UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

v.

YASSIN AREF,
Defendant.

MEMORANDUM OF LAW
Rule 29/33
04-CR-402 TJM

Yassin Aref, through his attorney, Terence L. Kindlon, respectfully submits:

I. RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

Under Rule 29 of the Federal Rules of Criminal Procedure, a judgement 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 the defendant guilty beyond a reasonable doubt. *United States v. Cassese*, 428 F.3d 92 (2nd Cir. 2005); *United States v. Gotti*, 2006 US Dist. LEXIS 66641 (SDNY 2006); *United States v. Stewart*, 305 F. Supp.2d 368 (SDNY 2004).

Where, as here, the conviction depends on circumstantial evidence, if, looking at the evidence in the light most favorable to the prosecution, it appears that there is "equal or nearly equal" support for guilt and innocence, acquittal must be granted. *Cassese*, supra, 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 intent. *United States v. Autuori,* 212 F.3d 105 (2nd Cir. 2000); *United States v. Lopac*, 411 F. Supp.2d 350 (SDNY 2006).

In *Stewart*, supra, the court granted a Rule 29 motion, stating:

> "... [T]he Second Circuit has emphasized that 'where a fact to be proved is also an element of the offense... *it is not enough that the inferences in the government's favor are*

*permissible....*The Supreme Court has noted that '*the defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense* "element"' *Apprendi v. New Jersey*, 530 US 466, 493 (2000).

...'It is the function of the judge to deny the jury an opportunity to operate beyond its province. *The jury may not be permitted to conjecture merely, or to conclude upon pure speculation... The critical point in this boundary is the existence or nonexistence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such doubt, the judge must require acquittal*, because no other result is permissible within the fixed boundaries of jury consideration.' *United States v. Taylor*, 464 F.2d 240, 243 (quoting *Curley v. United States*, 160 F.2d 229, 232)" *Stewart*, supra, at 375, emphasis supplied and some citations deleted.

Similarly, in *Rahseparian*, supra, the court, with respect to an alleged conspiracy, granted the Rule 29 motion, stating:

"A defendant's knowledge of the purpose of the criminal conspiracy must be shown by 'clear, unequivocal evidence.' *See United States v. Austin*, 786 F.2d 986, 988 (10th Cir. 1986). ...An inference is unreasonable where the jury engaged 'in a degree of speculation and conjecture that renders its finding a guess or mere possibility.'*United States v. Jones*, 44 F.3d 860, 865 (10th Cir. 1995)." *Rahseparian*, supra, at 1262.

There are many cases where Rule 29 motions were granted, often because there was insufficient evidence of intent.[1]

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[1] *United States v. Cassese*, 428 F.3d 92 (2nd Cir. 2005) (insufficient evidence of willfulness); *United States v. Frampton*, 382 F.3d 213 (2nd Cir. 2004)(insufficient evidence of intent); *United States v. Rodriguez*, 392 F.3d 539 (2nd Cir. 2004) (insufficient evidence of intent in conspiracy case);*United States v. Jones*, 393 F.3d 107 (2nd Cir. 2004); *United States v. Samaria*, 239 F.3d 228 (2nd Cir. 2001) (insufficient evidence of intent in conspiracy case); *United States v. Autuori*, 212 F.3d 105 (2nd Cir. 2000);*United States v. Nusraty*, 867 F.2d 759 (2nd Cir. 1989) (insufficient evidence of knowledge and intent in conspiracy case);*United States v. Gotti*, 2006 US Dist. LEXIS 66641 (SDNY 2006);*United States v. Stewart*, 305 F. Supp.2d 368 (SDNY 2004) (insufficient evidence of intent); *United States v. Yannotti,* 415 F. Supp.2d 280 (SDNY 2005) (jury engaged in impermissible speculation); *United States v. Martinez-Sandoval*, 2003 US Dist. LEXIS 3045 (SDNY 2003) (insufficient evidence of intent in conspiracy case); *United States v. Scofield*, 433 F.3d 580 (8th Cir. 2006); *United States v. Pahulu*, 108 Fed. Appx 606 (10th Cir. 2004); *United States v. Hernandez*, 301 F.3d 886 (2nd Cir. 2002);*United States v. Hernandez-Bautista*, 293 F.3d 845 (5th Circuit 2002); *United States v. Frigerio*, 254 F.3d 30 (1st Cir. 2001); *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000); *United States v. Rosario-Diaz*, 202 F.3d 54 (1st Cir. 2000) (insufficient evidence of knowledge with respect to aiding and abetting); *United States v. Schuchmann*, 84 F.3d 752 (5th Cir. 1996); *United States v. Pappathanasi*, 383 F. Supp.2d 289 (D MA 2005) (insufficient evidence of willfulness in conspiracy case); *United States v. Jones*, 291 F. Supp. 2d 78 (D CT. 2003) (jury engaged in speculation); *United States v. Waters*, 850 F. Supp. 1550 (ND AL

A. COUNTS 20, 26 & 27 (2339B JEM CONSPIRACY)

Count 20 of the superceding indictment charged, under 18 USC 2339B, that Yassin Aref:

> "...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')..." (Superceding Indictment, at 12-13, excerpted in Attachment "A," at 1).

Relevant portions of the jury instructions are included in Attachment "A." Very significantly, the jury was instructed that they could not convict if they found that Mr. Aref believed he was not violating the law. (Attachment "A," at 2)

1. THE FACTS

Out of the approximately 50 hours of recorded conversations between the "cooperating witness," Malik, and the defendants, the *only time* Malik discussed JEM with Yassin Aref was on January 14, 2004, and all relevant excerpts are included in Attachment "B," at 2-5. Malik tried over and over on that date to get Mr. Aref to say that he, Yassin, supported that organization. The closest he got was that Mr. Aref said, "If you believe they doing right and they using in the right way and they are working for Allah, for the faith, I believe *you* should to help." (Attachment "B," January 14, Page 57, lines 20-23, emphasis supplied)

Yassin Aref *never* stated that he, himself, supported JEM, but only that if Malik decided that they were doing the right thing, that it was okay for *Malik* to support them. In fact, Mr. Aref was very clear that he could *not* support that group, as he did not know enough about it. The excerpts in Attachment "B" show that Mr. Aref certainly did not believe *he* was in any way supporting that organization, and he said so ten different times on January 14.

1994); *United States v. Price*, 623 F.2d 587 (9th Cir. 1980) (insufficient evidence of intent and knowledge); *United States v. REI*, 725 F. Supp. 587 (D. DC 1989).

2. THE LAW

In *Cassese*, supra, the Second Circuit recently upheld the a Rule 29 grant in an insider trading case because there was insufficient evidence of willfulness - and therefore, there was insufficient proof that the defendant *believed he was acting unlawfully.* The *Cassese* court stated:

> "...[*E]ven under the Government's relaxed theory of criminal liability, we conclude that it did not adduce enough evidence to prove beyond a reasonable doubt that Cassese believed he was acting unlawfully*.
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> ***
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> *Since few events in the life of an individual assume the importance of a criminal conviction, we take the 'beyond a reasonable doubt' requirement with utmost seriousness. Here, we find that the Government's evidence failed to reach that threshold. As discussed above, viewed singly, each of the areas of proof by the Government was characterized by modest evidentiary showings, equivocal or attenuated evidence of guilt or a combination of the three. More importantly, when the evidence is viewed in its totality, the evidence of willfulness is insufficient to dispel reasonable doubt on the part of a reasonable fact finder*. Viewed in the light most favorable to the prosecution, the evidence, at best, gives 'equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence,' and thus 'a reasonable jury must necessarily entertain a reasonable doubt.' *United States v. Glenn*, [312 F.3d 58], 70 (citation omitted)." *Cassese*, supra, at 98, 103, emphasis supplied[2].

As in *Cassese*, the jury herein was told that in order to convict Mr. Aref, it must find that he acted *willfully,* i.e. "deliberately and purposefully" with a "specific intent to do something the law forbids." They were also told that they could not convict him if he had a good faith belief that he was not doing anything illegal. Even looking at the evidence in the light most favorable to the government, it is submitted that there is *no* evidence that Yassin Aref believed he was violating

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[2]In *United States v. Cassese*, 290 F. Supp.2d 443 (SDNY) (the district court's grant of the Rule 29 motion), the court pointed out, perhaps as an explanation of how the jury could have convicted Mr. Cassese, that there had been a great deal of extraneous but prejudicial evidence. While the introduction of Mr. Aref's journal and similar evidence is not argued in this motion, it is submitted that said inflammatory and prejudicial evidence had a far greater effect that the prejudicial evidence mentioned in *Cassese*, supra, and could well explain why the jury did what they did.

any law in regard to advising Malik about whether or not *Malik* should help JEM. To the contrary, it is abundantly clear that Mr. Aref believed he was *not* helping that group in any way - he said ten times that he could not and would not do so. And after saying that if Malik believed JEM was helping Allah, *he* should help them, Mr. Aref said "If you don't can, *like me*, you are yourself."

While the government may argue that Mr. Aref believed that Malik was claiming to be working for JEM when Malik said that the missile was sent to New York to teach Mushareff a lesson; and that therefore Mr. Aref must have believed that he was helping JEM by witnessing the loan, that reasoning, which piles inference upon inference, is far too speculative to support a finding of purposely helping JEM beyond a reasonable doubt. As pointed out in *Rahseparian*, supra, at 1262, a "defendant's knowledge of the purpose of the criminal conspiracy must be shown by 'clear, unequivocal evidence.'" Such speculation is not permissible, especially since it flies in the face of the clear evidence, elicited by the government, that Mr. Aref *did not believe he was helping JEM.*

In *Hernandez*, supra, the district court granted the Rule 29 motion in a drug case because the verdict was based on conjecture, and the appellate court upheld the grant, stating:

> "When the government's evidence is viewed in its entirety, Hernandez's activities may be sufficient to raise speculation that she shared Garcia-Melchor's criminal intent. *However, there is a critical line between suspicion of guilt and guilt beyond a reasonable doubt*. We believe the district court was correct in its assessment. *Even looking at the government's case in the most favorable light possible, the government has not transcended the realm of speculation to the realm of certainty beyond a reasonable doubt*. There exists insufficient evidence to allow a reasonable jury to find Hernandez guilty beyond a reasonable doubt." *Hernandez*, supra, at 893, some citations deleted and emphasis supplied.

It is submitted that, unlike *Hernandez*, where there was *some* evidence raising a speculation that the defendant had criminal intent, there is in fact *no* evidence that Yassin Aref has

any criminal intent with regard to purposely aiding JEM.

a. The Government's Own Evidence Raises Inference of Innocence

In fact, this case, in particular the JEM portion, is more akin to *United States v. Pappathanasi*, supra, where the district court granted a Rule 29 motion at the close of the government's case because, *looking just at the evidence elicited by the government*, there was insufficient evidence of intent in a conspiracy case. The court stated, with respect to the Rule 29 standard:

> "... 'The government is not bound by all of the evidence it presents. However, *if the government introduces evidence contrary to the inferences it wants the jury to draw, it must introduce other direct or circumstantial evidence to relieve itself of the effect flowing from the evidence introduced.* The evidence must be sufficient to prove the fact at issue beyond a reasonable doubt. ...' *United States v. Sampson*, 335 F. Supp.2d 201 (D. Mass. 2004)(citing First Circuit cases). ..." *Pappathanasi*, supra, at 290, emphasis supplied.

In *United States v. Lopac*, the court found insufficient evidence of intent in a conspiracy case, stating:

> "... To establish the requirement of intent, 'there must be something more than "mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy."' *United States v. Cianchetti*, 315 F.2d 584, 588 (2nd Cir. 1963). The defendant must 'in some way promote the venture himself, make it his own, [or] have a stake in its outcome.' *United States v. Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940), aff'd 311 US 205 (1940). ..." *Lopac*, supra, at 361.
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> ***
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> ...Lopac, like the defendants in Cianchetti and Nusraty, disavowed criminal intent by showing no interest to take part in any of the conspiratorial activities or to receive any benefit from the conspiracy..." *Lopac*, supra, at 366-367.

While it is submitted that Yassin Aref was *not* aware of the alleged JEM (or any other) conspiracy, even if*, arguendo*, he had been aware that *something* was going on, like the defendant in *Lopac*, supra, he clearly disavowed any criminal intent with respect to supporting JEM because he said 10 times on tape that he could not support that group.

As shown above, the government introduced evidence that Mr. Aref was not willing to support JEM. And absolutely no evidence was submitted, on either the government's case, or the defense case, which rebutted that. Therefore, because there was no evidence of willfulness, and no evidence (let alone the "clear and unequivocal" evidence required) of knowledge of the purpose of the alleged JEM conspiracy, the Court must grant a judgement of acquittal on Count 20.

b. No Real Question of Credibility

While the government may argue that the Court should not grant the Rule 29 motion because it is not permissible for the Court to decide questions of credibility, it is submitted that as in *United States v. Martinez-Sandoval*, 2003 US Dist. LEXIS 3045 (SDNY 2003), because all the actual evidence here is on tape, there are no credibility questions to be resolved, and it comes down to interpretation and speculation. In *Martinez-Sandoval*, the district court granted a Rule 29 motion because the circumstantial evidence regarding the defendant's specific intent to join the conspiracy was equally balanced between guilt and innocence, and there were no credibility questions because the evidence was on tape. The court stated:

> "...The circumstantial evidence regarding Defendant's specific intent to join the conspiracy however equally supports competing theories of guilt and innocence....
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> *...In the case before this Court, the evidence presented relating to Defendant's specific intent to join the conspiracy is all recorded on videotape and does not require that any credibility determinations be made by the fact finder*, and thus can be distinguished from the cases above [cases where the motion was denied based on the jury's credibility findings] on that basis. ..." *Martinez-Sandoval*, supra, at 21, 24, emphasis supplied and citations deleted.

c. Acquittals

It is submitted that even if the jury had convicted Mr. Aref of every single count, there would *still* be insufficient evidence to support a verdict beyond a reasonable doubt. However, the

jury acquitted Mr. Aref of all the counts charging transactions prior to July 1, 2004. There were thus several dates charged *subsequent to the January 14 discussion* (January 21, February 12, February 13, March 31, April 16, May 4, and June 1) where the jury acquitted Mr. Aref. *There was no mention of JEM after January 14.* Thus the jury's subsequent decision to convict could *only* be based on impermissible speculation.

While it is true that an inconsistent verdict generally can't be the basis for a reversal, in *United States v. Hilliard*, 392 F.3d 981 (8th Cir. 2004), the court upheld the grant of a new trial where the district court had based his decision heavily on the fact that there were several acquittals, which he believed showed that the government's case was weak and that there had been a miscarriage of justice. See also *United States v. Walden*, 393 F. Supp.2d 1324 (SDFL 2005). The *Hilliard* court stated:

> "...Recognizing that Hilliard was convicted of only one of the five charged counts even though the evidence for all five overlapped, the court opined that *the weakness of the evidence may have been the reason for the inconsistent verdict.* After independently viewing the evidence, the court held that 'a miscarriage of justice was likely done here,' and thus it would have granted the motion for a new trial if timely filed.
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> In its brief, the government contends that the testimony of James and Baskerville [government witnesses who had been more heavily involved in the offenses than Hilliard] was sufficient to convict Hilliard, recounting in great detail the different transactions to which their testimony connected Hilliard. *A review of the trial transcript, however, reveals that this testimony principally related to those charges that resulted in acquittals. Thus, this evidence does nothing to convince us that Hilliard's conviction should stand. ..." Hilliard*, supra, at 987, emphasis supplied.

As in *Hilliard*, supra, a review of the recorded conversations reveals that all mention of JEM occurred on January 14, and Mr. Aref was acquitted subsequent to that date. Thus, as in *Hilliard*, the "[January 14] evidence does nothing to convince us that ...the conviction[s] should stand." And there is no other evidence relating to JEM.

d. June 10, 2004

There was only *one date* where there were any relevant conversations involving Mr. Aref subsequent to the dates for which he was acquitted - that was June 10, and *there was absolutely no discussion of JEM on that date*. On June 10, all that was said which could in *any way* be connected to the instant offenses (referring here to *all* counts of the indictment) is included in Attachment "C."

While Malik and Yassin Aref also discussed the possibility of Malik buying into Mr. Hossain's pizza business on June 10, as discussed below, at p. 27, that can play no legitimate part in the jury's decision, as it had absolutely nothing to do with any of the charges. For the jury to rely in any way on those discussions would clearly be impermissible speculation, as discussed in *Cassese*, *Hernandez*, and the other cases cited above.

Absolutely nothing was said on June 10 regarding JEM. While Malik does talk on June 10 about his concerns that the FBI might be watching Mr. Aref, and while Mr. Aref does say, "you look like danger," that is a direct response to Malik's comment about the FBI and does *not* indicate any particular knowledge on Mr. Aref's part. Furthermore, right after that Mr. Aref makes it very clear that he *does not believe he is violating any laws* because he says even if the FBI is watching, he has no problem because they will know he is doing nothing but "eating, drinking and talking." It is submitted that these statements show a complete *lack* of knowing or willful violation of the law.

e. No Nexus Shown Between JEM and Loan

As discussed in more depth below, on Pages 36-37, Yassin Aref *never understood* that the loan was intended to launder money, or to "legalize" money, thus he never understood that his

witnessing the loan could in any way aid Malik in violating the law. To the contrary, it is clear from the tapes, as discussed below, that Mr. Aref believed he was *not* in any violation of any law himself.

Moreover, the acquittals are significant with respect to the required knowledge that the loan was intended to launder the money received from the importation of the SAM, i.e., to "legalize" that purchase. As discussed below, on Pages 36-37, the *only* conversations which could in any way be alleged to relate to money laundering or "legalizing" the money occurred on December 10, January 2, and January 14. Each time, far from the requisite knowledge increasing, it became *more and more clear* that Mr. Aref believed instead that "legalizing" the money meant that Malik would take the check from Mosharref in order to, as he said on January 14, "show some money which is you have the business for tax, for the be everything legal and that and that." (Attachment "B," at 1) Thus, in addition to the affirmative proof that Mr. Aref never had any intent to aid JEM, there is a complete lack of proof that he understood any connection between his witnessing the loan, and Malik's discussions of helping JEM.

f. Conclusion - Count 20

Therefore, because there was no evidence that Mr. Aref knowingly and willfully agreed to provide material support to JEM, and no evidence that in witnessing the loan, he had any intent to do so, the Court should vacate the conviction for Count 20, the JEM conspiracy.

g. Counts 26 & 27 (Aiding and Abetting)

In counts 26 and 27 Mr. Aref was convicted of aiding and abetting the intended provision of material support to JEM on July 1, 2004 and August 3, 2004, respectively. As with conspiracy, aiding and abetting requires proof beyond a reasonable doubt of the specific intent to commit the

offense. *United States v. Frampton*, 382 F.3d 213 (2nd Cir. 2004); *United States v. Samaria*, 239 F.3d 229 (2nd Cir. 2001). Thus in order to uphold the convictions on Counts 26 and 27, there must have been proof that Yassin Aref had the specific intent to provide material support to JEM. Not only was there was no evidence of such intent, but there was a great deal of evidence showing that Mr. Aref would *not* support JEM. Any inference of guilt was therefore based on impermissible speculation, as discussed in *Cassese, Stewart*, *Hernandez*, *Pappathanasi* and the other cases cited above, and the convictions on Counts 26 and 27 should be reversed.

h. Willful blindness

The willful blindness instruction herein is included in Attachment "A," at 4. There are several cases where similar willful blindness (or conscious avoidance) instructions were given and the convictions were reversed because of insufficient evidence of willful blindness and/or intent. *United States v. Samaria*, 239 F.3d 228 (2nd Cir. 2001); *United States v. Lopac*, 411 F. Supp.2d 350 (SDNY 2006); *United States v. Martinez-Sandoval*, 2003 US Dist. LEXIS 3045 (2003); *United States v. Frigerio*, 254 F.3d 30 (1st Cit. 2001). While, as stated in *United States v. Nektalov*, 461 F.3d 309 (2nd Cir. 2006), a willful blindness charge may at times be appropriate in a money laundering sting case, it is submitted that, even if, *arguendo*, there had been a basis for giving such a charge in this case, there was insufficient evidence of willful blindness herein, as in the cases cited above.

In *Samaria*, the Second Circuit reversed the conviction for insufficient evidence, stating:

> "...The government argues that either [Defendant] Elaiho's constructive possession of recently stolen goods or his conscious avoidance of the fact that the goods were stolen provides an inference that Elaiho knew that the contents of the boxes were indeed stolen. We reject the argument that Elaiho was in constructive possession of the boxes and find that *although conscious avoidance may be a substitute for knowledge, it cannot substitute*

for the intent necessary to prove the crimes." *Samaria*, supra, at 238, emphasis supplied.

Even though in a sting operation, as discussed in *Nektalov*, supra, the knowledge element is more properly characterized in terms of *belief*, there still must be proof of unlawful intent. A different result would negate the Second Circuit holdings in *Cassese*, *Frampton*, *Rodriguez*, *Samaria* and *Nusraty*, supra, all of which were reversed for lack of proof of intent.

Moreover, there can be no lesser requirement of intent in a sting operation where, if anything, there should be even more care given to learning whether the defendant truly wished to join the phony scheme, or whether he was manipulated and/or confused by those working for the government.

In *Samaria*, *Martinez-Sandoval* and *Lopac*, supra, the convictions were reversed due to insufficient evidence of intent, despite the fact that there had been willful blindness instructions. The *Lopac* court recently stated:

> "...Following an instruction defining conscious avoidance, the jury was told that 'if you find that the defendant consciously avoided joining a conspiracy, it's not enough in order [to] find that one joined, you have to find knowledge and actual intent.' (Tr. At 1098).
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> ***
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> However, the jury's finding that the government's evidence adequately proved Lopac's intention to join Powell's conspiracy is problematic. Te establish the requirement of intent, 'there must be something more than "mere knowledge, approval or acquiescence in the object or the purpose of the conspiracy"' *United States v. Cianchetti*, 315 F.2d 584, 588 (2nd. Cir. 1963). The defendant must 'in some way promote their venture himself, make it his own, [or] have a stake in its outcome.' *United States v. Falcone*, 109 F.2d 579, 581 (2nd Cir. 1940), aff'd 311 US 205 (1940). ..." *Lopac*, supra, at 361.

As argued above, even with the willful blindness instruction, there was no proof that Yassin Aref intended to aid the provision of material aid to JEM. To the contrary, he continually said he could *not* support that group, and clearly believed he was not in any way doing so.

Nektalov, supra, and *United States v. Tusaneza*, 116 Fed. Appx 305 (2nd Cir. 2004), are distinguishable for several reasons. First, unlike Mr. Aref, those defendants *never affirmatively stated on government recordings that they did not wish to support the object of the conspiracy*.

In addition, in *Tusaneza*, where the defendant was convicted of money laundering drug proceeds, the court held that there were several "red flags," stating:

> "The evidence sufficed to establish the presence of several such red flags. A very large amount of cash was involved, and the transaction was structured in an unusual way with the clear purpose of hiding the transaction from the state court and obscuring the identity of the property's true owner. Moreover, defendant was aware of information connecting the transaction with the drug trade: that the brother of the party with whom defendant dealt - the person the transaction was plainly designed to benefit - was in jail awaiting trial on serious drug charges." *Tusaneza*, supra, at 306.

In this case, there were no such "red flags." The loan involved cash, but to Mr. Aref, coming from a place where there were no banks, that was not at all unusual. In addition, it was brought out on the tapes that many Muslims don't use banks because receiving or paying interest is against their religion. And the transaction herein was not structured in an unusual way to conceal anyone's identity - it was presented to Mr. Aref as a straightforward loan from Malik to Mushareff, and he and Mosharref both insisted on written receipts. The fact that Mushareff profited from the loan was explained to Mr. Aref when Malik told him that he was helping a brother Muslim, and fulfilling his obligation of zakat, or charity. (Attachment "F," at 2; Attachment "G," at 1)

Nektalov (where the defendant was sentenced to five months imprisonment) is also distinguishable because the government informant told Mr. Nektalov that some "product," "stuff" or "shit" was being brought into this country from Columbia and sold "in the streets" for cash *in small denominations*, and the informant said he wanted to buy gold and diamonds *to send back*

down to Columbia. Also, the informant had extensive prior dealings with Mr. Nektalov, having often purchased gold from him with cash from drug traffickers. In this case, Mr. Aref had no prior dealings with Malik, and instead of "shit" coming from Columbia, being sold in the streets for cash in small bills, and then the purchase of diamonds and gold to send back to Columbia, we have a straight-forward loan, all aspects of which were explainable without any such red flags.

Further, *Nektalov*, though superficially similar to the instant case because it is a money laundering sting operation, is very different because it involves simple money laundering of drug proceeds. Here, in order to be convicted of the JEM conspiracy, Mr. Aref would have to believe several different things, as well as understand the connections between them all. First, Mr. Aref would have to intend to support JEM, which is clearly not the case, according to the government's own evidence. Secondly, he would have to understand that JEM was connected to the alleged missile conspiracy, discussed below. Finally, he would have to understand that *the loan* itself was in connected to JEM, and that by witnessing it he was therefore helping JEM. It is submitted that Mr. Aref never understood *any* of those things, and a willful blindness instruction can't change that, and cannot supply intent where none exists.

B. COUNTS 12, 18 & 19 (2339A MISSILE ATTACK CONCPIRACY)

Count 12 of the superceding indictment charges that Yassin Aref:

> "...believed that the cooperating individual had imported a SAM [surface to air missile] 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." (Attachment "A," at 1)

The jury instructions for Count 12 are included in Attachment "A," at 3.

As argued below, there was a lack of evidence as to *any* of the following (all of which are

required): 1) that Yassin Aref understood that Malik had imported a SAM; 2) that he understood that the SAM was to be used in an attack in New York City; and 3) that he understood that by witnessing the loan he was helping to launder money and thereby conceal the source of the money obtained from importing the SAM, the Court must dismiss Count 12.

1. THE FACTS

The first time any mention of a "missile" was made in front of Yassin Aref was January 2, 2004. No mention was made of any alleged plot in New York City until January 14, when a reference was thrown into the middle of a long statement by Malik.

a. January 2

On January 2, 2004 the government videotaped a meeting with Malik, Mohammed Hossain and Yassin Aref, where Mr. Aref was handed $5000 cash to count. (See Attachment "G.") Agent Coll testified that he had instructed Malik "to tell *them* this is part of the missile that was gonna be sent down to New York City." (Trial Transcript, 532, emphasis supplied) While Mr. Aref was *looking down* counting the money, Malik held up the trigger mechanism for the SAM, which looked like a pricing gun or staple gun, and said *to Mr. Hossain*, "This is the part of the missile that I showed you." (Attachment "G," January 2, Page 6, lines 15-16) As was his habit, Malik pronounced said "mizzAISLE" with a long "I" and the emphasis on the final syllable. Clearly Malik was speaking only to Mr. Hossain, as he had never shown any missile to Mr. Aref, and Mr. Aref was looking down counting the money at that point. There was *no reaction on the part of Mr. Aref*, who just kept counting the money.

Agent Coll, while admitting that Mr. Aref never raised his head, claimed that he briefly raised his eyes at the time of the above statement, and while a different version of that video was

played for the jury in an attempt to show this, it is submitted that no one knows what the jury made of this supposition. (536-537) However, they did acquit him for every date until July 1.

b. January 14

There were a few different statements, or claimed statements, on January 14 which warrant discussion. First, when Agent Coll, who testified that he himself prepared the tape transcripts for the conversations which were in English (290), drafted the transcripts, there was one line on January 14 (Page 14, line 7-8) where it originally said "FL" [foreign language]. Then, in the final version, Agent Coll changed that line to claim that Mr. Aref said "...just give him two, three thousand and *send terrorists* and same day write check ..." (Page 14, lines 7-8). [3] The jury did ask for that particular section of the tape to be played again during deliberations.[4] They then acquitted Mr. Aref for January 14 which, it is submitted, shows clearly that the jury did *not* believe that Mr. Aref has said "send terrorists."

Right after the above section of the tape, Malik said, with regard to Azar Muhammed Mulana, the leader of JEM, who he had just mentioned:

> "*... President Mushareff, the President of Pakistan is, uh, is against him and, uh, against the Holy War because he's helping the Mushriq, uh, and, uh, we are fighting him, too. Uh, that's why, the missile, that we sent it to New York City to teach Mu, uh, President Mushareff, the lesson not to fight with us.* And I don't know how, how I do look at it in Allah's way. What do you think about that? I mean, I want to make my mind clear with God..." (Attachment "B" January 14, Page 15, lines 3-17)

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[3] After an audibility hearing, the Court held that, while it was unclear what was said, the transcript could include the phrase "send to terrorists" and it would be up the jury to decide what was actually said, or whether it was unintelligible.

[4] It seems that out of the defense personnel and members of the media watching the trial, everyone had a theory about what those words were - from "send taxes" or "same time" - but no one believed they were "send terrorists."

Yassin Aref's response was to say, "Right brother, especial I'm not talking about that group and that organization." (Attachment "B," Page 15, lines 20-21)

This statement contained the first reference to any alleged attack in New York City. Once again, if Mr. Aref did not understand the word "missile," this statement would be very unclear and could mean any number of things. The fact that they jury acquitted him for many dates subsequent to this statement by Malik shows that they did not believe he understood that word.

In addition, Malik inserted the phrase "I send the missile to" right into the middle of a general statement by Mr. Aref regarding the persecution of Muslims and what can and cannot be done about it. (January 14, Page 19, lines 1-25, Page 20, lines 1-6) As discussed below, at 44-45, this was an example of Malik blurting out incriminating sounding words and phrases which Mr. Aref didn't understand and, in this case, obviously either didn't hear at all or completely ignored.

Also on January 14, Mr. Aref told Malik that he was opposed to suicide bombing and bombing in general, that when he and Malik had come to this country, they had promised to obey American laws, and that it was very important for Muslims to fulfill their promises. (Attachment "B," at 1-2.)

c. February 12, 2004

No recording was made of the February 12, 2004 meeting, although Malik was supposed to be recording it. Agent Coll testified that Malik never told him that the meeting was not recorded, and that he didn't learn that until his technician told him that nothing recorded. (574) In addition, a third person, Kassim Shaar was present, and he testified that Malik blurted out something about a missile attack in New York City, but that Mr. Shaar never took him seriously.

Agent Coll testified that for the February 12 meeting he instructed Malik "... to make sure

that Yassin Aref was sure to know they were using the code word Chaudry for missile." (381) Malik did not follow that instruction, as discussed below, at 24-25. A summary of the testimony regarding February 12 is included in Attachment "D."

d. March 2, 2004

Agent Coll said he had instructed Malik to tell Mr. Aref on March 2 "that he was concerned because Aref had questioned him about taping him on two occasions." (389) Excerpts from the March 2 recorded conversation are included in Attachment "E."

On March 2, Malik told Yassin that, unlike his dealings with Moshareff, which were purely business, Yassin was his spiritual leader, his Imam, in whose footsteps he had to follow, and so it made him feel bad that Yassin suspected him of taping. Yassin said he was very sorry.

Then Malik mentioned what had been said on February 12 in front of Kassim, and Yassin said that the FBI catches a lot of people by listening and recording them, sometimes even people who are only joking. He said he believes that the FBI may be secretly recording in the mosque, and in his home or car. He uses the story of a suicide bomber in Palestine to show Malik that he knows that when people are serious about things like that, they cannot tell anyone, not even their mother. Then Yassin said, "I wanted the brother to understand that you were not serious."

It is submitted that the March 2 tape can be interpreted a few different ways. As discussed on p. 46-47 below, it is completely implausible that anyone who was serious would blurt out such information in front of a total stranger. However, one interpretation is that Yassin did believe Malik had some kind of knowledge about an attack in New York City, but he wanted Kassim to think it was a joke so that Malik would not get in trouble. *Even with this interpretation, there is nothing to indicate that Yassin believed he was in any way connected to or in support of whatever*

was to happen. Clearly he believed the FBI might be recording him at all times and, as he pointed out on June 10, he was not worried about getting in any trouble himself.

Another interpretation is that, as Yassin testified at trial, he was certain that Malik was joking. That is much more likely and would be completely consistent with the recording, since Yassin pointed out that people can get into trouble even if they are joking. In that regard, Kassim testified that *he* believed Malik was joking, even before Yassin told him that. Finally, Yassin may not have known whether or not Malik was joking - he said "even if you are serious or joking..."

As with the other evidence prior to June 10, the jury believed there was insufficient evidence to convict Yassin Aref of anything based on the conversations on March 2, as he was acquitted for all dates after that until July 1.

e. June 10, 2004

Agent Coll testified that for the June 10 meeting he told Malik to "tell Yassin Aref, in substance, that the next surface to air missile which he imports into the United States that he makes 50,000 from, he could provide the money to him the same way he has done to Mohammed Hossain." (395-396) 9/15, at 22) However, Malik never said anything about any missile on June 10. Again, the relevant excerpts from the June 10 conversation are included in Attachment C.

Mr. Sprotbery questioned Agent Coll about his statement that the June 10 conversation referred to an "attack" in New York City. (724) When asked to find the word "attack" in the transcript, Agent Coll said he thought it was in "page 34, line 12 to approximately line 20 - or 21" (724) When shown that the word "attack" did not appear there, Agent Coll looked through the entire transcript before admitting that the word did not appear there at all. (724-726)

Thus the only relevant words spoken on June 10 were "ammunition" and "Chaudry."

There was never any evidence that Mr. Aref understood the significance of either of those words, and, as in *Hilliard*, supra, the jury's acquittal on prior dates where those words were used shows that the jury didn't believe he understood them.

The only understandable reference to "Chaudry" in any of the tapes where Mr. Aref was present was a reference to a Dr. Chaudry (Attachment "G," January 2, Page 6, line 3), a member of the local Muslim community who was apparently known by all three men.

Agent Coll admitted that the word "Chaudry" had never been defined for Mr. Aref on the tapes, and also admitted that if Mr. Aref didn't know that word, the June 10 conversation "didn't stand for much." (730)

While it is submitted that there was never any real evidence that Mr. Aref understood the word "mizzAISLE," especially as pronounced by Malik, that word was not even said on June 10.

While Malik and Yassin Aref also discussed the possibility of Malik buying into Mr. Hossain's pizza business on June 10, that can play no legitimate part in the jury's decision, as it had absolutely nothing to do with any of the charges.

Malik does talk on June 10 about his concerns that the FBI might be watching Mr. Aref, and while Mr. Aref does say, "you look like danger," that is a direct response to Malik's comment about the FBI and does *not* indicate any particular knowledge on Mr. Aref's part. Furthermore, right after that Mr. Aref makes it very clear that he *does not believe he is violating any laws* because he says even if the FBI is watching, he has no problem because they will know he is doing nothing but "eating, drinking and talking." It is submitted that these statements show a complete *lack* of knowing or willful violation of the law.

f. Other Evidence

The prosecution introduced a piece of paper which they had taken from a notebook found in Mr. Aref's house - the paper contained a list of English words, most of them including the Kurdish or Arabic translation written next to it, and the English pronunciation. (Government's Exhibit 28 B, received into evidence at 1667) One of the words on the list was "missile" but instead of a Kurdish or Arabic translation next to it, the entry said "rocet = missile." (Exh. 28 B, 16678, 1759) Mr. Aref testified that while he did make that list, he did not recall that particular entry, and had no idea when it was written. (1668, 1760)

It is submitted that even looking at the evidence in the light most favorable to the prosecution, little or no weight can be accorded to the above entry. First, unlike the other words on the list, there was no Kurdish or Arabic translation of the word "missile," nor was there any indication of its pronunciation. Second, there was absolutely no evidence as to when the list was written - it could have been anywhere between October, 1999 and August 4, 2004.

Finally, it is clear that when Malik said the word "missile," he pronounced it very differently than is customary in English - he put the emphasis on the final syllable and used a long "I" sound for that syllable, making it sound like "mizAISLE". (201)

2. THE LAW

As argued above with respect to JEM, even looking at the evidence in the light most favorable to the prosecution, there is insufficient evidence that Yassin Aref conspired to conceal the source of money used to import a SAM which was to be used in an attack in New York City. First, there is no actual evidence that Mr. Aref knew the meaning of the word "missile," especially as pronounced by Malik. Nor is there any evidence that the code word Chaudry was ever

explained to him. Moreover, given the acquittals for all dates prior to July 1, there is insufficient evidence that Mr. Aref believed that there was to be an attack in New York City, or that any such event was in any way connected to the loan that he witnessed. Finally, there is no evidence of any intent to conceal on the part of Mr. Aref. The inferences which need to be drawn are too speculative to remove reasonable doubt.

Moreover, as pointed out above, the evidence in question here was almost all introduced by the government so, as stated in *Pappathanisi*, supra, at 290, *"if the government introduces evidence contrary to the inferences it wants the jury to draw, it must introduce other direct or circumstantial evidence to relieve itself of the effect flowing from the evidence introduced."*

In addition, as stated in *Martinez-Sandoval*, supra, for the most part the evidence is on tape and thus there are no questions of credibility.

a. No Proof of Intent to Violate Law

As in *Cassesse,* supra, there is absolutely no evidence that Mr. Aref *believed he was acting unlawfully.* As argued above, there is considerable evidence to the contrary, which the government did not rebut (see *Pappathanasi*, supra.). In particular, Mr. Aref's statements on the crucial date of June 10 show that he felt that even if the FBI was recording everything that was said in his home, his car and the mosque, that he had nothing to worry about, because they would see that he was just "eating, drinking, talking, nothing more."

b. No Proof of Knowledge

As stated in *Rahseparian*, supra, the knowledge required to uphold a conspiracy conviction must be "clear and unequivocal." What we have here are guesses on the part of the jury - guesses that at *some undefined point* Yassin Aref must have figured out all of the following:

what a missile was; that Malik was involved with a missile; that the missile was being sent to New York City for an attack; and that the loan to Mr. Hossain was designed to launder the proceeds of the purchase of the missile.

In *United States v. Charles*, 313 F.3d 1278 (11th Cir. 2002), a conspiracy conviction was reversed because there was insufficient evidence in the recorded conversations that the defendant understood certain words, or that he had been told certain information about the purpose of the conspiracy. The court stated:

> "...The videotaped recordings show only that the coconspirators engaged in general conversations about the burglary itself, not about drugs or drugs as the object of the burglary. *Neither this videotaped evidence, nor any other evidence presented at trial, showed that Elliassaint had ever been told that the object of the burglary was drugs. n7*
>
> *n7 ...As noted, there was no over evidence of any meeting or conversations involving Elliassaint that could provide the inference that he understood the ambiguous word 'stuff' to mean drugs.*
>
> *...Elliassant was not present for any unambiguous statements about drugs and, even if he had been, no evidence presented at trial showed that Elliassaint could understand what was said.* [The other coconspirators often spoke Creole and it wasn't clear whether Eilliassaint could understand or speak that language.]
>
> Nor was there any non-verbal evidence in the videotape to indicate that Elliassaint knew what was being said. ..." *Charles*, supra, at 1286, emphasis supplied.

As in *Charles,* there was no evidence that Yassin Aref understood any of the following words: missile, chaudry or ammunition. Moreover, also like the defendant in *Charles*, there was no evidence that the object of the conspiracy had been explained to him, or that he ever understood that by witnessing the loan, he was aiding Malik in connection with the claimed missile attack.

In *Schuchmann*, supra, the court upheld a judgment of acquittal in a conspiracy case where there had been insufficient evidence that the defendant, a loan officer, knew the relevant facts of a particular loan. As in *Schuchmann*, the evidence herein provides equal (or more than equal)

circumstantial support to a theory of innocence. In *Schuchmann*, the acquittal was granted because there was insufficient evidence of knowledge as to one fact - whether Schuchmann knew the loan was truly intended for one person rather than another. In the instant case, it is submitted that there is a lack of proof of knowledge with respect to *several* points, all of which are required for a conviction on Count 12.

First, there is no real direct evidence that Mr. Aref was ever told of the meaning of the code word Chaudry. Thus, the government must rely on circumstantial evidence, where equal support for innocence and guilt must result in acquittal. When Agent Coll realized that this never occurred in any of the over 50 hours of tape-recorded conversation, he claimed that *Malik* told Mr. Aref the meaning of Chaudry on February 12, the one date which was "inexplicably" never recorded. (717) When he realized there was no support for this claim either, because Kassim Shaar was present the whole time, Agent Coll resorted to saying that Malik had told him that he had told *Mohammed Hossain* to tell Mr. Aref what Chaudry meant, and that Mr. Hossain had supposedly told Malik that he had done so[5]. (721)

As discussed in Footnote 5 below, Malik had indicated to Mohammed Hossain a few weeks earlier, on February 3, that he had *already* told Mr. Aref about the plot. Mr. Hossain was very surprised and made it clear that *he* had not told Mr. Aref anything. It would be very unlikely

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[5]This seems even more unlikely when taking into consideration the transcript for February 3, where Malik tells Mohammed Hossain what Chaudry means ("the missiles and stuff") and says that next week he, Malik, has to "give Mr. Chaudry to him, to the Ambassador." February 3 transcript, Page 12, line 15-16 and Page 13, lines 20-21. Then Mr. Hossain indicates that Yassin Aref doesn't know about the plot, but Malik says, "No, he knows. I have talked to him." Mohammed says, with great surprise [as a review of the tape will show] "You have talked to him?" Malik responds, "Yes. He knows." Mr. Hossain says, "Maybe he is not telling me, I did not tell him either." Malik laughs loudly. (February 3 transcript, Page 15, lines 15-20)

then, that after already telling Mr. Hossain that Mr. Aref knew about the plot (including the code word) that he would tell him to inform him. Also, based on Mr. Hossain's true surprise at the idea of Mr. Aref knowing this, it is very unlikely that he, Mr. Hossain, would wish to tell him.

That testimony is far too tenuous to support an inference, beyond a reasonable doubt, that Mr. Aref was told of the meaning of Chaudry. And, as Agent Coll admitted, without knowing that word, the key conversation on June 10 "doesn't stand for much."

The same is true with respect to whether or not Mr. Aref knew the meaning of the word "missile," especially as pronounced by Malik. As in *Schuchmann*, there is no direct evidence that he knew and the circumstantial evidence provides equal (or more) support to the idea that he did *not* know. *Mr. Aref never used the word "missile" in any of the conversations, nor did he ever say anything indicating that he understood what it meant.* Moreover, it is submitted that a review of the evidence will show that there were *many* words Mr. Aref did not know, and he could not possibly have asked for an explanation each time he heard a word with which he was unfamiliar.

The document with the phrase "rocet = missile,' does *not* shed any light on *when* this was written. The list could have been made either *after* the relevant conversations (which would show a lack of knowledge at the key time) or *before* those conversations, without any showing that it would have been remembered after the passage of a perhaps lengthy period of time. *Nor does the list show that Mr. Aref knew the meaning of the word "rocet."*

Finally, and very importantly, even if, arguendo, the list had any significance to begin with, it is rendered moot by the undisputed fact that Malik pronounced the word as "mizAISLE," which sounds quite different than the word's normal pronunciation.

In *United States v. Recognition Equipment Incorporated (REI)*, 725 F. Supp. 587 (DC Cir.

1989), where various defendants were charged in a complex scheme to defraud the Post Office to get a contract for REI's optical scanning equipment (and where the Rule 29 motion was granted at the close of the government's case) the court stated:

> "...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*. ...
>
> ***
>
> ...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.' *United States v. Singleton*, ... 702 F.2d 1159, 1163 (DC Cir. 1983). In other words, this court will not indulge in fanciful speculation or bizarre reconstruction of the evidence. *Moreover, this Court is not required to view the evidence through dirty window panes and assume that evidence which otherwise can be explained as equally innocent must be evidence of guilt.* This is clearly not the standard of Rule 29. ...
>
> *REI*, at 587-589, 593, emphasis supplied.

Assuming that Yassin Aref knew the meaning of the word "missile" where, after acquitting him over and over, the jury convicted him only with respect to July 1 and August 3, is looking at the evidence through the "dirty window panes" described in *REI* - and assuming that "evidence which can otherwise be explained as equally innocent must be evidence of guilt."

In addition, as in *Schuchmann*, supra (and *REI*), the transcript from June 10 "permits the inference that [Yassin Aref] was acting with lawful intent" - he says that even if the FBI is watching, he has no problem. He also reminded Malik, on January 14, that when they came to this country, they promised to obey American law ("the law in here") and that it is *very important* for Muslims to fulfill their promises. (Attachment "B," at 3) All of this, taken in conjunction with all the other evidence, not only permits but strongly supports the inference that Mr. Aref had lawful intent.

As in *Cassese* (and *Schuchmann*), supra, there was insufficient proof of knowledge and

willfulness on the part of Yassin Aref - as discussed above, there was insufficient evidence that he knew what a missile was, that he believed there was a plot to use a missile in New York City, that he believed this plot was connected to the loan he had witnessed, and that he intended to help launder that money.

As pointed out in *Cassese*, at 453, if Mr. Aref "acted with a bad purpose to violate the law, he would have tried to conceal" the loan transactions - indeed, the intent to conceal is an element of the offense. To the contrary, as discussed below, Mr. Aref brought a friend, Abdul Barr, to the first meeting on December 10, he insisted on writing down the transactions and making copies of the receipts. Significantly, he allowed the transaction to go forward in the presence of Kassim Shaar on February 12, even though Mr. Shaar had offered to temporarily leave if business was to be conducted. It would have been very easy for Mr. Aref to have agreed with Mr. Shaar that it would be better to conduct the business outside of his presence - that he told Mr. Shaar to stay shows clearly that he had no intent to conceal anything.

Further, along the same lines, it is worth repeating once more that on the crucial day of June 10, Mr. Aref said that even if the FBI was listening to everything he was saying, he had nothing to worry about - again, there is no intent to conceal, or to violate any law.

Moreover, any possible reliance by the jury on the June 10 discussions regarding Malik becoming a partner with Mr. Aref in Mr. Hossain's pizza business cannot reasonably be interpreted to support guilt. Clearly, if Mr. Aref did not believe that Malik was actually connected to any illegal plot, he would have no reason to back away from a completely legitimate business deal with him. Even if he thought Malik was "crazy" (as Mr. Aref testified) in connection with what he had blurted out on February 12, that would not necessarily mean that there was any

danger in having him as an investor or silent partner in the pizzeria.

c. No Nexus Between Required Beliefs/ Knowledge

In addition to the lack of evidence that Mr. Aref knew what a missile was, and knew/believed that Malik was involved in a missile plot in New York City, there is *no evidence* that Mr. Aref knew/believed that the loan he had witnessed was connected to said plot. Similarly, in *Gotti*, supra, the district court recently granted a judgment of acquittal where there was a lack of evidence of the nexus between the required elements.

As in *Gotti*, supra, there was insufficient evidence of any nexus between any alleged missile plot and the loan witnessed by Mr. Aref. Malik was very slippery in this regard and simply did not make the connection.[6] Once again, there is no evidence that Mr. Aref understood any of the words "ammunition" "chaudry"or "missile", and without that knowledge, it cannot be said that Mr. Aref understood anything about the alleged plot. (In fact, even if he *had* understood the word "ammunition," he would not have known anything about any missile plot.) While the prosecution cross-examined Mr. Aref about Malik's January 14 statements, and about his journal entry where he used the word "mujahid," and while Mr. Aref admitted that he understood the

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[6]It is submitted that the closest he came was on January 14, when he said to Mr. Aref that "...I help my brother Mujahideen with ammunition and stuff to fight the wars, Holy Wars." (January 14 transcript, Page 14, lines 16-18) Also, on June 10, he said that his business came from selling ammunitions and chaudrys. (Exhibit C, June 10, Page 29, lines 5-10).

Also, with regard to JEM leader, who Malik called Mulana Azar Muhammed, Malik stated:

"He's in Pakistan right now, and he's trying to liberate Kashmir from India. And, uh, he's been fighting the Holy War for almost now, so many years and we're, we are trying to help him in that war. And this President Mushareff, the President of Pakistan is, uh, is against him and, uh, against the Holy War because he's helping the Mushriq, uh, and, uh, we are fighting him, too. *Uh, that's why, the missile, that we sent it to New York City to teach Mu, uh, President Mushareff, the lesson not to fight with us.* And I don't know how, how I do look at it in Allah's way. What do you think about that? I mean, I want to make my mind clear with God..." (Exhibit "B," January 14, Page 15, lines 2-17)

Yassin Aref responded to Malik by saying, "Right brother, especial, I'm not talking about that group and that organization." (Exhibit "B," January 14, at Page 15, lines 20-21)

terms "mujahideen" and "holy war,"(1615-1617) that still does not mean he understood the word "missile." Without that crucial knowledge, any inference that Mr. Aref even knew about the specific plot in New York City is too speculative.

Moreover, and crucially, those statements *do not make any connection between the loan and the alleged missile plot. The connection was simply never explained to Mr. Aref*. Even looking at all the evidence in its totality, in the light most favorable to the prosecution, the connection was never made at all, let alone proven beyond a reasonable doubt.

d. Effect of Acquittals

In addition, as argued above, the fact that Mr. Aref was acquitted for all the dates prior to July 1 means that, as in *Hilliard*, supra, the evidence with regard to dates prior to June 10 cannot really be relied upon in any substantial way to support the conviction. As in *Hilliard*, it is extremely likely that the acquittals were based on the jury's recognition that the evidence was insufficient. Thus, it is the June 10 discussion which becomes very crucial. And the word "missile" is not even mentioned on June 10. There is nothing said on June 10 which shows Mr. Aref had any more knowledge on that date than he had on the dates for which he was acquitted. In fact, on June 10, he shows a good faith belief that he is not in violation of the law when he says that if the FBI is listening, they will know he is doing nothing wrong.

Without knowledge of the words "ammunition" and "Chaudry," Malik's statement that his business comes from selling ammunitions (or Chaudrys) does not mean anything sinister, whether or not the Court takes into consideration that Mr. Aref testified that Malik told him "ammunition" referred to a toothbrush. (1746) (Also, the buying and selling of ammunition is legal, so that word has even less significance.)

Again, without knowledge of the meaning of Chaudry, the statement that the "Chaudry was going to New York to make that money" is completely incomprehensible, although it could perhaps be interpreted to refer to Dr. Chaudry, a local man, going to New York City to make money.

Then Malik says "if they use the Chaudry on 142, then I've got a problem." Again, this would have been meaningless to Mr. Aref without knowledge of the code word. (Actually, it is submitted that a lot of what was said by Malik was meaningless to Mr. Aref.)

Then Malik brings up the FBI, and their surveillance of Mr. Aref, and says that is a problem. Mr. Aref's response is to laugh and say that in that case, he believes Malik is dangerous, but then he says several times that even if the FBI is listening to everything he says, *he* has no problem because he is only eating and drinking and talking.

Because there is no evidence that Mr. Aref learned anything new and relevant between the dates for which he was acquitted, and the dates for which he was convicted, any interpretation of the June 10 conversation as supporting guilt is too speculative, as in *Stewart* and the other cases cited above. Moreover, the June 10 conversation instead shows support for innocence, as it shows a lack of belief of Mr. Aref's part that he is in violation of any law.

e. Conclusion - Count 12

Therefore, because there was a lack of evidence as to *any* of the following (all of which are required to sustain the conviction): 1) that Yassin Aref understood Malik had imported a SAM; 2) that he understood that the SAM was to be used in an attack in New York City; and 3) that he understood that by witnessing the loan he was helping to launder money and thereby conceal the source of the money obtained from importing the SAM, the Court must dismiss Count 12.

f. Counts 18 & 19

In Counts 18 & 19 Yassin Aref was convicted, for July 1 and August 3, respectively, of aiding and abetting the intended provision of material support to a particular claimed terrorist attack via witnessing the loan. As discussed above, on Pages 10-11, *Frampton, Samaria*, *Nusraty* and *Hilliard* all show that, as with conspiracy, aiding and abetting requires proof beyond a reasonable doubt of the specific intent to commit the offense charged. Again, because there was no proof of intent with regard to the conspiracy charge, the aiding and abetting counts fail for the same reason.

g. Willful Blindness

As argued above, on Pages 11-14, and as stated in *Samaria*, supra, the willful blindness instruction does not mean that the jury can substitute willful blindness for intent. Moreover, there was no proof of willful blindness herein.

In *Frigerio*, supra, despite a willful blindness instruction, the First Circuit reversed the district court's denial of the Rule 29 motion in a money laundering conspiracy case. The defendant had been employed by a money remittance company where legitimate money was counted in the front office, and funds being laundered were counted in the back - additionally false coded receipts were made and Mr. Frigerio made several such coded receipts. Nevertheless, the appellate court found insufficient evidence of knowledge of money laundering, even with the willful blindness instruction.

It is submitted that while there weren't enough red flags to sustain the conviction in *Frigerio*, there was more evidence of willful blindness there than in the instant case. In *Frigerio*, the defendant actually *made and issued* coded receipts, while in the instant case the receipts made

by Mr. Aref were not at all coded, and there was no evidence that he understood the code word Chaudry.

As in *Frigerio*, where the court had explained the defendant's scan for a surveillance device as a possible legitimate security device, the suspicions Mr. Aref had of Malik, shown by his patting him down once or twice for a recording device, are explained by Mr. Aref's understanding that the FBI was probably watching him, and his belief that the government would try to catch Muslims, especially imams, whether they were actually committing crimes, or just joking.

After this occurred, Malik confronted Mr. Aref about it, and played on his sympathies by telling him how bad he felt that his *imam*, who he looked up to so much, did not trust him. Mr. Aref then felt guilty and said he couldn't find the words to say he was very sorry. Malik then stopped his bizarre outbursts about attacks in New York City, and so Mr. Aref was reassured that he was at least somewhat trustworthy, if a bit strange or crazy.

Moreover, just because the evidence must be viewed in the light most favorable to the government does not mean that *any* conceivable inference can be viewed as a red flag. A red flag must be *red*, not pink or some undetermined shade viewed from dirty window panes, where something otherwise pointing to innocence could be construed as indicative of guilt, as stated so well in *REI*, supra.

Similar to the discussion above, with respect to the JEM counts, in order to uphold the convictions on Counts 12, 18 & 19, Mr Aref would have to have knowledge (which could include willful blindness) and intent about not just one, but several different "facts," as well as the connections between them. First, he would have to not only know about, but *intend to support* the

alleged missile attack in New York City.

Secondly, he would have to believe that the money Malik loaned to Mushareff was made by buying the SAM and selling it to terrorists. That was never explained to Mr. Aref, and there was no actual "red flags" which would indicate that to him.

Further, as discussed below, he must understand that the loan was designed *to conceal that purchase*, via "legalizing" the money by running it through Mr. Hossain's business. Not only was there no evidence that Mr. Aref understood this, there was a lot of evidence, *introduced by the government*, which showed clearly that he had a *different* understanding - that he believed the purpose of the loan, in addition to allowing Malik to provide zakat to Mosharref, was to allow Malik to "legalize" the money by paying taxes on it.

Thus, as in *Frigerio*, and in contrast to *Nektalov* and *Tusaneza*, discussed above, there were no red flags which can be said to substitute for knowledge (not to mention intent, which willful blindness cannot replace) as to *any* of the above three elements. And all three are required to uphold the convictions.

C. COUNTS 1, 10 & 11 (1956 MONEY LAUNDERING)

Count 1 of the superceding indictment charged that:

> "It was part of the conspiracy that defendants [Yassin Aref and Mohammed Hossain] believed that another individual ... had imported a surface to air missile ('SAM') into the United States from China to provide to terrorists in New York City in return for $50,000, and that the cooperating individual wished to conceal the actual source of the $50,000 proceeds from the SAM importation." (Attachment "A," at 1-2)

The jury instructions for Count 1 are included in Attachment "A," at 3-4

1. THE FACTS

On December 10, 2003 Yassin Aref met for the first time with Malik, and Mr. Aref

brought a friend, Abdul Barr, to the meeting. (Coll, cross, at 507) Agent Coll testified that as to the December 10 meeting, he instructed Malik as follows:

> "I told Malik to explain that, in substance, that the missile was going to be transferred due to Mujahideen in New York City. ...
> I told him, explain to them that he imports merchandise from China and to explain that he could no longer, I told him in substance, launder his money in Chinatown anymore...."(Coll, direct, 299)

Agent Coll also testified that Malik really did have an import/export business - he stated, "...he was a pseudo import/export person. In other words, he would buy small numismatic goods and sell 'em at grocery stores. That's what he did for a living." (Coll, Cross, at 437)

Excerpts of the December 10 conversation are included in Attachment F. While Malik partially tried to follow Agent Coll's instructions on December 10*, he mentioned absolutely nothing about any missile*. Further, while he tried to explain, though not very clearly, that the money was somehow illegal, Mr. Aref obviously did not understand that, and even said he believed there was nothing illegal about the loan. Then Malik explained that he didn't pay tax on the money, leading Mr. Aref to understand that the illegality involved the failure to pay tax.

In addition, Mr. Aref insisted that the transaction be written down on a piece of paper to be copied, and which each person would then put in a special place with all of his other important papers.

Excerpts from the January 2, 2004 recorded conversations, and related testimony, are included in Attachment E. Based on the January 2 conversations it appears that most likely Yassin Aref's understanding of "legalize" meant that Malik would have to pay tax on the money. However, as seen below, Mr. Aref's understanding of this was made even clearer on January 14, when he said so explicitly, as shown below.

On January 14, 2004 Malik met with Yassin Aref and they had extensive conversations. As discussed above, most of the conversation related to the group JEM and other topics. However, there were certain discussions relating to "legalizing" the money, and related topics. The following occurred:

> "YA:..but what *I understood is he say that's good for you too because sometimes you want to, what you say, legally your money in the business, as part of the business, too.* I *say that something cause I was wondered why you want to take back a check in the name of your company cause this mean sold something, this mean at the end of the year you should to pay the tax, for that money and, this going to the record, he say because he want that, he want to do that, to show some money which is you have the business for tax, for the be everything legal and that and that.*" (Attachment "B," at 1)

Mr. Aref goes on to say, as cited above, in Attachment B, at 1-2, that when he came to this country he promised to obey American law, and repeated how important it is for Muslims to fulfill their promises.[7] The other relevant recorded conversations are included in the Attachments.

2. THE LAW

a. Still No Proof of Intent to Violate Law

As argued above with respect to the other sting counts, as in *Cassese* and the other cases cited above, as well as *Lopac,* and *Rahseparian*, discussed below, there was no evidence that Mr. Aref had any intent to violate the law, or that he had any belief that he was in violation of any law. Again, all his statements reflect that he did *not* believe he was violating any laws, and this is consisted with the evidence, on tape, that he had promised to follow American laws, and had every intent to fulfill that promise.

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[7]In that regard, it should also be noted that on December 5, 2003, Malik and Mohammed Hossain discussed Yassin Aref, and Mr. Hossain said that Mr. Aref is "very trustworthy," "speaks the truth, always keeps his word," and "[is] not afraid of anything .. only afraid of God." (December 5, 2003 translated transcript, Page 12, lines 11, 17, 19)

b. No Knowledge of Money Laundering or Intent to Conceal

Yassin Aref *never* (until long after his arrest) understood any of Malik's "explanations" as to the need to "legalize" the money, so he never understood how the loan to Mosharref, and his witnessing of it, could in any way help Malik to commit any crimes. Whether Mr. Aref even believed Malik might be committing any crimes is questionable - Malik did say certain things which may have led him to suspect that - but what is clear is that Mr. Aref did not see how witnessing what appeared to be a perfectly legitimate loan would help Malik violate any law.

As shown above, on December 10, Malik began his "explanations" by saying that he had a side business of importing ammunition from China, and then discussed the loan, trying to imply that he used to launder money in Chinatown, but could not do so anymore. Clearly, Yassin Aref had no idea what Malik was talking about, as his response was "I don't think it is any, anything against law in here. The money, I loan you the money if I help you."

Moreover, it is submitted that this conversation also shows Mr. Aref did not understand the word "ammunition" or he would have been more concerned about its importation - instead, he only focused on the loan itself when considering legality.

Malik's reply to Mr Aref's statement that nothing was illegal about the loan was to say "because I don't pay taxes," thus Mr. Aref began to believe, very understandably, that the money was illegal because Malik hadn't paid tax on it.

Then on January 2, Malik tried again to explain money laundering, and again reinforced the idea that the issue was taxes. He said "I have to legalize the money." He did mention the "black market," but Mr. Aref's focus was always on the taxes, showing that he must not have

understood that "black" market was supposed to mean that the *source* of the money was illegal in some way. Again, Mr. Aref's response to Malik's comments was to raise the issue of taxes.

On January 14 Yassin Aref's articulation of what "legalize" meant to him became clearer when he said explicitly, as above, that it meant paying tax.

There is absolutely no evidence that Yassin Aref ever understood any other interpretation of "legalize" than that stated above, and there is no other evidence showing 'money laundering," or that the loan was supposed to help Malik commit crimes.

The situation is similar to that described in both *Lopac* and *Rahseparian*, where the defendants did take certain actions to aid others, but their convictions were reversed because there was insufficient evidence of their intent.

As in *Lopac*, supra, while Yassin Aref clearly did witness and record the loan from Malik to Mosharref, he did so without the requisite intent. Similarly, in *Rahseparian*, the court discussed the acts performed by the defendant therein, who had done his sons' banking for them, and concluded there was not enough proof that he understood what they were doing was illegal.

As in *Rahseparian*, supra, there is no direct evidence of Mr. Aref's specific intent or knowledge herein, thus the government must rely on circumstantial evidence. Thus as in *Rahseparian*, where there was a lack of evidence that the defendant knew of the underlying illegality of his sons's business, making his aid to them completely innocent, there is a similar lack of evidence that Yassin Aref ever understood the underlying illegality claimed to be associated with the loan.

c. No Knowledge of Missile or its Connection to Claimed NYC Attack

As argued above, there was also a lack of evidence that Yassin Aref understood what a

"missile" was, or what the code word Chaudry referred to, or that there was any connection between such a weapon and Malik's vague comments regarding some possible attack in New York City. Because the government's theory of the case, as stated in Count One of the superceding indictment, was that Mr. Aref believed Malik had imported the SAM to provide to terrorists in New York City, without such proof, there can be no conviction on Count One or Counts 10 and 11.

In addition, the jury was instructed, with regard to Count One, that:

> **"***the property involved in the financial transactions was represented to be and believed by the defendants to be the proceeds from smuggling a ...SAM, into the United States to be used in a terrorist attack in New York City."* (Attachment "A," at 3-4)

In *Frigerio*, supra, the court explained the two separate knowledge requirements involved with a money laundering transaction - the knowledge of the specified unlawful activity and the knowledge/ intent to conceal.

As explained in *Rahseparian*, when the government utilizes a certain theory regarding the nature of the "specified unlawful activity" in a money laundering case, and so instructs the jury, the government may not rely on any *other* alleged unlawful activity.

As in *Rahseparian*, the "government's theory at trial was that [Yassin] knew the proceeds were from the [alleged importation of the SAM to be used by terrorists for an attack in New York], not from some unspecified form of felonious conduct." Thus without proof of knowledge of the missile and the NYC plot, Count One must be reversed.

d. No Knowledge of Claimed Illegal Arms Dealing

In the alternative, the government may argue that a finding of knowledge of any *one* of the three specified unlawful activities discussed in the indictment (material aid to JEM; material aid

to the alleged NYC missile plot; and the importation of firearms without a license) is sufficient to support that element of Counts One, 10 & 11. Even if *arguendo*, the Court finds that knowledge of illegal firearms importation would suffice in that regard, it is submitted that there was absolutely no evidence of the involvement of any firearm other than the missile/Chaudry mentioned by Malik.

The word "ammunition," even if it had been understood by Mr. Aref, does not refer to a "firearm," so that is not enough. There is simply no other evidence as to firearms beyond the missile, so regardless of which theory is used, Count One must be dismissed if Count 12 is dismissed, because both depend on knowledge of the SAM.

e. Effect of Acquittals

Once again, as in *Hilliard*, supra, the fact that the jury acquitted Yassin Aref for all dates prior to July 1 means that the conversations before that point carry less weight than they would otherwise, since it seems clear that the jury found insufficient evidence therein. As stated in *Hilliard*, supra, at 987, "...[a] review of the trial transcript, however, reveals that this testimony principally related to those charges that resulted in acquittals. Thus, this evidence does nothing to convince us that Hilliard's conviction should stand."

This is especially crucial with respect to the required knowledge that the loan was intended to launder the money received from the importation of the SAM, i.e., to "legalize" that purchase. As discussed above, the *only* conversations which could in any way be alleged to relate to money laundering or "legalizing" the money occurred on December 10, January 2, and January 14. Each time, far from the requisite knowledge increasing, it became *more and more clear* that Mr. Aref believed instead that "legalizing" the money meant Malik would take the check from Mosharref in

order to, as he said on January 14, "show some money which is you have the business for tax, for the be everything legal and that and that."

f. Counts 10 & 11

In Counts 10 & 11 Yassin Aref was convicted, for July1 and August 3, respectively, of aiding and abetting the laundering of money obtained via "specified unlawful activity" (which, as argued above, must be the alleged missile plot) via witnessing the loan. As discussed above, *Frampton, Samaria*, *Nusraty* and *Hilliard* all show that, as with conspiracy, aiding and abetting requires proof beyond a reasonable doubt of the specific intent to commit the offense charged. Again, because there was no proof of intent with regard to the conspiracy charge, the aiding and abetting counts fail for the same reason.

g. Willful Blindness - see Pages 11-14 and 31-33

II RULE 33 MOTION FOR NEW TRIAL

First, where relevant, the facts and legal arguments discussed above are incorporated herein. Under Rule 33, a district court may "vacate any judgment and grant a new trial if the interest of justice so requires." *United States v. Robinson*, 430 F.3d 537, 543 (2nd Cir. 2005); *United States v. RW Prof'l Leasing Servs. Corp.*, 425 F. Supp.2d 159 (EDNY 2006). In evaluating whether to grant the motion, the court may "weigh the evidence and in so doing evaluate for itself the credibility of the witnesses." *Robinson*, supra, at 543; *United States v. Sanchez*, 969 F.2d 1409 (2nd Cir. 1992). In *Sanchez*, the Second Circuit stated:

> "...By its terms, 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. ...
>
> ***
>
> Manifest injustice cannot be found simply on the basis of the trial judge's determination that certain testimony is untruthful, unless the judge is prepared to answer

> 'no' to the following question: 'Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty beyond a reasonable doubt?' In making this assessment, the judge must examine the totality of the case. All the facts and circumstances must be taken into account. An objective evaluation is required. There must be a real concern that an innocent person may have been convicted.. ..." *Sanchez*, supra, at 1414.

It is submitted that this is one of those rare cases where an injustice has been done, and there is a very strong danger that an innocent man has been convicted. Yassin Aref respectfully requests that this Court take a careful look at the evidence in this case, and ask the question stated above: 'Am I satisfied that competent, satisfactory and sufficient evidence in this record supports the jury's finding that this defendant is guilty *beyond a reasonable doubt*?'

There are several cases where Rule 33 motions have been granted or upheld on appeal.[8]

A. Counts 20, 26 & 27 (JEM CONSPIRACY)

As discussed above, it is submitted that there was *no evidence* that Mr. Aref intended to support JEM and, in fact, considerable evidence to the contrary. Thus, the Court should grant the Rule 29 motion. In the alternative, the Court could weigh that evidence and grant a new trial because as in *Dodd*, supra, at 934, the government "failed to conclusively show...'some degree of knowing involvement and cooperation' in the conspiracy."

B. Counts 12, 18 & 19 (MISSILE ATTACK CONSPIRACY)

It is argued above that the jury must have engaged in impermissible speculation with

[8] *United States v. Robinson*, 430 F.3d 537 (2nd Cir. 2005); *United States v. Lopac*, 411 F. Supp.2d 350 (SDNY 2006); *United States v. Mitchell*, 165 Fed. Appx. 821 (11th Cir. 2006); *United States v. Dodd*, 391 F.3d 830 (8th Cir. 2004); *United States v. Hilliard*, 392 F.3d 981 (8th Cir. 2004); *United States v. Charles*, 313 F.3d 1278 (11th Cir. 2002);*United States v. Huerta-Orozco*, 272 F.3d 561 (8th Cir. 2001); *United States v. Robertson*, 110 F.3d 1113 (5th Cir. 1997); *United States v. Washington*, 184 F.3d 653 (7th Cir. 1999);*United States v. Walden*, 393 F. Supp.2d 1324 (SDFL 2005); *United States v. Morales*, 902 F.2d 604 (7th Cir. 1990); *United States v. Shankman*, 13 F. Supp.2d 1358 (SDGA 1998).

regard to certain key elements of the above counts. However, if the Court decides that there was sufficient evidence to withstand the Rule 29 motion, the Court may weigh that evidence and make credibility determinations in deciding whether to grant a new trial.

In *Shankman*, supra, the court granted a Rule 33 motion based on insufficient evidence of intent, stating:

> "... Pedrick is not entitled to a judgment of acquittal. *However, when the Court independently evaluates the evidence and the credibility of the witnesses, the Court is left with a reasonable doubt about Pedrick's guilt. The evidence weighs heavily against finding the Pedrick knew of any agreement or had the specific intent to defraud the United States*. Accordingly, Pedrick should be granted a new trial." *Shankman*, supra, at 1363, emphasis supplied.

As in *Shankman*, the evidence in this case, as discussed below and in the Rule 29 memo, "weighs heavily against finding that [Mr. Aref] knew [of either the alleged missile plot or its connection to the loan] or had the specific intent to [violate *any* law].

In *Robertson*, supra, the appellate court upheld the grant of a Rule 33 motion in a sting case where certain taped statements could be interpreted either in support of guilt or innocence. The court stated

> "n1 The government candidly conceded at oral argument that this [Defendant Robertson's *knowing involvement in the drug conspiracy] was only one of several interpretations that could be made after listening to the surveillance tape. Other interpretations would not implicate Robertson as having an active involvement in the conspiracy.*" *Robertson*, supra, at 1115.

In *Morales*, supra, the Seventh Circuit Court of Appeals reversed the district Court's denial of a Rule 33 motion in a firearm possession case, stating:

> "... When.... the complete record, testimonial and physical, does not permit a *confident* conclusion that the defendant is guilty beyond a reasonable doubt, the district judge is obliged to grant a motion for a new trial. ...
> ***

> *The standard for new trials in Rule 33 of the criminal rules is the interest of justice, and it comprehends the interests of the law-abiding as well as those of possibly guilty defendants. The interests are accommodated one to the other by our ruling that Morales is entitled not to an acquittal, but only to a new trial at which the prosecution will have a chance to mount a stronger case, and Morales a stronger defense. The result will be a slight added expense of prosecution but also a proceeding much more likely to render a verdict in which the legal system and the public can have confidence....*"*Morales*, supra, at 608-609, some emphasis supplied.

Unlike *Morales*, where there was some direct evidence supporting every element of the conviction, in the instant case, there was *no evidence* as to certain key elements, including willfulness. However, like *Morales,* "the complete record, testimonial and [recorded conversations], does not permit a confident conclusion that the defendant is guilty beyond a reasonable doubt."

It is submitted that, as in *Morales*, *Robertson*, *Shankman* and *Dodd*, supra, and the other cases cited above, all the relevant evidence as to Counts 12, 18 & 19 is weighed, the interests of justice will require a new trial.

1. Language Barrier

It was undisputed by the government that when he arrived in this country in October, 1999, Yassin Aref did not speak more than a few words of English. The tape transcripts show that his English was still pretty poor during the whole time period of the sting. Even by the time of trial, when his English had improved more, Yassin Aref still did not understand many of the words used to question him during his testimony. Where a defendant is known to have difficulty understanding and speaking a language, especially in a sting operation where his intent and beliefs are so crucial, the Court should take great care in analyzing *and weighing* what was said, and what may well have been misunderstood.

Malik spoke very quickly and darted from topic to topic, often contradicting himself. Moreover, his heavily accented English was often hard to understand even for native English speakers, let alone for someone like Mr. Aref, who was just learning the language.

Yassin Aref testified that when he didn't understand something in English, *when he believed the word or phrase in question was very important*, he would ask the person to repeat it or explain its meaning. (1567) However, if it were just general conversation, he would not say anything, since there were far too many words and phrases he didn't understand - for him to ask about every single one would be burdensome and impractical, especially with someone like Malik, who spoke in such a rapid, confusing and disconnected manner about so many different topics.

From listening to the tapes, it is clear that for Mr. Aref, what mattered about the loan was that it be witnessed and recorded according to Islamic tradition, and that the terms, including the timing and amount of payments, be clearly understood by both parties. He also appreciated that Malik was exercising his obligation to provide "zakat" by helping Moshareff with his business.

When Malik tried to indicate that there was something illegal about the loan, Mr. Aref first said he didn't think it was illegal, but when Malik mentioned tax issues, he focused on that, and eventually clearly believed that the illegality stemmed from the failure to pay tax, and that Malik wanted to "legalize" the money by paying taxes on it.

Malik also was known to blurt out incendiary words and phrases into the middle of unrelated conversations, such as when, as discussed above, he said "I send the missile" in the middle of a long unrelated statement by Mr. Aref. It is submitted that he did this purposefully, because he had been instructed by Agent Coll to use certain words, but was wary of explaining

himself clearly, because he feared that Mr. Aref would have nothing to do with him or the loan if he knew the truth.

2. Missile & Related Evidence

It is submitted that whether Yassin Aref understood the word "missile," as pronounced by Malik, is one of the most crucial issues in this case.

a. January 2

While Agent Coll claimed that Mr. Aref, while not actually raising his head, briefly moved his eyes upward when Malik showed the trigger mechanism and said to Mr. Hossain that it was a piece of the mizzAISLE he had shown him, and even resorted to a as-yet-unseen version of the videotape in that regard, it is submitted that a careful viewing of the video will show that Mr. Aref did not actually look up. When Malik made that comment, Mr. Aref had absolutely no reaction, and no one said anything more about it.

b. Promise to Obey American Law and Fulfill Promises

It is significant that Yassin Aref, after stating that he did not believe in suicide bombings, or any type of bombing to help the plight of Muslims, stated that "When we came here we promised to respect the law in here, that's why we came." He also emphasized many times how important it is for Muslims to fulfill all their promises. Mohammed Hossain also told Malik, on December 5, 2003, that Yassin was extremely trustworthy, and always kept his word.

c. February 12

Two claims about February 12 are completely implausible. First, the claim that the recorder "fell off" of Malik's body on that day is totally incredible. Malik was a very experienced informant, who was quite accustomed to the body recorder, and it would not have just "fallen off"

without his noticing. Moreover, Malik did not tell Agent Coll about this - he did not learn there was no recording until his technician informed him much later. Secondly, it is completely implausible for anyone to believe that a person involved in a missile attack in New York City would casually announce that fact to a total stranger during dinner. Thus it is no surprise that Kassim Shaar did not believe Malik, and thought he was joking, even *before* he questioned Mr. Aref about the statement.

Mr. Aref also believed that Malik was joking, and/or that he was crazy. And even if, *arguendo*, he had thought Malik was serious, he had no idea that this "attack" in New York City had anything whatsoever to do with the loan he witnessed.

Mr. Aref was never told of the code word Chaudry on February 12 - while Agent Coll claimed that at one point, Mr. Shaar's testimony shows it could not have occurred, as he was present the whole time Malik was there. Then Agent Coll admitted that Malik had not explained the word, and said that instead Malik had told him that he had told *Mr. Hossain* to tell Mr. Aref the meaning of Chaudry, and that Malik had told him that this had occurred. However, there is absolutely no evidence Mr. Hossain ever told him, and it is very unlikely, considering that on February 3, Malik implied that he had *already* told Mr. Aref of the missile plot, and considering how surprised Mr. Hossain was to hear that.

d. March 2, 2004 - see pages 18-19

It is submitted that Yassin Aref told Malik the story about the suicide bomber on March 2 because he wanted to make the point that he understood that anyone who was serious about any kind of attack would not tell anyone, so anyone who told must not be serious. Mr. Aref also pointed out that even joking about such matters is not safe. The most likely interpretation of the

March 2 tape is that Mr. Aref believed Malik was joking on February 12, especially considering that a total stranger was present as well. However, even if Mr. Aref either believed Malik was serious about *something*, or if he wasn't sure whether he was serious or joking, he clearly never believed that witnessing the loan was connected to any illegal activity, and all of his statements confirm that. In any event, the word "missile" was never used on March 2.

e. June 10

On June 10, Malik and Yassin Aref discussed the possibility of Malik investing money and becoming a silent partner in Moshareff's pizza shop, in which Mr. Aref was one of several proposed buyers. However, as pointed out in the Rule 29 motion, the jury cannot permissibly attach any significance to this, because if Mr. Aref did *not* believe Malik was involved in any alleged missile plot, or any illegal activity, there would be no reason for him to hesitate in making completely legitimate business arrangements with him. Moreover, the entire discussion regarding investment occurred *before* Malik said he had a problem if the FBI was listening, and Mr. Aref said that in that case Malik "looked like danger," but that he, Yassin, had nothing to worry about. After that, there were no more discussions about buying the pizzeria or anything else.

f. No Mention of "Attack"

In addition, although Agent Coll clearly believed the word "attack" was used on June 10 - since he testified to that effect, and then searched the transcript carefully for that word, an examination of the June 10 tape and transcript shows clearly that the word "attack" was never used on that date. It is submitted that, as with the earlier claim (subsequently shown to be false) that Malik had explained the meaning of Chaudry on February 12, this is an example of how Agent Coll's strong belief that Mr. Aref was guilty of supporting terrorism clouded his memory,

and likely his judgment, as to certain key aspects of the case.

g. "I have No Problem"

Malik's comment that he had a problem if the FBI was listening may have indicated to Mr. Aref that Malik was involved in something illegal, but it does not mean he knew in particular what Malik was referring to. Again, his subsequent statement that even if Malik had a problem, *he* had no problem if the FBI were listening, shows clearly that Mr. Aref had absolutely no intent to violate the law, and believed he had nothing to worry about because he was not doing anything illegal. This is stated clearly on the crucial tape of June 10, and *all* of the evidence backs that up - *there is absolutely nothing in any of the evidence which shows that Mr. Aref ever believed he was doing anything illegal*.

h. 'Rocet=missile' - see page 21 and 25

i. Chaudry - see pages 20, 24-25

j. Ammunition[9]

3. Loan not Connected to any Plot

The government had to prove that not only did he know about the claimed missile attack in New York City, but also that: 1) the $50,000 loaned to Moshareff was obtained through the importation of the SAM from China; and 2) Malik intended to conceal that illegality by having

[9]The word "ammunition" is almost irrelevant, as buying and selling ammunition is not illegal, However, Mr. Aref did *not* know the true meaning of the word - as he testified, Malik had told him it was a toothbrush. While Agent Coll claimed at trial that he had asked Mr. Aref in 2002 if ammunition was stored in the mosque, that is *not* reflected on any of the 302 Reports for any interviews with Mr. Aref. It is submitted that while Agent Coll may not be lying, his memory is once again skewed by his strong belief that Mr. Aref is a supporter of terrorism. Moreover, even if, *arguendo*, Mr. Aref had been asked that question, his answer of "no" does not necessarily mean that he understood exactly what was being asked - his English was very poor at that point and he may have understood very little.

Mushareff "legalize" the money by running it through his business.

a. No Intent to Conceal - see Page 27

When Mr. Aref told Malik he didn't have to worry because no one would hear anything from him, that was because Malik had said he didn't want people to know he had loaned a large amount to Mosharref, because then everyone would come to him looking for money.

b. No Connection Made Between Loan and Any Illegality

In addition to the lack of evidence that Mr. Aref knew what a missile was, and believed that Malik was involved in a missile plot, there is *no evidence* that Mr. Aref knew/believed that the loan he had witnessed was connected to said plot. Malik was very slippery in this regard and did not really make the connection.[10] Even taken together, the statements in Footnote 11 do not make the connection between the loan and the alleged missile plot. *The connection was simply never explained to Mr. Aref*, *let alone proven beyond a reasonable doubt.*

c. Taxes - see Pages 34-37, 39-40

4. Acquitted Counts

In both *Hilliard* and *Walden*, supra, motions for a new trial were granted based, at least in

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[10] It is submitted that the closest Malik came was on January when, in the middle of a long sentence about JEM, said "Uh, that's why, the missile, we sent it to New York City..." (Attachment "B," at 2) Mr. Aref's response shows he did not understand that Malik was referring to a particular plot, and he must not have understood the word "missile," because he simply said that he wasn't talking specifically about JEM. If he had understood that the loan was in any way connected with supporting JEM, he would have had nothing to do with it, as he had made it *very clear* that he could not, and would not, support that group.

In addition, Malik said "...I help my brother Mujahideen with ammunition and stuff to fight the wars, Holy Wars." (Attachment "B,"at 2) While the prosecution cross-examined Mr. Aref about these statements, and about his journal entry where he used the word "mujahid," and while Mr. Aref admitted that he understood the terms "mujahideen" and "holy war,"(1615-1617) that still does not mean he understood *that the loan was in any way connected to Malik's statement.*

Also, on June 10, Malik said that his business came from selling ammunitions and chaudrys. (Attachment "C,"). However, he did not connect that to the money he had loaned Mr. Hossain.

part, on the fact that the jury had acquitted the defendant on several counts, and so the evidence with respect to *those* counts could not be relied upon to uphold the counts of conviction.

The *Walden* court also granted a new trial, stating:

> "...Indeed, Cross' acquittal on the drug charges and conviction on Counts One and Four suggests that the jury did not understand Cross' post-arrest statement to be an admission that he intended to steal cocaine specifically.
>
> ***
>
> *...In the face of the jury's verdict acquitting Cross of the drug charges and the absence of any other evidence connecting Cross to the cocaine ..., Cross' post-arrest statement is insufficient evidence from which to conclude beyond a reasonable doubt that Cross intended to steal cocaine, as charged. ... A new trial is required so that the government may, if it chooses, present clearer or more compelling evidence that Cross was guilty of all the necessary elements of each crime for which he was convicted."* *Walden*, supra, at 1338, 1340, emphasis supplied.

In the instant case, the evidence of all conversations prior to June 10 was considered by the jury when they decide to acquit Mr. Aref for all dates prior to July 1. Therefore, as in *Hilliard* and *Walden*, supra, even though it is discussed herein, that evidence cannot really be relied upon to support the convictions.

C. Counts 1, 10 & 11 (1956 MONEY LAUNDERING)

As argued in the Rule 29 memo, and incorporated herein, because Counts 1, 10 & 11 depend on proof of Mr. Aref's knowledge of the SAM, and proof of his knowledge that the SAM was connected to the loan, a new trial on Counts 12, 18 & 19 must include these counts as well.

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