

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HARSHAD SHAH, Defendant-Appellant.	No. 17-50383 D.C. No. 8:10-cr-00070-CJC-1 MEMORANDUM* (Filed Apr. 15, 2019)
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Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted February 4, 2019
Pasadena, California

Before: WARDLAW and BEA, Circuit Judges, and
DRAIN,** District Judge.

Defendant Dr. Harshad Shah was accused of bribing an IRS official who was conducting a civil audit of his personal and business tax filings. A jury found Dr. Shah guilty, and he was sentenced to 53 months of imprisonment. Because the parties are familiar with the facts of the case, we recount them only as necessary

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

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to explain our decision. Dr. Shah raises eleven distinct challenges to his conviction and sentence. We address each in turn.

I.

Dr. Shah first argues that it was structural error for the Government to have elicited racist testimony from Revenue Agent (“RA”) Raghaven that people of Indian descent are predisposed to commit bribery. Dr. Shah concedes that because he did not object to RA Raghaven’s allegedly racist statements at trial, plain error review applies.

Contrary to Dr. Shah’s characterization, RA Raghaven’s testimony was *not* the sort of racist predisposition testimony that the Supreme Court denounced in *Buck v. Davis*, 137 S. Ct. 759, 776–77 (2017). Testimony regarding RA Raghaven’s interpretation of Dr. Shah’s statements, using his numerous incongruous references to India as context, is *not* in the same category as testimony that a criminal defendant is predisposed to commit violence because of his race. There was no structural error.

II.

Dr. Shah next challenges a number of statements that the Government elicited from witnesses at trial, or made during closing argument, characterizing them as “materially false and/or misleading.” Because he did not object to any of the statements at trial, we review

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for plain error. *United States v. Olano*, 507 U.S. 725, 732–36 (1993). None of the challenged statements rises to the level of being materially false or misleading. And in any case, Dr. Shah has failed to show that he was prejudiced by any of them.

III.

Dr. Shah challenges the Government’s description during closing argument of the recorded conversations between RA Ham and Dr. Shah as being “dispositive” of the bribery charge. Because Dr. Shah did not object at trial, we review for plain error. *United States v. Brown*, 327 F.3d 867, 871 (9th Cir. 2003).

Dr. Shah raised an entrapment defense at trial, which placed the burden on the Government “to prove beyond a reasonable doubt that the defendant committed the crime not as a result of having been induced by the government but as a result of his predisposition to do so.” *United States v. Barry*, 814 F.2d 1400, 1402 (9th Cir. 1987). To overcome the defense, the Government needed to prove *either* that Dr. Shah was predisposed to commit the crime, *or* that he was not induced to do so. *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995). Dr. Shah argues that the recordings were not dispositive of predisposition because they took place *after* law enforcement became involved in the investigation. But we have held that evidence obtained after law enforcement involvement can be used to prove that the defendant was predisposed to commit a crime *before* such involvement. See *Jacobson v. United*

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States, 503 U.S. 540, 550–53 (1992). In any case, there was no prejudice because the jury could have found that the recordings were dispositive of *a lack of inducement* by law enforcement.

IV.

Dr. Shah next argues that the district court erred by offering a legally deficient answer to the jury’s question about what evidence it could consider in evaluating Dr. Shah’s predisposition to commit bribery. The district court consulted with Dr. Shah’s counsel before responding to that question during trial, and Dr. Shah’s counsel agreed that the district court’s proposed response was “correct as a matter of law.” Dr. Shah therefore waived his right to challenge the district court’s response to the jury note. *Cf. United States v. Cain*, 130 F.3d 381, 383–84 (9th Cir. 1997) (holding that a criminal defendant waived his right to appeal a jury instruction because his attorney agreed at trial that the instruction was legally correct).

V.

Dr. Shah challenges the district court’s denial of his motion for acquittal, arguing that there was insufficient evidence of predisposition to support his conviction. We review challenges to the denial of a motion for acquittal *de novo*, examining the ruling in the light most favorable to the prosecution, and asking whether any rational jury could have found the essential

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elements beyond a reasonable doubt. *United States v. Johnson*, 357 F.3d 980, 983 (9th Cir. 2004).

Dr. Shah's argument lacks merit because the evidence, viewed in the light most favorable to the prosecution, showed overwhelmingly that Dr. Shah was predisposed to commit bribery.

VI.

Dr. Shah challenges the district court's denial of his motion to dismiss for outrageous government conduct based on the district court's failure to hold an evidentiary hearing, and its failure to consider all of the relevant facts. We review the district court's denial of a motion to dismiss *de novo*, but accept the district court's factual findings unless they are clearly erroneous. *United States v. Ziskin*, 360 F.3d 934, 942 (9th Cir. 2003). We normally review a district court's failure to hold an evidentiary hearing on a motion for [sic] dismiss for abuse of discretion, *United States v. Hagege*, 437 F.3d 943, 951 (9th Cir. 2006), but because Dr. Shah never requested such an evidentiary hearing, we will reverse the district court only upon a showing of plain error. *United States v. Plascencia-Orozco*, 852 F.3d 910, 916 (9th Cir. 2017).

With respect to the evidentiary hearing, Dr. Shah cannot satisfy the plain error standard because he has not shown that the failure to hold an evidentiary hearing at the motion to dismiss stage prejudiced him in any way. As to his argument that the district court's decision was wrong on the merits, we find that the

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Government's conduct in the instant case (telling a taxpayer that he owes a substantial amount of back taxes, and then surreptitiously recording him to see if he offers a bribe to his IRS auditor) is far less outrageous than other cases—including *United States v. Black*, 733 F.3d 294, 300 (9th Cir. 2013), upon which Dr. Shah relies—where the Ninth Circuit has denied motions to dismiss for outrageous government conduct. *See also, e.g., United States v. Simpson*, 813 F.2d 1462, 1466 (9th Cir. 1987) (finding no outrageous government conduct where the FBI employed a prostitute to have sex with a suspected drug dealer to entice him into selling heroin to an undercover agent).

VII.

Dr. Shah next argues that the district court judge was biased against him because Dr. Shah lied to the judge at a status hearing in July, 2015. But Dr. Shah has waived any such argument. After the status hearing—despite having full knowledge of the circumstances that he now claims caused the judge to be biased against him—Dr. Shah affirmatively declined an opportunity to have the case transferred to a new judge.

VIII.

Dr. Shah argues that the district court erred in failing to hold an evidentiary hearing at the motion to suppress stage. This argument is also waived. Before the suppression hearing, the district court specifically

asked Dr. Shah’s counsel if he wanted to call any witnesses in support of his motion (i.e., to conduct an evidentiary hearing), and Dr. Shah’s counsel confirmed that he *did not*. Dr. Shah cannot now argue that it was error for the district court not to have forced him to call witnesses in support of his motion to suppress. *See United States v. Lindsey*, 634 F.3d 541, 555 (9th Cir. 2011) (where a defendant intentionally relinquishes a known right, he waives his ability to appeal an alleged deprivation of that right); *see also United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (errors induced or caused by the defendant are unreviewable on appeal).

IX.

Dr. Shah next argues that the district court erred by ignoring his sentencing entrapment argument. A challenge to the district court’s denial of a downward departure based on Dr. Shah’s assertion of sentencing entrapment is an argument that the district court misapplied the Sentencing Guidelines, which we review for an abuse of discretion. *See United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013).

We find that the district court did not ignore Dr. Shah’s sentencing entrapment argument, nor did it abuse its discretion at sentencing. The district court denied a downward departure based on sentencing entrapment after it concluded that there was sufficient evidence to find Dr. Shah was not induced to commit bribery.

X.

Dr. Shah next argues that the district court erred in denying his motion to strike the Pre-Sentencing Report (“PSR”), and in subsequently relying on the PSR at sentencing. We review the district court’s “factual findings for clear error,” and its “application of the Sentencing Guidelines to the facts of a given case [for] abuse of discretion.” *United States v. Brown*, 879 F.3d 1043, 1047 (9th Cir. 2018).

Dr. Shah accuses the district court of not “meaningfully address[ing] the specific and numerous infirmities discussed in Dr. Shah’s Motion to Strike” at sentencing. As the district court noted, however, Dr. Shah does not point to anything specific in the PSR that is misleading or one-sided. To the extent Dr. Shah complains that certain information was not included in the PSR, this was caused by Dr. Shah’s failure to participate in the PSR drafting process with the Probation Office.

Dr. Shah also complains that the district court judge ignored mitigating factors at sentencing. Dr. Shah similarly fails to point to any specific mitigating factors that the district court failed to consider. On the contrary, the evidence suggests that the district court reasonably calculated the Sentencing Guidelines range, rejected certain enhancements recommended by the Government; properly noted mitigating factors, such as Dr. Shah’s community engagement and his lack of a criminal record; and imposed a sentence of 53 months—which was on the low-end of the Guidelines

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range and less than half of the Government’s recommended sentence.

XI.

Dr. Shah finally argues that the “cumulative effect” of the district court’s alleged errors warrants relief from his conviction and sentence. For the reasons discussed above, all of Dr. Shah’s arguments lack merit. Dr. Shah’s cumulative error theory therefore does not warrant reversal. *See United States v. Fernandez*, 388 F.3d 1199, 1256–57 (9th Cir. 2004) (explaining that the cumulative-error doctrine is “inapplicable” absent proof of the underlying claimed errors).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HARSHAD SHAH, Defendant-Appellant.	No. 17-50383 D.C. No. 8:10-cr-00070-CJC-1 Central District of California, Santa Ana ORDER (Filed Jun. 11, 2019)
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Before: WARDLAW and BEA, Circuit Judges, and DRAIN,* District Judge.

Judges Wardlaw and Bea have voted to deny the petition for rehearing en banc, and Judge Drain has recommended denial. The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is therefore **DENIED** (ECF No. 37). No further petitions for rehearing will be accepted in this case.

* The Honorable Gershwin A. Drain, United States District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - TRIAL

Case No. SACR 10-00070-CJC-1 Date July 17, 2015
Present: CORMAC J. CARNEY, UNITED
The Honorable STATES DISTRICT JUDGE
Interpreter None

<u>Melissa Kunig</u>	<u>Debbie Hino-Spaan;</u> <u>Debbie Gale; Sharon Seffens</u>
<u>Deputy Clerk</u>	<u>Court Reporter/Recorder</u>

<u>Jennifer Waier</u>	
<u>Assistant U.S. Attorney</u>	

U.S.A. v. Defendant(s): Present Cust. Bond
Harshad Shan X X

Attorneys for Defendants: Present App. Ret.
Michael Severo X X
Daniel Layton X X
Joseph Wilson X X

____ Day COURT TRIAL 4th Day JURY TRIAL
____ Death Penalty Phase

____ One day trial; ____ Begun (1st day);
____ X Held & continued; ____ Completed by jury
verdict/submitted to court.

____ The Jury is impaneled and sworn.

____ Opening statements made _____

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- Witnesses called, sworn and testified.
- Exhibits identified Exhibits admitted
- Government rests. Defendant(s) _____ rest.
- Motion for mistrial by _____ is
____ granted denied submitted
- Motion for judgment of acquittal (FRCrP 29) is
____ granted denied submitted
- Closing arguments made Court instructs
jury Bailiff sworn
- Alternates excused Jury retires to deliberate
____ Jury resumes deliberations
- Finding by Court as follows: Jury Verdict
as follows:
 - Dft # Guilty on count(s) Not Guilty on
count(s)
 - Jury polled Polling waived
- Filed Witness & Exhibit lists Filed Jury
notes Filed Jury Instructions Filed
Jury Verdict
- Dft # Referred to Probation Office for Inves-
tigation & Report and continued to _____
for sentencing.
- Dft # remanded to custody. Remand/
Release# issd. Dft # released
from custody.
- Bond exonerated as to Dft # _____
- Case continued to _____ for further trial/
further jury deliberation.

The Court and counsel discuss Jury Notes #1 and 2; The jury is unable to reach a unanimous verdict and the Court declares a mistrial. The Court sets a status conference for August 10, 2015 at 11:00 a.m. The Court takes an oral waiver from defendant regarding his right to a speedy trial. The Court modifies the defendant's pretrial release to remove the condition of home detention and electronic monitoring effective immediately.

X Other:

cc: PSA Initials of Deputy Clerk 3 / 44 : mku

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA -
SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY,
U.S. DISTRICT JUDGE**

UNITED STATES)
OF AMERICA,)
Plaintiff,) **CERTIFIED**
vs.) Case No.
HARSHAD SHAH,) 8:10-cr-00070-CJC-1
Defendant.)

)

REPORTER'S TRANSCRIPT
OF JURY TRIAL – DAY 1
TUESDAY, OCTOBER 25, 2016
8:20 A.M.
SANTA ANA, CALIFORNIA

**DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
411 WEST FOURTH STREET, ROOM 1-191
SANTA ANA, CALIFORNIA 92701-4516
dhinospaan@yahoo.com**

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[95] [. . .] No change. Well, that was a lie. As we saw, the corporate audit was barely under way. There was no decision on what the audit was going to be.

During the conversation, remember we talked about this opening, he determines that Revenue Agent Raghaven is of Indian descent, and he starts talking to her in Hindi. You're going to hear from her that's never happened to her before. And he says to her, "We are brother and sister from the same country. Make this audit go away."

She's going to tell you that she, from her experience, felt that that was a bribe offering. And it put her in a state of shock. And she said to him, "This doesn't happen in America," and told him, "We have to go through with the audit." She then hangs up the phone, and she's going to tell you she was in a state of shock, this has never happened to her before. And she found out somehow that Revenue Agent Ham had the corporate, told him what happened. She then told the supervisor that was there at the time, Gloria Witherspoon, what had happened, and the personal audit was reasigned. So she gave away that file that very day.

Again, the evidence will show Dr. Shah found an opening and was trying to exploit it because he doesn't want to pay his taxes.

So now we have Revenue Agent Ham, he's got both the corporate and the personal. [. . .]

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA -
SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY,
U.S. DISTRICT JUDGE

UNITED STATES)
OF AMERICA,)
Plaintiff,) **CERTIFIED**
vs.) Case No.
HARSHAD SHAH,) 8:10-cr-00070-CJC-1
Defendant.)

)

REPORTER'S TRANSCRIPT
OF JURY TRIAL - DAY 1
TUESDAY, OCTOBER 25, 2016
8:20 A.M.
SANTA ANA, CALIFORNIA

DEBBIE HINO-SPAAN, CSR 7953, CRR
FEDERAL OFFICIAL COURT REPORTER
411 WEST FOURTH STREET, ROOM 1-191
SANTA ANA, CALIFORNIA 92701-4516
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* * *

[126] [. . .] After two days he answered the phone. And he said that – I explained myself I'm [sic] IRS agent, and I explained to him the taxpayer rights, Publication

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1 and Notice 609. And I explain the audit procedure what is going to happen. I stopped at that. Then he –

Q Then what happened next?

A After that he had small talk. We were talking about the tax return and the audit and everything, then he asked me with my last name whether I am from India. I said, "Yes, I am from India." Then he switched over – then he switched over to talk to me in Hindi, but I was continuing to talk to him in English.

Then he said that, "Oh, there are so many things that is going on in the world and you are also from India, I'm also from India. Both of us are brother and sister. Make this audit go away."

Q How did you take that?

A Well, where I come from, I'm from India, there are a lot of corruption and bribery goes on, I assume he's asking me to make it go away and offer me a bribe. That's what I was thinking.

Q So what did you do next?

A I continued to pretend as if I didn't hear anything about that. I said, "So we are in America. We have to – I have to do the audit," that's what I said, "and then we have to schedule an appointment." That's what I told him.

* * *

[133] A Yeah.

Q I want to talk to you a little bit about your call with Dr. Shah.

A Sure.

Q You spoke with Dr. Shah in June of 2009; correct?

A Yes.

Q You testified on direct examination that he said something during your call that you interpreted as a bribe or a bribe overture?

A Yes.

Q There was no mention of money during your call; right?

A There was no mention of money, but he said – okay, go ahead.

Q I'm sorry, I didn't mean to cut you off, but the question was –

A Yeah, there was no mention of money.

Q There was no mention of money. There was no offer; right?

A No.

Q He never said, "I'll give you 'X' in exchange for 'Y'?"

A No.

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Q There was no mention of a job?

A No.

Q I think you testified on direct examination that you made an assumption; right?

[134] A Yes.

Q And the assumption that you made was that because where you come from in India, these kinds of things happen?

A Yes.

Q And therefore, you assumed that what Dr. Shah was doing wasn't appropriate; right?

A Yes.

Q And again, India is – well, let me back up. So just to be clear, there was no offer on the call; right?

A No.

Q There was no mention of money?

A No.

Q There was no mention of any exchange?

A No.

Q But you made an assumption about Dr. Shah's motives because he's ethnically from India; right?

A In India that's what happens, so that's what I thought that he's offering. He is asking me to make the audit go away, so I assume that's what he's offering.

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He's asking me to make this offer go – audit go away, and that's the bribe he's offering.

Q So my question was, you made an assumption about Dr. Shah because he's Indian, and you had that kind of notion about how things work in India; right?

A Yes.

* * *

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA -
SOUTHERN DIVISION
HONORABLE CORMAC J. CARNEY,
U.S. DISTRICT JUDGE**

UNITED STATES)	
OF AMERICA,)	
Plaintiff,)	<u>CERTIFIED</u>
vs.)	Case No.
HARSHAD SHAH,)	8:10-cr-00070-CJC-1
Defendant.)	

REPORTER'S TRANSCRIPT
OF JURY TRIAL – DAY 4
TUESDAY, OCTOBER 28, 2016
8:31 A.M.
SANTA ANA, CALIFORNIA

**DEBBIE HINO-SPAAN, CSR 7953, CRR
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* * *

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[159] [. . .] And there are four elements, and I'm going to walk you through those elements to show that based on the evidence, the government can prove all four elements beyond a reasonable doubt.

The first element is defendant gave – before we do that, let's just back up and do a quick overview of the facts of the case. It's a quite straightforward story. Dr. Shah did not file taxes, but he did not pay taxes in 2006 and 2007 and paid some taxes in 2008, which started the audit.

The audit is the environment of what goes on. The audit is not – the evidence of the audit is not dispositive as to the bribe in this case, as the government submits the tape recordings are what is.

There were two revenue agents, you heard from both of them. You heard from Revenue Agent Michael Ham. He told you he's been retired and that his official duty was to perform the audit of Dr. Shah, corporation and personal audit. But you also heard from Mytryee Raghaven, and she had the personal audit for a short period of time.

The evidence showed that not only do both revenue agents share the fact that they spent some time on Dr. Shah's audit, they both were exploited by Dr. Shah. Dr. Shah found a way in for both of them. The evidence showed that Ms. Raghaven, he used the fact that she was from the same place that he was. And with Revenue Agent Ham, Dr. Shah zeroed in on his past [160] psychological problems.

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Going through a quick timeline, in March of 2009, the audit was started, and there was a conversation with Shah, and you heard Revenue Agent Ham talk about it. It was a little bit aggressive at times, and Dr. Shah contacts management. Dr. Shah knew how to contact management when he was not happy with the audit.

On May 15, Revenue Agent Ham meets with Dr. Shah at his office, the meeting is cordial. Dr. Shah apologizes, and a relationship begins where Revenue Agent Ham has a way of having some calming ground, talks about his depression.

And it was to find a common ground. You heard him talk about that. The audit, we're all human. No one likes to be audited. That's why he brought up his depression.

On May 22nd his – Dr. Shah's audit was expanded. And then in June of 2009 you heard from Revenue Agent Raghaven. And she told you that Dr. Shah lied to her by stating that his corporation was audited with no change. And she felt that she was being compromised by Dr. Shah, because Dr. Shah determined that Revenue Agent Raghaven was from India, started talking to her in Hindi, her native language, and said, "We are brother and sister from the same country. Make this audit go away."

So before TIGTA ever got involved, before any law enforcement, Dr. Shah has made overtures to a revenue agent to make it go away. Predisposition.

* * *

[166] [. . .] His intent. His intent wasn't to pay taxes, it was to pay Revenue Agent Ham. In fact, defendant continues to try to persuade Revenue Agent Ham to do the illegal act in telling him to "F" the IRS.

(Audio recording played, not reported.)

MS. WAIER: And finally, even though the defendant knows it's an illegal transaction, it's a violation of Revenue Agent Ham's lawful duty. He doesn't care.

(Audio recording played, not reported.)

MS. WAIER: And that opportunity is to pay – is to receive a bribe in exchange for zero tax due and owing.

So element No. 3, the evidence shows is proven.

Finally, element No. 4, defendant was not entrapped. And there are two elements of entrapment. Either the defendant was predisposed – the government must prove either defendant was predisposed or the defendant was not induced, not both.

So let's talk about predisposition. Factors relevant to whether a defendant is predisposed to commit a crime include whether the defendant demonstrated reluctance to commit the offense, the defendant's character and reputation, whether government agents initially suggested the criminal activity, whether the defendant engaged in the criminal activity for profit, and finally, the nature of the government's inducement or persuasion.

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We saw in June 2009 before TIGTA ever got involved, before [167] any monitored meeting, that Dr. Shah's corrupt efforts began with an attempt to bribe Revenue Agent Mytryee Raghaven. Shah started talking to her in Hindi: "I'm from India; you are from India. We are brothers and sisters. Make this go away."

And he also lied to her. You heard from Mytryee Raghaven. She told you that she took that as a bribe. She was in a state of shock. And because of that, the audit was transferred and taken out of her control.

Before TIGTA got involved, you also heard from Revenue Agent Ham. He – Shah made corrupt overtures to him, mental healthcare and employment.

Now let's talk about – just break down each of the factors. The first one is did defendant demonstrate any reluctance to commit the offense? And the evidence shows that the answer is no. Shah increased the payment. Shah continued to offer RA Ham more money, even though he was told it was illegal, and that Shah paid money for zero reports even though it was illegal. And you've heard those clips.

If you also look at defendant's character and reputation, all point – all the evidence there points to pre-disposition.

Dr. Shah made clear that if Revenue Agent Ham called upon his conscience, things could not go forward. He called Revenue Agent Ham an f'ing idiot for continuing to bring up the illegality of the

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action. He told Revenue Agent Ham how to be a criminal. [. . .]

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. SACR 10-00070-CJC Date: 10-31-16
Time: 10:20

Title: UNITED STATES OF AMERICA v. HARSHAD SHAH

JURY NOTE NUMBER _____

_____ THE JURY HAS REACHED A UNANIMOUS
VERDICT

_____ ✓ THE JURY REQUESTS THE FOLLOWING:

Are we allowed to consider evidence (tapes, recordings) as an indicator of the predisposition of the defendant's character before contact by a government official?

DATE: 10-31-16 SIGNED: REDACTED
FOREPERSON OF
THE JURY

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Case No. SACR 10-00070-CJC

Case Title: United States of America v. Harshad Shah

Date: October 31, 2016

RESPONSE TO JUROR NOTE # 1

Yes, if you determine the evidence (tapes, recordings) indicates the defendant's predisposition before being contacted by government agents.
