UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Criminal Case No.: 04-CR-402

United States of America,

- against -

Yassin Muhiddin Aref and Mohammed Mosharref Hossain,

Defendants.

DEFENDANT MOHAMMED MOSHARREF HOSSAIN'S MEMORANDUM OF LAW IN SUPPORT OF RULES 29(c) AND 33 MOTION

Dated: December 31, 2006

Yours, etc.,

TOBIN and DEMPF, LLP
Kevin A. Luibrand, Esq.
Federal Bar Roll No. 102083
Attorneys for Defendant Hossain
Office and P.O. Address:
33 Elk Street
Albany, New York 12207
Telephone: (518)463-1177
Facsimile: (518)463-7489
Email: kluibrand@tobindempf.com

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INTRODUCTION

Defendant Mohammed Mosharref Hossain (hereinafter referred to as "defendant Hossain") moves this Court pursuant to Federal Rules of Criminal Procedure Rule 29(c) seeking a judgment of acquittal, or in the alternative, a new trial pursuant to Rule 33(c) of the Federal Rules of Criminal Procedure. [1]

STANDARD FOR RULE 29(c) MOTION

Under Rule 29 of the Federal Rules of Criminal Procedure, a judgment of acquittal must be granted when, looking at the evidence in the light most favorable to the government, a reasonable jury could not have found guilt beyond a reasonable doubt. United States v. Cassese, 428 F.3d 92 (2nd Cir., 2005); United States v. Gotti, 2006 US Dist. LEXIS 66641 (S.D.N.Y. 2006); United States v. Stewart, 305 F.Supp.2d 368 (S.D.N.Y. 2004).

If, looking at the totality of the evidence in the light most favorable to the prosecution, it appears that there is "equal or nearly equal" support for a theory of guilt and a theory of innocence, acquittal must be granted. Cassese, 428 F.3d at 99. In Cassese, the Second Circuit upheld the granting of a Rule 29 motion, stating:

> *...[A]t the end of the day, if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt.*

Cassese, 428 F.3d at 99.

While the jury may draw reasonable inferences from the evidence, it may not engage in speculation or conjecture, especially as to the crucial issue of the defendant's knowledge or intent. United States v. Autuori, 212 F.3d 105 (2nd Cir., 2000); United States v. Yanotti, 415 F.Supp.2d 280 (S.D.N.Y. 2005); United States v. Hernandez, 301 F.3d 886 (8th Cir., 2002); United States v. Rahseparian, 231 F.3d 1257 (10th Cir., 2000); United States v. Schuchmann, 84 F.3d 752 (5th Cir., 1996).

[1] Defendant Hossain joins in and adopts the arguments set forth in the brief of defendant Aref to the extent that the arguments apply to defendant Hossain's counts, and requests the relief set forth in defendant Aref's brief on those counts where not inconsistent with this brief.

Moreover, viewing the evidence in the light most favorable to the government does not mean jumping to every possible conclusion the government suggests. The court in United States v. Recognition Equipment Incorporated (REI), 725 F.Supp. 587 (D.D.C., 1989), found:

> *...Although the evidence must be viewed in the light most favorable to the government, this Court is obligated to take a hard look at the evidence and accord the government the benefit of only* ***legitimate inferences****. In other words, this court will not indulge in fanciful speculation or bizarre reconstruction of the evidence ... and assume that evidence which otherwise* ***can be explained as equally innocent must be evidence of guilt****.*

REI, 725 F.Supp. at 588 (emphasis supplied). The Court went on further to find as follows:

> *Much of what the government characterizes as incriminatory evidence is not persuasive of guilt when viewed in its full context. In fact, some of the government's evidence is exculpatory and points toward innocent conduct of the Defendants.*

REI, 725 F. Supp. at 587-588.

The Second Circuit has both granted and upheld trial court Rule 29 motions where there was insufficient evidence of knowledge or intent. United States v. Frampton, 382 F.3d 213 (2nd Cir., 2004); United States v. Rodriguez, 392 F.3d 539 (2nd Cir., 2004); United States v. Jones, 393 F.3d 107 (2nd Cir., 2004); United States v. Samaria, 239 F.3d 228 (2nd Cir., 2001); United States v. Nusraty, 867 F.2d 759 (2nd Cir., 1989); United States v. Martinez-Sandoval, 2003 US Dist. LEXIS 3045 (S.D.N.Y., 2003). The Second Circuit has also granted and upheld Rule 29 motions where the jury engaged in impermissible speculation or conjecture. United States v. Stewart, 305 F. Supp.2d 368 (S.D.N.Y., 2004); United States v. Yannotti, 415 F. Supp.2d 280 (S.D.N.Y., 2005); United States v. Hernandez, 301 F.3d 886 (2nd Cir., 2002).

STANDARD FOR RULE 33 MOTION

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. *See* Fed. R. Crim. P. 33. The Second Circuit held in United States v. Sanchez, 969 F.2d 1409 (2d Cir. 1992), that "… Rule 33 confers broad discretion upon a trial court to set aside a jury verdict and order a new trial to avert a perceived miscarriage of justice." Sanchez, 969 F.2d at 1413. The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice.

Sanchez, 969 F.2d at 1414. A motion for a new trial will be granted only "in the most extraordinary circumstances," when the court, after looking at all the evidence, is left with a "real concern that an innocent person may have been convicted." Sanchez, 969 F.2d 1409, 1414 (2nd Cir., 1992).

In United States v. Ferguson, 246 F.3d 129 (2nd Cir., 2001), the Second Circuit ruled that:

> The trial court must be satisfied that "competent, satisfactory and sufficient evidence" in the record supports the jury verdict (internal quotation marks omitted). The district court must examine the entire case, take into account all facts and circumstances, and make an objective evaluation. See id. "There must be a real concern that an innocent person may have been convicted." Id.

Ferguson, 246 F.3d at 134; United States v. Robinson, 2003 U.S. Dist. LEXIS 8016, 4-5 (D.N.Y. 2003). It is long standing principle that a court may exercise broad discretion in determining whether a new trial should be granted in the interests of extreme justice.

POINT I

THE FINDINGS OF GUILT ON COUNTS 12 THROUGH 19 WERE NOT SUPPORTED IN THE TRIAL RECORD

The evidence is viewed in a manner most favorable to the government based upon the jury's finding of guilt with respect to these counts. *See* Cassese, *supra*. Even given the benefit of the proof, the government did not prove the elements of 18 U.S.C. §2339A against defendant Hossain with respect to Counts 12 through 19.

Counts 12 through 19 of the superseding indictment are introduced at Count 12 of the charging instrument with the grand jury's quotation of 18 U.S.C.A. §2339A and the general factual basis for the counts, followed by Counts 13 through 19 which delineate each of seven transactions as a distinct violation. Count 12 – which is incorporated by the government into Counts 13 through 19 by reference - charges as follows:

> Beginning in or around February 2004, and continuing through and including June 2004, in the State and Northern District of New York, defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN knowingly and intentionally combined, conspired, confederated, and agreed with each other to violate Title 18, United States Code, Section 2339A.

> It was a part and an object of the conspiracy that defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN would and did conceal and disguise the nature, location, source, and ownership of material support and resources, **knowing that they were to be used in preparation for, and in carrying out, a violation of Title 18, United States Code, Section 2332a** (which prohibits using, threatening to use, attempting to use, and conspiring to use, without lawful authority, a weapon of mass destruction **against any person within the United States** in a manner that affects and would have affected interstate and foreign commerce).
>
> It was part of the conspiracy that defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN **believed** that the cooperating individual had imported a SAM into the United States from China **to provide to terrorists for use in an attack in New York City**, and that the cooperating individual wished to conceal the source and means through which he had actually obtained the $50,000 proceeds from the importation of the SAM.
>
> All in violation of Title 18, United States Code, Section 2339A.
>
> On or about [*dates omitted*], in the State and Northern District of New York, defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN attempted to conceal and disguise the nature, location, source and ownership of material support and resources, knowing they were to be used in preparation for, and in carrying out, a violation of Title 18, United States Code, Section 2332a, and aided, abetted and caused such an attempt.

[*Docket No. 134* (emphasis supplied)]

Superseding indictment counts 12 through 19, which were read to the jury during the jury charge [*Jury Charge 53-58*], correctly recites 18 U.S.C. §2332a, which reads:

> A person who, without lawful authority, uses, threatens, or attempts or conspires to use, a weapon of mass destruction … **against any person or property within the United States**, and … the offense, or the results of the offense, affect interstate or foreign commerce, or, in the case of a threat, attempt, or conspiracy, would have affected interstate or foreign commerce … shall be imprisoned for any term of years ...

18 U.S.C. §2332a (emphasis supplied).

The government did not present evidence or prove beyond a reasonable doubt the 2339A element that defendant Hossain "did conceal and disguise the nature, location, source, and ownership of material support and resources, knowing that they were to be used in preparation for, and in carrying out" a 2332a violation which consisted of "using, threatening to use, attempting to use, and conspiring to use, without

lawful authority, a weapon of mass destruction **against any person within the United States** . . ." [*Docket no. 134 at page 10*] *See also* 18 U.S.C. §2332a. That is, the government asserted that Defendant Hossain "knowingly" conspired (Count 12) and "knowingly" acted in substantive counts (Counts 13-19) to assist Malik in the use of a weapon of mass destruction against a person in the United States. There was no evidence adduced – though alleged at Counts 12 through 19 – that defendant Hossain "knew" that the money provided by Malik to defendant Hossain (the claimed "material support") was for a SAM (weapon of mass destruction) to be used "against any person in the United States". *See* 18 U.S.C. §2332a.

Most of the conversations between Malik and Mohammed Hossain were tape recorded by the government. The first time that Malik introduces the SAM into a conversation between defendant Hossain and Malik (November 20, 2003) [*Exhibits 2D and 2DT*], the asserted weapon of mass destruction is described by Malik as being imported from China and shipped by him to New York City, and that he is unaware of whether it stays in New York City or is shipped elsewhere. [*Exhibit 2D at 5:8*] In this conversation, Malik informs defendant Hossain that "a lot of [his] stuff comes from China", that he "also import[s] weapons from China", and that it "will go straight to New York, it will be shipped". [*Exhibit 2DT at 3:24; 4:2; 4:23*] When asked by defendant Hossain where it would go from New York City, Malik replied "**I don't have anything to do with that**. My job is to get it to New York City." [*Exhibit 2DT at 5:8* (emphasis supplied)] [2]

On December 5, 2003, in a discussion with defendant Hossain, Malik stated "Whatever I'm doing, I'm not doing anything wrong, nor am I breaking any law." [*Exhibit 2GT at 11:1-2*] Malik went on to state that "I am not selling any kind of drug, nor am I selling any kind of weapon that can cause a man to be killed." [*Exhibit 2GT at 11:1-2*] Malik does not state to whom he sells the SAM or "ammunition" to or for what purpose, but does state that ultimately he is "delivering all this so that the Muslims can protect themselves". [*Exhibit 2GT at 11:10-11*] Again, there is no statement by Malik to defendant Hossain of the SAM's use "against any person within the United States". *See* 18 U.S.C. 2332a.

[2] There is no discussion of money or a loan involving defendant Hossain during this November 20, 2003 meeting.

Malik claimed no knowledge of what the SAM would be used for, claiming "All the missiles which come go for Jehadis, okay? They all go for Jehadis, okay? **What they want to do, it's up to them - they don't tell me, okay?** They don't - I don't want to know that. What's their program, I don't even know that." [*Exhibit 2GT at 9:20-22* (emphasis supplied)] Malik informed that he did not know what the SAM would be used for, and certainly did not claim it would be used "against any person within the United States". *See* 18 U.S.C. 2332a.

On December 10, 2003, Malik informs defendant Hossain that "I bring ammunitions from China and selling it to my brother (UI) **back there**." [*Exhibit 2IT at 4:9-11*] The reference to "back there" does not indicate it will be used "against any person within the United States", but instead that it is going back to China (i.e., "back there") or somewhere else, but not in the United States. The inference cannot be drawn that Malik informs defendant Hossain that it is for "use against a person in the United States", and Malik rather informs defendant Hossain that it is going **outside** the United States.

February 3, 2004 is the next meeting where the SAM or ammunition is discussed with the following exchange:

> *CW: Those missiles and stuff, there is a code word for that. The missiles and stuff, right? We have a code word for it. We call it "Chaudry". "Chaudry".*

[*Exhibit 2NT at 12:15-16*] Later in that conversation, Malik informed defendant Hossain:

> *CW: I want to teach him a lesson; to the Ambassador of Pakistan in New York City. We're going to teach him fucking lesson, okay?. . . . So, next week, I have to give Mr. "Chaudry" to him, to the Ambassador. [UI phrase] I have to give it to the Ambassador.*

[*Exhibit 2NT at 13:1-3; 13:20-21*]

February 12, 2004 is the next time the SAM or ammunition is raised by Malik in a conversation with defendant Hossain. This conversation was not tape recorded. Critical to this conversation is that Malik, who was present for the conversation, did not testify to the substance of the conversation.[3] [*Transcript at 760-906*] FBI Agent Timothy Coll monitored the February 12, 2004 conversation and

[3] Malik did not testify to any conversation with Hossain on direct examination by the government.

testified to only having heard the following words spoken: "chaudry, New York, 1 and 44". [*Transcript at 383; 572; 583-584*] Agent Coll did not testify either on direct examination or cross-examination if he knew who was present when the words he heard were spoken, who said the words or what the response was from those in the room.

Government witness Kassim Shaar was present for the conversation. Kassim Shaar did not testify to having heard the words "chaudry" or "1 and 44". Kassim Shaar did testify - confirmed in the defense testimony of Yassin Aref – that Kassim Shaar, Yassin Aref, Mohammed Hossain and Malik were present during the February 12, 2004 conversation. [*Transcript at 325-359*] Kassim Shaar gave conflicting testimony as to what he heard and how he understood what was said:

> Actually, he [Malik] said that -- we are talking about like business and what he does and he bring merchandise from New York City; and he, he say that there was an attack coming to New York City, a missile attack coming there.

[*Transcript at 328*] No further detail was presented in the testimony of Kassim Shaar. He did not say who was attacking New York City, if Malik was involved, if Malik had provided anything with the feigned attack, or why there might be an attack. Kassim Shaar testified to two different interpretations of the above comment, testifying on direct examination that he was "scared" [*transcript at 328*] and on cross-examination that he thought that Malik was "joking" [*transcript at pages 341, 347, 352, 358*]. Kassim Shaar never testified to the word "chaudry" being used in the conversation and there was not testimony by anyone that any of the money loaned to defendant Hossain had anything to do with the New York City comment. The only other testimony with respect to this conversation was that of Yassin Aref. Yassin Aref testified that he believed the comment by Malik was "a joke". [*Transcript at 1600-1601*]

There was no other reference by Malik to Mohammed Hossain about the SAM or "ammunition" from February 12, 2004, through the arrest of Hossain and Aref on August 5, 2004. On February 3, 2004, Malik asked defendant Hossain whether he was familiar with Jaish-e-Muhammad (hereinafter referred to as "JEM").[4] [*Exhibit 2N; 2NT*] Upon learning that defendant Hossain was unfamiliar with JEM, Malik

[4] This conversation is relevant to Point II hereinafter and is discussed there in more detail.

informed him that they "fight in Kashmir". [*Exhibit 2NT at 14:12*] As with the "back there" comment made to defendant Hossain on December 10, 2003, when referring to the destination of the SAM or "ammunition" [*Exhibit 2IT at 4:9-11*], Malik told defendant Hossain that "Jaish-e-Muhammad does it all. Jaish-e-Muhammad does everything for us. Whatever we need, they do it for us" [*Exhibit 2NT at 14:20-21*] referring to the organization that "fights in Kashmir". [*Exhibit 2NT at 14:12*] Once again, Malik was directing defendant Hossain that his work was *not* in the United States, but overseas, this time specifically an organization in Kashmir.

To sustain a conspiracy conviction (Count 12), the government must prove beyond a reasonable doubt that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it. United States v. Rodriguez, 392 F.3d 539, 545 (2nd Cir., 2004) quoting United States v. Morgan, 385 F.3d 196, 206 (2nd Cir., 2004) and United States v. Gaviria, 740 F.2d 174, 183 (2nd Cir., 1984). Proof that the defendant knew that some crime would be committed is not enough. Rodriguez, 392 F.3d at 545; United States v. Friedman, 300 F.3d 111, 124 (2nd Cir., 2002). The conspiracy alleged at Count 12 relates to defendant Hossain providing material support to Malik for the use of a weapon of mass destruction "against any person in the United States". *See* 18 U.S.C. §2339A. The government was at best vague in Malik's disclosure to defendant Hossain as to what use was to be made of the SAM or ammunition, and there is substantial evidence in the tape transcripts that Malik informed defendant Hossain that his SAM or ammunition business was to import from China and deliver to New York city for re-delivery to either "someplace else" [*Exhibit 2DT at 5:8*] or "back there" [*Exhibits 2IT at 4:9-11*]. The only organization that Malik spoke about was JEM in "Kashmir". [*Exhibit 2NT at 14:12*] Failure to prove that defendant Hossain "knowingly" provided material support for a missile attack "against any person within the United States" requires acquittal on Count 12.

With respect to Counts 13 through 19 of the superseding indictment, "an aiding and abetting conviction must be premised on 'more than evidence of a general cognizance of criminal activity' or 'suspicious circumstances'." Rodriguez, 392 F.3d at 545; citing United States v. Cruz, 363 F.3d 187. 198 (2nd Cir., 2004), quoting United States v. Samaria, 239 F.3d 228, 233 (2nd Cir., 2001). '[T]to prove that

the defendant acted with . . . specific intent, the government must show that [the defendant] knew of the proposed crime'." Cruz, 363 F.3d at 198 (quoting United States v. Labat, 905 F.2d 18, 23 (2d Cir. 1990)); United States v. Rodriguez, 392 F.3d 539, 545 (2nd Cir., 2004).

The charge against Mohammed Hossain in 18 U.S.C. §2339A is that his help to Malik was with the knowledge that he would aid the use of a weapon of mass destruction in the United States in each of the seven transactions: February 13, 2004 (Count 13); March 31, 2004 (Count 14); April 16, 2004 (Count 15); May 4, 2004 (Count 16); June 1, 2004 (Count 17); July 1, 2004 (Count 18) and August 3, 2004 (Count 19). [*Docket no. 134*] Section 2332a is a specific intent statute and requires that defendant Hossain "know" that the alleged money laundering was helping Malik "in the use of a weapon of mass destruction against any person within the United States" (18 U.S.C. §2332a). The government must prove that the money received by Malik and loaned to defendant Hossain was – the purpose, the goal, the object - to provide support for a weapon "to provide to terrorists in an attack in New York City" (Counts 12-19; 18 U.S.C. §2339A).

The government must make a connection between the claimed money laundering and the use of a weapon of mass destruction in the United States. *See* 18 U.S.C. 1956(a)(3)(B). There was no evidence that defendant Hossain was told and agreed that the money he accepted was related *in any way* to an attack in New York City. Malik had specifically told Mohammed Hossain that he sold his SAM and ammunition for use overseas ("back there"), and that JEM, which was "fighting in Kashmir", "does it all for us". [*Exhibits 2IT at 4:9-11; 2NT at 14:12*] Where is the conversation revealed through testimony on tapes where Malik says to defendant Hossain in words or substance "I need you to launder this money for this SAM so I can kill people in the United States"? Never does Malik say that defendant Hossain's claimed money laundering was to aid him in using a missile against a person within the United States.

In the worst interpretation of the muddled unrecorded February 12, 2004 conversation that neither Malik, who was present, or the FBI agent, who monitored it, testified about the details of the conversation, and accepting the more sinister of Kassim Shaar's two divergent views of the conversation, Malik was informing those present that there was going to be an attack in New York City and that, in fact,

Malik uttered that sentence in the middle of an unrelated conversation, and that no one responded to or acknowledged the comment. [*Transcript at 346-347*] But Malik did not say that he in any way was connected to the attack, participating in the attack, or providing material support for the attack. [*Transcript at 328; 383; 572; 583-584*]. And, Malik did not say that money he provided to defendant Hossain was in any way connected to the feigned attack.

Therefore, there is no testimony connecting Malik to providing support for a fictional attack in New York City, and definitely no testimony whatsoever with respect to any of the money obtained by Malik and provided in the loan process to defendant Hossain being related in any fashion to a weapon being sent to New York City for use in New York City. There was not evidence that defendant Hossain had "knowledge" that the alleged laundered money was being used for an attack "against any person in the United States", and on every instance where the topic arose, Malik told defendant Hossain that what he did "was legal" [*Exhibit 2GT at 11:1-2; 11:9-10*], the weapons were to be used "back *there*" (not *in* the United States) [*Exhibit 2IT at 4:9-11*], that the weapons were "for the Muslims to protect themselves" [*Exhibit 2GT at 11:10-11*], and that he was involved with JEM, a group that "fights ***in*** Kashmir" (not *in* the United States) [*Exhibit 2NT at 14:12*].

Defendant Hossain requests that the court vacate the finding of guilt with respect to counts 12 through 19, and enter a verdict of acquittal on each such count pursuant to Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, order a new trial on Counts 12 through 19 pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

POINT II

THE FINDINGS OF GUILT ON COUNTS 20 THROUGH 27 WERE NOT SUPPORTED IN THE TRIAL RECORD

The evidence is viewed in a manner most favorable to the government based upon the jury's finding of guilt with respect to these counts. *See* Cassese, *supra*. Even given the benefit of the presumption, the government did not prove violations of 2339B against defendant Hossain with respect to Counts 20 through 27.

Counts 20 through 27 of the superseding indictment are introduced at Count 20 of the charging instrument with the grand jury's quotation of 18 U.S.C. §2339B and the general factual basis for the Counts, followed at Counts 21 through 27 with each of seven transactions delineated as a distinct count. Count 20 – which is incorporated by the government into Counts 21 through 27, by reference - charges as follows:

> Beginning in or around February 2004, and continuing through and including June 2004, in the State and Northern District of New York, defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN knowingly and intentionally combined, conspired, confederated, and agreed with each other, to violate Title 18, United States Code, Section 2339B.
>
> It was a part and an object of the conspiracy that defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN would and did attempt to provide and aid and abet the provision of material support or resources to a foreign terrorist organization, Jaish-E-Mohammed (hereinafter "JEM"), **knowing that JEM was a designated terrorist organization, that JEM engages in or has engaged in terrorist activity, and that JEM engages in or has engaged in terrorism.**
>
> It was part of the conspiracy that defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN believed that the cooperating individual had imported a SAM into the United States from China to provide to JEM for use in an attack in New York City, and that the cooperating individual wished to conceal the source and means through which he had actually obtained the $50,000 proceeds from the importation of the SAM.
>
> All in violation of Title 18, United States Code, Section 2339B.
>
> On or about [*dates omitted*], in the State and Northern District of New York, defendants YASSIN MUHIDDIN AREF and MOHAMMED MOSHARREF HOSSAIN, knowing that Jaish-E-Mohammed (hereinafter "JEM") was a designated terrorist organization, that JEM engages in or has engaged in terrorist activity, and that JEM engages in or has engaged in terrorism, attempted to provide material support and resources to JEM, a foreign terrorist organization, and aided, abetted such attempt.

[*Docket No. 134*] .

Counts 20 through 27 of the superseding indictment charged that defendant Hossain "knowingly" attempted to provide, and aid and abet, the provision of material support or resources to a foreign terrorist

organization, Jaish-E-Mohammed (hereinafter referred to as "JEM"). [*Docket 134*] Under these counts, it was alleged in the superceding indictment that defendant Hossain believed that Malik had imported a SAM into the United States from China to provide to JEM for use in an attack in New York City, and that Malik wished to conceal the source and means through which he had actually obtained the $50,000.00 proceeds from the importation of the SAM. [*Docket 134*].

Pursuant to the jury instructions given to the jury at the end of the proof, Judge McAvoy instructed as follows with regard to Counts 20 through 27:

> The elements that the Government must prove to convict on Count 20 are that the defendant under consideration, one, agreed with his co-defendant; two, to **knowingly** provide material support and resources to an organization; three, which is, in fact, a Foreign Terrorist Organization … The elements that the Government must prove to convict on Counts 21 through 27 are, one, that the organization is designated as a Foreign Terrorist Organization; two, that the defendant under consideration attempted to provide material support to such an organization; three, **knowing either that the organization is a designated terrorist organization or that the organization engages in or has engaged in terrorist activity or terrorism**, and, four, the intended offense, if completed, would have occurred, in whole or in part, within the United States or would have affected interstate or foreign commerce.

[*Jury Charge 60-61*]

The sole evidence presented at trial with respect to the government proving the above highlighted elements of the statute for these counts against defendant Hossain was a conversation between defendant Hossain and Malik on February 3, 2004. [*Exhibits 2N; 2NT*] Prior to this conversation, Malik had not told defendant Hossain the name of any organization to whom he sold SAMs or "ammunition", instead saying that what he sold was to go "back there". [*Exhibit 2IT at 4:9-11*] Malik had previously told defendant Hossain with regard to the SAM or "ammunition" that it was imported from China and shipped by him to New York City, and that he is unaware of whether it stays in New York City or was shipped elsewhere. [*Exhibit 2D at 5:*8] Ultimately, after informing defendant Hossain that "[he is] not doing anything wrong, nor [is he] breaking any law", and that "he is not selling any kind of weapon that can cause a man to be killed" [*Exhibit 2GT at 11:1-2; 11:9-10*], Malik informed defendant Hossain that "I bring ammunitions from China and sell it to my brother (UI) back there." [*Exhibit 2IT at 4:9-11*] No

mention was made prior to February 3, 2004 to JEM or the use of the SAM or "ammunition" by any "terrorist organization".[5]

During the February 3, 2004 conversation, the following exchange occurred between Malik and Mohammed Hossain on the topic of JEM:

> *CW: Have you heard of - have you heard the name of Jaish-e-Muhammad, the organization?*
>
> *MH: Jaish-e-Muhammad.*
>
> *CW: Of Azhar Mahmood?*
>
> *MH: Yes.*
>
> *CW: Have you heard of it?*
>
> *MH: Yes, that - that Qawa - Qawwali. Jaish-e-Muhammad.*
>
> *CW: The Jaish-e-Muhammad, right? That -*
>
> *MH: That - to -*
>
> *CW: The organization that- in our -*
>
> *MH: Jama'at-e-Islami?*
>
> *CW: That fights in Kashmir.*
>
> *MH: I see. I see.*
>
> *CW: Azhar Mahmood.*
>
> *MH: I see. I see.*
>
> *CW: Have you heard his name?*
>
> *MH: No.*
>
> *CW: He was our leader - our leader, see.*
>
> *MH: I see. I see.*
>
> *CW: He does it all for us. It does everything for us, Jaish-e-Muhammad does it all. Jaish-e-Muhammad does everything for us. Whatever we need, they do it all for us.*

[*Exhibit 2NT at 14:1-22*]

The government presented a translator, Saeda, who testified that a "qawwali" – the understanding of JEM articulated by Mohammed Hossain to Malik's reference to JEM - is a "group[s] that sing religious-like hymns, religious music" and that it was the translator's understanding from the

[5] "Terrorist organization" is defined as an organization that engages in acts of "terrorism". Terrorism is defined at 22 U.S.C. §2656f as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents". *See* 22 U.S.C. §2656f.

conversation on February 3, 2004 that defendant Hossain believed JEM to be "a musical group of some kind". [*Transcript at 216*] Malik, the other party to the sole conversation about JEM, when questioned by defense counsel as to whether defendant Hossain believed JEM to be a musical group, replied "Yes, sir." [*Transcript at 905-906*] When Agent Coll was asked if defendant Hossain believed JEM to be a "musical group", the response by Agent Timothy Coll was "Absolutely, yes." [*Transcript at 695-696*] It is apparent that Malik recognized at the time – and Agent Coll recognized later - that Mohammed Hossain did not "know" as of February 3, 2004 anything about JEM or anything that it did.

During summation, the government acknowledged that "Mr. Hossain clearly does not know who Jaish-e-Mohammed is", and that "Mr. Hossain doesn't know who they are, so **that information has to be provided and the cooperating witness provides information about what they are, what they do**". [*Gov't summation at 36* (emphasis supplied)] But, what was the extent of "that information" identified by the prosecution that was provided by Malik to defendant Hossain to describe "what they [JEM] are, what they [JEM] do" so that the government could prove that defendant Hossain "knew" that JEM was a "designated foreign terrorist organization" or "engaged in terrorist activity"? **All** Malik said to defendant Hossain was that JEM "fights in Kashmir". [*Exhibit 2NT at 14:12*] That is it. Defendant Hossain expressed a direct *lack* of knowledge about JEM, and the information which the government argued is provided by Malik to defendant Hossain to educate defendant Hossain about JEM and bring him within Section 2339B was that JEM "fights in Kashmir". [*Exhibit 2NT at 14:12*] Does the fact that an organization – whatever organization – "fights in Kashmir" or "fights" anywhere make it a terrorist organization or one "engaged in terrorist activity"? It does not and cannot be grounds for a conviction of defendant Hossain.

The statute (18 U.S.C. §2339B) requires that the government prove that defendant Hossain "[know] either that the organization is a designated terrorist organization or that the organization engages in or has engaged in terrorist activity or terrorism". [*Jury Charge at 60-61*] Telling someone that an organization that he believes is a "musical group" is actually a group that "fights in Kashmir" does not tell him that it is a "designated terrorist organization", or "that the organization engages in or has engaged in

terrorist activity or terrorism". [*Jury Charge at 60-61*] There is no proof presented by the government that defendant Hossain had knowledge that JEM was a foreign terrorist organization or that it engaged in or had engaged in terrorism. *See* footnote 7, above.

As in Cassese, the jury in this case was instructed that in order to convict defendant Hossain, it must find that he acted *willfully* - that is, that his acts were "the deliberate and purposeful product of a conscious objective" and that he had a "specific intent to do something the law forbids". Even looking at the evidence in the light most favorable to the government, it is submitted that there is *no* evidence that defendant Hossain "knew" that JEM was a foreign terrorist organization. The government did not meet its burden of proof against defendant Hossain with respect to Counts 20 through 27 sufficient for a conviction of guilty. The Second Circuit reported in United States v. Glenn, 312 F.3d 58 (2nd Cir., 2002), that "we overturn a conviction on that basis only if, after viewing the evidence in the light most favorable to the Government and drawing all reasonable inferences in its favor, we determine that "no rational trier of fact" could have concluded that the Government met its burden of proof [*citation omitted*]." Glenn, 312 F.3d at 63. The Second Circuit held in United States v. Rodriguez, 392 F.3d 539 (2nd Cir., 2004) that:

> The government is entitled to prove its case solely through circumstantial evidence, provided, of course, that the government still demonstrates each element of the charged offense beyond a reasonable doubt. **It thus remains axiomatic that, it would not satisfy the Constitution to have a jury determine that the defendant is probably guilty**.

Rodriguez, 392 F.3d at 544 (emphasis supplied).

The government never presented proof that Mohammed Hossain had "knowledge" that JEM was a "foreign terrorist organization" or that JEM "engaged in terrorist activity or terrorism". [*Jury Charge at 60-61*] Malik never told defendant Hossain – even though the opportunity was presented – that JEM was a "foreign terrorist organization". Instead, the government chose to have Malik say only that JEM "fights in Kasmir" [*Exhibit 2NT at 14:12*]. Accordingly, defendant Hossain requests that the court vacate the finding of guilt with respect to counts 20 through 27, and enter a verdict of acquittal on each such count pursuant to Rule 29 of the Federal Rules of Criminal Procedure or, in the alternative, order a new trial on Counts 20 through 27 pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

POINT III

IMPROPER EXPERT TESTIMONY WAS ADMITTED IN SUPPORT OF THE GOVERNMENT'S CLAIM OF PREDISPOSITION

Preliminarily, the Court charged the jury on the question of "entrapment" of defendant Hossain. [*Jury Charge at 21-23*] The government acknowledged in pretrial proceedings that defendant Hossain was induced by the government into his actions with respect to Malik, the first element of entrapment. [*Docket no. 158 at page 14*] The second element for entrapment is that the target was "predisposed" to commit the crime charged. *See* United States v. Bala, 1999 U.S. Dist. LEXIS 12529 (N.D.N.Y., 1999) at 236 F.2d 87 (2nd Cir., 2000) citing Matthews v. United States, 485 U.S. 58, 63 (1988).

Entrapment was a principal focus of both the prosecution and the Hossain defense, and not, in any respects, a perfunctory defense. Both prosecution and defense addressed entrapment in their cases, and there was significant evidence showing that defendant Hossain was entrapped, as seen from the transcripts of the undercover tape recordings. Therefore, a single item of evidence or testimony had the probable result of affecting the outcome of the verdict, and the government was never in position from the proof to argue that the testimony of predisposition was "overwhelming".

Evan Kohlmann claimed to provide for the government a significant "expert" link to establishing defendant Hossain's predisposition. Evan Kohlmann was the only expert to testify with respect to organizations associated with defendants Hossain and Aref. Evan Kohlmann's "expert" report was presented three days before his planned testimony.

Defendant Hossain is an American citizen who emigrated from Bangladesh. During the government's case, the prosecution presented a transcript of a conversation between Malik and defendant Hossain regarding an organization known as Jamaat-e-Islami, a political party in Bangladesh, where Hossain said he was a "member". [*Exhibit 2O*] To aid in establishing Hossain's predisposition, the government offered Evan Kohlmann as a JEI "expert". In his expert report, Evan Kohlmann asserted with respect to JEI as follows:

> JI is a fundamentalist Islamic political party with known paramilitary elements

> that was first organized by Sayyid Abul Ala Maududi in 1940. Today, there are JI affiliate branches active in a number of Muslim countries in South Asia, including Pakistan, Bangladesh, and Afghanistan. The JI has attempted to enforce a stringently anti-Western agenda on various regional governments; a document currently posted on their website explains that the 1995 Oklahoma City bombing "made on this quite clear that though [the U.S.] is in the forefront of the campaign to declare Muslims and their countries as terrorists, the US itself is harboring a large number of terrorists on its own soil." Moreover, according to JI "Continuous pumping into the balloon of 'Islamic terrorism' is a political necessity. The government and the media will, therefore, continue to follow the beaten path... Since the authority of defining terrorism also lies with these powerful countries, they not only manage to keep their actions out of the definition of terrorism despite their being acts of overt state terrorism, they consider them to have been taken in the name of justice and fair-play and for the welfare of the humanity. On the other hand, acts of hijacking, occasional bomb blasts and killings done by the oppressed, who have no other means to register their protest draw world's attention to atrocities perpetrated upon them, are zealously projected as the worst forms of terrorism and all efforts are made to rally world support in favour of such biased propaganda."

See Appendix "A" hereto.

Essentially, Kohlmann reported no expertise on JEI in Bangladesh as of his late September 2006 report, and the complete scope of his JEI expertise was that JEI was publicly critical of how the United States characterized Muslim countries and that JEI "has attempted to enforce a stringently anti-Western agenda on various regional governments" . There was no representation of Kohlmann having any expertise in the political actions of JEI and his only cited authority was an internet document where JEI had been critical of United States "propaganda" about Muslim countries. He offered nothing by way of expert background in JEI and nothing more by way of planned JEI testimony.

The court allowed a deposition of Evan Kohlmann by the defense to prepare for his testimony because of the lateness of the Kohlmann expert disclosure, and his deposition was held on September 25, 2006 (two weeks into the trial). In his deposition, Evan Kohlmann described his background with respect to JEI in Bangladesh as follows:

> *Q: And have you written any papers on the topic of JEI Bangladesh?*
> *A:* ***No.***

[*Docket 329 at Exhibit "B"*]

> *Q: And have you ever been interviewed on MSNBC or NBC*

news on the topic of JEI Bangladesh?
A: ***No***.

[*Docket 329 at Exhibit "B"*]

Q: Have you ever interviewed any members of JEI Bangladesh?
A: ***No***.

[*Docket 329 at Exhibit "B"*]

Evan Kohlmann testified at the deposition to his knowledge of political organizations in Bangladesh, including JEI, as follows:

Q: How many political parties are there in Bangladesh?
A: Off the top of my head, ***I really couldn't tell you***.

[*Docket 329 at Exhibit "B"*]

Q: Who is the current prime minister of Bangladesh?
A: ***I don't know.***
Q: Who was the prime minister in 2003?
A: ***Don't know.***
Q: Who was the leader of JEI in 2003?
A: In Bangladesh?
Q: In Bangladesh.
A: ***I am sorry, I don't know.***
Q: Did JEI Bangladesh have a platform for its political party in 2003?
A: When you say platform, a written platform?
Q: Yes.
A: ***I don't have a copy if they did.***
Q: ***Have you ever seen it?***
A: ***No.***
Q: ***Have you ever been to Bangladesh?***
A: ***No.***

[*Docket 329 at Exhibit "B"*]

Q: Do you know what role, if any, JEI Bangladesh has in the current Bangladeshi government?
A: I believe that they're a minority party involved in parliament. I know they're active politically, in terms of acquiring more seats, ***but I couldn't tell you more than that.***

[*Docket 329 at Exhibit "B"*]

Q: What role, if any, does JEI Bangladesh have in the current executive branch for the Bangladesh government?
A: It's, I believe again, a minority involved in parliament, but ***I don't know about that****, the executive powers.*

Q: Does JEI have any role in the actual running of the Bangladeshi government?
A: Well, informally. But, formally, again, ***I don't know****.*

[*Docket 329 at Exhibit "B"*]

Q: Are there any elected JEI Bangladesh officials in the Bangladeshi government?
A: ***I don't know.***

[*Docket 329 at Exhibit "B"*]

Q: Can you name any of the major political parties in Bangladesh from the year 2000 to the year 2004?
A: Other than Jamaat-e-Islami?
Q: Yes.
A: That's -- ***I'm not familiar off the top of my head****.*

[*Docket 329 at Exhibit "B"*]

Q: Have you ever heard of an organization known as the Bangladesh National Party?
A: ***Vaguely.***
Q: Do you know what it is?
A: I'm assuming it's a political party, but, again -- ***the name vaguely sounds familiar****, but . . .*
Q: Do you know what, if anything, it stands for politically within Bangladesh?
A: ***Sorry, can't tell ya.***
Q: You can't tell me because you don't know?
A: ***I don't know off the top of my head.***

[*Docket 329 at Exhibit "B"*]

Following his deposition testimony, which confirmed that Evan Kohlmann was not an expert in the topic of JEI, defendant Hossain moved to preclude the testimony of Kohlmann on JEI before he began his testimony. [*Docket no. 329*] Following the motion being made and after Kohlmann's deposition, and on the morning of Kohlmann's trial testimony, the government disclosed that the night before - after receiving defendant Hossain's motion to preclude - Evan Kohlmann had become an expert in JEI and sought to supplement his original report. [*Transcript at 1170*] Kohlmann then provided a supplement to expert witness summary of testimony as follows:

> Due to its role in providing aid to the Pakistani military during Bangladesh's struggle for independence, Jamaat-e-Islami was not allowed to take an active political role in Bangladesh until 1977. **Since**

> **then, Jamaat-e-Islami has been a significant but minority political force in the country's Parliament (the two dominant political parties in Bangladesh are the Bangladesh Nationalist Party (BNP) and the Awami League). Currently, Jamaat-e-Islami Bangladesh is led by Matiur Rahman Nizami-and other top leaders of the group include Ali Ahsan Mohammed Mujahid, and Delwar Hossain Sayeedi.** The Prime Minister of Bangladesh, Begum Khaleda Zia, is not a member or representative of Jamaat-e-Islami. She has held that post since October 2001.
>
> **Jamaat-e-Islami Bangladesh has had a complicated and often hostile relationship with secular liberals, competing Muslim sects, non-Muslims, and Westerners**. According to a 45-page report issued by Human Rights Watch (HRW) in June 2005, Jamaat-e-Islami Bangladesh has been "involved in fomenting religious violence" against local minority groups, such as Hindus and the followers of the Ahmadiyya sect of Islam. Moreover, a second lengthy report in August 2005 from Amnesty International noted that Islam Chattra Shibir-a paramilitary "student" group "affiliated to Jamaat-e-Islami"-"appear[s] to function in connivance with" Jamaat-e-Islami. Like other similar groups in Bangladesh, "When their parties are in government, armed 'student' groups become unchallenged perpetrators of human rights abuses, reportedly under the patronage of their party's politicians. The involvement of these armed groups in the political process is believed to be one of the major causes of political violence in Bangladesh. It has resulted in severe injuries and deaths."

See Appendix "B" hereto (emphasis supplied).

As seen from Evan Kohlmann's supplemental report, between his deposition testimony on September 25, 2006 and his trial testimony on September 27, 2006, Kohlmann surfed the internet[6] to portray himself before the jury as an expert in Jamaat-e-Islami in Bangladesh when the day before he had been devoid of expert information on JEI. He had transformed from one who did not know the name of the prime minister of Bangladesh on Monday afternoon to an expert on Bangladesh on Wednesday morning.

The court heard argument on the motion to preclude Kohlmann's testimony, and ruled that Evan Kohlmann could testify with respect to Jamaat-e-Islami in Bangladesh. [*Transcript at 1166-1172*]

Evan Kohlmann then presented to the jury groundwork for his claimed expertise on examination by the government, testifying that he is a self-employed private consultant on Islamic extremist

[6] Kohlmann's supplemental report contains ten footnotes which reference materials copied directly from

movements and political dissident movements in the Middle East and Muslim world, that he does work for Nine Eleven Finding Answers Foundation (NEFA), that he works for MSNBC as an on-air consultant and research analyst, and hosts the website known as www.globalterroralert.com. [*Transcript at 1175;1177*] Kohlmann testified that he was previously a counter-terrorism consultant and analyst for The Investigative Project, that he authored Al-Quaida's Jihad in Europe, and that he has published several articles with respect to terrorism. [*Transcript at 1175-1177*] Evan Kohlmann testified that his educational background consists of a bachelor in foreign service from The Edmund A. Walsh School of Foreign Service at Georgetown University, a certificate in Islamic studies at the Center for Muslim's Christian Understanding, and a law degree from the University of Pennsylvania Law School. [*Transcript at 1176-1178*] He presented as an authority before the jury based upon his background. The government then moved to have Evan Kohlmann designated as an "expert in the area of Islamic political parties and paramilitary organizations in the Middle East and Southeast Asia". [*Transcript at 1179*]

Defendant Hossain was allowed a voir dire examination of Evan Kohlmann [*transcript at 1189-1193*], and over the objection of defendant Hossain, the Court permitted Kohlmann to testify as an expert. [*Transcript at 1193*] Evan Kohlmann, who the day before did not know the political parties in Bangladesh, the name of its current prime minister or the name of the prime minister in 2003 [*docket no. 329 at Exhibit "B"*], then testified as an expert on Bangladesh political parties and JEI. [*Transcript at 1211-1212; 1223-1226*] Kohlmann testified that JEI was a "political party with paramilitary elements". [*Transcript at 1211*] Kohlmann testified that JEI's goal was to "create an Islamic government rejects western ideologies, rejects the western way", that JEI "has been involved in conducing religious violence against political opponents, against religious minorities", and that "they have caused injuries and death". [*Transcript at 1225-1226*] His JEI expert testimony was critical to the government's portrayal of defendant Hossain as an extremist.

This expert testimony never should have been allowed. The Second Circuit held in United States v. Cruz, 363 F.3d 187 (2nd Cir. 2004):

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four different websites that refer to Jamaat-e-Islami Bangladesh. [Appendix B]

> Where an expert strays from the scope of his expertise, some jurors will find it difficult to discern whether the witness is relying properly on his general experience and reliable methodology, or improperly on what he has learned of the case.

Cruz, 363 F.3d at 194.

In Nimely v. City of New York, 414 F.3d 381 (2nd Cir., 2005), the expert was deemed qualified in one area, but found not qualified in an area that he had been allowed to testify:

> In the instant case, although the admissibility of a number of Dawson's opinions is a highly controverted matter, there is no substantial dispute concerning his expert qualifications as a forensic pathologist. The issue of whether he was at all qualified as an expert on human perception or cognition is quite another matter.

Nimely, 414 F.3d at 396. The Nimely court further held:

> The relevance and reliability inquiries, as well as the question of whether expert testimony will "assist the trier of fact," are separate from the threshold question of whether a witness is "qualified as an expert by knowledge, skill, experience, training, or education" to render his or her opinions. Fed. R. Evid. 702. The initial question of whether a witness is qualified to be an "expert" is important, among other reasons, because an "expert" witness is permitted substantially more leeway than "lay" witnesses in testifying as to opinions that are not rationally based on his or her perception.

Nimely, 414 F.3d at 396.

As the deposition testimony of Evan Kohlmann reveals, he had no basis to form any opinions with respect to JEI in Bangladesh, or to explain JEI in Bangladesh to the jury, based upon his knowledge in the topic of JEI Bangladesh.

The testimony provided by Evan Kohlmann was highly prejudicial to defendant Hossain, being the only expert evidence presented by the government as to predisposition that could have influenced the jury's conclusion that the government met its burden of proof to establish Hossain's predisposition. Because Kohlman's testimony on JEI relates solely to the Hossain entrapment defense, and that defense applies to all the counts against defendant Hossain, Defendant Hossain requests a Rule 29 order vacating of the jury's finding of guilt on all counts of the indictment and entry of judgment of acquittal with respect to Counts 1 through 27.

POINT IV

THE VERDICT AGAINST DEFENDANT HOSSAIN ON COUNTS 1 THROUGH 27 SHOULD BE SET ASIDE ON THE DETERMINATION OF ENTRAPMENT AS A MATTER OF LAW

In United States v. Cummins, 969 F.2d 223 (6th Cir. 1992), the Court of Appeals held:

> *Generally, an entrapment defense presents a jury question. United States v. McLernon, 746 F.2d 1098, 1111 (6th Cir. 1984).* ***When, however, the testimony and facts pertaining to that issue are undisputed and the evidence "demonstrates a 'patently clear' absence of predisposition" to commit the charged crime, a court may find that a defendant is, as a matter of law, entrapped.*** *United States v. Pennell, 737 F.2d 521, 534 (6th Cir. 1984), cert. denied, 469 U.S. 1158, 83 L. Ed. 2d 921, 105 S. Ct. 906 (1985).*

See Cummins, 969 F.2d at 228 (emphasis supplied).

This court has addressed entrapment as a matter of law in United States v. Bala, 1999 U.S. Dist. LEXIS 12529 (N.D.N.Y., 1999) at 236 F.2d 87 (2nd Cir., 2000). The court noted in Bala that there are two elements for an entrapment defense: government inducement of a crime and lack of predisposition on the part of the defendant to engage in the criminal conduct. Bala, citing Matthews v. United States, 485 U.S. 58, 63 (1988). The government conceded the first entrapment element with respect to defendant Hossain prior to trial. The government more specifically expressed its intention to concede the first entrapment element in framing its planned jury charge as follows:

> *. . . the Government* ***intends to propose jury instructions that concede inducement and move the jury directly to predisposition****.*

[*Docket 119 at page 26* (emphasis supplied)]

With the concession of the first entrapment element, the government's case and burden turned to its obligation "to prove beyond a reasonable doubt that [defendant Hossain] was disposed to commit the criminal act **prior to first** being approached by government agents". *See* Jacobson v. United States, 503 U.S. 540, 548-549 (U.S. 1992), 118 L.Ed.2d 174, 112 S.Ct. 1535 (1992).

In United States v. Williams, 705 F.2d 603 (2nd Cir., 1983), the Second Circuit made clear that a defendant's predisposition is measured before the informant suggests that the target become involved in

criminal activity:

> *A defendant's predisposition is **not** to be assessed "as of that time when he committed the crime." Normally, predisposition refers to the state of mind of a defendant **before** government agents make any suggestion that he should commit a crime.*

See Williams, 705 F.2d at 618 (2nd Cir. 1983). *See also* United States v. Khubani, 791 F.2d 260 (2nd Cir., 1986). In Jacobson, the Supreme Court stated:

> *Indeed, **the proposition that the accused must be predisposed prior to contact with law enforcement officers is so firmly established that the Government conceded the point at oral argument**, submitting that the evidence it developed during the course of its investigation was probative because it indicated petitioner's state of mind prior to the commencement of the Government's investigation.*

See Jacobson, 503 U.S. at 549 (emphasis supplied). The Supreme Court in Jacobson requires that the predisposition exist "prior to first being approached by Government agents". Jacobson, 503 U.S. at 549 citing United States v. Whoie, 288 U.S. App. D.C. 261, 263-264, 925 F.2d 1481, 1483-1484 (1991). More specifically, in Jacobson, the Supreme Court held that "although [the defendant] had become predisposed to break the law by May 1987, it is our view that the Government did not prove that this predisposition was independent and not the product of the attention that the Government had directed at [defendant] since January 1985" (citation omitted). Jacobson, 503 U.S. at 550. That is, once the defendant is allegedly in violation of the law, that is not the "point to determine if he is predisposed".

A. The Government Did Not Prove Beyond a Reasonable Doubt as a Matter of Law That Defendant Hossain Was Predisposed To Commit the Crimes Involving Terrorism Charged at Counts 12 Through 27

Counts 12 through 27 relate to money laundering connected to terrorism. The government had to prove defendant Hossain's predisposition to "***to commit the charged crime***" (Cummins, id.), and not some generalized criminal activity. These counts charge him with terrorism-related elements (as distinct from Counts 1 through 11 which relate to "simple" money laundering), and require the government to prove beyond a reasonable doubt defendant Hossain's predisposition to commit terrorism offenses "***prior to contact with law enforcement officers***" (*see* Jacobsen, id.).

Malik initiated conversations on the topic of terrorism on a number of occasions prior to

attempting to offer money to defendant Hossain. On each occasion – and during the time period that defendant Hossain's predisposition is to be measured (see Jacobsen, *id*.) – defendant Hossain repeatedly expressed his views against terrorism. When Malik raised the issue of jihad, defendant Hossain redirected Malik away from jihad associated with violence:

> MH: Muslims are over a billion, **we don't need the Jihad of killing, beating. But what we need is that, submit ourselves to complete on the path of God…**
>
> CW: Yes…
>
> MH: To our offspring, to our children… those are our Muslim brother, brothers… to let them follow our path… and keep on telling them to follow
>
> CW: Yes…
>
> MH: **If you are doing inside the home…these are not the work done in the path of God. Stop this, stop this, do good work. Go and say prayer on time. Do certain job at time… do certain job. Do this kind of Jihad** --

[*Hossain Exhibit 3*]

Defendant Hossain directed Malik to his faith instead of violence:

> MH: So, that - that things is - is clear indication even though enemy, we cannot kill them like a coward. We have to let them elect their fight. As you see, in Badr and all of those battles, we had faith. If they have more soldiers, they have less, it doesn't matter, **have more power in your faith.**

[*Exhibit 2DT at 7:8-11*]

Defendant Hossain implored Malik on his devotion to the United States:

> MH: I am a true citizen of this country. I am one of the best citizen in this country. I am teaching my children behave. I am a businessman. I am a house owner. I have nothing to do with anything else. This is my country.

[*Exhibit 2AT at 25:21-26:1*]

After Malik showed defendant Hossain the SAM, Hossain told him:

> MH: And then, and then you just hate from your heart is a lowest kind

of quality. **This person - these people work with you, that's not good, just stay away from them. That is the quality I am talking about**.

[*Exhibit 2DT at 8:23-25*]

Defendant Hossain specifically told Malik that he did not agree with his approach:

CW: You and I have common thinking.

MH: **You're thinking is different**. Perhaps I -

CW: You love God in a different way, I love in another way. There are so many ways.

MH: [Laughs] This is your idea. Your idea is

CW: .**My method is different, your style is different**

MH: **Mine is different. But I don't believe in your method, that why I don't take that path**.

[*Exhibit 2GT at 27:7-12*]

Defendant Hossain was critical of the bombing of the World Trade Center:

CW: What the Saudis did with the World Trade Center? In your opinion, was it good or bad?

MH: **This - of course, this was bad. This was bad. Do you understand that?**

[*Exhibit 2AT at 23:23-24*]

MH: It was bad because - I'll tell you. You are in possession of something good.

CW: Right.

MH: You want to sell this to me, understand?

CW: Uh-huh.

MH: If you want to sell to me, how will you treat me?

CW: Right.

MH: You'll shake hands with me, visit, offer a cup of tea - because you'll be getting money from me right? In other words, when you sell this thing, you want to profit. If we are true Muslims, and want to spread our Islam throughout the world, we can't frighten others like this. Now people say "Look, it's a Muslim!"

> "Oh, this is a Muslim! He's very cruel - he'll kill us!" "Watch out - it's a Muslim!" So before we even say what we wanted to, you'll run away. Understand? Just as if I came here and after greeting you, began abusing you. You'll say "Man, what are you doing?" If I say, "It's prayer time, it's time for this or that" etc., you'll say "Get out from here!" So how will you sell your product? You'll have frightened me away. No! **You should invite me politely, have me sit down, offer me some tea, and then say "Look, I have this excellent product." Understand? We should have a good relationship with the unbelievers. Then, because of our goodness, Islam will spread, and continue spreading.**

[*Exhibit 2AT at 24:1-18*]

> MH: Against Islam - this - this most likely, my heart says. Otherwise, my brother, let me tell you, this like Usama bin Lad - Laden, like that kind of guy, who know the Koran, who know the Hadeeth - the Prophet, may God's peace and blessings be upon him, repeatedly says, **"If some one person kill one human being, as he kill whole mankind. If he who save one mankind, like he save the whole world.**

[*Exhibit 2AT at 26:1-18*]

Defendant Hossain presented a lack of predisposition to commit offenses related to terrorism. He instead evoked contrary ideas to those advanced by Malik.

As a matter of law, the government did not prove that defendant Hossain was predisposed to engage in actions to support terrorism prior to the advances made by the government.

B. The Government Did Not Prove Beyond a Reasonable Doubt That Defendant Hossain Was Predisposed To Engage In Money Laundering as Charged In Counts 1 Through 27 as a Matter Of Law

Counts 1 through 11 relate to charges of "simple" money laundering. As with the above, the government must prove beyond a reasonable doubt that defendant Hossain was predisposed to commit money laundering before he was contacted by the government.

In July of 2003, Agent Timothy Coll directed that Malik meet with defendant Hossain to inquire as to whether defendant Hossain was interested in selling his pizzeria. [*Transcript at 274-275*] Following the July 28, 2003 meeting, Agent Coll against instructed Malik to meet with defendant Hossain on August 7, 2003 and inquire as to the financial status of the pizzeria, and whether defendant Hossain

would be interested in selling the pizza business. [*Transcript at 614*]

Throughout Malik's contact with defendant Hossain, Malik had been instructed by the government "to play a role and to pretend that you have an enormous amount of money". [*Transcript at 300; 435*] Malik was the informant of choice because, according to Agent Coll, Malik was "good at being deceptive". [*Transcript at 630*] At the direction of the government, Malik was also instructed to "portray himself falsely to Mr. Aref and Mr. Hossain" as having loaned money to everybody because he makes so much money" and that he had "a very successful import/export business". [*Transcript at 435-436*] Throughout Malik's contact with defendant Hossain, he portrayed himself to be a very wealthy businessman, and had two storefront locations for his import/export merchandise with various items such as lighters, dolls, playing cards, and laundry detergent. [*Transcript at 622-624*] On October 20, 2003, Malik stated to defendant Hossain that he was aware that defendant Hossain had "some money problem" [*Exhibit 2CT at 15:2*] and that "if it's a money problem, let me know" [*Exhibit 2CT at 15:4*]. Defendant Hossain responded (believing that Malik was a significantly wealthy businessman), that he had never asked anyone for money before, but that he could use a few thousand dollars due to tenants that were not paying rent. [*Exhibit 2CT at 15:5-14*]

On December 2, 2003, Malik visited defendant Hossain at defendant Hossain's pizzeria, and in a recorded conversation, Malik inquired as to defendant Hossain's financial status, and once again offered money to help defendant Hossain with his precarious financial situation. [*Exhibit 2DT at 26:8*] Later in the conversation, defendant Hossain again states he needs money due to the fact that his tenants have not paid rent. [*Exhibit 2ET at 13:2-18*] Malik tells defendant Hossain that he "has a lot of resources" [*Exhibit 2ET at 13:9*] and that it is the practice of the Prophet that "if you have extra money, that extra money has to be offered to a Muslim" [*Exhibit 2ET at 13:20-22*]. Malik explains that he has no bank account because of the traditional Islamic belief that Muslims cannot earn or pay interest [*transcript at 890; Exhibit 2ET at 13:25-14:19*], and that he will not charge defendant Hossain interest on the loan. [*Exhibit 2ET at 13:25; 14:19*]

On numerous occasions, defendant Hossain and Malik discussed defendant Hossain's views of

the obligation to pay money earned and his previous pattern of such.

> MH: I am a true citizen of this country. I am one of the best citizen in this country. I am teaching my children behave. I am a businessman. I am a house owner. I have nothing to do with anything else. This is my country. Other, why am I doing all these things? Am I right or wrong? **I am paying tax. I am praying. I never harming anybody. People like me. Society get benefit.**

[*Exhibit 2AT at 25:21 - 26:1*]

Defendant Hossain expressed his desire to produce money by legal means:

> MH: This is my intention, that to bring up my kids with **lawful income…**

[*Hossain Exhibit 3*]

When Malik sought to gain insight from defendant Hossain on his paying of taxes, and when Hossain had the incentive to overstate his income so as to sell his business at a higher amount, he said:

> MH: At the same time, my business also generate enough money, **but I have to show a lot of tax**.
>
> CW: Oh, do you show a lot of taxes or no?
>
> MH: No, I, **I just show whatever I earn**
>
> CW: Uh-hum
>
> MH: You know every 3 quarter I pay like 2000, 1500.
>
> CW: But you generate more taxes, more than business than that.
>
> MH: Actually, I don't know Allah wa 'Alam, I don't know, gonna get punished or not I just don't like the delivery.
>
> CW: Okay.
>
> MH: Sometime I couldn't show.
>
> CW: Uh, you don't show the deliveries?
>
> MH: Deliveries and things like that.
>
> CW: **But do you, aren't you talking the cash register too or no**?
>
> MH: **No, I nah, I punch the cash register**.
>
> CW: **Okay, but you don't show it to the tax people**.

MH: **No, I show it, I show that**.

CW: Okay.

MH: I show that, just only, uh like the deliveries, tips.

MH: And so what happen the delivery I don't show because I don't, I don't claim that my gas money, I don't claim my insurance money, whatever my car insurance, and etcetera, and things like that, you know, so therefore I am thinking because of the delivery and I am not.

[*Exhibit 2KT at 18:14-19:7; 20:20-20:24*]

MH: So perhaps I didn't pay enough money to the zakat but **I have to pay what you call the United States, whatever**, you know, the fix, my house, and . .

[*Exhibit 2KT at 19:23-19: 24*]

MH: From that, $1,450 per month, so that's from that, that income. **And the income from my business - I've shown everything on my tax statement, etc., about two or two and a half thousand every three months** -

[*Exhibit 2FT at 13:8-13:10*]

The information provided the government was that defendant Hossain was not predisposed to engage in money laundering prior to contact by the government. As a matter of law, the government did not prove beyond a reasonable doubt that defendant Hossain was predisposed to commit the money laundering offenses at Counts 1-11, and defendant Hossain requests entry of judgment of acquittal.

CONCLUSION

Defendant Hossain requests that the court vacate the findings of guilt with respect to all the charges for the reasons set forth above and those incorporated by reference, and enter judgment of acquittal, or, in the alternative, order a new trial**.**

Dated: December 31, 2006

Yours, etc.,

TOBIN and DEMPF, LLP

Kevin A. Luibrand, Esq.
Attorneys for Defendant Hossain
Office and P.O. Address:
33 Elk Street
Albany, New York 12207
Telephone: (518)463-1177