U.S. Department of Justice

Jock
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United States Attorney
District of Connecticut

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FTS/643-4596

October 29, 1987

Mr. Jonathan Scharfen
National Security Council
Old Executive Office Building
Room 381
Washington, D.C. 20503

Re: United States v. Arif Durrani

Dear Jock:

Enclosed are copies of the Appellant's and Government's briefs in the above-entitled case. Alan Dershowitz has been retained by Durrani (for a fee of at least $75,000). The argument is scheduled for November 5, 1987.

Very truly yours,

STANLEY A. TWARDY, JR.
UNITED STATES ATTORNEY

HOLLY B. FITZSIMMONS
ASSISTANT UNITED STATES ATTORNEY

HBF:lad
Enclosure

87-1256

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 87-1256

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ARIF DURRANI,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF FOR APPELLANT ARIF DURRANI

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ISSUES PRESENTED FOR REVIEW

1. Whether the government failed to prove that the defendant's unlicensed export of Hawk missle parts was not part of its own highly irregular covert sale to Iran of Hawk parts and whether it was error to first impose upon the defendant the burden of producing evidence that he was part of the covert operation, and then preclude him from introducing probative government documents in his defense.

2. Whether the prosecutor's summation and the errors in the charge deprived the defendant of a fair trial.

3. Whether the court erroneously refused to charge all the elements of the offense.

4. Whether the court erroneously failed to fully charge defendant's theory of the case.

5. Whether the court erred in admitting hearsay evidence that the purchased parts were on the United States Munitions List.

6. Whether the defendant's motion to recuse the judge because the judge was not randomly selected should have been granted.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment in a criminal case brought in the United States District Court for the District of Connecticut. Jurisdiction is based on 28 U.S.C. §1291.

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

Arif Durrani appeals from a judgment of conviction entered on May 13, 1987, convicting him of exporting and attempting to export defense articles without a State Department license in violation of 22 U.S.C. §2778(b)(2) (counts 1 and 2) and engaging in the business of exporting defense articles without having registered with the

Department of State, in violation of 22 U.S.C. §2778(b)(1).

He was sentenced to a term of five years imprisonment on count 1 with a fine of one million dollars ($1,000.000), a concurrent five year sentence and a consecutive one million dollar ($1,000,000) fine on count 2, and a concurrent 10 year sentence and one million dollar ($1,000,000) fine on count 3. Defendant, who was initially held on pretrial detention, is currently incarcerated.

PRELIMINARY STATEMENT

Defendant Arif Durrani was charged with the unlicensed export to Iran of parts designed for the Hawk missile system.[1] The shipment, and a subsequently planned shipment, occurred in late August and early October, 1986 -- the same period during which the staff of the National Security Council was coordinating its secret transfer of spare Hawk missile parts to Iran.

Through the widely publicized Congressional hearings on the Iran/Contra affair that took place this summer, the nation has learned much about this highly irregular covert operation that was not presented at this trial -- about the utilization of private citizens who were not accountable to the government, about contemplated military operations outside accepted principles of governmental oversight, about the willful destruction of government documents. These matters not

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[1]Under 22 U.S.C. §2778, the President is authorized to control the import and export of defense articles which have been designated on the United States Munitions List. One engaged in the business of exporting designated defense articles must register with the Secretary of State. 22 U.S.C. §2778(b)(1). Export of designated items requires a license from the Secretary of State. However, a license is not required for exports "made by or for an agency of the United States Government (A) for official use by a department or agency of the United States Government, or (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means." 22 U.S.C. §2778 (b)(2).

only cast suspicion on the evidence that was presented but raise even graver suspicion about evidence that may have been withheld. They also provide a telling backdrop to a number of flawed legal decisions made by the trial court and leave the ultimate conclusion reached by the jury of questionable validity.

Throughout the proceeding, the trial court based a series of critical decisions on two erroneous premises: first, that the activities of all participants in the covert government arms sales to Iran would be fully and regularly documented and such documents would be accessible to government personnel at the time of the trial; and, second, that the question of whether defendant's activities could have been part of the government's clandestine military sales program with Iran rested on an assessment of defendant's credibility.

Thus, despite Durrani's pre-trial affidavit stating his belief that he was involved in the United States operation coordinated by Richard Secord, and despite striking coincidences between the defendant's conduct and the conduct of the NSC and CIA as subsequently reported in the Tower Commission Report, the court ruled that the government was not obligated to prove that the exports were not part of the NSC operation unless and until the defendant presented affirmative evidence that they were.

Then, after the defendant testified, the court not only precluded the introduction of evidence that corroborated his connection with the American arms sale to Iran, but accepted as adequate government proof that in fact failed to negate it. Finally, the court gave a charge to the jury that shifted the burden of proof, conveyed the impression the case turned on the credibility of the defendant, and misstated both the law and the defendant's theory of the case.

STATEMENT OF FACTS

Prior to trial, defendant submitted an affidavit, dated February 4, 1987, in which he attested to his prior knowledge of the movement of arms to Iran by the American government through various individuals and entities, and his belief that the persons who had approached him to procure the Hawk missile parts had, in turn, been approached by U.S. government agents (in particular Richard Secord) to obtain the Hawk missile spare parts. According to Durrani, he had been informed that these parts were needed to complete deals that had already been concluded between the United States and Iran. (A.20)

A month later, with the publication of the Tower Commission Report, documents came to light that substantiated defendant's affidavit. On March 9, counsel elaborated that it was defendant's theory that he was asked to procure parts which could not be obtained by the Department of Defense through normal means. (T.3/9/86, 136) To corroborate this theory, counsel attempted to secure, among other government records, several documents referred to in the Tower Commission Report. (A.30-34)

In particular, defendant identified a list of Hawk missile parts provided by the Iranians to the CIA in March of 1986, the packing list of items subsequently shipped from the United States in early May and delivered by the government to Iran in late May and early August, and four documents (PROF memos) written by Oliver North to Admiral Poindexter between April 16 and October 2, 1986.

In the first North memo, dated April 16, 1986, North wrote about the inability to locate all the parts Iran had requested:

> We have a problem on our side in that over 50 of the parts now do not appear to be in stock or are no longer made for our version of the system. Nir [an advisor to

> Israeli Prime Minister Shimon Peres] is checking in their older inventories to see if they have them on hand. (A.91B)

This was significant corroboration of the assertion in defendant's February 4th affidavit that he had been informed the parts he supplied were needed to complete the American deal. In fact, defendant contacted the private parts supplier from whom he ultimately purchased the Hawk spare parts less than three weeks after North reported the unavailability of parts, in early May, and furnished them with a list of 240 Hawk missile parts that was identical to the list of parts provided by the Iranians to the CIA in March of that year. (T.3/17/87, 30-33; 3/26/87, 28-29)

Durrani's February 4th assertion that he was supplying some of the parts the government originally had been unable to locate was further corroborated by the packing list of items subsequently delivered by the United States to Iran in late May and August. That list showed that, of the seven items on the Iranian list which defendant contracted to buy, four were either not delivered by the United States or were short. (T. 4/1/87, 127-28, 147, 173)

Moreover, Durrani arranged for the export of five of the items in the last week of August, 1986. (T.3/20/87, 57) Notably, another revelation contained in the Tower Report was that on September 8, 1986, a little over a week after Durrani's first export, North reported to Poindexter that some of the missing parts had been located:

> Since last week, CIA and Army Logistics have located a significant number of HAWK parts which had previously been listed as °unavailable.' We now believe that the total °package' will be sufficient to entice the Iranians to proceed with the sequential release pattern proposed in the London meetings. (A.91J-K)

Notwithstanding the defendant's affidavit, as substantiated by the subsequently disclosed CIA lists and North memoranda, the court ruled that the question of whether the defendant arranged for the export as part of the NSC's military sales program to Iran -- i.e., the question whether an export license was needed in the first place -- need not be addressed by the government in its case in chief. The defendant was obliged to produce evidence raising the issue before the government would be obligated to negate it. (T. 3/23/87, 28)

Then, after defendant testified, he was effectively precluded from corroborating his testimony because of Oliver North's assertion of his Fifth Amendment privilege against self-incrimination and the court's sustaining of the government's objection to the introduction of North's memoranda. (T. 3/9/87, 141-49; 3/24/87, 67; 3/25/87, 244-51; 3/26/87,6-25; 4/1/87, 105)

In other words, defense counsel was not only given the extraordinary task of unraveling the entire Iranian arms for hostage deal -- a task found impossible even by the government's own investigators -- but, more unjustly, was prohibited from sharing with the jury the fruits of the government's investigation.[2]

The Government's Case in Chief

In early May, 1986, Durrani, representing himself as the Chairman of the Board of a company called "Merex," visited Radio Research Instrument Company, a supplier of government surplus radar equipment located in Danbury, Connecticut, and indicated he was

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[2]The unfairness of putting the burden on defendant to produce evidence about the government's covert operation when the government's point-man on the operation was pleading the Fifth and withholding information from the government's own investigators is patent. North's refusal to cooperate and his shredding of documents certainly suggests that important evidence was withheld.

interested in buying Hawk missile parts. (T.3/17/87, 30, 25, 32) He furnished a list of 240 parts (GX 6) to Executive Vice President Edmund Doyle and asked which parts Radio Research had available. (T.3/17/87, 33) While Durrani did not indicate who he was buying these for, Doyle explained that the export of all Hawk parts required a State Department license. Durrani indicated his familiarity with export regulations and assured Doyle that the required licenses would be obtained. (T.3/17/87, 32, 39)

In late May and throughout June, Doyle both wrote and telexed Durrani at Merex, advising him that Radio Research could supply about a dozen items on the list, enumerating the quantities available and quoting prices. (T.3/17/87, 35-44) At the end of June, Durrani expressed his desire to purchase various quantities of eight of the items. He indicated to Radio Research President Paul Plishner that the parts he was purchasing were going to Jordan and assured him that any necessary documentation would be taken care of. (T.3/17/87, 41-42, 51, 58, 63-4, 69; 3/18/87, 62-63, 71; GX 8)

After considerable prodding from Radio Research for written confirmation, on August 11, Durrani sent four written purchase orders, and requested that they each be invoiced to "CAD Transportation, Inc."-- a company not previously mentioned by Durrani-- in Westlake Village, California. (T.3/17/87, 69, 75, 77-78, 79 81-88)[3] Thereafter Durrani, at Doyle's instruction, sent corrected orders that included a statement on each concerning the export license. (T.3/17/87, 89-90)

A few days later, Doyle inquired about the intended freight

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[3]The government's theory was that Durrani utilized CAD Transport and conducted its business without records in order to conceal assets from his wife in anticipation of a divorce. (T. 3/24/87, 190-95)

forwarder. Durrani responded that he would get the necessary information from his customer and that the customer "does everything." (T.3/17/87, 111-13; GX 30-a, at 6) Later, Durrani provided the information about the freight forwarder, Jet Stream Freight Service in New York. (T.3/17/87, 113)[4]

The First Shipment

On August 22, Durrani visited Radio Research and inspected various quantities of five of the items that were ready for shipment. He signed an invoice, which was made out in care of Jet Stream Freight Service, Valley Stream, New York, and which included at the bottom a warning that any export required a State Department license. Durrani informed Doyle that Jet Stream would have the necessary license. (T.3/17/87, 123-27)

Thereafter, Doyle contacted Jet Stream and was told that Jet Stream did not have the requisite licenses. He reported this to Durrani and informed him that, to protect Radio Research, the goods would not be released unless Durrani signed a document guaranteeing that the licenses would be obtained. Durrani agreed to sign whatever

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[4]Jet Stream became involved with Durrani through its customer in Europe, Willy de Greef. In June of 1986, the owner of Jet Stream, Hank Spreeuwenberg, received a telex from a fellow freight forwarder in Brussels, Tony Van Memeeryert who was with a company called "Comexas," regarding some shipments of spare parts from the United States for de Greef, a Comexas customer. According to Van Memeeryert, de Greef had given instructions to his supplier to forward various shipments to Jet Stream which would then reforward the parts to Brussels in care of Comexas. Thereafter, Durrani arranged for some 16 shipments for de Greef through Jet Stream. In each instance, the freight costs were paid for by the client in Brussels and Jet Stream split the profits with Comexas. On numerous occasions, Jet Stream received telexes from Comexas expressing de Greef's concern with delays and urging Jet Stream to apply pressure on Durrani to expedite the shipments. With regard to the August shipment charged in this case, Jet Stream received not only telexes from Comexas, but also a phone call from de Greef. (T. 3/20/87, 44, 118, 140, 159, 165-70, 219-40)

Doyle prepared. To accommodate Durrani's travel schedule, Doyle telefaxed a document to Jet Stream and Jet Stream personnel took it to Durrani at John F. Kennedy Airport on August 26 for his signature.[5] (T.3/17/87, 127-29; 3/18/87, 11; GX 47-A)

Upon receipt of the signed statement and a check for payment, Doyle delivered the goods to a local trucker for transport to Jet Stream in New York. (T.3/17/87, 129-30; 3/19/87, 169) The box containing the goods was stenciled with black spray paint: "RJAF Amman, Jordan" and had a Radio Research label on it. (T.3/19/87, 171)

Following customary practice, Jet Stream obliterated the markings on the box and removed the packing list so that the supplier's name would not be revealed. Pursuant to faxed instructions from Durrani, Jets Stream owner Spreeuwenberg then prepared new invoices, using blank invoices he had been given with CAD transports name and

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[5]The document, prepared by Doyle with the assistance of Customs Service Special Agent Steven Arruda, and signed by Durrani, stated:

> "To whom it may concern. The export of Hawk missile parts being sold to you by Radio Research requires a U.S. State Department export license prior to their export. I certify that the appropriate State Department export license will be obtained prior to the exportation of the Hawk missile parts from the U.S." (GX 65; T.3/18/87, 11)

When Durrani signed the statement, he told Jet Stream's Spreeuwenberg not to worry about the license, that he was getting his orders from Washington, and showed him a paper with "Merex" on it. At the time, Durrani was with Manual Pires whom he introduced as de Greef's boss. Pires gave Spreeuwenberg a canvas bag of personal effects and directed him to ship it to Lisbon. Durrani then gave Jet Stream a check for $10,000. According to Spreeuwenberg's assistant, Muhammed Moosa, the money was intended to cover the cost of the shipment for Pires, Durrani's outstanding balance, as well as costs of future shipments to Jet Stream from Durrani. However, the money was not recorded in Jet Stream's ledger on Durrani's account. (T.3/20/87, 48-50, 51, 86-90, 179)

address. On the CAD invoice, the value was reduced from $22,165 to $367.85.[6] The invoice showed that the parts were sold to "Kram, Ltd.;" the shipment was consigned to Comexas in Brussels. (T. 3/19/87, 190-91; 3/20/87, 7, 56-64, 182-88, 216) The shipment was consolidated with another smaller shipment from CAD to Comexas and sent to Brussels on August 29. (T. 3/19/87, 182; 3/20/87, 189) The freight charges for the flight to Europe were billed to Jet Stream's and Comexas' customer in Brussels, Willy de Greef. (T.3/20/87, 159)

The Preparations for a Second Shipment

Throughout the month of September, Durrani spoke with Doyle on a regular basis about testing that Radio Research was to perform on certain of the ordered but still undelivered parts, the possible purchase of additional equipment, and the repair of two "klystron tubes" Durrani had delivered to Radio Research. Finally, after Durrani arranged for the payment of $148,860, Doyle advised that the parts were ready for inspection. (T.3/18/87, 15-29)

Durrani went to Radio Research to inspect the goods on October 3. Once again, he signed a statement that the necessary export licenses would be obtained, instructed that the boxes be marked for Amman, Jordan, and arranged for the delivery of the boxes to Jet Stream. When he left Radio Research, he was arrested and the boxes were seized. While in custody, Durrani claimed, "I don't know why I'm arrested, I have all the licenses in California." (T.3/18/87, 31-33,

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[6]By valuing the shipment at less than $1000, Jet Stream, listed on the airway bill as the "shipper," avoided filing a "Shipper's Export Declaration" with Customs; such a declaration is generally required for shipments valued in excess of $1000. On at least one prior occasion, on instructions from de Greef and without discussion with Durrani, Jet Stream falsified shipping documents for de Greef. (T. 3/19/87, 193; 3/20/87,7, 248-49)

40; 3/19/87, 197, 205)[7]

As evidence that the exported items were on the United States Munitions List[8] and that Durrani neither registered with the State Department, nor applied for or obtained export licenses, the government introduced the testimony of Billy Boland, an electronic technician equipment specialist at the Hawk Project Office, U.S. Missile Command, Redstone Arsenal, and Brenda Carnahan, a paralegal in the Department of State's Office of Munitions Control.

On direct examination, Boland claimed that, of the five items exported to Brussels on August 29, two of them (items 48 and 64) were "specifically designed" for the Hawk system, while a third (item 240) was "specifically used" in the Hawk system. (T.3/19/87, 75, 79, 81) One, a relay switch (item 54), was not designed specifically for the Hawk; it is a repair part used in other pieces of equipment as well as the Hawk. (T.3/19/87, 78) According to Boland, each of the line items prepared for export on October 3 was "specifically designed" for the Hawk system. (T.3/19/87, 82, 83, 84)

However, on cross, Boland clarified that he was not involved

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[7]Shortly after Durrani's arrest, a woman identifying herself as "Mrs. Durrani" called Jet Stream and instructed Mr. Moosa to send the shipment destined for Belgium to California instead, to destroy all files, and that if asked, to deny knowing anything about Durrani or CAD. Later, Durrani called and asked if the message had been received and if the files could be destroyed. When Spreeuwenberg reported that customs agents had already been there and seized the files, Durrani said, "I have a lot of trouble." Spreeuwenberg responded, "Me too." (T.3/20/87, 79, 82, 200-03) (In his testimony, Durrani denied that he instructed Spreeuwenberg to destroy documents.

[8]Category IV subsection (b) and (H) of the Munitions List includes missle systems and all "specifically designed or modified components, parts, accessories, attachments, and associated equipment" for such systems.

in the manufacturing process, and, therefore, could not say whether the items, particularly such low level electronic equipment as the delay line (item 48), were used in other equipment; he only knew that the items met the Hawk's specifications. (T.3/19/87, 91)[9]

Paralegal Brenda Carnahan was employed in the Services Support Division of the Department of State Office of Munitions Control, an office responsible for enforcing 22 C.F.R. §§120-130. (T.3/19/87, 110-12) Over defense objection, Carnahan testified that, at the request of the case agent, she made a determination that each of the items exported and planned for export in this case fell within Category IV of the Munitions List. (T. 3/19/87, 127-44) On cross, she admitted that none of the items was specifically referred to in the Code of Regulations, that she had no expertise in the design of the Hawk system, that the State Department had never previously made a formal determination with respect to any of the parts, that the question of whether a particular part is on the List may be a difficult and delicate one, and that her determination that each part was on the Munitions List was based entirely on a telephone conversation she had with Ralph Wills, an engineer at Redstone Arsenal. (T.3/19/87, 155-59, 164, 167)[10]

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[9]Boland also explained that the U.S. Army supplies spare parts to every country around the world with a Hawk missile system except Iran; the spare parts are stocked at Redstone Arsenal. If a part is ordered that is not in stock, the Army will procure it, though obsolete parts could take as long as two years to procure. (T. 3/19/87, 73-74, 87-88, 108-09) According to Boland, with the exception of one of the items at issue, each of the items was in stock in May of 1986, and Redstone Arsenal received no orders at that time that it could not fill. (T.3/19/87, 86-87) However, Boland had no knowledge of any Hawk missile parts being shipped to Iran in 1986, and had no knowledge of the NSC or the CIA procuring Hawk parts in 1985 or 1986. (T.3/19/87, 102, 104, 94)

The Defense Case

Durrani testified in his own behalf and told the jury that which he had told to the court in his pre-trial affidavit: his belief that he was working for people connected with the government's covert arms for hostage deal with Iran. Durrani also sought to introduce portions of the Tower Commission Report which outlined the government's covert operation and the two North memoranda, discussed above, which, along with the CIA lists, provided strong corroboration that he was approached to supply parts requested by Iran but initially unavailable to those responsible for the government's operation. The court, however, thwarted this vital effort at substantiating his testimony by ruling that the Tower Commission Report and the North memoranda were untrustworthy and inadmissible. (A.92)[11]

Durrani described the international community of arms dealers as a handful of people all known to one another; those in the community sooner or later learn of every movement of weapons in the Western world. As part of this community, Durrani learned of the shipment of arms to Iran by Israel and the United States in 1985 and 1986. (T.3/24/87, 27, 29)

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[10]According to Carnahan, there was no record of any registration or export license application, or export license issued during the period of October, 1981 through February, 1987 for a host of individuals and companies including Durrani, Pires, de Greef, CAD Transportation, Comexas, and Jet Stream. (T.3/19/87, 148-149) However, Carnahan also explained that the Department of State does not license "foreign military sales;" that is handled by the Department of Defense. (T.3/19/87, 124)

[11]The proffered portions of the Tower Commission Report are included in the appendix. Two editions of the report were before the court; the version included in the appendix, from the New York Times Edition, is paginated differently from the version referred to in the court's ruling.

Durrani was familiar with several Iranian officials involved with the procurement of arms for the government of Iran. Through Merex associate Ahmed Shams, an Iranian, Durrani became socially acquainted with Rahim Malekzedeh, the Chief of Logistics and "number 2" man in the Iranian Revolutionary Guard. In the autumn of 1985, Malekzedeh informed Durrani about Israeli shipments of arms to Iran, and about American overtures to Iran through Japan and other countries. (T.3/24/87, 44-47, 210) Later Malekzedeh told Durrani that Iran was dealing with a number of Americans and Israelis, including Oliver North, George Cave and Amiram Nir. (T. 3/24/87, 218)

In late 1985, through Shiraz Dewji, an employee with a subsidiary of Varian Corporation in Switzerland, Durrani learned about two shipments of tubes -- the VA-145-E (known as the "heart" of the Hawk missile system) -- by Major General Richard Secord from the United States to West Germany and Sweden, through Portugal and, ultimately to Iran. (T.3/24/87, 32-38; 3/25/87, 172)

As corroborated by Merex phone records, Durrani was in Portugal in April, 1986. While in Lisbon, Durrani met with George Hassan, a former Iranian Secret Service Agent with ties to Israel. Hassan was working with Secord and Albert Hakim coordinating the American shipment of parts to Iran. Hassan, who wanted Durrani to vouch for Secord and Hakim with Malekzedeh, showed Durrani three leased aircraft loaded with Sidewinder missiles parked on the tarmac at U.S./NATO air bases in Lisbon. (T.3/24/87, 40-44, 49, 50, 218)

Also while in Lisbon, Durrani was told by an Israeli Air Force Officer that Manual Pires was looking for Hawk parts. Durrani knew that Pires was one of two individuals licensed to export arms from Portugal. Since Durrani also had learned from Hassan that Pires was a

supplier of small arms and ammunition to Secord, he deduced that the United States was shipping the goods to Iran through Pires. (T.3/24/87, 48-50, 238) Durrani tried unsuccessfully to reach Pires at his office in Lisbon, but he was not in. Thereafter, he received a call from Willy de Greef, who arranged a meeting in Geneva on April 23. (T.3/24/87, 50-52)

At the Geneva meeting were not only Durrani, Pires and de Greef, but also a Mr. Hussein, an Iranian official responsible for Iran's Hawk missile system. Durrani was asked generally about the kinds of parts he could supply and specifically whether he could supply Hawk parts included on a list given to the United States by Iran. Durrani agreed to locate whatever parts he could. He was given the phone number of a "Mr. Korser" and instructed to call him in Washington D.C. to arrange to obtain the list. (T.3/24/87, 52-57)

Durrani was also told that if there was a procurement, the shipping arrangements would be taken care of. According to Pires, though the parts would actually be going to Israel and then to Iran, any end user certificates would show that the parts were going to Jordan and would be obtained with the assistance of the Government of Jordan. (T.3/24/87, 58-59)

Durrani returned to the United States and, as instructed, arranged the meeting to obtain the list of parts. Thereafter, he determined that Radio Research possessed some of the parts and went to them with the list the first week of May. The list of parts Durrani submitted to Radio Research (GX 6) was identical to the list of parts given to CIA agent George Cave by the Iranians in Paris on March 7, 1986; while typed on different typewriters, both lists included the identical 240 parts and misspellings or missing portions were the same

on both. (T.3/24/87, 63-66, 71-72; 3/26/87, 28-29; DX 609-C)[12]

Durrani forwarded to de Greef and Pires in Brussels the information he received from Radio Research. De Greef and Pires indicated which items they were interested in and which prices were too high. Durrani made it clear to Pires and de Greef that he would arrange for the purchase of parts and inspect them, but would not be responsible for obtaining any licenses. They again assured him that they had arrangements to obtain export licenses from Jordan. Based on this, Durrani placed his orders with Radio Research.

By the end of August, Durrani was under increasing pressure from Pires and de Greef to obtain the parts at any cost and increasing pressure from Radio Research to obtain an export license. Based on the assurances of Pires that export licenses would be provided, Durrani agreed to sign whatever statement Doyle prepared and arranged to have Pires with him at the airport when the statement was delivered by Spreeuwenberg of Jet Stream. At the airport, he was told that Spreeuwenberg had obtained the license and had been obligated to pay $10,000 for it. Durrani agreed to reimburse Jet Stream for the expense on Pires' behalf. (T.3/24/87, 86-92)

In September, Pires made clear what Durrani had previously only deduced: Pires related that he was working with people, particularly Secord, who were working on behalf of the United States. He explained that the man identified as "Korser" from whom Durrani had

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[12]At the end of May, Durrani met with Malekzedeh in Brussels and learned about a trip to Tehran by various officials of the United States and a shipment of arms. Malekzedeh showed Durrani a copy of the packing list that accompanied the first American shipment. (A copy of the packing list, obtained from the CIA, was introduced into evidence. (DX 609-B)) (T.3/24/87, 71-72; 3/25/87, 187, 214)

obtained the list of parts was with the NSC. (T.3/24/87, 216, 237-40)

Exhorting Durrani that the delivery was urgent, Pires pressed Durrani for the parts that were not available with the August shipment. He informed Durrani that the United States was planning to deliver parts to the Iranian delegation in Frankfurt in early October and, therefore, delivery to Brussels had to be confirmed for October 3. In order to reassure the Americans that the parts would be delivered, Pires urged Durrani to meet with an American official in London in late September. (T. 3/24/87, 96, 243, 251)

Durrani went to London and was summoned to the Hilton Hotel by a man using a code name but who Durrani subsequently identified as Oliver North. Durrani explained the reasons for the delay and assured North that the parts would be available as soon as Durrani returned to the United States. When Durrani mentioned that part of the delay was attributable to the supplier's insistence on an export license, North told him not to worry about it, just deliver the parts to New York. (T. 3/24/87, 101, 244, 248)[13]

Rebuttal

There were essentially three parts to the government's rebuttal case: an attempt to negate, through absence of record evidence, defendant's assertion that he was working indirectly on

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[13]Durrani's testimony concerning his relationship with de Greef and Pires and his understanding about their relationship with Secord and the United States Government was admittedly at odds with two prior statements: his post-arrest statement that the licenses were in California, as well as a submission of his attorney to the Court, made in connection with an appeal from the detention order, that Durrani believed the goods were to be forwarded to Jordan. Durrani explained that he made the first statement because he was frightened. He did not tell "the whole truth" to his lawyer because he thought he could get out on bail and resolve the matter with Pires and the people at the NSC (T.3/24/87, 61-62, 102; 3/25/87, 74-76, 157-61)

defendant's credibility, mainly about the nature of his business with bank records;[14] and, the introduction of so-called "similar act" evidence designed to rebut defendant's contentions that he believed he was working on behalf of the government and/or was not responsible for obtaining the necessary licenses.[15] (The government also sought to elicit the testimony of Manual Pires. However, after it had made all the necessary arrangements to take his mid-trial foreign deposition, Pires balked and refused to cooperate.)

To rebut Durrani's claim that he actually met with Oliver North in London, the government presented the testimony of an English Customs Officer who had been asked to search various London hotel records for a period in late September, 1986. While he found registration records for Durrani and Pires, he found no such record at the Hilton Hotel under the names of North, White or Goode, aliases attributed to North during the trial. (T. 4/1/87, 77-79)

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[14]The introduction of the bank records was part of the government's relentless effort to prejudice the defendant by revealing to the jury that he had structured certain financial transactions in a way to conceal assets from his wife in anticipation of a divorce. (T. 3/24/87, 190-195; 3/26/87, 59, 164; 4/1/87, 14) The trial court correctly precluded the prosecution from introducing evidence of his extra-marital relationship, and the bank records ultimately proved little more than that Durrani was paid by Pires and had access to Swiss bank accounts in his mother's name.

[15]Over objection, Nathan Newbern, the president and owner of Imperial Tool and Manufacturing Machine Shop in Fort Worth, testified about a sale to Durrani of Bell military helicopter parts which Durrani said were destined for Turkey. (T.3/26/87, 81-154) Some of the parts were consolidated by Jet Stream with the unlicensed August shipment from Radio Research and, though Durrani had represented himself to Newbern as Chairman of Merex, were also invoiced from CAD Transport to Kram, Ltd. (T.3/18/87, 181-90; 3/26/87, 112) Evidence was also introduced to show that these parts were on the U.S. Munitions List. (T.4/1/87, 34-40, 153) Durrani testified that he understood that the parts were for helicopters privately owned by Pires and de Greef in Malta and that he did not think that an export license was required. (T.4/1/87, 213-14)

In addition, Michael Sneddon, an accounting and budget analyst for the NSC responsible for processing the Council's travel documents, testified that there were no travel records for travel by North to London between September 28 and October 2, 1986. (T.4/1/87, 109-10) Sneddon explained, however, that if North financed his trip outside the NSC, there would be no NSC travel records to reflect it, and admitted that he made no effort to ascertain North's whereabouts on these particular days. (T.4/1/87, 118-21) Moreover, though the court precluded defendant from inquiring of Sneddon whether North and Poindexter talked to him about covert operations (T.4/1/87, 114), Sneddon confessed that prior to November 1, 1986, he had no knowledge of North's trip to Tehran in May of that year. (T. 4/1/87, 112-114, 123)[16] Sneddon also testified that there was no record of a "Jack Korser" working with the NSC. (T.4/1/87, 110)

To prove that defendant's activities did not fall within the statutory exception of 22 U.S.C. section 2778 (b)(2), the government also relied on the testimony of Charles Moyer, Senior Records Management Officer of the CIA's Directorate of Administration. Over repeated hearsay objections, Moyer was permitted to testify, based on his examination of unspecified records maintained by the CIA's Office of Logistics/Administration, that the Office of Logistics had responsibility for obtaining the Hawk missile parts sold to Iran and delivered in May and August of 1986.[17] Moyer testified that the CIA

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[16]North's trip to Tehran in May of 1986 -- along with Robert McFarlane and others-- has been widely reported. See, e.g., The Tower Commission Report, Appendix B "The Iran/Contra Affair: A Narrative," VII. "Hostages and Iran Pursued: March- May 1986," D. "Tehran: May 25-28, 1986." It was acknowledged at trial by a senior record keeper from the CIA called as a witness for the government. (T.4/1/87, 167)

did not make any effort to obtain Hawk parts after May and did not participate in any further shipments of Hawk missile parts after the delivery in August. (T. 4/1/87, 124-34, 147, 158)[18]

On cross-examination, Moyer explained that he only searched for records relating to the actual acquisition of parts by the CIA. He did not check for documents by CIA officials relating to the need to acquire additional parts, or the location of parts that were on the Iranian list but were not included in the May shipment to Israel. (T.4/1/87, 161-63, 168, 182, 187)[19]

Moreover, the records Moyer did search showed only the parts that the CIA bought and paid for; Moyer explained that CIA records would not reflect activities on behalf of the NSC unless the CIA participated in such activity. Thus, if, for example, Manual Pires was involved in the purchase of Hawk parts, CIA logistics records would not reflect this unless the CIA paid for the parts. (T.4/1/87, 170-71) Similarly, the CIA would not necessarily record all contacts made by persons associated with the agency. For example, Moyer confessed, the

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[18]In addition, Moyer testified that Office of Logistics records would reflect whether the CIA attempted to obtain any of these parts from any sources outside of the Department of Defense. According to Moyer, searches of records conducted by him and by persons whom he supervised and interviewed did not uncover a record of an effort by the CIA to obtain parts included in the May and August shipments from a number of individuals and entities including Durrani, Pires, de Greef, George Hassan, Richard Secord, Albert Hakim, Jack Korser, CAD Transportation, Merex, and Kram, Ltd. (T.4/1/87, 132-37) Moyer also testified that, with the exception of Secord and Hakim, there was no record of any of these individuals or entities being employed by or associated with the CIA. (T.4/1/87, 137-44)

[19]The court precluded defense counsel from eliciting testimony about the existence of one such document, written by CIA Director William Casey in July of 1986, concerning the need to acquire additional parts that was turned over to the Tower Commission. (T.4/1/87, 187-88) (A.91C-E)

participated in such activity. Thus, if, for example, Manual Pires was involved in the purchase of Hawk parts, CIA logistics records would not reflect this unless the CIA paid for the parts. (T.4/1/87, 170-71) Similarly, the CIA would not necessarily record all contacts made by persons associated with the agency. For example, Moyer confessed, the absence of a record of George Hassan is not evidence that he was not working with Secord or Hakim. (T.4/1/87, 186) Furthermore, there would be no record of attempts to purchase parts unless that attempt was "normal enough to be committed to paper, ...[i]f we put out a solicitation for bid for Hawk missile parts that would be in the file." Moyer agreed that the sale to Iran was not one "put out...for bid." (T.4/1/87, 171-73)

Moyer conceded that the CIA was unable to obtain all the parts it was looking for from the Department of Defense, that the arms for hostage deal with Iran was unique, and that if the CIA needed something, it would probably obtain it from whatever source it could. (T.4/1/87, 173, 175-77)[20]

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[20]However, he insisted that, nevertheless, any procurement of parts by the CIA would follow normal CIA procurement procedures and would be accomplished through and fully documented by the Office of Logistics. (T.4/1/87, 173-75, 180) Defense counsel's effort to discredit this assertion by reference to the use of Secord and Hakim to divert arms to the Nicaraguan Contras was thwarted by the court. (T.4/1/87, 181) Moyer did admit, though, that the Office of Logistics would have records of CIA procurements only if its agents complied with federal record-keeping regulations. (T.4/1/87, 190)

POINT I

THE GOVERNMENT SHOULD HAVE BEEN REQUIRED TO NEGATE THE STATUTORY EXCEPTION IN ITS CASE IN CHIEF, AND, IN ANY EVENT, ONCE THE ISSUE WAS RAISED, IT FAILED TO PRESENT SUFFICIENT EVIDENCE ON THIS ELEMENT

This case is, to say the least, unusual. Defendant was accused of shipping Hawk missile system spare parts to Iran at precisely the same time the government of the United States, in a highly unorthodox covert operation, was selling Iran the identical parts. It was undisputed that the list of parts Durrani presented to Radio Research in May contained the identical items as the list of parts the Iranians had given to the CIA two months earlier. The list of parts shipped by the United States in May, some of which were delivered to Iran that month and the rest in early August, did not include several items on the March list requested by the Iranians. Some of the parts not included in the government's shipment were obtained by Durrani from Radio Research in late August and early October.

Several questions are obviously raised by these facts. Did the government make an effort to obtain the missing parts after the May shipment? If so, who in the government was responsible for this effort? What efforts, if any, were made and were these efforts documented? Which agency of government, if any, maintained such records? Are there NSC records which show that the parts obtained by the defendant were the product of such an effort?

The government produced no evidence at trial that answered these critical questions and succeeded at every turn at keeping out evidence that might shed any light on them. Either the charges against Durrani must be dismissed because these questions were not answered by

the government, or a new trial must be ordered because Durrani was first unfairly forced to produce evidence about a covert government operation that is still riddled with uncertainty even after months of public scrutiny, and, then, was precluded from introducing government documents -- uncovered during that public inquiry -- that supported his version of events.

A. The Court Erred in Holding that the Statutory Exception Was An Affirmative Defense On Which Defendant Had A Burden of Production

Prior to trial, defendant asserted that he was working on behalf of individuals whom he believed were associated with Mr. Secord and the American sales effort. He made repeated efforts to obtain documents relating to the government's Iranian sales program. He also drew the court's attention to several documents subsequently made public in the Tower Commission Report that were consistent with his position that the parts he supplied were needed by the government to complete the arms for hostage deal with the Iranians. These memoranda revealed both a continuing interest by the individuals apparently in charge of the covert American operation, throughout the summer and early fall of 1986, to obtain parts requested by the Iranians but previously unavailable, as well as the representation that some of the missing parts were located just at the time Durrani arranged his first shipment.[21]

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[21]Two memoranda by North to Poindexter are quoted above at pages 4-5. Two other memoranda from North to Poindexter, dated September 2, and October 10, 1986, set forth various initiatives involving future deliveries of Hawk parts on the original list being pursued or proposed in the arms for hostage swap. (A.91A-L; 91N-O) Defendant also pointed to a memo from CIA Director William Casey (prepared by Charles Allen), dated July 26, 1986, which concerned prospects for freeing American hostages in return for deliveries of Hawk missile parts to Iran, and (footnote continued)

The court, however, discounting Durrani's pre-trial affidavit completely,[22] ruled that the government would not be obligated to negate the applicability of the statutory exception, for exports made on behalf of the United States Government, in its case in chief.[23] The

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(footnote continued from previous page)

concluded that further deliveries should be made. (See, A.91C-E) (A.30-36)

[22]Apparently the district court was skeptical with the notion that the United States would use private arms dealers to secure spare parts for Hawk missile. Subsequent disclosures have shown that the district court's skepticism was misdirected. The court conveyed its skepticism of defendant's affidavit when it granted the government's motion to quash various subpoenae defendant had filed on the CIA, NSC and State Department. (A.44)

[23]Resting its decision on United States v. Mayo, 705 F. 2d 62 (2d Cir. 1983), the court held that the statutory exception carved out an affirmative defense rather than appended an additional element which the government must prove to establish the crime.

Mayo teaches that in deciding whether particular statutory language creates an affirmative defense or is part of the crime itself, both the text and legislative history should be considered. Here, both suggest that non-applicability of the exception is an element of the crime. The text is unusual. It contains the two exceptions -- one that starts the statute and the one, at issue here, which concludes it. The opening exception, which relates to certain exceptions provided in the regulation such as obsolete fire arms and export for personal use of members of the armed forces (see 22 CFR §§123.16-21) is much like the antique fire arms exception at issue in Mayo. Proof establishing any of these exemptions "would not negative any of the government's proof" that the firearm was on the Munitions List, was exported without a license, and was not exported on behalf of the United States Government; the defendant would "certainly [be] in a better position [than the government] to place the exception in issue;" and, requiring the government to disprove each exemption in all prosecutions under 22 U.S.C. §2778 would "unduly stifle effective enforcement" of this law. Id. at 75-76.

The exception at issue here is quite different. As the preamble to the statute sets forth, 22 U.S.C. §2778(B)(2) is part of a comprehensive scheme designed to put control of exports of defense articles in the hands of the President. The entire premise of the licensing requirement of subsection (B)(2) is that licensing provides the President with a way to monitor and control private exports of

(footnote continued)

defendant would have to come forward with some evidence at trial to put the statutory exception at issue before the government would bear the burden of disproving its applicability.[24] This ruling in this unique case not only misconceived the nature of the crime, but was improper. Putting the burden on the defendant to come forward with evidence in this case was fundamentally unfair. Defense counsel was saddled with the extraordinary burden of producing evidence about the conduct of an enigmatic covert government operation. The President's Tower Commission, Congress and a special prosecutor have spent, and are still spending, an inordinate amount of time trying to figure it out. Not only was the government's arms sale to Iran a clandestine operation, but it was managed by officials at the NSC who, prior to trial, had refused to provide information about the operation to the President's

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(footnote continued from previous page)

defense articles. Where that export is undertaken on behalf of the government for its "official use" or as part of a foreign sales program "authorized by law and subject to the control of the President by other means," 22 U.S.C. §2778(B)(2), however, other controls are in place and the need for licensing completely disappears. Moreover, particularly where, as here, the export of defense articles is part of a covert government program, the government will be in the better position to shoulder the burden of coming forward with the evidence. Indeed, the defendant may not be able to put the exception at issue at all if he had no knowledge of the covert operation. For all these reasons, the statutory exception for government related exports is an intergraded part of the offense. The court erred in holding that its non-applicability need not be proved by the government in its case in chief to establish the crime.

[24]By quashing the subpoenae defendant had served on the CIA, the NSC and the Department of State, the court effectively forced defendant to testify in order to present such evidence. This, in turn, meant that in order to raise the issue, defendant's credibility -- which would inevitably be attacked with his prior inconsistent statements and inquiries into his private life -- would necessarily become a critical issue in the case.

Specially Appointed Review Board investigating it, and, at trial, asserted the privilege against self-incrimination. Moreover, these same individuals later admitted at Congressional hearings conducted this summer that they conducted the operation surreptitiously, outside established channels of government oversight, hid information from other government officials all the way up to the President, and then, when the operation became public, destroyed government documents. When a government operation is managed without accountability, bridling a criminal defendant with the burden of producing evidence about that operation is fundamentally unfair.[25]

As we show below, having erroneously and unfairly placed the Kafkaesque burden on Durrani to come forward with evidence that he came within the exception, the court compounded the error by unduly stifling introduction of highly probative evidence on this issue, including documents that were relied upon by both the Tower Commission and Congress in their attempts to understand the operation of the arms for hostage deal with Iran and by relieving the government of its consequent obligation to disprove the applicability of the exception

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[25]The trial court was understandably reluctant to impose upon the government the obligation to establish the non-applicability of the exception in every export license case its prosecutes. This no doubt stems from the fact that, ordinarily, the court could rely on the government not to prosecute a defendant who had exported defense articles on the government's behalf. However, the unique circumstances of this government sales program point to the fallacy of this assumption in this case. Quite simply, given the nature of this covert operation, the United States Attorney -- or indeed the Justice Department -- was not in a position to know one way or the other whether the defendant was involved with the goverment's sales program. Moreover, the concern for the unnecessary expenditure of government resources, could easily be accommodated with a defendant's right to a fair trial. Once the defendant raises the issue pretrial, the government should be required to disprove the applicability of the statutory exception without requiring the defendant to come forward with any evidence at trial.

beyond a reasonable doubt.

B. The Government Failed to Negate the Statutory Exception and The Defendant was Unfairly Precluded from Showing its Applicablity

Once the defendant testified and raised the defense that he fit within the statutory exception at issue, the "government was obligated to prove its inapplicability beyond a reasonable doubt." United States v. Mayo, supra, 705 F.2d at 74; United States v. Rosenberg, 515 F.2d 190, 199 (9th Cir. 1975). The evidence, however, even when viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), was simply insufficient to support a finding beyond a reasonable doubt that Durrani's shipments were not for an agency of the United States Government

> (A) for official use by a department or agency of the United States Government, or
>
> (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means. 22 U.S.C. §2778(b)(2)

It is indisputable that the government was engaged in a sales program with Iran -- authorized by the President -- at the same time and involving the same Hawk missile parts that Durrani was charged with exporting. The government sought to negate Durrani's involvement with the covert operation with the testimony of two government record-keepers, one from the NSC and one from the CIA. "[T]he jury, drawing reasonable inference from th[is] evidence, [could not] fairly and logically have concluded that the defendant was [not acting on behalf of the United States Government] beyond a reasonable doubt." United States v. Carson, 702 F. 2d 351, 361 (2d Cir.), cert. denied, 462 U.S. 1108 (1983).

First, the government attempted to prove, by absence of NSC travel records, that Oliver North was not in London at the time Durrani said they met and discussed the planned export. There are two central problems with this testimony. First, discrediting a piece of defendant's testimony does not affirmatively establish that defendant was not part of the U.S. effort.[26] See Simmons v. Dalsheim, 543 F. Supp.729, 737-39 (S.D.N.Y. 1982), aff'd, 702 F.2d 423 (2d Cir. 1983).

Second, and even more important, by his own testimony, NSC record-keeper Sneddon made clear that the absence of a travel record was an insufficient basis on which to infer that North was not in London on the days in question. Sneddon candidly admitted (1) that even though he was responsible for all NSC travel documents, he had had no knowledge of North's secret trip to Tehran in May of 1986 (a trip it was undisputed North took in connection with the sale of arms to Iran), and (2) that if North's trip were financed outside of the NSC, there would be no NSC travel records to reflect it.[27]

Under Fed. Rules Evid., Rule 803 (10), testimony that a search failed to disclose a record to prove the nonoccurrence of a matter is not admissible unless a record of such a matter "was regularly made and preserved by a public office or agency." Sneddon's

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[26]Theoretically, defendant could have mistakenly believed that he was involved in a strictly commercial and illicit venture and yet, in fact, have been working on behalf of individuals associated with the government. In that case, a license would not be required regardless of defendant's intent and regardless of whether he took the stand and lied.

[27]The government, of course, introduced neither the testimony of North or anyone else responsible for the government's covert military sales operation; the jury was simply left in the dark as to how trips by government personnel during the covert operation were financed, or how, or even if, travel records involved in this operation were maintained.

testimony underscores the rationale for this rule. It showed that during the Iranian arms for hostage operation, the travel of NSC officials was not regularly reported or recorded with the NSC. Sneddon's absence of record testimony, therefore, not only failed to support the inference the government sought the jury to draw, but it was also inadmissible hearsay erroneously admitted.

The government fares no better with the erroneously admitted testimony of CIA record-keeper Moyer.[28] His testimony that the CIA acquired all the parts that were shipped to Iran by the government in May and August from the Department of Defense, that the CIA did not participate in any subsequent shipments to Iran, and that there was no record of an effort by the CIA to acquire parts from Durrani or any of the affiliated parties -- even assuming he was competent to ma ke these assertions -- hardly disproved Durrani's connection with the covert operation.

Most critically, the evidence revealed that the CIA was <u>not</u> the only agency involved in the government's sale of missile parts to Iran. Moyer himself referred to the trip to Tehran by members of the NSC and the acquisition of parts by the Department of Defense. The government, however, offered no evidence relating to the efforts of

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[28]Moyer was merely a custodian of records at the CIA. He had no first-hand knowledge of the covert operation -- how it was conducted, who was responsible for directing it, how it was documented. His testimony about the CIA's involvement in the covert operation should have been excluded as hearsay. (Hypocritically, when the defendant sought to introduce DX-609-C, the packing list from the May and August shipments, the government argued against its admissibility on the ground that the sworn statements of the CIA official who turned the document over in response to defendant's subpoena were based on hearsay. T.3/24/87, 128)

either the NSC or the Department of Defense to obtain parts.[29] Therefore, proof relating exclusively to the efforts of the CIA could not provide the basis for the conclusion beyond a reasonable doubt that Durrani's shipments were not connected with the government operation.

Second, Moyer's absence of record testimony suffered the same flaws as Sneddon's. Moyer explained that the government's sale to Iran was a unique operation; bids were not solicited, so the normal recording of attempted procurements by the CIA would not exist. In other words, because records of attempts to procure parts for the covert sale to Iran were not "regularly made and preserved," F.Rule Ev. 803(10), the absence of a recorded attempt to procure parts from Durrani could not serve as the basis for the inference that such an attempt never occurred. Similarly, Moyer confessed that the absence of a record that any particular individual or entity was associated with the CIA is not evidence that that individual or entity was not working with someone who was associated with the agency since such contacts are not necessarily recorded.

Third, Durrani never asserted that he supplied parts included in the May and August shipments. To the contrary, it was his position that the government was attempting to locate parts that were previously unavailable and were not included in the first shipments that left the United States in May and that the parts he supplied were those needed to complete the deal with the Iranians. Evidence that there were no

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[29] Indeed, the government made every effort to insure that the jury learned very little about the government's operation. Every time defense counsel sought to elicit testimony or introduce evidence relating to the Iran/Contra affair, the government objected. See, e.g., T. 3/24/87, 128; 3/25/87, 244-51; 3/26/87, 8-25; 4/1/87, 114, 187, 202-04)

CIA sponsored deliveries to Iran after August or efforts to procure parts after May does not answer the question whether efforts were made by the NSC, the Department of Defense, or some private citizen like Richard Secord working with one of these government bodies to acquire additional Hawk parts in anticipation of a future delivery to Iran.

The logical insufficiencies in the government's proof are underscored by the evidence the defendant sought to introduce but which the court erroneously excluded. Defendant proffered a portion of the Tower Commission Report which set forth a general outline of the government's involvement in the transfer of arms to Iran. In it, the President's Special Review Board made several points that are fundamentally inconsistent with the basic assumptions underlying the government's proof. (A.56-91)

First, the Board explained that in the course of its investigation, it had reviewed a "vast quantity" of documents provided by "all affected departments and agencies" and interviewed over 80 witnesses. (A.56; emphasis added) Yet, despite this wide-ranging inquiry, the Board was forced to admit throughout its report that it still had many unanswered questions and found many areas "murky."

At trial, by contrast, the government never even identified all the affected departments and agencies, and put on only two record-keepers who had no first-hand knowledge of the covert operation and confessed that their records did not even purport to reflect a complete picture of it.

Moreover, the Board explained that, among the questions it sought to determine with regard to each phase of the Iran initiative was who was responsible for carrying out the President's directives. Of utmost importance here is the Board's determination that after the

President signed the January 17, 1986 Finding approving direct sales of arms to Iran, the NSC -- not the CIA -- assumed operational responsibility:

> Lt. Col North, with the knowledge of VADM Poindexter and the support of selected individuals at CIA, directly managed a network of private individuals in carrying out these plans. ... Mr. Secord and his associates, rather than the CIA, had the more substantial operational role.(A79-80)

Despite the determination by the Board that it was the NSC through a network of private individuals that was orchestrating the government's sale of arms to Iran, the government presented no evidence from anyone with management responsibility at the NSC to negate Durrani's connection with the operation. It relied instead on the wholly inadequate testimony of a CIA record keeper who negated only the very foundation for his own absence of record testimony.[30]

Additionally, the Tower Commission Report pointed to efforts by those responsible for implementing the operation to insure that certain activities remained undocumented. For example, the Commission reported that "State Department notes of Secretary Shultz' contemporaneous report of a conversation he had with VADM Poindexter asked that Secretary Shultz's calendar not show the meeting [with the President on December 7]." (A-74) The government's failure to introduce any evidence concerning the methods utilized by the affected agencies and departments to record the activities involved in the

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[30]Moyer concluded his testimony with the admission that CIA records would reflect procurement activities only if its agents complied with federal record-keeping regulations. This, of course, supports the conclusion that procurement efforts by the "network of private individuals" who were managed by the NSC would not be recorded with the CIA even if such private individuals had some kind of connection with the CIA.

covert Iranian arms transfers again made it impossible for the jury to conclude beyond a reasonable doubt, on the basis of the skimpy absence of record evidence offered, that Durrani's activities were not part of the American operation.

If the insufficiency in the proof does not warrant dismissal of counts 1 and 2, then a new trial is required because of the court's erroneous refusal to permit the defendant's introduction of either the proffered summary by the Tower Commission or two of the North memoranda -- the one dated April 16, 1986, reporting the shortage, and the one dated September 8, 1986, reporting the location of missing parts -- contained in the Appendix to the Tower Commission Report. The court ruled that both the Report and the North memoranda were inadmissible hearsay. Specifically, the court determined that these documents "lacked sufficient indicia of trustworthiness so as to be admissible under either [F. Rules Ev.] Rule 803(8)(C) or Rule 803(24)." (A.98-104)

The court premised its conclusion that the Tower Report was untrustworthy on several factors: the two-year interval between some of the events and the investigation, the reported failures of recollection by major policymakers, the particular mandate of the Board not to resolve conflicts among recollections or to determine matters of criminal culpability, the limitations on the Board's ability to gather evidence, and the possible motivation of the underlying sources of information to mislead the Board.[31] Each of these factors was noted in the section of the Report defendant sought to introduce. Each went to

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[31]These are precisely the kinds of factors that made it fundamentally unfair to place the burden of producing evidence on the defendant. In effect, the court demanded that defense counsel be better able to produce evidence about a government operation than the government itself could produce.

the weight to be given to the document, not to its admissibility.[32]

The Board was careful to point out that its mandate was "to attempt to ascertain the essential facts" and, despite the limitations it spelled out, "the general outlines of the story" which it presented in the following pages were "clear." Each time the Board was unable to determine a certain fact, it explicitly stated so; when conflicting versions of an event existed, each was reported. The Board had access to a vast quantity of documents and over 80 witnesses. The Report also included a 300 page appendix consisting of a narrative of the information obtained from documents and interviews regarding the arms sales to Iran. As the Board itself stated, while the narrative is necessarily incomplete because certain key witnesses either refused to be interviewed or were unavailable and because certain documents located abroad had not been released, the available documentation provided a sufficient basis for the essential facts set forth in the Report. Surely the Board's findings about who was managing this operation for the government, how it was managed, and about how many unanswered questions remained were more reliable than the facts about the operation the government elicited through record-keepers Sneddon and Moyer. The court's preclusion of the report was improper and

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[32]Rule 803 (8) exempts from the general proscription against hearsay "reports" and "statements...,in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or ...(C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness." The proffered pages of the Tower Commission Report set forth the "activities" of the Special Review Board and "factual findings resulting from an investigation made pursuant to" Executive Order 12575. The court purported to rely on the Advisory Notes in excluding the report but ignored the advice that the rule "assumes admissibility in the first instance."

deprived defendant of the ability to present his defense and challenge the government's proof.

Likewise, the two North memoranda to Poindexter should have been admitted pursuant to F. Rule Ev., Rules 803(8)(A) and 803(24). These reports to Poindexter set forth "the activities of the" NSC during the implementation phase of the Iranian arms sale operation and thus came within Rule 803(8)(A). There was nothing before the court supporting its conclusion that North's "sources of information or other circumstances" rendered his reports about the missing parts untrustworthy. Significantly, to the extent any such circumstances existed -- with respect to either the North memos or the Tower Commission Report -- the government was certainly in the best position to produce the witnesses who could bring this to the attention of the jury.

Alternatively, the North memoranda were admissible under Rule 803 (24). In assessing admissibility under Rule 803(24), trusthworthiness must be balanced against need. See, e.g., United States v. Loalza-Jasquez, 735 F.2d 153, 157 (5th Cir. 1984). Any question the court had about the memos' trustworthiness was substantially outweighed by the defendant's need.

The memos were offered as evidence of the critical factual issue in the case: whether Durrani's activities were in connection with the government's arms deals with Iran. North's memos indicated that Durrani's activities dovetailed precisely with what North was saying and doing; this provided strong corroboration of Durrani's testimony. Given the secrecy surrounding the shipment of arms to Iran, North's invocation of his Fifth Amendment privilege, and the government's adamant opposition to defendant's subpoenae, North's statements to

Poindexter were more probative on this point than any other evidence Durrani could procure. Admitting the documents would have been consistent with the general purpose of the rules and interests of justice; it would have advanced the search for the truth. Under the peculiar circumstances of this case, it is a denial of due process -- to require Durrani to produce evidence that his activities fell within the statutory exception and then to deprive him of the means to do so.[33] See Gilmore v. Henderson, slip op. 4543, __F. 2d __ (2d Cir. July 31, 1987)(trial court's erroneous preclusion of defense witnesses who would have explained defendant's flight and the nature of his surrender deemed harmful where trial was essentially a credibility contest between defendant and government witness).

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[33]The proffered portion of the Tower Commission Report and the North memoranda were also admissible under F. Rule Ev. 801(d)(2)(D), as statements of government agents or servants "concerning a matter within the scope of his agency or employment, made during the existence of the relationship." The court's reliance on United States v. Santos, 372 F.2d 177 (2d Cir. 1967), a case involving the prior inconsistent statement of a government agent who witnessed the assault with which the defendant was charged, and who testified against the defendant but was not confronted with his prior inconsistent statement identifying a different perpetrator, is inapt.

POINT II

THE PROSECUTOR'S SUMMATION AND ERRORS IN THE CHARGE DEPRIVED DEFENDANT OF A FAIR TRIAL

Regardless of who had the burden of going forward, the government was obligated to prove beyond a reasonable doubt that defendant was not acting on behalf of an agency of the United States. United States v. Mayo, 705 F.2d 62, 75 (2d Cir. 1983). Yet the prosecutor's summation and the court's charge improperly suggested to the jury that the defendant had the burden of persuasion on the question of whether a license was required. Moreover, both erroneously advised the jury that the issue turned on defendant's credibility.

The prosecutor insisted that, in order to determine whether or not defendant's shipments were connected with the government's sales to Iran, the jury had to decide whether to believe the defendant:

> Take away Mr. Durrani's testimony...and there's no evidence whatsoever to support this claim. None. The only evidence that Mr. Durrani can provide that he had anything to do with the Government of the United States is out of his own mouth. And you have to decide... if you believe him. (T.4/2/87, 45; A.106)[34]

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[34]The argument was offensive not only because it suggested that defendant had to be believed in order to be acquitted, but because of the prosecutor's disingenuous statement that Durrani was able to produce no evidence supporting his claim. The prosecutor knew full well that the North memos corroborated defendant's testimony but she had successfully prevented the jury from seeing them. Similarly, knowing that the Tower Commission Report contained the memo by CIA director William Casey referred to in questions addressed to CIA record keeper Moyer, she led the jury to believe that no such document existed. (T.4/2/87, 95; A.115)

Furthermore, she asserted that in order to believe Durrani, the jury had to disbelieve each and every government witness:

(footnote continued)

Turning the government's burden to prove the case beyond a reasonable doubt on its head, she concluded:

> Do you believe him? Are you willing to trust without corroboration that testimony? Because in determining ... whether the Government has met its burden of proving the case beyond a reasonable doubt you can consider what he said. Consider the doubt. Consider the kind of doubt that can be created by a man who isn't corroborated and who has been shown to have lied and lied and lied...Is that the kind of man in whom you could base a reasonable doubt of on. Is that the kind of man on honestly you would want to base anything, the most important of your own affairs. (T. 4/2/87, 108; A.119)

This argument erroneously suggested to the jury both that defendant had the burden of creating doubt, and that the government could satisfy its burden of proof simply by convincing the jury that

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(footnote continued from previous page)

> And in deciding whether you believe him, you're going to have to come back to this testimony and look at it and throw the Government's whole case, the hard facts, the physical evidence, the testimony of all the Government's witnesses out the window. Because if Mr. Durrani is telling you the truth in his most recent statement from the witness stand, Mr. Doyle is lying, Mr. Spreeuwenberg is lying, Mr. Moosa is lying, the bank records are lying, Mr. Arruda is lying about the statement, C.I.A. is lying to you, the National Security Council is lying to you, Mr. Newbern is lying to you...(T.4/2/87, 45; A.106)

Of course, as defense counsel responded in his summation, the defendant's testimony about working for the government was not inconsistent with the government's case in chief, and, therefore, the jury could believe the defendant about this without disbelieving any of the government evidence listed by the prosecutor. This kind of argument by the prosecutor, so recently condemned by this Court, is itself grounds for reversal. United States v. Richter, __ F.2d __ (2d. Cir. Aug. 20, 1987), N.Y.L.J., Sept. 9, 1987.

the testimony of the defendant, that he was part of the government's arms sales effort, was not worthy of belief. This is inconsistent with the law of this Circuit. See United States v. Tyler, 785 F.2d. 66 (2d Cir. 1985).

The prosecutor's erroneous suggestion that it was the defendant who had the burden of persuading the jury that he was part of the government sales operation, rather than the government which had the burden of proving that he was not, was implicitly endorsed by the trial court. While the court charged that the government had the burden of negating the statutory exception beyond a reasonable doubt, other parts of the charge were inconsistent with this instruction.

After reciting the defendant's theories of the case -- that he "believed that it was not his responsibility to obtain the export licenses," that "Colonel North had advised him that no license was necessary," and that the shipments "were made for a department for official use by a department or agency of the United States Government" (T.4/2/87, 137) --the court charged:

> Now ...if you find and accept as true the evidence in support of these contentions and theories and believe the defendant's defense theory, and this belief leaves you with a reasonable doubt as to whether the Government has proved beyond a reasonable doubt each and every element of the crimes charged ..., then you must find the defendant not guilty ...(T.4/2/87, 137-138; emphasis added; A.148-49)

Contrary to the charge, the jury did not have to credit the defendant's testimony in order to find him not guilty. Reasonable doubt would exist and the jury should not convict if it was simply unsure whether it believed defendant's testimony. Similarly, because the burden was on the government to negate the applicability of the

statutory exception, the jury could completely disregard the testimony of the defendant and the evidence he presented and simply determine whether the government had met its burden.

This charge, like the prosecutor's summation, conveyed the impression that the defendant had the burden of presenting evidence that created a reasonable doubt. The charge reasonably could have been understood to require that defendant's evidence must be "true" or "believed" before there could be a reasonable doubt as to his guilt. "[A]n instruction that requires the defendant to prove that there is a reasonable doubt that he or she committed the crime unquestionably places a burden of persuasion... on the defendant, and hence runs afoul of" the constitutional principle of Due Process. Simmons v. Dalsheim, supra.[35] The charge together with the prosecutor's summation were plain error.

POINT III

THE COURT ERRONEOUSLY REFUSED TO CHARGE ALL THE ELEMENTS OF THE OFFENSE

The charge misstated the law. The statute excepts from the

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[35]The error in placing the burden of persuasion on the defendant was exacerbated by the charge's powerful suggestion that defendant was not worthy of belief and that his admittedly false exculpatory statement upon arrest could establish his guilt:

> Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement th[at] tends to establish the person's innocence...(T.4/2/87, 120-21)

The suggestion that the false exculpatory statement alone could establish defendant's guilt was error. United States v. Gaviria, 740 F.2d 174 (2d Cir. 1984).

license requirement two types of exports: those made by or for an agency of the United States Government:

> (A) for official use by a department or agency of the United States Government, or
>
> (B) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means. 22 U.S.C. section 2778 (b)(2)

While the arms shipments to Iran by the United States clearly involved a sale to that country (presumably authorized by law and subject to the control of the President), inexplicably, the court refused to consider that portion of the statutory exception dealing with foreign military sales. Instead, over objection, it charged only that the government must prove that the defense articles were not "exported on behalf of a department of agency of the United States Government for their official use." (T.4/2/87, 128, 132, 143)

If there was any reason to make a choice as to which of the statutory exceptions was raised by the defendant's testimony, it was subsection (B) rather than subsection (A). Since there was no evidence that the Hawk missile parts were to be used abroad by a department or agency of the United States, the court in effect reduced the statutory exception to a nullity.

POINT IV

THE COURT ERRONEOUSLY FAILED TO FULLY CHARGE DEFENDANT'S THEORY OF THE CASE

The court erred in not fully charging on the defendant's theory of the case. Durrani testified that without anything explicitly stated by Pires in the early stages of their association, he deduced based on his knowledge of Pires' connection with Secord, Pires' status

as one of two individuals legally permitted to export arms out of Portugal and the United States shipment of arms to Iran through Portugal, that Pires was associated with the American venture. Durrani stated at trial that he believed that Pires was arranging with the Jordanian embassy to obtain export licenses. Durrani also testified to his familiarity with export laws and regulations. The belief that, as part of the covert American operation, Pires was going to be obtaining false licenses was not inconsistent with the belief of one knowledgable of the law that, in fact, no licenses were even required because the export was part of the government's sales program.

Therefore, defendant requested the court to charge, as part of his theory of the case, that even if the government was not involved with the shipments, the jury should acquit if defendant reasonably believed the government was involved. (A.160-61; A.167; A.172-73) The court's refusal to do so is reversible error.

This court has repeatedly recognized that a "°criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be.'" United States v. Pedroza, 750 F.2d 187, 205 (2d Cir. 1984), (quoting United States v. O'Connor, 237 F.2d 466, 474 n.8 (2d Cir. 1956); United States v. Durham, Nos. 86-1394, 86-1395, slip op. at 4697-4701 (2d Cir. Aug. 5, 1987).

While Durrani did not specifically testify that he believed licenses were not required for the first shipment, his stated belief that Pires was purchasing the parts on behalf of the government for sale to Iran and his knowledge of the export licensing regulations was evidence from which the jury could infer his belief that a license was

not, in fact, required. The trial court improperly assumed that a defense theory must be predicated on the express testimony of the defendant. This, of course, is nonsense since that would suggest that a defendant is never entitled to a charge on his theory of the case unless he takes the stand and clearly articulates his theory for the jury. Defense counsel can extrapolate a defense theory from all the evidence. So long as it is supported, a charge on it is required.[36]

POINT V

THE COURT ERRED IN ADMITTING HEARSAY EVIDENCE THAT THE PURCHASED PARTS WERE ON THE U.S. MUNITIONS LIST

The government had to prove that the items Durrani purchased from Radio Research and either exported or prepared for export were on the United States Munitions List. The Munitions List does not contain particularized items, but rather broad categories of parts. The pertinent category here, Category IV, includes missile systems and "all specifically designed or modified components, parts, accessories, attachments, and associated equipment" for such systems. 22 C.F.R. Section 121.1

The government offered the testimony of Billy Boland of Redstone Arsenal and Brenda Carnahan of the Department of State's Office of Munitions Control to prove that the items purchased by Durrani from Radio Research were "specifically designed or modified...parts" of the Hawk missile system. While Boland, an

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[36]As in the recently decided Durham case, neither the general instructions on specific intent nor the defense summation sufficed to inform the jury that Durrani's reasonable belief that a license was not required because the export was on behalf of a United States agency would be a valid legal defense.

electronic technician equipment specialist at the Hawk Project Office, testified on direct that a number of the parts were "specifically designed" for the Hawk system, on cross, he clarified that he was not involved in the manufacturing process and did not know if, in fact, any of the parts were used in other pieces of equipment. At most, he could say that the item met the Hawk's specifications. Boland's testimony standing alone, then, was insufficient to prove that the exported parts were on the Munitions List and, therefore, required a license.

To bolster his testimony, the government introduced the patently hearsay testimony of Carnahan that, based on her telephone conversation with an engineer at Redstone Arsenal, she determined, at the request of the case agent, that each of the items was on the Munitions List. (The government also introduced, over objection, an unsworn statement of William Robinson of the Department of State, certifying that the items involved in the so-called "similar act" purchase from Imperial Tool, see n.16, were also on the Munitions List. (GX 224; T. 4/1/87, 99-104, 209)).

Carnahan's testimony (as well as the State Department certification) was inadmissible hearsay. Carnahan's determination that the items were on the Munitions List was based entirely on the statements of an individual whom Durrani had no opportunity to confront. The State Department imprimatur was inevitably considered by the jury in resolving the contested factual issue of whether the parts were, indeed, specifically designed for the Hawk system. Since guilt on each count of the indictment depended on the finding that the parts were on the Munitions List, each count must be reversed.

POINT VI

THE DEFENDANT'S MOTION TO REQUIRE THE RANDOM SELECTION OF THE JUDGE SHOULD HAVE BEEN GRANTED

On February 4, 1987, the defendant, pursuant to 28 U.S.C. §§144 and 455, moved to disqualify Chief Judge T.F. Gilroy Daly. The motion asserted that the random assignment procedures used were deliberately subverted by the government, "apparently allowing the government and the Chief Judge in concert to assign him to this case." (A.175-76) The motion also questioned Judge Daly's impartiality.[37]

On February 24, 1987 Chief Judge Daly denied the motion upon the ground it was untimely and that it was not accompanied by a certificate of good faith by counsel.[38] (A.191-93) No response was made to the allegations that the random selection process was intentionally subverted. On March 6, 1987 the defendant submitted a motion for "reconsideration and articulation" which incorporated a certificate of good faith and requested the court address the defendant's contentions that the case was not assigned randomly despite

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[37]An affidavit by counsel outlined the AUSA request to the Magistrate that this case not be sent to the clerk for random assignment but rather be assigned to the Chief Judge for "special assignment." The magistrate granted the government's request for "referral in the first place to the Chief Judge for scrutiny and decision as to assignment." The affidavit also described events from which it could be inferred that the Chief Judge and the United States Attorney had ex parte communications about this case. (A.178-82) An affidavit by the defendant outlined the facts he believed showed that the court was biased and prejudiced against him or his case. (A.184-89)

[38]As to the allegations of ex parte communications the court wrote, inscrutably "Communications between the Chief Judge and the Supervising Assistant United States Attorney in the same seat of court as that judge, and the position of the judge with regard to the defendant's bail, are insufficient as a matter of law to support a motion to disqualify." (A.193)

the Local Rules. (A.194-97) That request was never acted upon by the court.

The importance of the random system of assignment of judges in criminal cases was recently addressed by the Ninth Circuit in a trilogy of cases. See Cruz v. Abbate, 812 F.2d 571 (9th Cir. 1987); See also In re Matter of Yagman, 796 F.2d 1165, 1178 (9th Cir. 1986); United States v. Flynt, 765 F.2d 1352, 1355 n.2 (9th Cir. 1985). As the Court wrote in Cruz, a mandamus challenge to the non-random selection procedure of the Guam Superior Court:

> We must take great pains to avoid any inference that assignments are being made for an improper purpose, particularly where criminal cases are concerned. Cf. United States v. Flynt, 756 F.2d 1352, 1355 n.2 (9th Cir. 1985) (assignment of order to show cause should have been made in a manner that avoided appearance of arbitrariness and unfairness). The suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow, touching the entire criminal justice system in the local courts of Guam. Such charges, to the extent they are being raised, must not remain unexamined and unanswered.

812 F.2d at 574.

Here defendant charged that the assignment was made for improper purposes but his contention remains unexamined and unanswered. The trial record is consistent with Durrani's fear that Judge Daly was predisposed against him. From his earliest rulings on the government's motions to quash the defendant's subpoenae, Judge Daly cast aspersions on the defendant's veracity. As this brief demonstrates, as the case progressed, legal and evidentiary rulings were made that seemed premised on the court's assumption that defendant was not telling the truth. Numerous obstacles were placed in Durrani's path making it

virtually impossible for him to substantiate his version of events. At the same time the government's way was smoothed by rulings that significantly lightened its trial burdens. In his charge, Judge Daly joined the prosecutor in conveying to the jury that its determination of defendant's guilt or innocence turned on the question of defendant's credibility. And finally, in a case riddled with unanswered questions, the Judge imposed an extravagant ten year and two million dollar sentence.

The Ninth Circuit in Cruz observed:

> The selection of a judge to preside at a criminal trial is a matter of considerable significance to the criminal defendant. The judge to whom the case is assigned has occasion to set or modify the amount of bail, make numerous discretionary decisions during the trial and determine the severity of punishment after conviction. Id.

Here, Durrani was profoundly affected by so many of the judge's decisions. If Chief Judge Daly assigned the case to himself for impermissible reasons it undermines the objectivity and fairness of the whole criminal justice system and destroys the appearance of impartiality. As the Supreme Court has noted "justice must satisfy the appearance of justice." Aetna Life Insurance Co. v. Lavore, 106 S.Ct. 1580, 1587 (1986).

The case should be remanded to another judge for a determination as to how the case was assigned to Chief Judge Daly. If the assignment was not in conformity with the controlling random selection system, the conviction should be reversed.

CONCLUSION

For the reasons stated in Point I, the convictions on counts 1 and 2 should be reversed and the counts dismissed; dismissal of these counts require a retrial or at the least resentencing on count 3. For reasons stated in Points I through V, the conviction on all counts should be reversed and a new trial ordered. For the reasons stated in Point VI the matter should be remanded for a hearing.

Respectfully submitted,

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