

1 DENNIS JACOBS, Chief Judge, concurring in part and
2 dissenting in part:

3 I concur as to the affirmance of the convictions of
4 David Williams, Onta Williams, and Laguerre Payen, and I
5 concur in the majority's rejection of any argument premised
6 on outrageous government misconduct, and its rejection of
7 other defense arguments. I respectfully dissent in part
8 because James Cromitie was entrapped as a matter of law.
9

10 **I**

11 As to entrapment, it is common ground on this panel
12 that the government induced Cromitie to commit the terrorist
13 crimes charged, and that it became the government's burden
14 to prove beyond a reasonable doubt that Cromitie was
15 "predisposed" to commit them. See United States v. Bala,
16 236 F.3d 87, 94 (2d Cir. 2000) ("[If] a defendant presents
17 credible evidence of government inducement, then the
18 prosecutor must show predisposition beyond a reasonable
19 doubt."). The government had to do that by proving any of
20 three things: "(1) an existing course of criminal conduct
21 similar to the crime for which the defendant is charged, (2)
22 an already formed design on the part of the accused to
23 commit the crime for which he is charged, or (3) a

1 willingness to commit the crime for which he is charged as
2 evidenced by the accused's ready response to the
3 inducement." United States v. Brunshtein, 344 F.3d 91,
4 101-02 (2d Cir. 2003) (internal quotation marks and
5 alteration omitted). Since Cromitie had no similar criminal
6 background, and since the government informant enlisted him
7 only after a dogged and year-long campaign of nagging,
8 pursuit, and temptation (with money, a business, and a
9 Mercedes-Benz), this panel is in agreement that the
10 government had to prove an "already formed design."

11 In my view, there was no evidence of an "already formed
12 design." At the outset, Cromitie told of wanting to "do
13 something to America" and "die like a martyr," but this big
14 talk does not amount to a design--to *do* what?--never mind
15 one that was "already formed." The design here was entirely
16 formed by the government, and fed to Cromitie. He liked it,
17 but he didn't form it.

18 19 II

20 The term "already formed design" is defined away by the
21 majority: it is "only a rather generalized idea or intent to
22 inflict harm on" the interests of the United States. Maj.
23 Op. at 25. That definition of the term is more its converse

1 because an idea or intent does not amount to a design, and
2 one that is "generalized" is unformed; the "generalized
3 idea" of an act is not a disposition to do it; and
4 entrapment is the very process of mobilizing a generalized
5 idea that otherwise would remain an idle thought. Thus the
6 majority opinion renders entrapment untenable as a defense.
7 Unsurprisingly, the majority's definition is incompatible
8 with precedent.

9 "Formed design" is one of the three ways that the
10 government may prove predisposition, as set out in United
11 States v. Becker, 62 F.2d 1007, 1008 (2d Cir. 1933) (Hand,
12 J.): "an existing course of similar criminal conduct; the
13 accused's already formed design to commit the crime or
14 similar crimes; [and] his willingness to do so, as evidenced
15 by ready complaisance." Id. at 1008. The same short
16 catalog was repeated in somewhat different words in United
17 States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952) (Hand,
18 J.): "The proof of [predisposition] may be by evidence of
19 his past offences, of his *preparation*, even of his ready
20 compliance."¹ Id. (emphasis added) (internal quotation

¹ As the majority points out, Sherman used the word "prepared" as well as the word "preparation"; the majority argues that (given the common root of the words) Judge Hand meant "prepared" in the same sense as he meant "preparation" a few lines later. The two words are used in different senses, to suit distinct contexts. The first, as the

1 marks omitted). So an "already formed design" is one
2 sufficiently advanced that (before government solicitation)
3 the defendant had already "prepar[ed]" to do the crime.
4 Entertaining a "generalized idea" of a crime is several
5 critical steps removed from preparing to commit it. A
6 design that is "already formed" has taken shape, and assumed
7 parameters even if particulars remain open. A design
8 already formed is not (as here) inchoate, undirected, and
9 open to suggestion and revision in every respect.

10 The term "already formed design" takes meaning from its
11 company, appearing in a series of three related ways to show
12 predisposition: commission of the offense in the past, the
13 ready willingness to do it then and there, or a formed
14 design, which looks to the future. Existence of a formed
15 design matters only if it cannot be shown that the defendant
16 had already done analogous acts or had given ready assent.
17 The three can operate as alternatives only if they are
18 understood to be of comparable predictive force. There is

majority explains, conveys "the sense of being ready to commit the offense once the opportunity is presented," Maj. Op. 26-27, which bears on whether Cromitie was "ready and willing"; but *proof* of being "ready and willing" requires a showing (beyond a reasonable doubt) of similar prior acts, quick acceptance, or "preparation" in the sense of an "already formed design." The majority opinion thus conflates predisposition ("ready and willing") with a way of proving predisposition (an "already formed design").

1 great predictive force in a showing of past criminal acts
2 along the same lines. Similarly, a ready acceptance
3 bespeaks a complete absence of qualm or inhibition, and
4 likewise shows that the defendant's will and disposition did
5 not run counter to the act and did not need to be overcome.

6 The predictive force of a formed design is sufficient
7 on its own only if a course of conduct is already so well
8 advanced in the defendant's mind that one can be sure
9 (beyond a reasonable doubt) it was not planted by an agent
10 provocateur. Perhaps this is why we have never before found
11 sufficient evidence to prove that the accused had an already
12 formed design without there also being sufficient evidence
13 of a relevant criminal history or of ready assent to the
14 government's proposal. Cf., e.g., United States v.
15 Valencia, 645 F.2d 1158, 1167 (2d Cir. 1980) ("All of this
16 evidence [of the defendants' prior criminal conduct] could
17 support a jury finding either that the [defendants] had been
18 engaged in a similar 'course of criminal conduct,' or had
19 already formed the design to sell cocaine and were merely
20 looking for a buyer.").

21 It therefore is not enough to infer a formed design to
22 commit an act of terror from a sense of grievance or an
23 impulse to lash out. These disquiets are common, and in
24 most people will never combust.

1 refers back to Cromitie's state of mind prior to the
2 inducement. But it proves nothing about any "design"
3 Cromitie might have had; it might perhaps bear on whether
4 there was inducement, except that it is common ground that
5 inducement was offered.

6 The majority opinion relies heavily and passim on post-
7 inducement acts and statements that do not reflect the
8 defendant's state of mind *before* the initial inducement, and
9 therefore do not bear on predisposition. See Jacobson, 503
10 U.S. at 551-52. Cromitie did what he was induced to do, and
11 seemed happy doing it, but that cannot suffice; otherwise
12 the induced act would always evidence the predisposition to
13 do it. All of Cromitie's statements listed in the
14 majority's opinion, Maj. Op. 39-40, regarding specifics of
15 the attack--such as targets--were made in direct response to
16 Hussain's badgering Cromitie to form a design or make a
17 plan. For example, Cromitie's statement about "hit[ting]
18 the bridge" was a direct response to Hussain's asking
19 "[w]hat is the, what, I mean, in your mind, were your best
20 targets here? In New York?" And Cromitie's statement about
21 "get[ting] a synagogue" occurred later in that same
22 conversation and context. These statements, which occurred
23 months after the first meeting in June 2008, cannot be used
24 to prove predisposition under Jacobson. Hussain's

1 industrious labor to convince Cromitie to join a terrorist
2 plot--including Hussain's exploitation of Cromitie's "love"
3 of and respect for Hussain and Hussain's offers of large
4 sums of money to the impoverished Cromitie--colors these
5 statements, along with many others cited by the majority³;
6 they show the government's successful inducement, not
7 Cromitie's predisposition.

8 No reasonable jury weighing only the evidence of
9 predisposition admissible under Jacobson could conclude that
10 Cromitie had an "already formed design" to commit an act of
11 terror. Wanting to "die like a martyr" and "do something to
12 America" is not a formed design, and certainly not
13 "preparation," Sherman, 200 F.2d at 882. These are wishes,
14 not designs. One amounts to no more than the boastful piety
15 of a foolish man; the other could be banter in any faculty
16 lounge.

17 It is clear that Cromitie in his unmolested state of
18 grievance would (for all the evidence shows, and as the
19 district court found) have continued to stew in his rage and

³ For instance, Cromitie's statement regarding Allah giving him his "own will," and "if I'm doing something, it's because I wanted to do that for so long," Maj. Op. 40-41, were made during a long conversation in February 2009, months after Hussain's concerted inducement had begun. During that same conversation, Hussain pushed Cromitie to scout targets and recruit other members from the mosque.

1 ignorance indefinitely, and had no formed design about what
2 to do. The government agent supplied a design and gave it
3 form, so that the agent rather than the defendant inspired
4 the crime, provoked it, planned it, financed it, equipped
5 it, and furnished the time and targets. He had to, because
6 Cromitie was comically incompetent, possibly the last
7 candidate one would pick as the agent of a conspiracy.⁴
8 There simply was no evidence of predisposition under our
9 settled definition of that term.

10 I would therefore reverse Cromitie's conviction as the
11 product of entrapment. At the same time, I agree with the
12 majority that the other defendants were not entrapped, and I
13 therefore concur in the affirmance of their convictions.⁵

⁴ En route to the terror site, the government agent directed Cromitie to assemble the bombs; but he couldn't figure it out, and had to be shown how to do it. At the site, the government agent directed him to hide the bombs in the trunk of the car; but he couldn't get the trunk open, so he put them in the back seat. The government agent then directed him to arm the bombs, but as they drove away from the supposed car-bomb parked in front of the synagogue, Cromitie exclaimed "holy s***, I forgot to turn it on."

The majority opinion argues that competence is not a consideration in the entrapment defense. I agree, up to a point; but Cromitie's bumbling compelled the exasperated government agent to treat him as a puppet. Certainly, it shows how little danger Cromitie posed to the community.

⁵ As the majority points out, the district court has conscientiously demonstrated with telling circumstantial evidence that each defendant (other than Cromitie) readily responded to Cromitie's offer to join the plot. I would affirm based on the district court's reasoning.