as his "brother, the overseer"); GSA 116 (referring to "huge power plant" near Liberty, New York, stating: "And I always said, ['']I'm gonna get this fucking place.['']"); GSA 117 ("I always look for something huge too, ... big shit, football stadiums").

* *See, e.g.*, A. 3461-64, 3467-73, 3480) (Cromite's difficulty recruiting Haroon); GSA 77 ("Listen, my team never think of that. . . . I do. . . . I really do, . . . they never understand me."); GSA 91 ("I don't know too many brothers are gonna do like me."); GSA 130-31 ("You know, . . . I'm dealing with American men," as opposed to foreign jihadists; "they're not gonna do what I want them to do."); GSA 132 ("I know some people gonna freeze on me. . . . [Y]ou know, wow he asking for too much."); GSA 145 ("[A]ll the people I counted on . . . has let me down . . . ."); GSA 147 (referring to Badi from the mosque: "I never talked to him about nothing like that. . . . I don't know how he would respond to that . . . . Badi told me to stay away from you [the CI]."); GSA 162 ("These brothers here ain't shit. [Foreign jihadists are] the type of brothers I need right here, Hakim.").

** *See, e.g.*, GSA 52-53 (threatening to bomb Army recruitment center), GSA 80-81 (hurling "gas bombs" in precincts)). *See United States* v. *Duran*, 133 F.3d 1324, 1335-36 (10th Cir. 1998) (evidence of predisposition to

As these statements, among others, reflect, Cromitie possessed none of the moral reluctance that could be expected from an "unwary innocent" person, *Sherman* v. *United States*, 356 U.S. 369, 372 (1958), who was not predisposed to carry out a terrorist attack.

Likewise, the statements of the three other defendants reflected that they too were ready and willing to carry out the charged crimes, unlike those, like Haroon, who rejected Cromitie's recruiting efforts. For example, David Williams warned Cromitie that other people would be more difficult to recruit than he was. (*See* GSA 237 ("Everybody don't think like me, either."); *see also* GSA 342-43 (discussing his experiments with homemade bomb making)). Similarly, Onta Williams stated that the killing of Americans was justified based on U.S. military action abroad (*see* Tr. 2528 ("So if we kill them here, it would all be equal.")), and reacted to the sight of the weapons of mass destruction by joking that his preference would be to use the bombs to blow up the Newburgh police department (*see* GSA 410), and the missiles to blow up the Newburgh courthouse (*see* GSA 458). Payen professed his readiness for the operation in his very first meeting by responding to the CI's admonition that the plot was "jihad" and "secret" with: "*Insha'Allah*. I know what time it is. There's a lot of things I've done in my lifetime, Hakim." (*See* GSA 312).

Far from exhibiting the type of apprehension one might expect from an "unwary innocent," the defendants all

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deal drugs sufficient based, in part, on defendant's "bragg[ing] about being able to obtain drugs" to informant).

reveled in the idea of carrying out the attacks. (*See, e.g.*, GSA 232 (David Williams: "The ones that should be hit [are] . . . the cargo planes . . . ."); GSA 310 (Cromitie predicting that plot "is going down in history"); GSA 357 (Cromitie explaining to co-defendants that "[e]verything will blow up at the same time"); GSA 384 (Payen recommending that the plot needed a leader, because the Prophet appointed leaders); GSA 396 (David Williams: "[Attacks would] be a hell of a story though. Tell your grandkids."); GSA 403 (David Williams recognizing that the bomb is "gonna blow up by itself," and Onta Williams predicting that the twin attacks were "gonna be a double whammy."); GSA 409 (Cromitie and David Williams marveling at the ball bearings accompanying the bombs); GSA 411 (David Williams exclaiming, "God damn!," upon realizing how many bars of C-4 each bomb contained); GSA 453 (David Williams: "As long as it get blown up, that's all I care about.")). Indeed, the defendants showed a lack of regard for the ramifications of the attacks to potential victims and the community and instead focused on the fear of getting caught, *i.e.*, (1) avoiding detection by the police (*see, e.g.*, GSA 266 (David Williams: "It's going to be a mad police block" after the attacks.), GSA 450 (David Williams wanting to observe "how the police run there [at Stewart] at night"), GSA 465 (Onta Williams anticipating police response at Stewart and predicting that "top investigators" will be assigned to the case), GSA 470 (Payen anticipating police searches), GSA 471 (David Williams: "This thing is real. Like, if we get caught, don't say nothin' to these police.")); (2) plotting getaway routes (*see, e.g.*, GSA 252 (David Williams: "We got the spot [to fire the missile at Stewart]. Now we gotta find a way . . . outta here."); GSA

462-65, 476 (all defendants reviewing lookout spots and getaway routes)); and (3) covering their tracks and destroying evidence (*see, e.g.*, GSA 410 (Payen concerned about Cromitie handling triggering device without gloves); GSA 442-43 (defendants planning to destroy cellular phones after the attacks); GSA 449-51 (defendants debating whether to "throw [missiles] in the river" after they are fired); GSA 475 (defendants agreeing to "throw [the missiles] in the woods.")).

In light of this evidence, this case falls squarely within this Court's decisions upholding the sufficiency of predisposition evidence based the nature and quality of defendants' responses to a government agent. *See, e.g.*, *Al Kassar*, 660 F.3d at 119-20 (relying in part on the defendants' "positive reaction to the idea that the arms would be used to kill Americans and harm U.S. interests" to find predisposition); *Brand*, 467 F.3d at 195 (relying on the defendant's "oblique" references to illegal activity, his recorded, enthusiastic statements in response to a government agent, and his actions in setting up their encounter, to find sufficient evidence of predisposition); *United States* v. *Harvey*, 991 F.2d 981, 992 (2d Cir. 1993) (relying on "prompt acceptance of the government-sponsored invitation to purchase child pornography"); *see also United States* v. *Carathers*, 280 F. App'x 72, 74 (2d Cir. 2008) (summary order) (relying "on the expediency and manner in which the transactions were completed," which reflected defendant's "willing[ness] to avail himself of the government-initiated opportunity to sell both cocaine and crack"). Accordingly, the District Court properly concluded that the Government introduced "more than sufficient [evidence] to establish Cromitie's predisposition

beyond a reasonable doubt," including Cromitie's statements "that he had long harbored a desire to commit terrorist acts, and so was predisposed to participate when offered the opportunity to do so." 2011 WL 1842219, at *5; *see id.* at *8 (finding that Cromitie had "'an already formed design on the part of the accused to commit the crime for which he is charged.'") (quoting *Al Moayad*, 545 F.3d at 154). As to Cromitie's hesitation at points of the investigation, the District Court also properly found that the evidence was "open to [the] plausible interpretation" that Cromitie was concerned with getting caught, not with the illegality or immorality of his conduct. *Id*. at *7. As to the other defendants, the relatively short period of time between when they were approached by a co-defendant and when they accepted, and the unhesitating quality of their acceptance itself, together provided sufficient evidence that they were "ready and willing" to commit the charged crimes and, therefore, predisposed when the opportunity arose. *Id*. at *19-*20, *22-*24.

Relying on *Jacobson* v. *United States,* 503 U.S. 540 (1992), the defendants argue that the Government may not "rel[y] on [a defendant's] behavior that occurs after government contact" to prove the defendant's predisposition. (Payen Br. 20-21).* This reliance is misplaced. In

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* To be clear, and as an initial matter, the defendants do not challenge the District Court's instruction to the jury that it could "consider evidence relating to a defendant's conduct *after* he was first approached, [but] only to the extent that it shows something about the defendant's state of mind before that point" (Tr. 3488 (emphasis added),

Jacobson, the Supreme Court reiterated what it called a "firmly established" principle that a defendant's predisposition is measured at the point in time "*prior* to the commencement of the Government's investigation." 503 U.S. at 549 n.2 (emphasis in original); *see also id.* at 548-49 ("Where the Government has induced an individual to break the law and the defense of entrapment is at issue, ... the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to the commencement of the Government's investigation") (citing *United States* v. *Whoie*, 925 F.2d 1481, 1483-84 (D.C. Cir. 1991)). In other words, the Government must prove that the defendant's predisposition was "independent and not the product of the attention that the Government had directed at" him or her. *Id.* at 550. However, the Supreme Court did not hold that post-contact behavior by defendant was irrelevant to predisposition. To the contrary, it reaffirmed that "the ready commission of the criminal act amply demonstrates the defendant's predisposition," *id.*, and this Court has done the same. *See, e.g.*, *Al Kassar*, 660 F.3d at 115-20 (affirming conviction where trial evidence consisted entirely of statements and actions of the defendants after they were approached by Government agents, and rejecting the defendants' claims that they were entrapped, in light of "their positive reaction to the idea that the arms would be used to kill Americans and harm U.S. interests suggests a predisposition to support and participate in that goal," despite the fact that, at least as to defendant al Kassar, the

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and instead merely challenge the sufficiency of the evidence in light of them.

confidential informant took "over several months" to win his trust); *United States* v. *Brand*, 467 F.3d 179, 195 (2d Cir. 2006) (finding, in a child enticement case, that even though a Government agent first broached the topic of the crime in phone calls, the trial court properly relied on the defendant's ready response as evidence of predisposition, including the fact that the defendant "jumped at the opportunity," "planned the logistics" of meeting the agent, and ultimately "traveled to meet [her] at the appointed time and place") (internal quotation marks omitted); *see also United States* v. *Gagliardi*, 506 F.3d 140, 150 (2d Cir. 2007) (relying on defendant's graphic conversations with undercover agents to establish that "he stood ready and willing to violate" the law, even in the absence of evidence concerning his prior tendencies); *United States* v. *Jackson*, 345 F.3d 59, 66 (2d Cir. 2003) (relying on "series of drug transactions" with the informant, as well as evidence of defendant's fluency with the drug trade developed in the course of the investigation, to find predisposition). Indeed, were the Government unable to rely on post-contact evidence, a defendant with no criminal history or admissible record of prior bad acts, as the case was here, "would be effectively immune from any possibility of conviction," which would be a "perverse result." *Brand*, 467 F.3d 192 n.8 (citing *Jacobson*, 503 U.S. at 557). As such, the defendant's claim on this issue should be rejected.

The defendants further argue that *Jacobson*, in which the Supreme Court reversed a conviction because the Government had failed to prove predisposition beyond a reasonable doubt, compels reversal. (*E.g.,* Cromitie Br. 38-39, 42-43; Payen Br. 15-18). But *Jacobson* is easily distinguished for at least three reasons. First, in *Jacobson*,

the prosecution's only pre-contact evidence of predisposition was the defendant's purchase of a magazine that was not illegal at the time he bought it and which reflected only "a generic inclination to act within a broad range, not all of which is criminal." 503 U.S. at 550. Cromitie, on the other hand, signaled his predisposition to violent, illegal actions as soon as he met the CI, when he said he wanted to "do something to America" and to die like a martyr. (Tr. 681-82; *see also* GSA 77, 98 (statements that Cromitie had contemplated a terrorist attack long before he met the CI)). Second, unlike in *Jacobson*, where the Government's solicitations were vague and oblique, treading the line between legal and illegal conduct, *id*. at 543-47, Cromitie here explicitly referred to his *jihad* by that very name and made clear his understanding that his activities with the CI stood far outside the law. (*See, e.g.*, GSA 32 ("So, don't be surprised if one day you might see me in handcuffs again. . . . I have zero tolerance for people who disrespect Muslims. Zero."); GSA 40 ("I am an American soldier. . . . [B]ut not for America."); GSA 121 (Cromitie: "I have to make sure I can guarantee them [his team] safety out of that area. . . . And we have to get rid of everything we have." CI: "Don't get caught." Cromitie: "You feel me?"); GSA 119-20 (recalling speech in which an imam discussed doing jihad in America and stating: "Something like that has to be done. I agree with the brother.");GSA 97, 218 (Cromitie agreeing with the CI that "this is jihad."). Third, unlike the record of the defendant's statements in *Jacobson*, which reflected an arguably equivocal response, *see, e.g.*, 503 U.S. at 545 (stating he "enjoy[ed]" materials relating to pre-teen sex, while indicating that he was "opposed to pedophilia"), the hours of video-taped recordings in this case show all of the

defendants reveling in the prospect to commit an act of violence from the very moment they each met the CI. The defendant's recorded responses here were unambiguous and on full display for the jury to see.

The defendants also contend that their responses were insufficiently "prompt" and were instead "the product of [the Government's] attention." (Cromitie Br. 36-42; Payen Br. 15-18). In Cromitie's case, he contends, on appeal, that "it took months of prodding by the informant and promises of spiritual reward and earthly treasure to prevail upon [him]." (Cromitie Br. 41). However, the length of time between the CI's first contact with Cromitie in June 2008 and his arrest on May 20, 2009 does not, by itself, demonstrate a lack of predisposition. After all, the planning of complex crimes like this one might naturally take place "over several months." *Al Kassar*, 660 F.3d at 115. What Cromitie lacked, as the conversations in December 2008 demonstrated, was not the desire to commit the crime, but the means to organize it. Indeed, the CI's absence from December through February provides a logical justification for Cromitie to have abstained from criminal conduct during that period, and while Cromitie avoided the CI during a six week period, beginning in late February 2009, such hesitation alone does not rebut other evidence of predisposition. *See United States* v. *Salerno*, 66 F.3d 544, 548 (2d Cir. 1995) (noting that a defendant may hesitate to commit a crime because he is uncomfortable with his confederates, not because he is actually reluctant to commit a criminal act); *see also United States* v. *Evans*, 924 F.2d 714, 716 (7th Cir. 1991) ("second thoughts following initial enthusiasm do not establish entrapment") (citation omitted). In fact, here, the evidence reflects that

right before Cromitie broke contact with the CI, Cromitie was willing to carry out the attacks, but was afraid of getting caught. (*Compare, e.g.*, GSA 173-75 (Cromitie expressing his desire on February 24, 2009 at Stewart Airport to blow up the military planes), *with* GSA 154 (recalling movie about terrorist facilitators in which it turned out American investigators "knew their every move"); *see also, e.g.*, GSA 160 (warning that he was uncomfortable proceeding without the support of additional personnel; "Well, this gotta be done with more than just two people.")). Cromitie even sought the help of operatives from the CI's overseas terrorist organization. (*See* GSA 162 ("Those the type of brothers I need right here, Hakim. That's the kind I need.")). Based on this evidence, and drawing all inferences in the Government's favor, a rational jury could have easily concluded that Cromitie's temporary pause was not due to any moral reservation that would contradict a predisposition, but rather due to his fear of getting caught. *See United States* v. *Bala*, 236 F.3d 87, 94 (2d Cir. 2000) (rejecting defendant's sufficiency challenge over his argument "that the evidence showed his lack of experience in money laundering and his reluctance to participate in the crime," because "the jury rationally could infer otherwise from the same evidence"); *United States* v. *Salerno*, 66 F.3d at 548 (rejecting defendant's sufficiency challenge to predisposition evidence where jury "could reasonably view [the defendant's] hesitance not as reluctance to engage in criminal activity").

Cromitie also contends that the District Court erred in concluding that his statements to the CI reflected an "already formed design" to commit the charged crimes,

because his statements were simply too general to suggest a predisposition to attack two synagogues and a military base, and that they became specific only as a result of the CI's influence, *contra Jacobson*. (Cromitie Br. 36-38). This claim should be rejected. Cromitie ignores the fact that the material aspects of the events of May 20, 2009 (namely, an attack on synagogues and military planes) were all born of his initial suggestions. (*See* GSA 78, 103). Cromitie (not the CI) was the first to suggest his interest in attacking those targets. Second, Cromitie misinterprets the level of specificity required to show predisposition under *Jacobson*. For example, in evaluating Cromitie's predisposition, a jury could consider (1) the fact that Cromitie walked up to the CI in the parking lot of a mosque and, in the context of a discussion about injustices against Muslims worldwide suggested that he wanted to "do something to America" and to die like a martyr (Tr. 681-82); *Brand*, 467 F.3d at 194 ("the manner in which [defendant] contacted both [victims, including] . . . a chat room with a very suggestive name"); (2) the fact that the CI fairly openly described himself as a terrorist looking to recruit individuals for a terrorist act (Tr. 689-91); *Brand*, 467 F.3d at 194 (defendant believed that he was chatting with thirteen-year-old girls, based on their online profiles and screen names); (3) the fact that the CI claimed he had been wanting to do this since he was seven, and had, in fact, engaged in violence before (GSA 77, 80-81); *Brand*, 467 F.3d at 194 ("Brand confessed to . . . chat[ting] over the Internet with other girls as young as ten years old and to engaging in sexual and explicit communications with those girls," and to previously looking at child pornography). "All of these events occurred *prior* to, and were

independent of, any contact by government agents." *Brand*, 467 F.3d at 194-95 (emphasis original). As such, these facts constituted more than sufficient evidence that Cromitie was predisposed and not entrapped.

As to the other three defendants, they claim that because there were no recordings of their interactions at the moment Cromitie and David Williams recruited them, there was a complete vacuum of proof about their response. (Payen Br. 21-22). But the law has never required the Government to record the moment of any inducement. As the District Court explained, the jury could rationally conclude that very little time passed — *i.e.*, no more than "a few days," *Cromitie,* 2011 WL 1842219, at *19, *21 — between the time each of those defendants was first approached and when he was whole-heartedly committed to the plot. And from that point forward, David Williams, Onta Williams and Payen participated in the plot all the way to its fruition without hesitation or any sign of reluctance — doing extraordinary things all the while, like freely interacting with a terrorist, surveying targets for attack, and securing weapons of mass destruction — which comfortably supports the conclusion that they readily and willingly accepted the opportunity to commit the charged crimes.

Finally, the defendants argue, as they did at trial, that they were all induced by the lure of a big payday — namely, that the CI promised a large reward to Cromitie and caused the recruitment of the others by telling Cromitie that "lookouts" would share in the reward money. (*See* Cromitie Br. 32; Payen Br. 15). However, there was more than sufficient evidence for a rational jury

to conclude that the defendants were uninfluenced by the prospect of a reward. Such evidence included the defendants' express denials of such motivation (*see, e.g.*, GSA 98 (Cromitie: "You don't have to give me a dime."); GSA 202 (Cromitie: "[M]oney will help my family too, but it's not for the money."); GSA 219 (David Williams: "I understand perfectly," in response to instruction that he not "do[] it for money"); GSA 223 (David Williams: "It's for Allah, so there's nothing really I can say."); GSA 420 (Payen: "I'm doing this for the sake of Allah"; Onta Williams: "I mean the money . . . helps, but I'm doing it for the sake of Allah.")); and, with respect to Cromitie, the lack of any discussion about financial reward until the CI mentioned it to Cromitie after he had already stated he wanted to seek violent revenge against Jews and the U.S. military, form a team to carry out attacks, and attack a synagogue and military planes (*see* Tr. 893 (CI telling Cromitie's girlfriend, in December 2008, she can have his BMW); A. 4499 (Cromitie's first follow-up on BMW "promise," on May 1, 2009); GSA 141 (CI's first suggestion that Cromitie could escape to Miami, in December 2008); GSA 158 (CI's first mention of "reward," on February 23, 2009); GSA 195-96 (first, and only, mention of the reward of a barber shop, on April 16, 2009, which was rejected by Cromitie)). Cromitie argues on appeal that he was expecting a $250,000 reward (Cromitie Br. 32), but he never asked for that kind of money and never followed up on a statement by the CI that reasonably could have been interpreted as an offer for that very amount.[*] (*See* A.

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[*] None of the defendants asked for money until two weeks before the attacks, but even then it was for a

4486; Tr. 1036, 2507, 2513-14). Indeed, it was Cromitie who reached out to the CI by phone on April 5, 2009, not vice versa, and Cromitie did so without any reason to believe that the CI would make the $250,000 offer.

For these reasons, the defendants' arguments that they were not predisposed should be rejected.

B. The District Court's Charge Accurately Stated the Law on Entrapment

The defendants also argue that the District Court erred in its instruction on entrapment by refusing to include certain language, drawn from the Seventh Circuit, reflecting their view that they were innocent because they were incapable of committing the charged crimes without the CI's assistance. (D. Williams Br. 28-37). This argument should be rejected, as the District Court's charge was entirely proper and reflected the settled law of this Court.

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relatively small amount (*see* GSA 417 (Cromitie: "I ain't asking for no ten thousand dollars."); GSA 418 (Cromitie: "We just need the rent money, Hak."); GSA 420 (Onta Williams: "[J]ust like, trying to help me get an advance on my bills. . . . [H]aving money in my pocket for personal use, I don't care about that.")), and there was no demand for any payment in advance (*see* GSA 419 (David Williams: "I'm gonna show you I'm gonna do this [with or without money]."")). In any event, no one complained about getting an amount that was far less than$250,000. (*See* Tr. 1036 (CI "didn't get any bad reaction" when he told the defendants they would get $5,000)).

1. Relevant Facts

Prior to trial, the defendants raised an assortment of claims about their alleged inability to commit the charged crimes, *e.g.*, inability to acquire weapons, lack of sophistication, training, money, or intelligence, to support their contention that the defendants could never have pulled off the operation without the CI's help. (*See, e.g.*, *Pretrial Motion by Onta Williams*, Dkt. No. 43 at 32 (Mar. 16, 2010) ("Cromitie and the other defendants did not have even the most rudimentary resources, knowledge, training or skills to carry out the alleged offenses on their own."); Transcript of Bail Hearing at 31 (June 21, 2010) ("[O]n the way down to Riverdale, our clients were incapable of doing anything and it was the government who actually put any wires together that had to be put together.")). The Government subsequently moved *in limine* to preclude a defense based on the defendants' inability to commit the charged crimes, and the District Court reserved judgment on the motion until the charge conference. (8/24/10 Tr. 267-68).*

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* The trial transcript began at page 1, with a conference related to jury selection on August 19, 2010, and continued until page 273 on August 23, 2010, at the conclusion of *voir dire* for that day. On August 24, 2010, *voir dire* continued on transcript pages marked 264 through 278 (to which this citation refers), during which the venire was discharged and the trial jury was sworn. The undated trial transcript pages, to which the balance of this brief cites, begins anew at page 1, at 11 a.m. on August 24, 2010, with the District Court's preliminary

At the close of the trial, the defendants requested the following charge:

> Finally, in determining whether the government has proved predisposition beyond a reasonable doubt, you should consider whether the defendant was so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so. In considering this aspect of entrapment, a defendant's lack of present means to commit a crime is not alone enough to establish entrapment if the government supplies the means.

(Dkt. No. 148 at 2; *see also* Tr. 3114-23, 3498), drawing upon language from *United States* v. *Hollingsworth,* 27 F.3d 1196, 1200 (7th Cir. 1994). The Government objected, arguing, *inter alia*, that the charge misstated the law of this Court and that it was inconsistent with the established law that the entrapment defense is focused on the defendant's state of mind, not his physical abilities. (Tr. 3123-26). The District Court rejected the defendants' proposed instruction, but nevertheless charged the jury that it could consider the defendants' abilities:

> [T]he fact that the defendant lacked what we call the present physical ability to commit a particular charged crime before he encoun-

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instructions to the jury.

> tered the government agent does not, without more, establish entrapment. However, you may consider evidence about such matters as you assess whether the government has proved beyond a reasonable doubt that any defendant was predisposed to commit a particular crime before he was approached directly or indirectly by the government agent.

(Tr. 3488). After the jury was charged, the defendants reiterated their objection to excluding their requested instruction. (Tr. 3498).

2. Applicable Law

A defendant challenging a jury instruction must demonstrate both that he requested a charge that "accurately represented the law in every respect" and that the charge delivered was erroneous and prejudicial. *United States* v. *Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004); *see also United States* v. *White*, 552 F.3d 240, 246 (2d Cir. 2009) ("To secure reversal based on a flawed jury instruction, a defendant must demonstrate both error and ensuing prejudice.") (internal quotation marks and citation omitted). To establish prejudicial error based on denial of a requested instruction, a defendant must show that the charge requested "is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge." *United States* v. *Doyle*, 130 F.3d 523, 540 (2d Cir. 1997); *accord United States* v. *Amato*, 540 F.3d 153, 164 (2d Cir. 2008); *United States* v. *Han*, 230 F.3d 560, 565 (2d Cir. 2000). A court may properly refuse to give a

charge that fails to accurately state the law. *United States* v. *Paccione*, 949 F.2d 1183, 1200 (2d Cir. 1991).

In reviewing jury instructions, this Court does not look only to the particular words or phrases questioned by the defendant, but must "'review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law.'" *United States* v. *Carr*, 880 F.2d 1550, 1555 (2d Cir. 1989) (quoting *California* v. *Brown*, 479 U.S. 538, 541 (1987)); *United States* v. *Mulder*, 273 F.3d 91, 105 (2d Cir. 2001) (court must "look to 'the charge as a whole' to determine whether it 'adequately reflected the law' and 'would have conveyed to a reasonable juror' the relevant law") (quoting *United States* v. *Jones*, 30 F.3d 276, 284 (2d Cir. 1994)).

As a general matter, no particular wording is required for an instruction to be legally sufficient, so long as "taken as a whole" the instructions correctly convey the required legal principles. *Victor* v. *Nebraska*, 511 U.S. 1, 5 (1994) (internal quotation marks and citation omitted). Further, the district court "has discretion to determine what language to use in instructing the jury as long as it adequately states the law." *United States* v. *Alkins*, 925 F.2d 541, 550 (2d Cir. 1991).

Where, as here, a defendant has preserved his objection to the charge as given, *see* Fed. R. Crim. P. 30(d); *United States* v. *Crowley*, 318 F.3d 401, 411 (2d Cir. 2003), this Court "review[s] a claim of error in jury instructions *de novo*, reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States* v. *Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003); *see also United States* v. *Bok*, 156 F.3d 157, 160 (2d Cir. 1998)

("We review challenged jury instructions *de novo* but will reverse only if all of the instructions, taken as a whole, caused a defendant prejudice."). Conversely, reversal is not warranted if the error was harmless. *See DiGuglielmo* v. *Smith*, 366 F.3d 130, 136 (2d Cir. 2004) (noting that claims of assertedly erroneous jury instructions reviewed for harmless error) (citing *Neder* v. *United States*, 527 U.S. 1, 8-10 (1999)). Accordingly, so long as there is "fair assurance" that the jury's "judgment was not substantially swayed by the error," the error will be disregarded as harmless. *Kotteakos* v. *United States*, 328 U.S. 750, 764-65 (1946).

3. Discussion

This Court has long permitted the Government to rebut the entrapment defense with proof of, among other things, a defendant's "willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." *Al-Moayad*, 545 F.3d at 154; *see also, e.g.*, *United States* v. *Valencia*, 645 F.2d 1158, 1167 (2d Cir. 1980). The District Court's charge properly reflected this Court's precedent that the Government need not "prove [that] the defendant was not only willing but also ready to commit the crime, in the sense of having the present physical ability to do so." *United States* v. *Ulloa*, 882 F.2d 41, 44 (2d Cir. 1989). This Court has made quite clear that the "ready and willing" construct is the appropriate framework for articulating this test for predisposition to the jury, without requiring additional definition of those terms. *See United States* v. *Ulloa*, 882 F.2d at 44 ("[W]e have consistently approved the phrase 'ready and willing' as an appropriate definition of the requisite predisposi-

tion"); *see also*, *e.g.*, *United States* v. *Williams*, 705 F.2d 603, 618 (2d Cir. 1983); *United States* v. *Myers*, 692 F.2d 823, 849 (2d Cir. 1982). Indeed, this Court has "repeatedly advised [that] instructions on entrapment should be simplified. The district courts should focus the jury's attention on the central issue presented by a claim of entrapment: Was the defendant 'ready and willing to commit the offense if given an opportunity to do so?'" *United States* v. *Dunn*, 779 F.2d 157, 160 (2d Cir. 1985). A defendant's capability may be probative of his state of mind, but it is not a prerequisite to predisposition, because "[t]he focus of the entrapment inquiry, once inducement by the Government is established, is on the defendant's state of mind." *Ulloa*, 882 F.2d at 44. "By 'state of mind' we do not mean to require specific prior contemplation of criminal conduct. It is sufficient if the defendant is of a frame of mind such that once his attention is called to the criminal opportunity, his decision to commit the crime is the product of his own preference and not the product of government persuasion. The phrase 'ready and willing' adequately captures that concept and does so in a manner likely to be comprehensible to juries." *United States* v. *Williams*, 705 F.2d at 618. "The jury need not find that the defendant consciously considered committing the crime before the opportunity arose, only that he was predisposed to accept the opportunity presented to him, *i.e.*, of a frame of mind that made him 'ready and willing' to commit the crime, even on the first occasion that he may have considered it." *United States* v. *Myers*, 692 F.2d at 849. Indeed, this Court has specifically rejected the argument that the Government would have to prove the defendant's prior ability to commit the crime charged to establish predispo-

sition. *See Ulloa*, 882 F.2d at 44 (rejecting the defendant's contention that "readiness" required a physical ability to commit the crime and noting that it found "no support for this position in our cases.").

Although the Seventh Circuit has decided to include the defendant's ability — or "positional readiness" — in the predisposition inquiry, *see United States* v. *Hollingsworth*, 27 F.3d at 1199-1200 ("Predisposition is not a purely mental state, the state of being willing to swallow the government's bait. It has positional as well as dispositional force."), that decision is inconsistent with this Court's doctrine, as articulated in *Ulloa*, and unsound in any event. Indeed, the Seventh Circuit acknowledged in *Hollingsworth* that its decision was something of an outlier, *see* 27 F.3d at 1198 (noting that other "courts of appeals had been drifting toward the view, clearly articulated by the Second Circuit in [*Ulloa*], that the defense of entrapment must fail in any case in which the defendant is 'willing,' in the sense of being psychologically prepared, to commit the crime for which he is being prosecuted, even if it is plain that he would not have engaged in criminal activity unless inveigled or assisted by the government"), and not surprisingly, the Seventh Circuit's approach has been rejected by other Circuits. *See, e.g.*, *United States* v. *Thickstun*, 110 F.3d 1394, 1397-98 (9th Cir. 1997) (rejecting the claim that "a defendant was 'predisposed' only if she is actually in a position to commit the crime without government assistance"). As the Ninth Circuit explained:

> A person's ability to commit a crime may illustrate her predisposition to do so, but

> should not become a separate element to be proven. Such a rule would be especially problematic in bribery cases. A person is never "positionally" able to bribe a public official without cooperation from that official.

Id. at 1398 (internal citation omitted). The Ninth Circuit's reasoning elaborates upon a fundamental problem with measuring predisposition by the defendant's capability to carry out the crime: just as in cases involving the bribery of a public official, the Government would virtually never defeat an entrapment defense in any sting case if the jury were asked to decide whether the defendant would have committed the act on his own. *Accord United States* v. *Gendron*, 18 F.3d 955, 962 (1st Cir. 1994).

In any event, the defendants received more than the typical "ready and willing" formulation of the entrapment charge required by the law this Court, because, as requested by the defense, the District Court charged the jury that it "may consider evidence" that a particular defendant "lacked what we call the present physical ability to commit a particular charged crime before he encountered the government agent" in evaluating whether he was predisposed. (Tr. 3488). Based on that instruction, the defendants argued from their limitations — their absence of connections to terrorist groups, for instance, or their lack of familiarity with sophisticated weapons — that they were the "unwary innocent," not the "unwary criminal." *Sherman* v. *United States*, 356 U.S. at 372. Accordingly, even if the Court were to conclude that *Hollingsworth* correctly states the law of this Circuit (and it does not, for

the reasons discussed above), the defense's theory was "effectively presented elsewhere in the charge." *United States* v. *Doyle*, 130 F.3d at 540. Accordingly, the defendants were not prejudiced.

POINT II

The District Court Properly Rejected the Defendants' Claim of Outrageous Government Misconduct

On appeal, as they did below, the defendants assert that their rights under the Fifth Amendment's due process clause were violated by the investigation and prosecution of this case. (*See* Cromitie Br. 43-69; O. Williams Br. 59-93). They argue primarily that the Government engaged in outrageous misconduct by (1) manufacturing the criminal offenses; and (2) coercing the defendants to commit these crimes through improper inducements. (*See id.*). This argument should be rejected.

A. Relevant Facts

Both before and after trial, the defendants moved to dismiss the indictment, arguing that the Government's investigation and prosecution violated their due process rights. The District Court denied the defendants' pretrial motion without prejudice to a post-trial motion, and after trial, when the defendants renewed their motion, the District Court again denied it, in a written opinion dated May 3, 2011. *United States* v. *Cromitie*, 781 F. Supp. 2d 211 (S.D.N.Y. 2011).

With respect to Cromitie, the District Court found that no law enforcement technique used in the investigation of

him were "in and of itself constitutionally outrageous or conscience shocking, as that term has come to be understood." *Id*. at 221. The District Court based its conclusion in large part on Cromitie's "expressed interest, even enthusiasm, for the idea of jihad from the early days of his dealings with Hussain — a fact that quite properly set off alarm bells in the minds of law enforcement agents" and on a lack of "coercion of any sort" or any "suggestion of duress [or] physicial deprivation." *Id*. at 222-223. The District Court also found that "[t]he evidence simply does not support any view of Cromitie's having been manipulated by someone who took advantage of his religious devotion. On the contrary, it appears that religious conviction was not enough to persuade Cromitie to act." *Id*. at 224. Indeed, the District Court found "the single most damning fact about Cromitie" to be that "when the Government had all but lost interest in the man, he came back to Hussain." *Id*. Accordingly, the Court concluded that "Cromitie's own behavior fatally undermines any suggestion that he was subjected to pressure so coercive as to run afoul of the Constitution" and that he "gave the Government ample reason to think that he might be susceptible to being stung." *Id*. at 226-227.

As to the other defendants, the District Court found their arguments "weaker than Cromitie's." *Id*. at 227. In rejecting their contention that they were unfair targets in light of their personal circumstances, the District Court held that "[t]hey were offered money to participate in criminal activity, and they said yes. It is of no moment that they were poor and needed money." *Id*. The District Court also noted that there was no evidence to suggest that "either of the Williamses or Payen were coerced, pressured

or manipulated, by Hussain, Cromitie, or anyone else, to participate in the 'mission,' let alone that the Government employed tactics that were in and of themselves conscience-shocking in order to persuade them to participate in the scheme." *Id*.

B. Applicable Law

The notion that government misconduct could warrant dismissal of an indictment traces back to the Supreme Court's remark in *United States* v. *Russell*, 411 U.S. 423, 431-32 (1973), that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Only three years later, in *Hampton* v. *United States*, a plurality of the Court appeared to reject such a concept, noting that "[i]f the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." 425 U.S. 484, 490 (1976) (plurality opinion). In an opinion concurring in the judgment, however, Justice Powell preserved the idea that due process might set some outer limit on government involvement in criminal conduct. *See id*. at 491-95. But he emphasized that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id*. at 495 n.7.

Since *Hampton*, only one Court of Appeals has ever invalidated a conviction on the basis of outrageous government misconduct. *See United States* v. *Twigg*, 588

F.2d 373 (3d Cir. 1978); *see also United States* v. *Lakhani*, 480 F.3d 171, 181 (3d Cir. 2007) (noting that *Twigg* is the only appellate decision to have "recognized a violation of due process as set out by Justice Powell in *Hampton*"). As this Court has observed, outrageous government misconduct is "an issue frequently raised that seldom succeeds." *United States* v. *Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997); *accord United States* v. *LaPorta*, 46 F.3d 152, 160 (2d Cir. 1994) ("Such a claim rarely succeeds."); *see also United States* v. *Santana*, 6 F.3d 1, 4 (1st Cir. 1993) ("The banner of outrageous misconduct is often raised but seldom saluted."). Although courts recognize the doctrine hypothetically, "[b]e that as it may, the doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity." *Santana*, 6 F.3d at 4. Courts have even questioned whether the doctrine still exists, *see United States* v. *Tucker*, 28 F.3d 1420, 1425-26 (6th Cir. 1994), and the Seventh Circuit has gone so far as to reject it altogether. *See United States* v. *Boyd*, 55 F.3d 239, 241 (7th Cir. 1995) (holding that "the doctrine does not exist in [the Seventh C]ircuit").

This Court has recognized that, "in principle," government overinvolvement in criminal activity could rise to the level of a due process violation, *United States* v. *Rahman*, 189 F.3d 88, 131 (2d Cir. 1999), but it has never found such a violation in practice. It has cautioned that "only Government conduct that shocks the conscience can violate due process," *id*. (internal quotation marks omitted), and it has repeatedly observed that "[o]rdinarily such official misconduct must involve either coercion or violation of the defendant's person." *United States* v. *Schmidt*, 105 F.3d at 91 (citations omitted); *accord United*

States v. *Rahman*, 189 F.3d at 131.

A sting operation — even an "elaborate" sting operation — does not violate due process where it merely "creat[es] . . . an opportunity for the commission of crime by those willing to do so." *Myers*, 692 F.2d at 837; *see also id*. at 843 ("Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats." (citing cases)); *Schmidt*, 105 F.3d at 92 (rejecting a due process challenge even though the Government's "involvement in [the] plan was extensive"). "Especially in view of the courts' well-established deference to the Government's choice of investigatory methods, the burden of establishing outrageous investigatory conduct is very heavy." *Rahman*, 189 F.3d at 131 (citations omitted). "Likewise, feigned friendship, cash inducement, and coaching in how to commit the crime do not constitute outrageous conduct." *Al Kassar*, 660 F.3d at 121.

To show a due process violation, a defendant must show some "type of coercive action or outrageous violation of physical integrity or other egregious or outrageous government conduct." *United States* v. *Jackson*, 345 F.3d 59, 67 (2d Cir. 2003) (internal quotation marks and citation omitted). As this Court has explained, "We have rarely sustained due process claims concerning government investigative conduct, stressing that the conduct involved must be most egregious . . . and so repugnant and excessive as to shock the conscience." *United States* v. *Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (internal quotation

marks and citation omitted). This Court has stated that "[t]he paradigm examples of conscience-shocking conduct are egregious invasions of individual rights . . . [such as] breaking into suspect's bedroom, forcibly attempting to pull capsules from his throat, and pumping his stomach without his consent." *Rahman*, 189 F.3d at 131 (citation omitted).

Conceivably, "[e]xtreme physical coercion" and "psychological torture" by law enforcement agents could provide a basis to dismiss the indictment, but mere "psychological manipulation" — "efforts to win [defendant's] friendship and trust through the creation of a phony . . . relationship" — does not. *United States* v. *Chin*, 934 F.2d 393, 398-99 & n.4 (2d Cir. 1991). This is because "an essential element of the effectiveness of an undercover agent [or informant] is the promotion and engendering of trust in dealing with contacts," and "[t]he more effective the agent's performance in this respect, the greater the likelihood of his or her success." *United States* v. *Cuervelo*, 949 F.2d 559, 568 (2d Cir. 1991).

C. Discussion

As noted, the defendants seek to reverse their convictions by arguing that their due process rights were violated. Substantially for the reasons stated by the District Court in its thorough opinion denying the defendants' post-trial motion to dismiss, their arguments are meritless, as they cannot establish outrageous government misconduct.

1. The Government's Conduct Was Entirely Proper

As an initial matter, "[w]hatever may be the due process limit of governmental participation in crime, it was not reached here." *United States* v. *Myers*, 692 F.2d at 837. It is true that the Government, through a confidential informant, provided the defendants with weapons of mass destruction, transportation, money, and plenty of logistical direction. It is also true that the sting operation was, by law enforcement standards, relatively elaborate. But it was no more — and arguably less — elaborate than the Abscam investigation at issue in *Myers*, discussed below, which this Court found was "not even close to the line." *Id.* at 843; *see id.* (citing with approval one case rejecting a due process challenge to undercover operations where a "defendant was solicited twenty times before committing an offense" and another where the defendant "was tempted by a million-dollar cash deal and prodded by veiled threats"); *see also Al Kassar*, 660 F.3d at 122 (denying a claim of outrageous government misconduct in elaborate government-initiated international weapons transaction because, "[w]hile the sting operation in this case was elaborate and prolonged, there was no coercion or physical force, and nothing done was outrageous or a shock to the conscience"; noting also that "financial and ideological inducements are not outrageous conduct"); *Schmidt*, 105 F.3d at 92 (rejecting a due process challenge where the Government's involvement in the defendant's plot was "extensive").

First, it could be said that the Government's investigation in this case "creat[ed] . . . an opportunity for the

commission of crime by those willing to do so." *Myers*, 692 F.2d at 837. As this Court's precedents make clear, however, that does not a due process violation make. *See, e.g.*, *Rahman*, 189 F.3d at 131 (holding that a government informant's involvement in a conspiracy to bomb targets in New York City, allegedly lending direction, technical expertise, and critical resources, did not shock the conscience, and noting that "[u]ndercover work, in which a Government agent pretends to be engaged in criminal activity, is often necessary to detect criminal conspiracies"); *Schmidt*, 105 F.3d at 91-92 (rejecting a due process challenge where law enforcement officers posed as hit men and actually conducted a controlled breakout of the defendant from a mental observation jail unit where she had been held, and remarking that "there are occasions when the government is required to appear to participate in a criminal conspiracy in order to gather evidence of illegal conduct"); *United States* v. *LaPorta*, 46 F.3d at 160 (finding no due process violation where a government informant provided a government-owned car to the defendant to be burned); *see also United States* v. *Lakhani*, 480 F.3d at 182-83 (holding that due process was not violated by a sting operation even though the Government acted as both the buyer and seller in a supposedly illegal arms transaction and a Government informant first suggested the criminal activity to the defendant).

The defendants maintain that "the government manufactured the crime of conviction." (Cromitie Br. at 49). They claim that the "government's involvement in the crime of conviction was everything; it conceived, instigated, planned, trained and supplied — everything." (*Id.* at 53). The plot moved ahead, according to the defendants,

because "[i]t was in the offer of material goods that Hussain eventually hit the sweet spot." (*Id*. at 57). But these facts, which are largely the same facts that the defendants have relied upon to argue they were entrapped, fall well short of establishing outrageous government misconduct.

In rejecting what amounted to a recast entrapment claim, this Court took care to distinguish entrapment from outrageous government misconduct:

> [W]hether investigative conduct violates a defendant's right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law. Rather, the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it "shocks the conscience," regardless of the extent to which it led the defendant to commit his crime.

United States v. *Chin*, 934 F.2d at 398 (quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)); *see also United States* v. *Cuervelo*, 949 F.2d at 565 ("The outrageousness of the government's conduct must be viewed 'standing alone' and without regard to the defendant's criminal disposition . . . ." (citing *Chin*, 934 F.2d at 398)); *accord United States* v. *Mosley*, 965 F.2d 906, 910 (10th Cir. 1992) (due process argument not "intended merely as a device to circumvent the predisposition test in the entrap-

ment defense").* As this Court reasoned in *Chin*, "were we to accept [the defendant's] suggestion that governmental instigation of criminal activity violates the due process rights of even predisposed defendants, we would undermine the [Supreme] Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense." 934 F.2d at 398 (citation and internal quotation marks omitted).

The defendants' claims fail for the same reason. The question is not whether the Government entrapped the defendants (and it did not); instead, it is whether the Government's actions constituted outrageous government misconduct. And they do not. It can hardly be said that the Government's principal investigatory technique (*i.e.*, deploying a confidential informant, who recorded conversations and promised material rewards) was "fundamentally unfair or shocking to our traditional sense of justice," *Schmidt*, 105 F.3d at 91, or was "'so outrageous' that common notions of fairness and decency [were] offended," *id.* (citation omitted), or was "'so repugnant and excessive' as to shock the conscience," *United States* v. *Jackson*, 345 F.3d at 67 (citation omitted), or was "shocking, outrageous, and clearly intolerable," *Mosley*,

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* The defense of outrageous misconduct is distinct from the defense of entrapment in that "the entrapment defense looks to the state of mind of the defendant to determine whether he was predisposed to commit the crime for which he is prosecuted, [while] [t]he outrageous conduct defense, in contrast, looks at the government's behavior." *United States* v. *Mosley*, 965 F.2d at 909.

965 F.2d at 910. The due process clause "is not to be invoked each time the government acts deceptively or participates in a crime that it is investigating." *Id.* Because agents often "need to play the role of criminals in order to apprehend criminals, ... [w]ide latitude is accorded the government to determine how best to fight crime." *Id*.

The defendants argue that this case is similar to *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), in which a divided Third Circuit panel reversed narcotics convictions on the basis of excessive governmental involvement in the crime of illegal manufacture of methamphetamine. (*See* Cromitie Br. 54-55). This argument should be rejected. As an initial matter, the authority of *Twigg* has been questioned by the Third Circuit. *See United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (noting that the majority in *Twigg* had relied on *United States* v. *West*, 511 F.2d 1083 (3d Cir. 1975), which was "limited by [the Supreme Court's decision in] *Hampton*"); *see also United States* v. *Tucker*, 28 F.3d at 1425-26 (noting that *Twigg* "has been greatly criticized, often distinguished and . . . [even] disavowed in its own circuit"). In any event, *Twigg* is easily distinguished from the facts of this case, principally, because the cooperating witness in *Twigg* reached out to one of the defendants and "suggested the establishment of a speed laboratory." 588 F.2d at 380. Here, however, the CI had never seen, heard of, or spoken to Cromitie before Cromitie approached him. (Tr. 674-83). Thereafter, unlike the cooperator in *Twigg*, Cromitie immediately stated that he wanted "to do something to America." (Tr. 682). The defendants here were also much more involved than the defendants in *Twigg*: the defendants actively participated in all of the key stages of the plot. (*See, e.g.*, GSA 240-41

(David Williams telling CI and Cromitie that the missile should be fired "from the other side" of the airport because the previously selected spot was "not safe"); GSA 384 (Payen telling CI that the team needed a leader); GSA 390-92 (all four defendants agreeing that, while everyone would have input, Cromitie would be the leader); GSA 449-54 (defendants convincing CI to push back the time of the operation); GSA 462-68 (Onta Williams leading discussion about respective assignments and avoiding police detection)). For these reasons, the defendants' reliance on *Twigg* is misplaced.

2. The Defendants Were Not Coerced

The defendants contend that they were coerced because of the Government's alleged offer of "the religious reward of Paradise and the earthly reward of great riches." (Cromitie Br. 74). However, the types of financial discussions in this case, referenced *supra* at Point I.A.2.b, fall clearly outside of the realm of outrageous government misconduct. *See Al Kassar*, 660 F.3d at 123 (holding that government payments to the defendants in an amount well over $200,000 for a weapons transaction did not violate due process because "financial . . . inducements are not outrageous conduct"); *see also Myers*, 692 F.2d at 837-38 (noting that even extremely large financial inducements do not rise to the level of due process violations). Similarly, the evidence demonstrated that Cromitie had long-held views that linked religion to violence. Indeed, when Cromitie first approached the CI on June 13, 2008, outside a mosque, he made clear that he already held specific views on this subject, uninfluenced by the CI (*see* GSA 98 (Cromitie: "So you already knew I was like that. It wasn't

you who was talking to me, I talked to you about it. When we first met in the parking lot, I talked to you about it. I said, 'Did you see what they did to my people over there? . . . [I]n Afghanistan. . . . And you knew I wanted to get back. You knew I did."); GSA 217-18 (Cromitie: "It wasn't you who said anything, it was me, right?")), and that those views were anti-American. (Tr. 682 (within minutes of introducing himself to the CI, Cromitie tells the CI that he wanted to "do something to America.")). This was reinforced by Cromitie's discussions with the CI in their third meeting, on July 3, 2008, when Cromitie stated that he wanted to joined Jaish-e-Mohammed — an organization that the CI had just described as "fighting in Afghanistan and Pakistan as a terrorist organization." (Tr. 691). In other words, since it was Cromitie who "sought to initiate an intimate . . . relationship" with the CI on religious grounds, his outrageous government conduct claim must fail. *United States* v. *Mahon,* No. CR 09-712 PHX-DGC, 2010 WL 4038763, at *8-*10 (D. Ariz. Oct. 14, 2010). As such, the defendants cannot credibly argue that the CI's subsequent discussions with Cromitie constituted coercion.

As this Court has previously noted in *Cuervelo*, "[t]he outrageousness of the government's conduct must be viewed 'standing alone' and without regard to the defendant's criminal disposition." 949 F.2d at 565 (citing *Chin*, 934 F.2d at 398). Here, the Government's conduct falls far outside of the category of outrageous, as the only conceivable injury to Cromitie and the other defendants is the kind of conduct resulting in "feelings of betrayal . . . when [they] realized that [their] sense of security in conspiring to violate the law was unfounded." *Chin*, 934 F.2d at 399.

Nevertheless, the defendants attempt to rely on *Cuervelo* to argue that, like the defendant in *Cuervelo*, the Government coerced Cromitie into criminal activity by "using a sexual relationship." (*See* O. Williams Br. 68-69). This reliance is misplaced. In *Cuervelo*, the defendant alleged that the undercover agent repeatedly engaged in sexual intercourse with her. 949 F.2d at 562-65. None of the conduct cited by the defendants here falls anywhere close.

For these reasons, the District Court properly rejected the defendant's motion to dismiss the indictment for outrageous government misconduct.

POINT III

The District Court Properly Denied the Defendants' Motion for a New Trial Based on the CI's Testimony

The defendants argue that the District Court erred in denying their motion for a new trial based on allegedly perjured testimony by the CI. (O. Williams Br. 97). Along the same lines, the defendants argue that the Government committed plain error, asserting that, "[i]n rebuttal summation, the prosecutor improperly vouched for [the CI]'s credibility by emphasizing that because of his status as someone who could be deported he had a strong motive to tell the truth." (O. Williams Br. 103). Both claims should be rejected. The District Court properly determined that the CI's testimony did not warrant a new trial, in light of the fulsome nature of the CI's testimony on both direct and cross examination, which provided the jury with a complete picture of both the accurate and inaccurate aspects of the CI's statements at trial. Similarly, the Government's

statements in summation were proper and did not constitute error, let alone plain error.

A. Relevant Facts

1. Defendants' Motion to Dismiss the Indictment

After approximately four days of direct examination, the defendants began cross examination of the CI on September 15, 2010. During about six full days of cross-examination, defense lawyers questioned the CI about a wide range of topics, from his conduct in this case to his financial and personal background over the past 20 years. (Tr. 1211-2358). On September 20, 2010, the defense, alleging that the CI perjured himself, filed a motion to compel the Government to "investigate and correct suspected perjury" concerning various collateral matters and seeking a hearing on the CI's testimony. (*See* Tr. 1910-24; Dkt. No. 108).

By oral ruling on September 21, 2010, the Court declined to order a mid-trial hearing. (Tr. 2019). However, it postponed the redirect examination of the CI until after the Government had an opportunity to question the CI about the issues raised during cross-examination and potentially correct any inaccurate testimony pursuant to *United States* v. *Wallach*, 935 F.2d 445 (2d Cir. 1991). (Tr. 2020). Accordingly, the Government interviewed the CI and others concerning his testimony, gathered additional materials, and then provided those materials to the defense on September 25, 2010, together with a cover letter highlighting what appeared to be additional impeachment material, such as the CI's new admission that

certain handwriting on his asylum application was his, although he had previously denied it during cross-examination. (Dkt. No. 139). In connection with that disclosure, the Government also filed a letter brief explaining why, in light of its investigation, it was prepared to redirect the CI in accordance with *Wallach*. (Dkt. No. 139).

On September 27, 2010, the following Monday, the defense moved to dismiss the indictment based on what it characterized as the untimely production of those materials. (Tr. 2414-29). The District Court denied the motion but gave defense counsel additional time to review the materials and to reopen cross-examination. (Tr. 2537-42).

2. The Alleged Perjury

On appeal, the defendants claim that they were prejudiced by the CI's alleged perjury as to four aspects of his testimony: (1) the CI's explanation for his statement to Cromitie, "I told you, I can make you $250,000 dollars" during an April 5, 2009 telephone call (A. 4486); (2) the CI's testimony that he only offered a specific amount of money once, which was $5,000, on May 19, 2009; (3) the circumstances surrounding his representation in his prior, criminal case; and (4) the circumstances surrounding a gift of a car from Benazir Bhutto to his son. (O. Williams Br. 44-50, 96-97).

a. The Explanation of $250,000 and Offers of Money to the Defendants

As described further below, throughout his testimony on direct and cross examination, the CI admitted that he had stated to Cromitie and the other defendants that they

could make substantial amounts of money from participating in a terrorist plot, and the Government introduced (and played) recordings confirming as much.

For example, when they met on February 23, 2009, the CI told Cromitie he would "be rewarded in both ways" by Jaish-e-Mohammed (GSA 158), meaning spiritually and financially. (Tr. 822). The CI also testified that, throughout Spring 2009, he implied that Cromitie and his recruits would "get a lot of money," but he did not offer a "specific amount" of money to them until May 19, 2009. (Tr. 891-92, 1877-78). On that day, he told Cromitie and the other defendants they would be paid $5,000. (Tr. 892-93, 1018, 1035-36).

With respect to GX 239-T, and the CI's statement, "I told you, I can make you 250,000 dollars," the CI stated "that was a code word we used . . . for the operation," and was some kind of reference to the cost of the 9/11 attacks, which he had previously discussed with Cromitie. (Tr. 850). Later, the CI testified similarly, that he meant the reference to $250,000 as a "code word" for the "costs of the equipments" for the operation. (Tr. 1036, 1797, 1799-1800). At the same time, however, he conceded that there was no reference in any other evidence to that "code" (Tr. 1801), and that he had never previously discussed it with Cromitie or the FBI (Tr. 1880-81, 1959-60). During redirect examination, the CI called the statement a "bad code" and a "mistake," and acknowledged that what he said could have given Cromitie the impression that he was being offered that sum of money. (Tr. 2513-14).

The CI also testified about other discussions of money with Cromitie. In December 2008, the CI told Cromitie

and his girlfriend that they could have his BMW. (Tr. 893-94). Cromitie followed up on that promise for months thereafter, but when May 3 (an original date for the operation) came and went, Cromitie later acknowledged that he never got the car he was promised. (Tr. 2510-13; A. 4354.). And when Cromitie and the CI met on April 16, 2009, the CI implied that he would buy Cromitie a barber shop costing "[s]ixty, seventy thousand dollar[s]," but Cromitie immediately declined. (GSA 195-96). Generally, the CI never denied giving Cromitie the impression that "he would make a lot of money." (Tr. 1887). But the CI said he did not consider creating that "impression" to be the same thing as an "offer," in part because Cromitie never took most of what the CI said seriously enough to follow up. (Tr. 1869-70, 2505-07).

With respect to the other defendants, beginning in fall 2008, Cromitie made clear to the CI in the fall that he was offering "a lot of money" to potential recruits, and the CI did not contradict or admonish him. (Tr. 816; *see also* Tr. 841-42). Later, the CI explicitly "offered money to get people to participate." (Tr. 1659). For example, the CI told Cromitie that David Williams would receive "separate money" from Cromitie (who had offered to pay Williams out of his own share). (GSA 199; *see also* GSA 214). And when the CI next met with Williams to confirm his participation, both he and Cromitie explicitly offered him money. (GSA 218 ("But they givin' us money, anyway.")). The CI frequently confirmed that he did not want recruits who were in it "for the money" (GSA 193), implying that the lookouts would be paid. On May 8, all of the defendants asked the CI for money to pay bills before the operation, and he said he would consult with other mem-

bers of Jaish-e-Mohammed. (Tr. 1016-17; GSA 417-23). On May 15, 2009, after talking to Agent Fuller, the CI told three of the defendants that their money would be placed in mailboxes after the operation, and, on May 19, he told them all that they would receive $5,000 each. (Tr. 1033-36, 2068-70, 2077-81).

During his redirect examination, the CI largely repeated the testimony described above: he acknowledged offering Cromitie's girlfriend a BMW (Tr. 2500), and that he had given Cromitie the general impression in Spring 2009 that any lookouts he recruited would be paid, but that he did not offer a specific amount until May 19, 2009, when he offered $5,000 (Tr. 2501-02, 2518-19).

b. The CI's Sentencing in Albany and His Relationship with His Defense Counsel

During his cross-examination, the CI admitted that the Presentence Investigation Report ("PSR") relating to his Albany criminal case contained factual inaccuracies, like the dates his parents died (Tr. 1349-52, 1515-18), even though his lawyer had said in open court that the report was "accurate" and the CI himself had told the District Judge he had no "objections" to its facts (DX 5 at 2-3; Tr. 1264-65, 2051-52).

By way of explanation, the CI testified that he did not meet his lawyer until the day of sentencing in October 2006, and for that reason, he had no chance to review the PSR in detail. (Tr. 1264-66). He also said that he had agreed there were no errors because his lawyer had told him just to agree with whatever the judge said, which, the

CI accepted, amounted to an instruction from his defense lawyer to lie to the sentencing judge. (Tr. 2337-38, 2049-50).

Although the CI once said that he had met with his lawyer, Fred Ackerman, to review the PSR before sentencing (Tr. 2041-42), the CI later insisted that he had never met Ackerman before the day of his sentencing, and that the FBI must have retained and paid Ackerman to represent the CI prior to that point. (Tr. 2044-49, 2312, 2858-59, 2955). However, the Government stipulated to the fact that Ackerman began representing the CI in or about August 2004 (Tr. 2046, 2053-54), and the sentencing transcript itself (which was in evidence and was read to the jury) reflected that the CI had reviewed the PSR in his lawyer's office prior to sentencing (Tr. 1264-65).*

c. The Gift of a Car from Benazir Bhutto

The CI testified that, although a number of cars

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* Other testimony by the CI also undermined his recollection of these collateral events. For example, the CI had stated in this trial that Ackerman was not representing him when he testified in Albany (as a cooperating witness) in or about Summer 2006 (about eight weeks before he was sentenced in October 2006), but when the CI was confronted with his testimony as a cooperating witness, the CI admitted that he had named Ackerman as his lawyer during that testimony, which clearly contradicted his recollection on the stand of when Ackerman began representing him. (Tr. 2313-14).

registered in his name were purchased for resale, one of the cars (a Mercedes Benz) was a gift to him from the former Prime Minister of Pakistan, Benazir Bhutto. (Tr. 1353-54). The CI first said that he "believe[d]" it was "somewhere [in] '03 or '02' when she made the gift, when she was staying in a hotel in New York City. (Tr. 1354). He later elaborated that, when the CI and his 17-year-old son met her at her hotel, Bhutto offered to buy him a car, and she provided $40,000 cash, which was later used to buy a Mercedes Benz that was registered in Albany, under either the CI's or his wife's name. (Tr. 1525-26).

Over the weekend after that testimony, however, the CI reviewed bank and other records, which showed he received the funds for the purchase of the car in or about 2005. (Tr. 1579-80). As a result, the CI realized that the meeting with Bhutto could not have been in 2002 (when his son was only 14 years old), but rather occurred in or about 2005 (when his son was about 17 years old) and that he bought the car that year. (Tr. 1576-77, 1580).

The following Monday, defense counsel for Cromitie began cross-examining the CI on the gift by attempting to commit him to his prior testimony that the meeting with Bhutto occurred in 2002. The CI said he had previously testified mistakenly, and he corrected his account. (Tr. 1576). Through further cross examination, counsel intimated that the CI had realized he needed to change his story over the weekend because his son was not old enough to drive a car in 2002, and that the CI was lying about the entire course of events. (Tr. 1578-79, 2891-92).

On re-cross-examination a week later, the CI repeated that he received the $40,000 from Bhutto "in 2005 or six,"

and that he had been wrong when he said 2002. (Tr. 2842).* He also provided additional details about the transaction: he said that after the meeting with Bhutto, a wire transfer of about $40,000 arrived in his account in January 2006 from a company in Dubai associated with Bhutto's husband. (Tr. 2895-96). The CI's son used that money to purchase a Cadillac Escalade (not a Mercedes, as the CI had previously testified), which his son exchanged a couple months later for a Mercedes (consistent with the CI's prior testimony). (Tr. 2893). The CI explained that he was living in Tennessee at the time, and never saw the Escalade, which is why his prior testimony was mistaken. (Tr. 2893).**

The defense suggested that the CI was lying about the purpose and source of the $40,000, because nothing on the face of the records established that it was an international wire transfer associated with the Prime Minister's husband. (Tr. 2895, 2897). The defense also suggested it was

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* The CI identified bank records, which he obtained over the prior weekend, that established a wire transfer of $40,000, less a wire transfer fee, into his account in January 2006, which records were produced to the defense as 3502-1407 to 3502-1408. The defense did not offer those records, marked as DX 35, into evidence.

** The Government interviewed the CI's son, who corroborated his father's account of events. *See* Letter from the Government (Sept. 27, 2010). The Government also obtained and produced car registration records that corroborated the CI's account. (*See* 3502-1403 to 3502-1405).

implausible that the CI did not know his 17-year-old son had purchased a Cadillac, and had never seen the car itself, when the CI admitted, based on DX 36, a record produced by the Government to the defense, that he had registered the Escalade in his name in Tennessee in August 2006, months after the wire transfer was received. (Tr. 2898-2900, 2926-28).

3. The Parties' Summations

During summations, the parties spent vastly different amounts of time on the CI's testimony. The defense summations were dominated by allegations that the CI was a liar and that, because the CI had given the jury false testimony about events in his personal life, he could not be believed about anything concerning the facts of this case, including the conduct of the defendants. (Tr. 3238-39, 3251-52, 3269-70, 3353-55, 3366, 3377-78, 3401). As a result, the defense argued, any unrecorded interactions between the defendants and the CI should be construed in the defendants' favor, to support the entrapment defense. (Tr. 3272-73, 3404-05).

In its main summation, the Government spent little time discussing the CI's testimony as to unrecorded events and no time whatsoever addressing collateral matters (*i.e.*, matters unrelated to the charged conduct being raised on appeal: the circumstances surrounding his prior representation and the car gift from Bhutto). Instead, it explicitly called the cross-examination on those matters a distraction that the jury could disregard, because the more crucial evidence in the case was tapes of the defendants themselves, their interactions with the CI, and their planning and execution of a terrorist plot. (Tr. 3144). The defense

seized on this to argue that the Government had abandoned its witness. As Cromitie's counsel stated in his own summation, "[the prosecutor who gave the Government's main summation] . . . didn't talk at all about whether or not Hussain is a credible witness." (Tr. 3238 (Counsel for James Cromitie)). Indeed, Onta Williams' counsel stated that the Government did *not* vouch for the credibility of its witness: "[The prosecutor] didn't say you should believe him. He didn't say he was credible. He didn't say anything about him. It was like Mr. Hussain did not exist." (Tr. 3398-99 (Counsel for Onta Williams); *see also* Tr. 3378 (Counsel for Laguerre Payen) ("If he wasn't lying, [the Government] . . . . would be jumping up and telling you how trustworthy he is. . . . But they are not doing it."); Tr. 3404 (Counsel for Onta Williams) ("I don't think they can really tell you with a straight face that he was a credible witness and that's why [the prosecutor] didn't talk about him yesterday.")).

To the extent the Government relied on the CI's account of unrecorded events, it defended his credibility in its rebuttal by arguing explicitly that, regardless of the CI's past (including "[w]hat happened to the CI in bankruptcy court"), he could be trusted in his account of what happened in this particular case, because his testimony was corroborated by dozens of hours of recorded meetings (Tr. 3414-16)[*] — including, for example, Cromitie's own

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[*] Trial transcript erroneously repeats the page number range "3316" to "3345" twice due to court reporter transcribing error. The second set of numbers should instead be pages 3416 to 3445 (Oct. 5, 2010). This

highly inculpatory, recorded references to his first encounter with the CI. (Tr. 3419-20; GSA 98 (Cromitie: "So you already knew I was like that. It wasn't you who was talking to me, I talked to you about it. When we first met in the parking lot, I talked to you about it. I said did you see what they did to my people over there? . . . In Afghanistan. . . . And you knew I wanted to get back. You knew I did."); GSA 218 (Cromitie: "It wasn't you who said anything, it was me, right?")). The Government never denied that the CI offered money to the defendants, and instead argued that the defendants were still predisposed. (*E.g.,* Tr. 3144-45, 3155-56, 3198-3204, 3220-25, 3436-38). The Government also conceded that, although "Cromitie, easily, could have took [the statement regarding the $250,000] as an offer," other evidence demonstrated that Cromitie never took it seriously as an inducement. (Tr. 3185-86, 3429). Finally, the Government also explicitly argued that the jury could discount all of the CI's testimony and still be convinced beyond a reasonable doubt, because of the sheer weight of the recorded evidence in the case. (Tr. 3416-17).

B. Applicable Law

1. New Trial Based On Perjured Testimony

Rule 33 of the Federal Rules of Criminal Procedure provides, in relevant part, that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R.

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brief contains the correct citing.

Crim. P. 33(a). "[T]he standard for granting such a motion is strict," *United States* v. *Gambino*, 59 F.3d 353, 364 (2d Cir. 1995), and "a district court must exercise great caution . . . and may grant the motion only *in the most extraordinary circumstances*," *United States* v. *Petrillo*, 237 F.3d 119, 123 (2d Cir. 2000) (emphasis in original; internal quotation marks omitted). The District Court's decision is reviewed for abuse of discretion, *United States* v. *Petrillo*, 237 F.3d at 124, which is "broad," "and its ruling is deferred to on appeal because, having presided over the trial, it is in a better position to decide what [the] effect . . . might have [been] on the jury," *United States* v. *Gambino*, 59 F.3d at 364; *accord United States* v. *Zagari*, 111 F.3d 307, 322 (2d Cir. 1997); *United States* v. *Locascio*, 6 F.3d 924, 949 (2d Cir. 1993); *United States* v. *Spencer*, 4 F.3d 115, 119 (2d Cir. 1993). The "'ultimate test' [in deciding a Rule 33 motion] is 'whether letting a guilty verdict stand would be a manifest injustice. . . . There must be a real concern that an innocent person may have been convicted.'" *United States* v. *Canova*, 412 F.3d 331, 349 (2d Cir. 2005) (quoting *United States* v. *Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001)); *United States* v. *Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (reversing grant of new trial based on trial court's determination that government witnesses gave perjured testimony).

"In order to be granted a new trial on the ground that a witness committed perjury, the defendant must show that (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the perjury at [the] time of trial; and (iv) the perjured testimony remained undisclosed during trial." *United States* v. *Josephberg*, 562 F.3d 478, 494 (2d Cir.

2009) (internal quotation marks and alterations omitted). When "nothing in the record indicates the alleged perjury remained undisclosed during trial, the perjury claim fails." *United States* v. *McCarthy*, 271 F.3d 387, 400 (2d Cir. 2001); *accord United States* v. *Canova*, 412 F.3d at 349 (new trial motion based on alleged perjury properly denied where "[t]hese arguments [concerning witness credibility] were forcefully presented to the jury through the vigorous cross-examinations and arguments of . . . able trial counsel"); *United States* v. *Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000) (affirming denial of new trial motion where the defendants had "ample opportunity to rebut [the witness's] testimony and undermine his credibility" based on record evidence and "[t]he jury was thus aware of the dispute"); *United States* v. *Joyner*, 201 F.3d 61, 82 (2d Cir. 2000) ("[C]ross-examination and jury instructions regarding witness credibility will normally purge the taint of false testimony."). This is because the jury is the "appropriate arbiter of the truth," charged with "sift[ing] falsehoods from facts," *United States* v. *Zichettello*, 208 F.3d at 102 (internal quotation marks omitted), "entitled to weigh the evidence and decide the credibility issues for itself," *United States* v. *McCarthy*, 271 F.3d at 399, "and determine whether an inconsistency in a witness's testimony represents intentionally false testimony or instead has innocent provenance such as confusion, mistake, or faulty memory," *United States* v. *Josephberg*, 562 F.3d at 495. "It long has been [the] rule that trial courts must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses. It is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment."

United States v. *Sanchez*, 969 F.2d at 1414 (internal quotation marks and citations omitted).

"An example of exceptional circumstances is where testimony is 'patently incredible or defies physical realities,' although the district court's rejection of trial testimony by itself does not automatically permit Rule 33 relief." *United States* v. *Ferguson*, 246 F.3d at 134 (quoting *Sanchez*, 969 F.2d at 1414); *accord United States* v. *McCourty*, 562 F.3d 458, 475-76 (2d Cir. 2009).

2. Improper Vouching

A defendant asserting that a prosecutor's remarks warrant reversal "face[s] a heavy burden, because the misconduct alleged must be so severe and significant as to result in the denial of [his] right to a fair trial." *United States* v. *Locascio*, 6 F.3d at 945; *see United States* v. *Shareef*, 190 F.3d 71, 78 (2d Cir. 1999) (prosecutorial misconduct ground for reversal "only if it causes the defendant substantial prejudice so infecting the trial with unfairness as to make the resulting conviction a denial of due process") (internal quotation marks, citations and brackets omitted). As this Court has repeatedly stated, "'[t]he government has broad latitude in the inferences it may reasonably suggest to the jury during summation.'" *United States* v. *Zackson*, 12 F.3d 1178, 1183 (2d Cir. 1993) (quoting *United States* v. *Casamento*, 887 F.2d 1141, 1189 (2d Cir. 1989)). Remarks of the prosecutor during summation "do not amount to a denial of due process unless they constitute 'egregious misconduct.'" *United States* v. *Shareef*, 190 F.3d at 78 (quoting *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974)).

The burden is even heavier on a defendant who, like these, fails to object to the Government's summation. Without an objection, the plain error standard governs, and the defendant's claim must be rejected unless the statement in question amounts to a "flagrant abuse." *Zichettello*, 208 F.3d at 103; *United States* v. *Rivera*, 22 F.3d 430, 437 (2d Cir. 1994). Under such limited review, this Court will exercise its discretion to correct plain error only where the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (internal quotation marks omitted); *United States* v. *Olano*, 507 U.S. 725, 732 (1993).

During its arguments, the Government should not "vouch for [its] witnesses' truthfulness." *United States* v. *Modica*, 663 F.2d 1173, 1179 (2d Cir. 1981). Vouching occurs when a prosecutor "'express[es] his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'" *Id*. at 1178 (quoting ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980)). Such comments are inappropriate because by making them the prosecution "tends to make an issue of its own credibility, or to imply the existence of extraneous proof." *United States* v. *Rivera*, 22 F.3d at 438 (internal quotation marks, citations, and brackets omitted). "In a particular context, however, what might superficially appear to be improper vouching for witness credibility may turn out on closer examination to be permissible reference to the evidence in the case." *United States* v. *Perez*, 144 F.3d 204, 210 (2d Cir. 1998).

This Court evaluates challenged vouching "in the

context of the trial as a whole, for the Government is allowed to respond to argument that impugns its integrity or the integrity of its case." *Id.*; *see United States* v. *Bagaric*, 706 F.2d 42, 61 (2d Cir. 1983). Thus, when the defense has attacked the Government's or its witnesses credibility, "'the prosecutor is entitled to reply with rebutting language suitable to the occasion.'" *Rivera*, 22 F.3d at 438 (quoting *United States* v. *Praetorius*, 622 F.2d 1054, 1060-61 (2d Cir. 1979) (internal quotation marks and citation omitted)). Also, prosecutors have greater leeway in commenting on the credibility of their witnesses when the defense has attacked that credibility. *See, e.g.*, *United States* v. *Perry*, 643 F.2d 38, 51 (2d Cir. 1981) ("[I]n light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements vouching for witnesses were understandable if not laudable.").

C. Discussion

1. The District Court Properly Denied the Defendants' Motion for a New Trial

Contrary to the defendants' arguments, a new trial is not warranted on the basis of the CI's testimony, given, as the District Court properly found, that, regardless of the credibility of CI, the jury was able to fully assess the relevant aspects of the CI's testimony being contested by the defendants. *See* 2011 WL 1842219, at *25 (rejecting "the defendants' argument that the jurors were not made aware of [the CI's] mendacity, or that the Government failed in its obligation to be candid with the jury and the court."). Indeed, this is supported by the defendant's own

approach to this issue on appeal. Specifically, in arguing on appeal that the CI committed perjury, the defendants rely almost exclusively on the CI's testimony before the jury. (*See, e.g.*, O. Williams Br. 44-50, 94-97). For example, in arguing that the CI perjured himself when he said he was using a "code" when he told Cromitie, "I told you, I can make you $250,000" (A. 4486), the defendants point merely to the statement's "plain language and [the absence of] any other explanation for it." (O. Williams Br. 96-97; *see also* Tr. 2513 (CI admitting that it was a "bad code, [the] worst code")). In any event, what mattered is not what the CI intended by the statement, but rather what Cromitie himself could have understood, and on this, the record was clear: the CI said — and the Government never disputed — that Cromitie himself could reasonably have interpreted the statement as an offer. (Tr. 2513). Of course, Cromitie's subsequent behavior suggested he did not.

With respect to the potential financial rewards, the evidence of them, which consisted largely of recorded conversations, was undisputed, and the CI freely acknowledged it. The CI distinguished those rewards from the "offer" of $5,000 he made on May 19, 2009, because, according to him, that was the only time he mentioned a specific amount of money in a way that the defendants could reasonably construe it as an "offer." (Tr. 1869-70). But even if the CI's testimony that he had not offered a specific amount of money before May 19 was perjury — because, as the defendants claim, he had told Cromitie on April 5, "I can make you $250,000" — the proof of that perjury was available for the jury to see from the CI's testimony on that April 5 conversation.

And with respect to the collateral matters raised by the defense on appeal, *i.e.*, the circumstances surrounding his prior representation and his car gift, the testimonial record likewise contained more than enough evidence from the trial itself to impeach the CI on those matters. For example, the Government stipulated to the fact that Ackerman began representing the CI nearly two years before his sentencing (Tr. 2046, 2053-54), and other admitted evidence clearly established their relationship began well before the day he was sentenced in his criminal case, contrary to his testimony on cross-examination. (Tr. 1264-65 (sentencing transcript reflected that the CI had reviewed the PSR in his lawyer's office prior to sentencing); Tr. 2313-14 (CI named Ackerman as his lawyer during his testimony about two months before he was sentenced). And with respect to the car, the CI's testimony itself contained numerous inconsistencies that he acknowledged himself: such as whether the gift was made in 2002 or 2005 (*compare* Tr. 1354 *with* Tr. 1576-80); whether it was in cash or in kind (*compare* Tr. 1525-26 *with* Tr. 2895-96); whether his son bought a Mercedes or an Escalade (*compare* Tr. 1525-26 *with* Tr. 2893); and whether the CI ever knew about the Escalade, although he was the one who registered it (*compare* Tr. 2893 *with* Tr. 2898-2900, 2926-28).

Given that the defendants' issues with the CI's testimony were squarely vetted before the jury, this Court need not reach the question of materiality. *See United States* v. *Middlemiss*, 217 F.3d 112, 122 (2d Cir. 2000) ("The controlling issue generally is the effect the evidence would have on the jury's verdict *if it had been submitted at trial*.") (emphasis added). Indeed, as the District Court

summarized, "Hussain admitted to some of his lies, denied others and minimized them all. But the fact that he was a serial liar was certainly not kept from the jury. . . . To argue, as defendant[s] do here, that the jurors were misled about the CI's credibility flies in the face of the entire conduct of the trial." 2011 WL 1842219, at *26. But in any event, any false testimony by the CI was immaterial to the verdict. The vast majority of the CI's interactions with the defendants was recorded, leaving the jury with dozens of hours of evidence from which to judge the predisposition of the defendants, even if the jury disregarded the CI's testimony in its entirety, as the defense urged it to, and as the Court instructed the jury that it was permitted to do. In this respect, the CI was neither the "centerpiece of the government's case" nor was his testimony the "only" evidence of the defendants' predisposition. *United States* v. *Wallach*, 935 F.2d at 455, 457. Further, those recordings also corroborated the CI's testimony about unrecorded events in two critical ways: at least two recorded conversations with Cromitie demonstrated that it was Cromitie who approached the CI and first suggested an illegal act (Tr. 3419-20; GSA 98, 218) and the sheer amount of recorded conversations (including the discussions of money and other rewards) made it less likely that the CI was having discussions with the defendants "offline" that differed materially from the version of events on tape. As the District Court put it, "Cromitie himself supplied all the evidence that was necessary to support a finding of predisposition," and "on the one and only point that mattered . . . Hussain's credibility ended up being immaterial." 2011 WL 1842219, at *27. For these reasons, there is no "reasonable likelihood" that any

perjury affected the verdict. *United States* v. *Stewart*, 433 F.3d 273, 297 (2d Cir. 2006).

Finally, this case is easily distinguished from the cases relied upon by the defense. Principally, in cases granting new trials based on the prosecution's knowing failure to correct perjury, the witness lied on the stand about highly material matters that remained unexplored during cross-examination, such as the prosecution's promises to the witness in exchange for his testimony, *see Napue* v. *Illinois,* 360 U.S. 264, 265, 270 (1959); *see also DuBose* v. *Lefevre*, 619 F.2d 973, 978 (2d Cir. 1980) ("[T]he jury labored under the misapprehension that the State had not offered her 'any kind of deal or any kind of promise or anything' in return for her testimony when in fact it had at least agreed to 'do the right thing,' with a misdemeanor plea possible."), whether the witness reached his professional opinion immediately because it was obvious, instead of only after careful review and consideration over a period of weeks, *e.g., Drake* v. *Portuondo*, 553 F.3d 230, 241-244 (2d Cir. 2009), the date the witness last met with the Government, where he made (undisclosed) exculpatory statements, *e.g., United States* v. *Rivas*, 377 F.3d 195, 199 (2d Cir. 2004), the witness's "conscious decision to lie" about his gambling problem, when he had "purportedly undergone a moral transformation," *Wallach*, 935 F.2d at 457, the witness's conscious decision to lie about his criminal history on the stand, *e.g., Perkins* v. *LeFevre*, 642 F.2d 37, 38-39 (2d Cir. 1981); *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975), and the witness's personal profits from the very illegal conduct that he was testifying about, *e.g., United States* v. *Stofsky*, 527 F.2d 237, 242-43 (2d Cir. 1975). Here, by contrast, the Government

"conducted an investigation and formed a good-faith belief that the [alleged lies] referr[ed] only to the already-known inconsistencies in [the witness's] testimony that were aired at trial," and thus, "there [was] nothing for the prosecution to disclose and no duty under . . . *Napue*," or the other authorities cited by the defense. *Morris* v. *Ylst*, 447 F.3d 735, 744 (9th Cir. 2006).

For these reasons, the defense's motion for a new trial on the ground that the CI perjured himself should be denied.

2. The Government Did Not Improperly Vouch For the CI

Finally, the defendants contend that the Government improperly vouched for the CI during its rebuttal summation when it argued that the CI had an incentive to tell the truth in light of possible deportation consequences. (O. Williams Br. 103-06; *see* A. 2499). But the Government's argument was entirely fair, based on the record. Prior to February 20, 2009, when the CI returned to the United States from a personal trip to Pakistan, he believed that his immigration status would not be affected by his prior conviction in Albany, because of his cooperation. However, the CI realized on that day, when Agent Fuller's assistance was required to parole him into the country, that he could, in fact, be deported based on that conviction. (Tr. 819, 1389-91, 1472-74). The CI testified that his immigration status depended on a judge who would "decide [his] fate." (Tr. 2472). He hoped that cooperating with the Government as an informant, including by testifying, would allow him to remain in the United States. (Tr. 2473). He also testified that, if he were convicted of

perjury, "I would go to jail, in prison, and then I will be deported right away . . . ." (Tr. at 2473).

In the context of cooperation agreements, this Court has repeatedly upheld the Government's ability to offer evidence that a witness has tangible incentives to tell the truth, including the penalties that apply for violating such agreements. *See United States* v. *Cosentino*, 844 F.2d 30, 32-35 (2d Cir. 1988); *United States* v. *Edwards*, 631 F.2d 1049, 1052 (2d Cir. 1980); *United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir. 1978); *accord United States* v. *Gaind*, 31 F.3d 73, 78 (2d Cir. 1994); *United States* v. *Rivera*, 971 F.2d 876, 888 (2d Cir. 1992). In *United States* v. *Arroyo-Angulo*, for example, the prosecutor made just such an argument, pointing out that in light of the provisions of his agreement, if the cooperating witness lied, he would not get a reduction in sentence and would be subject to a perjury prosecution. 580 F.2d at 1147. This Court found "no error in the Government's summation references to [the witness'] cooperation agreement," and noted that "the cooperation agreement was a matter which the jury could properly consider in relation to the witness' credibility." *Id.* Specifically, the Court held that these remarks "did not amount to . . . improper vouching . . . but simply constituted permissible argument to the effect that these witnesses, whose veracity and credibility had been fiercely attacked by defense counsel, had no motive to testify falsely." *Id.* (quoting *United States* v. *Ricco*, 549 F.2d 264, 274 (2d Cir. 1977)); *see also United States* v. *Parker*, 903 F.2d 91, 101 (2d Cir. 1990) (approving prosecutor's argument in summation that cooperation agreement "gave [the witness] a motive to tell the truth").

The defendants miscast the issue by relying on cases that found reversible error based on the argument that, "if the defendant is innocent, government agents must be lying," *United States* v. *Richter*, 826 F.2d 206, 209 (2d Cir. 1987), where a prosecutor "invoke[d] his or her oath of office as a means of defending the credibility of government witnesses," *United States* v. *Pungitore*, 910 F.2d 1084, 1125 (3d Cir. 1990), or where a prosecutor invoked extra-record evidence, for example, that an officer "risked his . . . career if he lied," *United States* v. *Martinez,* 981 F.2d 867, 871 (6th Cir. 1992); *e.g., United States* v. *Combs*, 379 F.3d 564, 575 (9th Cir. 2004); *United States* v. *Boyd*, 54 F.3d 868, 871 (D.C. Cir. 1995). (O. Williams. Br. 104). But "[v]ouching consists of placing the prestige of the government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the jury supports the witness's testimony." *United States* v. *Weatherspoon*, 410 F.3d 1142, 1146 (9th Cir. 2005) (internal quotation marks omitted).

Here, by contrast, the Government argued only from the record evidence that the CI had a motive to tell the truth, because he believed that committing perjury would have negative immigration consequences. The fact that, since the trial, the CI has not been prosecuted for perjury does not reflect (as the defense has argued), that the argument was "a lie" "beneath the dignity of [the prosecutors'] calling" (O. Williams Br. 105); rather, it reflects the Government's judgment that there is well less than the proof necessary to prove, beyond a reasonable doubt, that the CI testified inaccurately "with the willful intent to provide false testimony, rather than as a result of confu-

sion, mistake, or faulty memory," *United States* v. *Canova*, 412 F.3d at 356-57 (internal quotation marks omitted), or of "[d]ifferences in recollection [that] do not constitute perjury." *Josephberg*, 562 F.3d at 494.

For these reasons, the Government's statements in summation did not constitute error, let alone plain error.

POINT IV

The District Court Properly Admitted Demonstrative Video Evidence

The defendants contend that the District Court erred in admitting certain demonstrative video evidence. (*See* D. Williams Br. 37-44). Specifically, the defendants contend that the video misled the jurors because it was not probative of the defendants' state of mind and was inaccurate. (D. Williams Br. 40, 42). The defendants' claims should be rejected. The District Court properly admitted the video as relevant evidence for the reasons explained below.

A. Relevant Facts

During the investigative stage of this case, Special Agent Fuller asked the Explosives Unit of the FBI Laboratory in Quantico to provide devices that were responsive to Cromitie's request for weapons. Specifically, in December 2008, Cromitie and the CI discussed using bombs made with C-4 explosives, which the CI said he could acquire from a contact in Connecticut, and which Cromitie referred to as "powerful." (GSA 117-18). During their meetings in December 2008, Cromitie also asked, "[H]ow far does a rocket launcher hit?" and was pleased when the

CI said approximately 300 yards, because Cromitie deemed that sufficient range to permit a clean getaway. (GSA 121-23). As a result, in April 2009, Agent Fuller sent a request to the FBI Laboratory to construct three inert improvised explosive devices, as well as a stinger missile. (Tr. 225).

At trial, FBI Special Agent Richard Stryker, who constructed the devices as requested, explained how he constructed the IEDs that the defendants intended to detonate. Each device contained 30 inert blocks of C4, blasting caps, and a fragmentation sleeve with ball bearings to be expelled from the device upon explosion, among other things. (Tr. 2754-57).

All of the defendants were fully familiar with the construction of the inert devices, including the number of bricks of explosive and the fragmentation sleeve. Indeed, during a May 1, 2009 meeting, David Williams and Cromitie talked about putting nails in a homemade bomb, and the sounds they would make, zipping through the air, after the bomb exploded. (GSA 343). The defendants had also been trained in how to detonate the IED (GSA 370-382, 385-87, 409-11). Unbeknownst to the defendants, however, the explosive ingredient found in "live" C4 (a compound known as "RDX") was replaced with an inert compound of similar density and weight. (Tr. 2756). In all other respects, the inert blocks of C4 appeared identical to military-grade materials sold by the same manufacturer to the U.S. Department of Defense, down to the style of lot numbers stamped on the packaging. (*See* Tr. 2757).

Following the defendants' arrest, the FBI's Explosives Unit tested the destructive capacity of 30 blocks of "live"

C4 (the same amount of C4 contained in inert form in defendants' IEDs) in devices comparable to ones the defendants conspired to used, and in the manner the defendants intended to use them — that is, positioned in stationary automobiles. (*See* Tr. 2759). Each of the three test IEDs contained 30 blocks of C4 (weighing a total of 37.5 pounds), which were placed in the center compartment of a tool bag along with a fragmentation sleeve containing 500 steel ball bearings. The demonstration admitted at trial involved two IEDs detonated after being placed in the rear passenger side of a Mazda. The car was surrounded by brightly colored targets screwed to wooden stakes, and the devices were detonated remotely. The detonation of the car was captured on a 20-second video and in high-speed still photographs. Photographs were also taken before and after the detonations, showing the preparation for, and effects of, each test. (Tr. 2760-68).

The defendants moved *in limine* to preclude the video demonstration and related evidence on the same grounds that they advance here, namely, that the evidence was not probative of the knowledge or intent of the defendants, and, to the extent the evidence was probative, it was unduly prejudicial. The District Court denied defendants' motion in an oral ruling before trial. (*See* May 28, 2010 Tr. 14).

At trial, the Government played the video and displayed a handful of still photographs, to illustrate the testimony of Agent Stryker. (*See* Tr. 2768; *see* GX 301 through 330). The Government also played the video during rebuttal. (Tr. 3441).

B. Applicable Law

It is the goal of the Federal Rules of Evidence to promote the admission of relevant evidence. *See* Fed. R. Evid. 102. Rule 401 defines "relevant evidence" as evidence that "has any tendency to make a fact more or less probable than it would be without the evidence." Fed. R. Evid. 401. As this Court has emphasized, "[a]ll relevant evidence is admissible unless excluded by the constitution, a statute, or a rule." *United States* v. *Onumonu*, 967 F.2d 782, 786 (2d Cir. 1992). Indeed, Rule 403, which squarely addresses the exclusion of relevant evidence, instructs that, to justify suppression, it is not sufficient that an item's probative value be somewhat less than its pernicious potential; rather, relevant evidence may not be excluded unless its "probative value is *substantially outweighed* by the danger of . . . *unfair* prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403 (emphasis added). All evidence of guilt is, of course, prejudicial, in the sense of disadvantaging the defense, but that is not the same as being "unfairly" prejudicial. *Costantino* v. *Herzog,* 203 F.3d 164, 174 (2d Cir. 2000) ("Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be *unfair*.").

"The district court has broad discretion regarding the admission of evidence." *United States* v. *SKW Metals & Alloys, Inc.*, 195 F.3d 83, 87 (2d Cir. 1999). Consequently, "[t]he trial court's evidentiary rulings, including its determination of relevance, *see, e.g., George* v. *Celotex Corp.*, 914 F.2d 26, 28 (2d Cir. 1990), and its assessment

that the probative value of relevant evidence is not 'substantially outweighed by the danger of unfair prejudice,' Fed. R. Evid. 403, are reviewed only for an abuse of discretion." *United States* v. *Khalil*, 214 F.3d 111, 122 (2d Cir. 2000); *see also, e.g., United States* v. *SKW Metals & Alloys Inc.*, 195 F.3d at 87-88 (2d Cir. 1999) ("Evidentiary rulings are reversed only if they are 'manifestly erroneous,' such that the admission constitutes an abuse of discretion") (citation omitted); *United States* v. *Salameh*, 152 F.3d 88, 110 (2d Cir. 1998) ("We will second-guess a district court 'only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally.'") (citation omitted). Moreover, courts "reviewing a challenge to a Rule 403 balancing . . . must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." *United States* v. *Rubin*, 37 F.3d 49, 53 (2d Cir. 1994) (internal quotation marks omitted).

C. Discussion

The video demonstration was compelling evidence of an essential element of charged offenses, namely, that the objects the defendants conspired and attempted to use were "weapons of mass destruction." 18 U.S.C. § 2332a(b). Because the evidence was relevant, and because it was neither unfairly prejudicial, nor likely to confuse the jury, it was properly admitted.

The most effective, efficient way to prove to a jury that the defendants tried to detonate an "explosive" or "incendiary" "bomb," 18 U.S.C. §§ 921(a)(4)(A)(i), 2332a(c)(2)(A), was to test the kind of device the defendants themselves intended to detonate. Courts have long

recognized this principle. *See United States* v. *Spoerke*, 568 F.3d 1236, 1250 (11th Cir. 2009) (admitting video of pipe bombs exploding under experimental conditions because "the government had the burden to prove every element of [the defendant's] crime at trial, including that the devices were 'destructive devices'"); *United States* v. *Jones*, 124 F.3d 781, 787 (6th Cir. 1997) (admitting a video showing the explosion of a replica device to prove the defendant possessed a "destructive device" within the meaning of the statute); *see also United States* v. *Smith*, 502 F.3d 680, 687 (7th Cir. 2007) (admitting expert's use of a replica of the pipe bomb in a demonstration because it was "necessary to help the government meet its burden to prove that [the defendant] attempted to use a bomb with intent to cause harm").

The demonstrative evidence also properly reminded the jury of the gravity of the defendants' intended actions, which was especially relevant at trial where the defendants' predisposition was at issue. *See Old Chief* v. *United States*, 519 U.S. 172, 188 (1997) ("[T]he prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."). Where, as here, the defense contended that the government's offers of money and favors compelled the commission of the crime, the jury was properly free to compare the consequences of the intended crime against those inducements. The more serious the consequences, the more difficult it was to accept that a few thousand dollars and meals, as opposed to a defendant's predisposition, caused them to commit the

charged crimes.*

Contrary to the defendants' claim (D. Williams Br. 40), it is of no moment that there may have been other means of establishing the same facts (*e.g.*, through mere testimony). Merely because the video was hard-hitting does not mean that it was unfairly prejudicial under Rule 403. Courts have routinely and properly admitted arguably far more forceful evidence of guilt, even when there are alternatives. *See, e.g.*, *United States* v. *Polouizzi*, 564 F.3d 142, 152 (2d Cir. 2009) (images of child pornography); *United States* v. *Velazquez*, 246 F.3d 204, 211 (2d Cir. 2001) (autopsy photos); *United States* v. *Salameh*, 152 F.3d 88, 122 (2d Cir. 1998) (finding no abuse of discretion to admit a "significant" number of "graphic" and "disturbing" photos of World Trade Center bombing victims, including corpse of a pregnant woman, despite defendants' stipulation offer). Such evidence "not only satisfies the formal definition of an offense, [it] tells a colorful story with descriptive richness." *Old Chief* v. *United States*, 519 U.S. at 187. "Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a

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* Nor did the video demonstration invite confusion or mislead the jury, which knew from the very beginning of the case that the weapons the defendants sought to use were inert, and that the demonstration was offered only to show what the defendants planned to do, and not what they actually accomplished. *See Smith*, 502 F.3d at 688 (holding that "it is unlikely that the jury was confused, because it heard testimony that the actual bomb did not explode").

narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them." *Id*. The video evidence here was forceful, but not because its impact came from any illegitimate source or inference.*

For these reasons, the District Court properly admitted the video demonstration and did not abuse its discretion.

POINT V

The District Court Properly Denied the Defendants' Mistrial Motion Regarding the Jury's Exposure to Extra-Record Statements

The defendants argue that the District Court erred in denying their motions for mistrial based on the inadvertent exposure to the jury of two extra-record statements during deliberations: one by Onta Williams (GX 290.1-T (A. 4512-4513)), and the other, by David Williams (GX 290.2-T (A. 4514-16)). (Payen Br. 24-29). This argument should be rejected. After a thorough voir dire and fact-finding, the District Court properly concluded that the defendants were

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* Indeed, the Government took great care to reduce any prejudicial impact that video and photographs of the explosion could have on the jury. As noted at sidebar before Agent Stryker testified at trial, Government avoided any close-up images of the damage to brightly colored targets surrounding the explosions, so as not to evoke images of people. (*See* Tr. 2737).

not prejudiced by those materials, because (1) with respect to GX 290.1-T, Onta Williams' statement was actually helpful to the defense, and (2) with respect to GX 290.2-T, "not a scintilla of evidence" suggested that the jury was actually exposed to the prejudicial portions of David Williams' statement. (Sp.A. 53). Accordingly, its decision to deny the mistrial motions was an appropriate exercise of its discretion.

A. Relevant Facts

1. Transcripts at Issue and District Court's Limiting Instructions

Prior to trial, the Government produced in discovery recordings of two telephone calls made respectively by defendants Onta Williams and David Williams while they were detained pending trial.* The calls were later redacted to pertinent portions and marked for identification as GXs 290.1 and 290.2, respectively.

In GX 290.1, Onta Williams claimed to an unidentified female ("UF") that he committed the charged offenses only because he was offered $10,000 by the CI:

WILLIAMS:	I said, the only reason why I was even in it 'cause of the money, you know what I'm saying, like he was like, "Yo."
UF:	What was he gonna give you?

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* Although the calls were recorded while the defendants were detained, nothing on the face of the transcripts of the calls suggested that. (*See* A. 4512-16).

WILLIAMS: He was like ten thousand, just walk 'em down the street, that's it.

UF: Ten thousand?

WILLIAMS: Yeah.

(A. 4512-13).

In GX 290.2-T, David Williams and his father also discussed money and the entrapment defense. On page one, his father said that "[s]ociety don't know that you [David Williams] were trying to . . . do for this money or whatever," and David Williams agreed. David Williams also said he was "going with" an entrapment defense based on "the first dude," referring to Cromitie and that "[t]he dude [the CI] was sending him [Cromitie] money and all that." (A. 4514-15). On the third page, David Williams said, "my case, my entrapment is dead," but would not have been "if they had been trying to persuade us instead of us just agreeing with them the first time." (A. 4516).

Prior to trial, the Government notified defense counsel that it intended to offer both calls into evidence. On August 23, 2010, all counsel moved *in limine* either to exclude or redact both of them. (08/24/2010 Tr. 266-69). On or about August 24, 2010, after trial commenced, and after consulting internally and with defense counsel, the Government advised the defense and the Court that it would not seek to introduce the David Williams recording, GX 290.2, but that it planned to introduce a redacted form of the Onta Williams recording, GX 290.1, that would be acceptable to the defense. (Tr. 266). The Government then

offered the corresponding transcript, GX 290.1-T, as "an aid to the jury," and the Court received it (Tr. 640), with a limiting instruction to the jury that the purpose of the transcript was to aid the jury in listening to admitted recordings. (Tr. 639).

On August 31, 2010, each member of the jury received a binder of "Telephone Transcripts" that included a transcript of the Onta Williams recording, GX 290.1-T, with a reminder from the District Court that the transcripts were merely aids. (Tr. 845 ("Folks, more. You know the rules.")). But the underlying recorded call, GX 290.1, was never admitted into evidence; through oversight, the Government did not withdraw GX 290.1-T, and no defendant moved to strike it from the record. Similarly, the Government inadvertently produced the transcript of the David Williams recording, GX 290.2-T, in Juror One's Telephone Transcripts binder, although the corresponding recording, GX 290.2, had never been introduced. (Sp.A. 40).

The Court charged the jury on October 6, 2010 and again reminded the jury that any transcripts they reviewed were not evidence. (Tr. 3464 ("In connection with the recordings that you have seen and heard, you were provided with transcripts. I instructed you then, and I remind you now, that the transcripts are not evidence. The transcripts were provided only as an aid.")).

2. The Jury Identifies the Transcripts and the Court's Voir Dire

At about 2 p.m. on October 8, 2010, the third day of deliberations, the jury sent the following note regarding

the transcript of the David Williams recording:

> URGENT!!! We the jury discovered 290.2T in one of the telephone transcript books. Is this admitted and should we consider it?

(CX 12). At some point, the jury sent a second note, "We the jury also noticed telephone exhibit 290.T [referring to 290.1-T] in all our books dated 5/29/09." (Tr. 3631). After receiving these notes, the Court immediately ordered the jury to cease deliberations, impounded the jurors' binders shortly thereafter, and conducted a voir dire of all twelve jurors. (Tr. 3593-3625).

Based on its voir dire, the District Court concluded that the transcript of the Onta Williams recording, GX 290.1-T, which had been admitted as an aid to the jury, "was seen," discussed, and "absorbed by the entire jury." (Sp.A. 40, 45, 54 n.6 (internal quotation marks omitted)). With respect to the transcript of the David Williams recording, GX 290.2-T, which was located only in Juror One's binder, only five members of the jury saw the document; "[n]o other juror read or saw the contents of this transcript," and none of the jurors discussed its contents. (Sp.A. 40-42). Of the five who even saw the document, only Juror One looked past the first page of the document on to the second, and this juror was excused. (Sp.A. 48, 51). No juror ever saw the third page of GX 290.2-T, which contained David Williams' prejudicial statement that the entrapment defense "was dead." (A. 4516; Sp.A. 51). In making those findings, the District Court also determined that, based on their demeanor, the jurors were all "highly credible, deeply earnest witnesses, who were concerned about doing the right thing." (Sp.A. 42).

3. The Court's Decision and the Continuation of Deliberations

The defendants moved for a mistrial based on the jury's exposure to the two transcripts. The District Court denied the motions, finding that GX 290.1-T was "more helpful to the defendants than it is to the Government," and that "[i]n view of the way the trial actually played out, any possible prejudice to Onta Williams from this transcript is both miniscule and curable by the court's limiting instruction." (Sp.A. 55, 57). The Court also found no prejudice as to the remaining defendants, who were not implicated by the transcript, much less prejudice that could not be cured by an instruction. (Sp.A. 56, 59-60). As to GX 290.2-T, the Court found that, because the jurors had not discussed that exhibit's contents and had not seen the third page, which contained prejudicial statements, the Court's instruction to disregard that document was sufficient to cure any prejudice to the defense. (Sp.A. 50-53).

The Court called the jury into the courtroom, commended the way it handled the situation, and explained that the jury should not have seen the transcripts, because, as they had been previously instructed, the underlying recordings had not been offered or admitted into evidence, and that the transcripts themselves were not evidence in the absence of those recordings. (Tr. 3654). The Court further instructed the jurors to disregard anything they had seen in the transcripts and "not think about anything in the transcripts or mention them again as [they] continue [their] deliberations." (Tr. 3654). The Court then polled the jurors individually on whether they could follow those instructions. Juror One responded, "I don't know." The rest of the

jurors responded, unequivocally, "Yes." (Tr. 3654-55).

After the poll, the District Court heard from defense counsel and then, without objection from the defense, excused Juror One for "good cause," pursuant to Rule 23(b)(3) of the Federal Rules of Criminal Procedure, because she was uncertain whether she could follow the District Court's instruction to disregard the transcripts. (Tr. 3657-70; Sp.A. 48-49 n.13.). The District Court then decided to proceed with deliberations with a jury of 11, instead of declaring a mistrial (Tr. 3662-66) — a decision that is not challenged on appeal.

The jury deliberated four more days, reaching a verdict on October 18, 2010, in the afternoon. (Tr. 3702).

B. Applicable Law

"[A] mistrial is warranted only upon a showing of actual prejudice." *United States* v. *Gaskin*, 364 F.3d 438, 463 (2d Cir. 2004). Although extra-record evidence is "presumptively prejudicial," *Remmer* v. *United States*, 347 U.S. 227, 229 (1954); *Bibbins* v. *Dalsheim*, 21 F.3d 13, 16-17 (2d Cir. 1994), "[t]his presumption . . . may be overcome by a showing that the extra-record information was harmless," *United States* v. *Peterson*, 385 F.3d 127, 134 (2d Cir. 2004) (internal quotation marks omitted); *see also Loliscio* v. *Goord*, 263 F.3d 178, 185 (2d Cir. 2001) ("[T]he determination of whether . . . Sixth Amendment rights have been violated by the jury's consideration of extra-record information requires a determination of whether the extra-record information had a prejudicial effect on the verdict.").

"The trial court should assess the 'possibility of preju-

dice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware." *United States* v. *Weiss*, 752 F.2d 777, 783 (2d Cir. 1985) (quoting *Sher* v. *Stoughton*, 666 F.2d 791, 794 (2d Cir. 1981)). "[T]he court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." *United States* v. *Greer*, 285 F.3d 158, 173 (2d Cir. 2000) (internal quotation marks omitted). That objective inquiry "focus[es] on the information's probable effect on a 'hypothetical average juror,'" *id*. (quoting *United States* v. *Calbas*, 821 F.2d 887, 896 n.9 (2d Cir.1987)), in light of "the entire record" of the case, including the arguments of counsel, *see United States* v. *Weiss*, 752 F.2d at 783; *United States* v. *Hillard*, 701 F.2d 1052, 1063-64 (2d Cir. 1983). It is also relevant what was *actually* "brought to the jury's attention," not merely what the jurors *might* have been exposed to. *See* Fed. R. Evid. 606(b); *United States* v. *Calbas*, 821 F.2d at 896-97. "The touchstone of decision . . . is thus not the mere fact of infiltration of some molecules of extra-record matter . . . but the nature of what has been infiltrated and the probability of prejudice." *Bibbins* v. *Dalsheim*, 21 F.3d at 16 (internal quotation marks omitted).

The ultimate question in determining whether to grant mistrial is not whether the extraneous material could conceivably have been prejudicial to the defense, but whether remedial measures short of a retrial were "sufficient to dispel any confusion and alleviate any prejudice." *United States* v. *Hillard*, 701 F.2d at 1063 (internal quotation marks omitted) (affirming conviction where jury learned that one defendant was incarcerated during trial).

"In many instances, the court's reiteration of its cautionary instructions to the jury is all that is necessary." *United States* v. *Cox*, 324 F.3d 77, 88 (2d Cir. 2003) (internal quotation marks omitted); *see, e.g., United States* v. *Peterson*, 385 F.3d at 133-34 (cautionary instruction was sufficient to cure prejudice when "disturbed" juror told other jurors (falsely) that she met the defendants during college and knew they dealt drugs); *Sher* v. *Stoughton*, 666 F.2d at 795 (trial court's cautionary instructions were sufficient to dispel any prejudice of anonymous calls to jurors, exhorting them to convict and advising them that co-defendant had received the death penalty); *United States* v. *Abrams*, 137 F.3d 704, 708 (2d Cir. 1998) (holding that a cautionary instruction was sufficient to dispel any prejudice from jury's premature discussion of the case). Other effective remedial alternatives to mistrial may include removing or replacing a tainted juror and providing additional cautionary instructions. Fed R. Crim. P. 23(b), 24(c)(3); *see United States* v. *Deandrade*, 600 F.3d 115, 118 (2d Cir. 2010) (affirming district court's discretionary denial of a mistrial); *United States* v. *Rodriguez*, 587 F.3d 573, 583 (2d Cir. 2009); *United States* v. *Cox*, 324 F.3d at 86; *United States* v. *Abrams*, 137 F.3d at 708. And in evaluating what remedial measures are required, "a court should generally presume that jurors are being honest" in responding to the Court's inquiries. *United States* v. *Cox*, 324 F.3d at 87; *see also United States* v. *Gaskin*, 364 F.3d at 464 (crediting foreperson's representation that "there had never been any consideration of evidence or culpability except with all jurors

present").*

In the end, a "trial judge is best situated to decide intelligently whether the ends of substantial justice cannot be attained without discontinuing the trial." *United States* v. *Millan*, 17 F.3d 14, 19 (2d Cir. 1994) (internal quotation marks omitted). Accordingly, "[a] district court has broad discretion in handling claims of jurors' partiality and taint that arise during trial," *United States* v. *Rodriguez*, 587 F.3d at 583, and a district court's denial of a motion for a mistrial will not be reversed absent abuse of that discre-

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* In this regard, the law is analogous to other cases where prejudicial testimony or evidence is improperly admitted: a mistrial is not the automatic remedy, because striking the testimony or evidence and providing an instruction is often sufficient protection. For example, in the context of co-conspirator statements, "[i]f the government succeeds in persuading the court that the conditionally admitted coconspirator statements were [properly admitted], the statements are allowed to go to the jury. If the court is not so persuaded, it either should instruct the jury to disregard the statements, or, if those statements were 'so large a proportion of the proof as to render a cautionary instruction of doubtful utility,' should declare a mistrial." *United States* v. *Tracy*, 12 F.3d 1186, 1199 (2d Cir. 1993) (quoting *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir.1969) (Friendly, J.)); *see United States* v. *Flores*, 73 F.3d 826, 831 (8th Cir. 1996) (affirming denial of mistrial motion where Government inadvertently elicited prior bad acts of defendant without providing pre-trial notice to the defendant).

tion, *United States* v. *Deandrade*, 600 F.3d at 118 (inadmissible testimony about defendant's incarceration); *United States* v. *Rodriguez*, 587 F.3d at 583 (jurors believed defendant was threatening them); *United States* v. *Weiss*, 752 F.2d at 783 (2d Cir. 1985) (extra-record evidence). *Cf. Marshall* v. *United States*, 360 U.S. 310, 312-13 (1959) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial.").

C. Discussion

Viewed in light of these legal standards, the District Court's decision to deny the defendants' motion for mistrial was entirely proper. As an initial matter, the jury's exposure to the extra-record information was harmless. As the defense conceded in its new trial motion before the District Court, "the only question before the jury was *why* defendants participated" in the charged crimes (Dkt. No. 160 at 31) (emphasis added), and both GX 290.1-T and the portion of GX 290.2-T to which the jury was actually exposed in fact supported the entrapment defense being advanced by the defendants at trial, *i.e.*, that they committed the charged crimes only because the CI offered them money, and not because they were otherwise predisposed. (*See, e.g.*, Tr. 94 (Onta Williams opening: "Onta Williams is absolutely not guilty. He was entrapped . . . . And he had no predisposition to participate in anything like this before the government started throwing our money around, our money around."); Tr. 107-08 (Counsel for Payen arguing that the defendants committed the charged crimes only because they were "starving" men desperate for money) Tr. 117 (Payen opening: "One of the things about entrap-

ment is that everybody has a price"); *see also* Tr. 264 (counsel for Onta Williams elicited from Agent Fuller that the CI "helped the defendants out personally" during the investigation by providing "grocery money," meals, rent, and money for other bills as a way to build "rapport"); *see also, e.g.*, Tr. 1620-23, 1659-61, 1669-71, 1674-78, 1709, 1734-37, 1860-61, 1895-97, 1930-32, 1998-99, 2160, 2192-94, 2235, 2917-18 (defense counsel arguing that the CI deliberately used the promise of money to recruit and motivate the defendants, who were not well-off, to commit the charged crimes, and that whether or not the money was "jihad money" would mean nothing to a poor man who wanted to spend it)).

Nevertheless, the defense contends that GX 290.2-T referred to "the defense strategy of entrapment as a made-up excuse." (Payen Br. 26). However, as the District Court properly found, no juror read enough of the document to draw that inference, and "no juror — even one who carefully read the portions of GX 290.2-T to which a few jurors were exposed (which none of them did) — would be left with the impression that the entrapment defense was the product of slick lawyer, or that it was 'cooked up.'" (Sp.A. 52-53). To the extent that David Williams' statement, "right now we're just going with entrapment" based on "the first dude," Cromitie (Sp.A. 38), is even open to that interpretation, any prejudice in light of the trial record supporting the defense would be "*de minimis* and was overcome by the curative instruction

that was given." (Sp.A. 54).*

As to GX 290.1-T, Onta Williams's self-serving, exculpatory statement that he was only committing the crime for money — indeed, even more money than the CI testified to offering him — was helpful to the defense, not prejudicial. If deemed credible, GX 290.1-T provided excellent support for the defense's arguments throughout the case that the defendants were induced by the lure of money offered by the CI, that they lacked predisposition, and further that the CI was not truthful when he testified the defendants were offered only $5,000 on May 19, 2009. For these reasons, the District Court properly found that the extra-record evidence was "more helpful to the defendants than it is to the Government," and "any possible prejudice to [the defendants] from this transcript [was]

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* The defense also argues that a mistrial was warranted because both exhibits were "seen" and "absorbed" by the entire jury. (Payen Br. 10, 26). This argument should be rejected for the reasons stated here, and in any event is inaccurate as to GX 290.2-T. The District Court specifically found, based on its voir dire, that the jurors were not exposed to the prejudicial portion of GX 290.2-T. (Sp.A. 41-42). Specifically, no juror who rendered a verdict against the defendants looked beyond the first page of that exhibit. (Sp.A. 51). The four who saw the first page of it remembered virtually nothing except that it concerned a conversation between two people; and only one juror remembered that it even involved the word "entrapment," but she could say nothing more about its substance. (Sp.A. 41-42, 51).

both miniscule and curable." (Sp.A. 55, 57).

The defense also argues that GX 290.1-T is prejudicial because it contains "the only direct information the jury has seen regarding the inducements offered to Payen and the other Appellants (besides Cromitie), and their initial responses thereto." (Payen Br. 25). But this claim is belied by the record. "[A]n abundance of properly admitted evidence relevant to this matter exists," *Weiss*, 752 F.2d at 783, in the form of the defendants' recorded interactions with Cromitie and the CI. The prejudicial impact of Onta Williams's statement should be considered in light of that "entire record," *id.*, including the hours of recorded conversations reflecting: (1) Cromitie's statements to the CI in December 2008 and early 2009 that he was offering large amounts of cash to people like "Chase" to participate in the plot as lookouts (Tr. 816; GSA 216-17); (2) the discussions with David Williams on April 23, 2009, that he would be paid by Jaish-e-Mohammed to participate in *jihad* (GSA 218); (3) the CI's first interactions with Onta Williams on April 28, 2009, when Onta Williams got into the CI's car and began calling around to find a gun (GSA 323), and Cromitie offered him a new car (Tr. 1442-44); (4) the four defendants' first interactions as a group at the Shipp Street house later that night, when Cromitie explained the operation and also assured the group, "we're gonna get something out of this too . . . . [W]e already explained that" (to which Onta Williams agreed) (GSA 279); (5) Cromitie's calls to Onta Williams and Payen on May 1, advising them in a sing-song voice that "the cash came through," and their reactions (A. 4502, 4504); (6) the CI's meeting with the defendants on May 8, when Onta Williams and the other defendants asked for "money . . .

so [they] can pay [their] bills," not "for personal use" (GSA 420); and (7) the evidence that the CI told the defendants on May 19, 2009, that they would each be paid $5,000 after the operation (Tr. 892-93). That evidence, along with the other evidence of the defendants' planning and training for the intended attack, provided context for the post-hoc, three-sentence gloss on those interactions that Onta Williams offered to a friend.

Indeed, the defense did not even object when the Government offered GX 290.1-T, although it did object moments later when the Government offered transcripts of other intercepted telephone calls without offering the underlying calls themselves (Tr. 640, 642-43), and it never moved to strike the admitted transcript from the record. *See* Fed. R. Evid. 103(a). Accordingly, it is reasonable to infer that, had the Government offered the underlying recording, it would have been admitted. (Sp.A. 54). Such circumstances, where "extraneous information was otherwise admissible," weigh further in favor of a denial of a mistrial. *United States* v. *Prime*, 431 F.3d 1147, 1157 (9th Cir. 2004) (internal quotation marks omitted); *see also United States* v. *Simmons*, 923 F.2d 934, 942-44 (2d Cir. 1991) (affirming conviction where the Court admitted only a redacted exhibit into evidence, but after the close of evidence, permitted the jury to view the unredacted exhibit, even though defense counsel was unable to make additional arguments on the unredacted information).

To the extent the transcripts might have caused some conceivable prejudice to the defense, the record of the jury's conduct in this case demonstrates that, when combined with the District Court's limiting instructions

throughout the trial and the jurors' affirmations that they could follow the law, the Court's curative instruction was sufficient to dispel any possibility of prejudice to the defendants. The Court had repeatedly instructed the jury throughout the trial that "the transcripts are not evidence," and that the jury should consider "one thing only and that is the evidence" in reaching its verdict. (Tr. 3455, 3464 (jury charge)). They were, therefore, well inoculated to disregard the two transcripts at issue. When they came across GX 290.2-T, as Payen's counsel recognized, "[t]hey understood . . . the significance of that immediately." (Tr. 3599). When GX 290.2-T came to light, Juror Eight checked the Government exhibit list and realized the transcript was not listed as evidence. (Tr. 3618; *see also* Tr. 3621 (Juror Ten asked, "if it belongs in evidence, if it was evidence or if we should have it."); Tr. 3624 (Juror Twelve remembered another juror mentioning that "this could lead to a mistrial if it is something we are not supposed to see.")). All of the jurors reached consensus that the exhibit should not be read aloud, and they sent a note marked "URGENT!!!," and with a pink highlighter, framing precisely the right question: "Is this admitted and should we consider it?" (CX 12). Shortly thereafter, the jury alerted the Court that they also had GX 290.1-T. (CX 13). The jurors' conduct suggested that they would follow the law if they could and honestly admit when they could not. *See United States* v. *Magaña*, 118 F.3d 1173, 1182 (7th Cir. 1997) (relying in part on "the fact that the jury alertly picked up on the absence of certain tapes [which] meant that they were following instructions by listening to the tapes, and not referring to the transcripts alone").

After the incident, the Court again instructed the jury

that transcripts without tapes were not evidence, and that the jury was required to disregard anything in the transcripts and "must not think about [them] or mention them again as [they] continue [their] deliberations." (Tr. 3654). It then asked the jurors, individually, whether they could do that. The District Court, having found the jurors "highly credible, deeply earnest witnesses, who were concerned about doing the right thing" (Sp.A. 42), had every basis to credit those responses.

Finally, subsequent events suggest that GX 290.1-T and GX 290.2-T did not have a prejudicial effect on the defense. The jury sent notes CX 12 and CX 13, regarding those transcripts, after lunch on Friday, October 8, after a little more than two full days of deliberations. After the District Court denied mistrial motions on Tuesday morning, October 12, the jury continued to deliberate the balance of that week — nearly four full days — and returned a verdict after lunch the following Monday, *i.e.*, after another intervening weekend. In other words, the jury deliberated nearly a full week — twice as long as they had deliberated before they saw the exhibits in question — before returning a verdict. Unlike cases where a deadlocked jury reached a verdict soon after it was tainted, *e.g.*, *Sassounian* v. *Roe*, 230 F.3d 1097, 1110 (9th Cir. 2000), the foregoing strongly suggests that the jury's decision was not influenced by the extraneous material. *See United States* v. *Liquori*, 1999 WL 613440, at *1 (9th Cir. Aug. 12, 1999) (finding no ineffective assistance for failing to move for a mistrial where jury deliberated for four days after the offending exhibit was removed).

In sum, the record supports the District Court's finding

that the possibility for prejudice was small, and any possible prejudice from either exhibit was cured through an instruction. Accordingly, the defendants' claim regarding this issue should be rejected.

POINT VI

The District Court Properly Sentenced the Defendants

The defendants argue that the District Court erred at sentencing in failing to sentence them below the 25-year mandatory minimum sentenced required by statute, asserting that the Government engaged in sentencing manipulation and sentencing entrapment. (*See* Cromitie Br. 43-68). This argument is meritless. The District Court's sentence of 25 years' imprisonment was reasonable, and it appropriately rejected each of the defendants' sentencing arguments.

A. Relevant Facts

Prior to sentencing, the defendants requested that the District Court sentence them below their relevant Guidelines ranges and the 25-year mandatory minimum sentence required on Counts Five and Six of the Indictment. (Dkt. Nos. 177, 180, 181, 182). In particular, the defendants argued that, because the Government "manufactured" the 25-year mandatory minimum sentence through its sting operation, the District Court should disregard this mandatory minimum and impose a sentencing based only on the Guidelines and Section 3553(a) factors. (*Id.*).

In a written decision, the District Court denied the defendants' request for a sentence below the mandatory

minimum, because "the record affords no basis for concluding that the Government overcame any defendant's will in this matter." *United States* v. *Cromitie*, No. 09 Cr. 558 (CM), 2011 WL 2693297, at *1 (S.D.N.Y. June 29, 2011). Although the District Court found that "it would certainly be fair to infer that the purpose for introducing the missile element into the case was to render the defendants subject to the quarter-century mandatory minimum," the District Court concluded that, because "no circuit has actually upheld a district court's decision not to impose a mandatory minimum sentence because of manipulation," it lacked the discretion to sentence the defendants to less than the mandatory minimum term of imprisonment. *Id*. at *4.

In any event, at sentencing, the District Court imposed 25-year sentences on other counts of conviction that did not carry the mandatory minimum. (*See* 6/29/2011 Tr. 57) and said that, regardless of the mandatory minimum, the court had "no mind to sentence [the defendants] to less than 25 years." (6/29/2011 Tr. 60). In support of this sentence, the District Court stated that it could not "condemn James Cromitie, David Williams, and Onta Williams strongly enough" (6/29/2011 Tr. 58), and described the defendants' crimes as "odious" (6/29/2011 Tr. 59), and "beyond despicable," (6/29/2011 Tr. 61). While recognizing the impoverished conditions surrounding the defendants in Newburgh, New York, the District Court rejected claims for leniency based on the defendants' personal situations because "it is an insult to [the law-abiding people of Newburgh] to say that Newburgh afford[s] you any excuse for these hateful crimes." (6/29/2011 Tr. 61).

B. Applicable Law

"Sentencing manipulation has been described as occurring when the Government engages in improper conduct that has the effect of increasing the defendant's sentence." *United States* v. *Caban*, 173 F.3d 89, 93 n.1 (2d Cir. 1999). Sentencing entrapment "normally requires that a defendant convince the fact-finder that government agents induced her to commit an offense that she was not otherwise predisposed to commit." *United States* v. *Knecht*, 55 F.3d 54, 57 (2d Cir. 1995) (internal quotation marks omitted); *see also United States* v. *Oliveras*, 359 F. App'x 257, 260 & 261 n.5 (2d Cir. 2010).

"This Court has not yet recognized the doctrines of sentencing manipulation or sentencing entrapment." *United States* v. *Deacon*, 413 F. App'x 347, 350 (2d Cir. 2011); *see also United States* v. *Pena*, 297 F. App'x 76, 79-80 (2d Cir. 2008) (finding that the district court lacked the authority to impose a sentence below the mandatory minimum on the bases of sentencing manipulation or sentencing entrapment); *see generally United States* v. *Jimenez*, 451 F.3d 97, 102 (2d Cir. 2006) ("[M]andatory minimums have taken on increased significance after [*United States* v. *Booker*, 543 U.S. 220 (2005)] — in that they remain binding on the district courts and work to restrain their newly acquired discretion"); *United States* v. *Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005) ("*Booker* makes the Guidelines advisory in nature, leaving sentences to the district court's discretion, guided by the Guidelines and the other factors of § 3553(a), and bounded by any applicable statutory minimum and maximum."). Specifically, "[t]he validity of the concept of 'sentencing entrap-

ment' has not been determined in this Circuit, but . . . even where it has been approved in theory, its potential application has been limited to 'outrageous official conduct which overcomes the defendant's will.'" *United States* v. *Gomez*, 103 F.3d 249, 256 (2d Cir. 1997) (internal quotation marks omitted); *see United States* v. *Gagliardi*, 506 F.3d at 148 (confirming that a manipulation claim "'would likely require a showing of 'outrageous' government conduct'") (quoting *Bala*, 236 F.3d at 93).

C. Discussion

The defendants' argument must be rejected in light of this Court's precedents. *See, e.g.*, *United States* v. *Deacon*, 413 F. App'x at 351 (noting that "even if this Court were to recognize one or both doctrines [of sentencing entrapment and manipulation] and conclude that the agent's actions constituted 'outrageous' government conduct, [the defendant] provides no authority that would justify the district court's imposition of a sentence below the statutory minimum in such circumstances"). Accordingly, the defendants attempt to support their argument by relying on *United States* v. *Montoya*, 62 F.3d 1 (1st Cir. 1995), in which the court of appeals stated in dicta that improper government conduct "applies to statutory minimums as well as to the guidelines." *Id.* at 3. This reliance is misplaced. Even assuming *Montoya* is applicable here — and it is not — there was no outrageous government misconduct in this case, as discussed *supra* at Point II. Accordingly, even if this Court were to recognize the doctrine of sentencing entrapment, the District Court properly sentenced the defendants to the statutory mandatory minimum.

CONCLUSION

The judgments of conviction should be affirmed.

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August 1, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel hereby certifies that this brief does not comply with the type-volume limitation of Rule 32(a)(7)(B). As a result, the Government filed a motion for permission to file an overlength brief of no more than 50,000 words, and this Court granted that motion on July 31, 2012. As measured by the word-processing system used to prepare this brief, there are 36,381 words in this brief.

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