

JS-3

**United States District Court  
Central District of California**

UNITED STATES OF AMERICA,

Plaintiff,

v.

CEDRICK MARQUET HUDSON;

JOSEPH CORNELL WHITFIELD;

ANTUAN DUANE DUNLAP,

Defendants.

Case No. 2:13-cr-00126-ODW-3

**ORDER GRANTING MOTION TO  
DISMISS INDICTMENT FOR  
OUTRAGEOUS GOVERNMENT  
CONDUCT [92]**

**I. INTRODUCTION**

“Lead us not into temptation,” Judge Noonan warned. *United States v. Black*, 733 F.3d 294, 313 (Noonan, J., dissenting). But into temptation the Government has gone, ensnaring chronically unemployed individuals from poverty-ridden areas in its fake drug stash-house robberies. While undoubtedly a valid law-enforcement tool when employed to target or prevent demonstrated criminal enterprises, reverse stings offend the United States Constitution when used solely to obtain convictions.

The Court is mindful that fighting crime is undoubtedly an arduous task that the Executive Branch must endure. But as James Madison wrote in *The Federalist No. 51*,

1 If angels were to govern men, neither external nor internal controls on  
2 government would be necessary. In framing a government which is to be  
3 administered by men over men, the great difficulty lies in this: you must  
4 first enable the government to control the governed; and in the next place  
5 oblige it to control itself.

6 The only way to effectively control the Government in this case and effectuate the due  
7 process that the Constitution demands is to dismiss this indictment which the ATF  
8 obtained against Defendant Antuan Duane Dunlap through outrageous government  
9 conduct. For the reasons discussed below, the Court accordingly **GRANTS** Dunlap's  
10 Motion to Dismiss the Indictment. (ECF No. 92.) Dunlap shall be **RELEASED** from  
11 custody **FORTHWITH** barring any other holds.

## 12 II. FACTUAL BACKGROUND

13 To catch individuals suspected of engaging in home-invasion robberies, Bureau  
14 of Alcohol, Tobacco, Firearms and Explosives ("ATF") Special Agent Dan Thompson  
15 masquerades as a "cocaine courier who wishes to steal the cocaine he is expected to  
16 deliver" from a location in the Los Angeles area. (Aff. ¶ 4.) Special Agent  
17 Thompson, consistent with previous ATF reverse-sting operations, paints a picture of  
18 an all-too-easy stash-house robbery. He tells unwitting individuals a tale of bountiful  
19 harvests of 20 to 25 kilograms of "pure" cocaine being guarded by just a few  
20 individuals. The only problem: it's all a lie.

21 Special Agent Thompson's interaction with Defendants began around  
22 November 2012 when Los Angeles Police Department Task Force Officer Erik Shear  
23 informed ATF Special Agent Jason Moore that Defendant Cedrick Marquet Hudson  
24 had asked a confidential informant ("CI") whether he knew of any good "come ups."  
25 (*Id.* ¶ 5.) At the hearing on this Motion, the Court questioned the Government  
26 whether the term "come ups" refers only to robbery opportunities. The Government  
27 conclusorily indicated that Moore and Thompson knew that Hudson meant robbery  
28 opportunities based on the context—whatever it was. It still remains a mystery how

1 “come ups” only referred to robberies here—let alone a stash-house robbery. Further,  
2 Moore did not provide any background regarding the CI’s interaction with Hudson;  
3 rather, Moore’s recount starts with the appearance that Hudson approached the CI out  
4 of the blue.

5 After the CI contacted the ATF, the agents told the CI to tell Hudson that  
6 Special Agent Thompson wanted to meet with him. (*Id.* ¶¶ 6–7.) On December 20,  
7 2012, the undercover agent met with Hudson and Defendant Joseph Cornell Whitfield  
8 at a restaurant in Gardena, California. (*Id.* ¶ 8.) The undercover agent explained the  
9 proposed robbery to Hudson and Whitfield and told them to let him know if they were  
10 not interested. (*Id.* ¶ 8(c).) The undercover agent described the scheme as “a once in  
11 a lifetime type thing. . . . [L]ike this is like the one. You know, the come up don’t  
12 come around that often . . . .” (Suppl. Opp’n Ex. 6, at 5, 13.) Special Agent  
13 Thompson said that he picks up two kilograms of cocaine from the nonexistent stash  
14 house, but he always sees 20 to 25 kilograms there. (Aff. ¶ 8(d).)

15 The undercover agent also asked if Hudson and Whitfield if they had “a  
16 crew . . . a couple other homies” that could participate in the nonexistent robbery.  
17 (*Id.*; Suppl. Opp’n Ex. 6, at 20.) They said that they did. (Aff. ¶ 8(d).)

18 Special Agent Thompson further explained that there were usually two  
19 individuals guarding the fake stash house—one of which always carried a firearm.  
20 (*Id.* ¶ 8(e).) Special Agent Thompson said that he usually picked up cocaine once a  
21 month and that he would find out two days before the pick-up where the imaginary  
22 stash house was located. (*Id.*)

23 The undercover agent proposed that he would be inside the nonexistent stash  
24 house during the robbery. (*Id.* ¶ 8(i).) He said that Hudson and Whitfield should  
25 empty his pockets and tie him up to make it look like the agent was also a victim.  
26 (*Id.*)

27 Special Agent Thompson asked if Hudson and Whitfield’s associates “could  
28 handle it if something happened during the robbery (referring to someone getting

1 shot)." (*Id.* ¶ 8(m).) They said that they could. (*Id.*) Thompson then stated that he  
2 had "a home girl like got a hook up at a rental car company" and volunteered to  
3 procure a getaway car and safe house. (*Id.* ¶ 8(n); Suppl. Opp'n Ex. 6, at 16.)

4 The undercover agent alluringly described the fictitious cocaine as "pure" and  
5 told Hudson and Whitfield that they would need to repackage it before distributing it.  
6 (*Id.* ¶ 8(g), (t).)

7 On January 10, 2013, the undercover agent, Hudson, Whitfield, and the CI met  
8 for a second time outside a coffee shop in Carson, California. (*Id.* ¶ 11.) Special  
9 Agent Thompson stated that the cocaine shipment would arrive later in the month.  
10 (*Id.* ¶ 11(f).) He also asked about the third member of the group, and Hudson and  
11 Whitfield said he—"Rowdy" or "Baby Rowdy"—was ready. (*Id.* ¶ 11(h).) Later in  
12 the meeting, Special Agent Thompson again referenced the third member of the  
13 group, saying that he wanted to meet him. (*Id.* ¶ 11(j).)

14 The undercover agent then told Hudson and Whitfield that the fictional drug  
15 traffickers would be guarding 20 to 25 kilograms of pure cocaine. (*Id.* ¶ 11(l).) The  
16 group discussed the logistics of the robbery, including how Special Agent Thompson  
17 should leave the stash-house door unlocked. Special Agent Thompson inquired if  
18 Hudson and Whitfield "could get him anything (referring to a firearm)"; Whitfield  
19 said that he could. (*Id.* ¶ 11(u).)

20 On January 21, 2013, the undercover agent informed Hudson via telephone that  
21 the drug traffickers were in Mexico and that the cocaine shipment would arrive in  
22 early February. (*Id.* ¶ 12(a).) Hudson said that they were ready. (*Id.* ¶ 12(b).)

23 On January 30, 2013, Special Agent Thompson called Hudson to arrange a  
24 meeting with the third member of Hudson and Whitfield's crew at an undercover  
25 warehouse in Los Angeles, California. (*Id.* ¶ 14(a).) Hudson and Whitfield arrived  
26 and introduced Dunlap—a completely different person from the previously referenced  
27 "Rowdy" or "Baby Rowdy." (*Id.* ¶ 11(f).) The group then further discussed the  
28 details of the fake stash-house robbery.

1       The undercover agent again asked Whitfield if he could get him a little “strap,”  
2 meaning a gun, and the agent said that he could pay Whitfield for it. (*Id.* ¶ 14(o).)  
3 Whitfield obliged. (*Id.*)

4       Hudson bragged to Thompson that Dunlap is a “jack-boy” and “robs banks and  
5 all that shit.” (*Id.* ¶ 14(l), (n).) Dunlap also stated that he had robbed a Western  
6 Union by threatening an employee with a Taser and had robbed a Nix check-cashing  
7 establishment. (*Id.* ¶ 14(ss), (tt).) But at no point did Dunlap or the other Defendants  
8 indicate that they had previously engaged in home invasions or drug stash-house  
9 robberies.

10       On February 5, 2013, Special Agent Thompson again met with Hudson,  
11 Whitfield, Dunlap, and the CI at an undercover warehouse that was to serve as the  
12 safe house—a safe house provided by the Government. (*Id.* ¶ 15.) The undercover  
13 agent had rented a minivan as a getaway vehicle. (*Id.* ¶ 15(c).) Hudson placed a rifle  
14 bag from his vehicle into the rental van. (*Id.* ¶ 15(f)–(g).) The bag contained a  
15 shotgun and revolver. (*Id.* ¶ 15(h).)

16       While the crew waited in a breakroom, Special Agent Thompson told them that  
17 they were “about to get these birds (meaning kilograms of cocaine)” and described the  
18 cocaine as ““pure[,] pure ass coca . . . this ain’t like no bullshit cocaine, [*sic*] this is  
19 like cocaina.”” (*Id.* ¶ 15(o).) The agent then left the room, and Defendants were  
20 arrested. (*Id.* ¶ 15(p).)

21       On February 25, 2013, the Grand Jury indicted Defendants for alleged  
22 violations of 21 U.S.C. § 846 (conspiracy to possess cocaine with intent to distribute),  
23 18 U.S.C. § 1951 (conspiracy to interfere with commerce by robbery), and 18 U.S.C.  
24 § 924(c)(1)(A) (using or possessing a firearm in furtherance of a drug-trafficking  
25 crime). Hudson was also charged with violating 18 U.S.C. § 922(g)(1) (felon in  
26 possession of a firearm).

27       On January 28, 2014, Dunlap moved to dismiss the indictment due to  
28 outrageous government conduct. (ECF No. 92.) The Government timely opposed.

(ECF No. 96.) On March 3, 2014, the Court held a hearing on the matter and took the Motion under submission. Both parties have since submitted supplemental briefing, which the Court has extensively reviewed. (ECF Nos. 104, 108, 109.)

### III. LEGAL STANDARD

The Fifth Amendment to the Constitution commands that “[n]o person shall . . . be deprived of life, liberty, or property without due process of law.” U.S. Const. amend. V. The Due Process Clause stands as a bar to the Government invoking judicial process to obtain a conviction when its conduct is “outrageous.” *United States v. Russell*, 411 U.S. 423, 431–32 (1973) (Rehnquist, J.). The outrageous-government-conduct doctrine permits a court to dismiss an indictment when the Government engages in conduct “so grossly shocking and so outrageous as to violate the universal sense of justice.” *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991). Judicial scrutiny focuses solely on the government’s actions—not the alleged actions of the criminal defendant. *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991). The outrageous-government-conduct doctrine thus differs in that respect from an entrapment defense. *Id.*

There is no brightline test for determining whether to apply this doctrine. *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013). In *United States v. Bonanno*, 852 F.2d 434 (9th Cir. 1988), the Ninth Circuit previously developed a multifactor inquiry to determine whether to dismiss an indictment for outrageous government conduct. The court held that the government’s conduct is permissible when,

(1) the defendant was already involved in a continuing series of similar crimes, or the charged criminal enterprise was already in progress at the time the government agent became involved; (2) the agent’s participation was not necessary to enable the defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out criminal activity; (4) the agent infiltrated a criminal organization; and (5) the

1 agent approached persons already contemplating or engaged in criminal  
2 activity.

3 *Id.* at 437–38.

4 But in the most recent case on point, the Ninth Circuit disavowed rigid  
5 application of the *Bonanno* inquiry and subsumed it within a new multifactor rubric.  
6 *Black*, 733 F.3d 294, 304 n.7 (9th Cir. 2013) (rejecting the *Bonanno* factors as a  
7 “test”). The Ninth Circuit expounded a new, totality-of-the-circumstances standard  
8 that a court must consider in assessing the outrageousness of the Government’s  
9 conduct:

10 (1) known criminal characteristics of the defendants; (2) individualized  
11 suspicion of the defendants; (3) the government’s role in creating the  
12 crime of conviction; (4) the government’s encouragement of the  
13 defendants to commit the offense conduct; (5) the nature of the  
14 government’s participation in the offense conduct; and (6) the nature of  
15 the crime being pursued and necessity for the actions taken in light of the  
16 nature of the criminal enterprise at issue.

17 *Id.* at 303. The burden, at least in reverse-sting cases like this one, is on the  
18 Government to establish that its conduct does not surpass due-process limitations. *Id.*

#### 19 **IV. DISCUSSION**

20 Dunlap moves to dismiss the indictment due to outrageous government conduct,  
21 namely, the ATF’s entirely fake stash-house scheme. In response, the Government  
22 contends that Dunlap manifested his propensity to commit robberies and admitted to  
23 engaging in “similar conduct in the past”—therefore justifying the reverse sting that  
24 the ATF employed. But the Court finds that the Government’s extensive involvement  
25 in dreaming up this fanciful scheme—including the arbitrary amount of drugs and  
26 illusory need for weapons and extra associates—transcends the bounds of due process  
27 and renders the Government’s actions outrageous.

28 ///



1 **A. Standing**

2 Citing to *United States v. Emmert*, 829 F.2d 805 (9th Cir. 1987), the  
 3 Government contends that Dunlap lacks standing to challenge the indictment based on  
 4 outrageous government conduct because he was not the “actual target” of the  
 5 Government’s operation. The Government asserts that any issues Dunlap has with  
 6 how he entered into the alleged conspiracy “lie solely with Hudson and Whitfield.”  
 7 (Suppl. Opp’n 4.)

8 *Emmert* is entirely distinguishable from this case. In *Emmert*, the Ninth Circuit  
 9 affirmed the district court’s denial of defendant Arriaga’s motion to dismiss the  
 10 indictment based on outrageous government conduct, holding that “Arriaga lacks  
 11 standing to object to the government’s activities in this case since he was never an  
 12 actual target of the investigation.” *Id.* at 811. The court noted that Arriaga had not  
 13 previously been involved in the negotiations between the undercover agent and  
 14 Emmert. *Id.* at 807. Rather, it appears that Emmert simply brought Arriaga into the  
 15 picture of his own volition.

16 In contrast, the undercover agent in this case repeatedly asked Hudson and  
 17 Whitfield whether they had “a couple other associates” who could partake in the fake  
 18 stash-house robbery. (Aff. ¶ 8(d).) As the ruse wore on, the undercover agent  
 19 continued to ask about the third member of Hudson and Whitfield’s crew, asking  
 20 several times to meet with him. When Hudson and Whitfield finally introduced  
 21 Dunlap to the undercover agent, Dunlap was as much the “actual target” of the  
 22 Government’s dragnet operation as Hudson and Whitfield. Unlike the happenstance  
 23 that led Arriaga to the Government in *Emmert*, it was the undercover agent’s continual  
 24 badgering to include more members in Hudson and Whitfield’s crew that resulted in  
 25 Dunlap’s five-day involvement in this fictitious plan.

26 It is also curious how the Government argues that “[a]ny issues that [Dunlap]  
 27 has regarding how he entered into the conspiracy lie solely with Hudson and  
 28 Whitfield.” (Suppl. Opp’n 4.) It is not clear how the Government believes Hudson



1 and Whitfield would be able to remedy the outrageous government conduct of which  
2 Dunlap was a victim. They do not have the power to dismiss the indictment. Neither  
3 is it likely that Dunlap has some sort of civil remedy against Hudson and Whitfield.  
4 Instead, Dunlap faces real prison time as a result of the Government's action. It  
5 would be a strange result to find that Dunlap could not challenge the actions of the  
6 sovereign that put him there.

7 The Court accordingly finds that Dunlap has standing to challenge the  
8 Government's conduct through this Motion to Dismiss the Indictment.

9 **B. Outrageous government conduct**

10 All of the factors the Ninth Circuit expounded in *Black* weigh in favor of  
11 dismissing the indictment for outrageous government conduct.

12 *1. Defendants' known criminal characteristics*

13 In assessing the outrageousness of the Government's conduct, the Ninth Circuit  
14 has stated that a court should consider "whether a defendant had a criminal  
15 background or propensity the government knew about *when it initiated its sting*  
16 *operation.*" *Black*, 733 F.3d at 304 (emphasis added).

17 Here, there is no indication that the ATF, Thompson, the LAPD, or the CI had  
18 any knowledge of Hudson, Whitfield, or—in particular—Dunlap's alleged "criminal  
19 background or propensity" prior to Thompson inventing the stash-house scheme. In  
20 fact, Dunlap did not even come into the picture until January 30, 2013—just five days  
21 before his arrest and long after the Government had begun laying out the stash-house  
22 ruse. Thompson asked Hudson and Whitfield repeatedly about the third member of  
23 their crew, and they initially told him they were bringing a completely different  
24 person. Absent a crystal ball, it is therefore impossible for Thompson—or anyone  
25 else at the ATF—to have known the slightest details about Dunlap in advance of the  
26 January 30, 2013 meeting.

27 In *Black*, the Ninth Circuit confronted a similar situation where the special  
28 agent learned of the Defendants' alleged criminal backgrounds only after the agent

1 invented the stash-house scheme. After iterating the known-criminal-conduct factor,  
2 the court stated that the later-supplied knowledge “mitigated to a large degree” the  
3 court’s concerns. *Black*, 733 F.3d at 307. The court reasoned that the defendants’  
4 “repeated representations that they had engaged in related criminal activity in the past  
5 quickly supplied reasons to suspect they were likely to get involved in stash house  
6 robberies.” *Id.*

7 But this Court’s concerns are not so easily “mitigated” to any degree by  
8 Dunlap’s braggadocio at the January 30, 2013 meeting. It makes little sense to justify  
9 the Government’s capricious, stash-house scheme at its inception by what Thompson  
10 later learned about Dunlap. In a situation where an apparently experienced cocaine  
11 courier is boasting to some small-time crooks about the chance to hit the mother lode,  
12 it is only human nature that the individual is going to try to impress the courier with  
13 wild tales of past criminal conduct. In this case, there is no evidence that Dunlap  
14 actually robbed a Western Union or Nix. But even if he did, Thompson did not learn  
15 about Dunlap’s alleged past crimes until after Dunlap joined the doomed-to-fail crew.  
16 The Government cannot bootstrap this *post hoc* knowledge to justify the scheme from  
17 the beginning.

18 Those commercial robberies also bear little upon the fictitious stash-house  
19 scheme or the home invasions the ATF sought to eliminate. In fact, when Dunlap was  
20 bragging about this past exploits, he disavowed any connection to drugs:

21 [Dunlap]: Keep my ass clean. I never touch dope. I’m just saying  
22 though.

23 [Whitfield]: He’s a jack boy, he don’t know nothing about no drugs.  
24 (Opp’n Ex. 2 at 55.) So contrary to the Government’s contention, Dunlap’s  
25 “admissions” only served to demonstrate that he had no propensity to commit drug  
26 crimes—the entire subject of the reverse sting.

27 Allowing after-the-fact knowledge to mitigate the Court’s concerns in a  
28 situation like this also creates a perverse incentive for the Government. It encourages

1 the Government to cast a wide net, trawling for crooks in seedy, poverty-ridden  
 2 areas—all without an iota of suspicion that any particular person has committed  
 3 similar conduct in the past. And if the Government happens to get it right and catch  
 4 someone who previously engaged in crime, the courts will place their imprimatur on  
 5 the whole fishing expedition.

6 The Court declines the invitation to endorse this nab-first-ask-questions-later  
 7 approach. While this situation is a win-win for the Government, it is really only lose-  
 8 lose for the unwitting individuals unlucky enough to fall into the Government's net. If  
 9 they have never committed criminal activity in the past but agree to participate in the  
 10 fake robbery, they go to prison—unless they can surmount the Everest-like hurdle to  
 11 establish an entrapment defense. And if they have criminal backgrounds, entrapment  
 12 is likely off the table. *See United States v. McClelland*, 72 F.3d 717, 722 (9th Cir.  
 13 1995) (“If the defendant is found to be predisposed to commit a crime, an entrapment  
 14 defense is unavailable regardless of the inducement.”).

15 If the Government were to actually have knowledge that a particular person had  
 16 engaged in similar conduct in the past—or at least had suspicion based on identifiable  
 17 facts—then the Government should and does have free rein, consistent with  
 18 constitutional restrictions, to go after those individuals. That's all that the first *Black*  
 19 factor appears to ask for. *See* 733 F.3d at 304. But that advance knowledge is wholly  
 20 lacking here, thus weighing in favor of an outrageous-government-conduct finding.

## 21 2. *Individual suspicion of the defendants*

22 The Ninth Circuit does not require that the Government have “individualized  
 23 suspicion of a defendant's wrongdoing before conducting an undercover  
 24 investigation.” *Id.* But if the Government has reason to suspect a person or  
 25 identifiable group before launching a reverse sting, that is a relevant consideration. *Id.*

26 Dunlap points out that there is no evidence that he or the other Defendants were  
 27 previously involved—or even suspected of being involved—in stash-house robberies.

28 ///

1 But the Government argues that Dunlap's admission that he had participated in other  
2 alleged robberies manifested a propensity to commit more robberies.

3 When the Eleventh Circuit considered a similar fictitious, stash-house-robbery  
4 scenario, the court confronted a situation where "ATF agents contacted individuals  
5 suspected of being involved in home invasions." *United States v. Sanchez*, 138 F.3d  
6 1410, 1413-14 (11th Cir. 1998). The court found that factor persuasive in finding no  
7 outrageous government conduct.

8 Here, too, the ATF sought to "investigate individuals suspected of being  
9 involved in home invasion robberies." (Aff. ¶ 4.) But not once did the ATF indicate  
10 that it suspected any Defendant of being associated with home invasions—even after  
11 Dunlap and the others started boasting about their past criminal conduct. At best, the  
12 ATF operated off a hunch that Dunlap and the others were up to no good. But  
13 something more is required before the Government can ensnare individuals in an all-  
14 too-tempting, made-up robbery and take 15-plus years away from their lives.

15 While the Government contends that this case lacks the troubling factor of the  
16 informant trolling for targets in a bad part of town as occurred in *Black*, there is little  
17 evidence about what the informant actually did in this case. Moore only states in his  
18 affidavit that Hudson approached the CI. But Moore does not elaborate on how  
19 Hudson and the CI came into contact with each other, such as whether the CI initiated  
20 any contact or suggested that he might be a source for good "come ups." Dunlap  
21 proffers that there was a disagreement between Hudson and the CI, which led the CI  
22 to furnish this opportunity as a peace offering. In any event, the Government's lack of  
23 individualized suspicion is therefore not allayed by this missing page in the  
24 Government's story.

### 25 3. *Government's role in creating the crime of conviction*

26 The United States Supreme Court has drawn a line between infiltrating an  
27 ongoing criminal enterprise on one hand and manufacturing crime on the other. The  
28 Court stated that the "function of law enforcement is the prevention of crime and the

1 apprehension of criminals. Manifestly, that function does not include the  
2 manufacturing of crime.” *Sherman v. United States*, 356 U.S. 369, 372 (1958). While  
3 the Government may not create crime, the Court has accepted that “infiltration is a  
4 recognized and permissible means of investigation.” *Russell*, 411 U.S. at 432; *see also*  
5 *Black*, 733 F.3d at 305 (“Also relevant is whether the government approached the  
6 defendant initially or the defendant approached a government agent, and whether the  
7 government proposed the criminal enterprise or merely attached itself to one that was  
8 already established and ongoing.”).

9 But for the undercover agent’s imagination in this case there would be no  
10 crime. The undercover agent invented his drug-courier persona, the stash house, the  
11 20 to 25 kilograms of cocaine supposedly inside the stash house, the two individuals  
12 supposedly guarding the stash, the need to use weapons, and the idea of robbing the  
13 stash house. He even provided the putative safe house and getaway van. Dunlap  
14 brought little to the table besides his sheer presence and perhaps the hope of being  
15 able to obtain some quick cash. He hardly took an “independent role in planning the  
16 crime” like the defendants did in *Black*. 733 F.3d at 306 n.8. Rather, the most it  
17 appears he did was say, “I’m straight.” (Aff. ¶ 14(cc).)

18 Despite the Supreme Court’s admonition, the ATF manufactured this entire  
19 crime. It did not infiltrate an ongoing criminal enterprise, as there is no indication that  
20 Hudson, Whitfield, and Dunlap had any previous criminal affiliation between them.  
21 In fact, before the CI informed Thompson that Hudson was interested in “come ups,”  
22 Defendants were not even on the ATF’s radar. Total falsity concocted by the ATF  
23 was precisely one of the Ninth Circuit’s concerns in *Black*. 733 F.3d at 303  
24 (“Although [the defendants’ actions in participating in the plan] clearly corroborate  
25 the defendants’ intent to carry out an armed robbery, defendants were responding to  
26 the government’s script.”). That fiction is likewise one of this Court’s misgivings and  
27 weighs in favor of dismissing the indictment.

28 ///

1           4.       *Government's encouragement of the defendants to the commit the crime*

2           A court must also consider the extent to which the Government encouraged the  
3 defendant to commit the crime charged, “with mere encouragement being of lesser  
4 concern than pressure or coercion.” *Id.* at 308.

5           At the hearing on the Motion, the Government argued that in *United States v.*  
6 *Shapiro*, 669 F.2d 593 (9th Cir. 1982), the Ninth Circuit established that a defendant  
7 must offer “some evidence or persuasion *by someone who was a government agent*” in  
8 order for a court to give an entrapment instruction. *Id.* at 598 (emphasis added). The  
9 Government also contends that just like the defendants in *Black*, once the agent set his  
10 bait, Hudson and Whitfield responded without any further inducement—thereby  
11 demonstrating the Government’s minimal role in the scheme.

12           The Government’s reliance on *Shapiro* is misplaced. In that case, the court  
13 dealt with whether a district court should have given the jury an entrapment  
14 instruction. But Dunlap has not reached trial yet; the jury-instruction issue is therefore  
15 premature. Further, he moves to dismiss the indictment based on outrageous  
16 government conduct—not entrapment. And rightfully so. Entrapment is a jury issue,  
17 whereas outrageous government conduct is an issue for the Court. *Compare Sorrells*  
18 *v. United States*, 287 U.S. 435, 452 (1932), *with United States v. Williams*, 547 F.3d  
19 1187, 1199 (9th Cir. 2008).

20           While there may be no indication that the undercover agent or the CI threatened  
21 or otherwise coerced Defendants to enter into the conspiracy, one cannot turn a blind  
22 eye to the economic coercion inherent in a fake stash-house case like this. The  
23 Government essentially targets people who are poor and have distorted moral  
24 compasses. As Hudson commented in a postarrest interview, “[I]f you ‘tell 3 broke  
25 dudes there’s 20 birds [kilograms of cocaine], what do you think’s gonna happen?’”  
26 (Mot. Ex. B.) Dunlap’s “willingness” to participate is just as consistent with Dunlap  
27 being “broke” and in need of cash as it is with his “propensity to commit robberies”—

28       ///

1 let alone his propensity to commit home-invasion or stash-house robberies. (*See*  
2 *Opp’n* 8–9.)

3 An exchange between the undercover agent and Defendants on January 30,  
4 2013, compellingly demonstrates the economic pressures Defendants faced,  
5 exacerbated by the Government:

6 [Agent]: Yep, what do you always say, you ain’t afraid of no money,  
7 right?

8 [CI]: Yeah, I ain’t afraid of no money.

9 [Agent]: You ain’t afraid of no cocaina are you? . . .

10 Male: Hell yeah, it will change my life. . . .

11 [Whitfield]: Sure, I’ll never be broke again. My kid’s gonna be  
12 straight. . . .

13 [Whitfield]: I’m gonna buy property and everything, probably like five or  
14 ten years down the line, but it will be right.

15 (*Opp’n Ex. 2* at 45.) With the Government dangling over \$600,000 in front of clearly  
16 impoverished individuals, it is no surprise that they took the bait.

17 In a recent scholarly article, Professor Eda Katharine Tinto echoes the Court’s  
18 concerns. She writes, “The inducements used to persuade suspects to commit, or  
19 simply to agree to commit, a serious and severely sentenced set of crimes elicits  
20 significant questions regarding the extent of the defendants’ blameworthiness and the  
21 possibility that the mandatory sentence will be disproportional to any determination of  
22 culpability.” *Undercover Policing, Overstated Culpability*, 34 *Cardozo L. Rev.* 1401,  
23 1451 (2013). Professor Tinto’s point is well taken. It is difficult to comprehend how  
24 a person like Dunlap deserves a 15-plus-year sentence for being part of an entirely  
25 fake robbery scheme for a mere five days—especially when the extent of his  
26 involvement was merely to say, “I’m straight.” (*Aff. ¶* 14(cc).)

27 So while arm-twisting and extortionate threats would easily satisfy the  
28 government-coercion factor, so too should the Government hitting individuals like



1 Dunlap where they are most vulnerable: their depressed economic circumstances. The  
 2 Court consequently finds that this factor weighs in favor of an outrageous-  
 3 government-conduct determination.

4 5. *Nature of the government's participation in the offense conduct*

5 In assessing the Government's participation in the crime alleged, the Ninth  
 6 Circuit considers the duration, nature, and necessity of the Government's actions.  
 7 *Black*, 733 F.3d at 308–09.

8 At the hearing, the Government repeatedly argued that it was Defendants who  
 9 dragged the plan out for two months through their continued excitement to participate  
 10 and contact with Thompson. But Moore's affidavit reveals a very different story. On  
 11 January 7, 2013, Hudson called the CI's cell phone, but the CI ignored the call. (Aff.  
 12 ¶ 10.) Rather, the CI sent Hudson a text message stating, "I'll be back in two days ill  
 13 call u." (*Id.*) On January 21, 2013, speaking to Hudson on the telephone, Thompson  
 14 "conveyed to HUDSON that the drug traffickers were still in Mexico and the  
 15 shipment (of cocaine) would probably be coming sometime early in February." (*Id.*  
 16 ¶ 12(a).) These statements demonstrate that Defendants did not call the shots when it  
 17 came to timing; instead, they simply followed the undercover agent's lead and met  
 18 him when he asked. The Government's drawn-out, two-month involvement in this  
 19 fictitious stash-house scheme thus only weighs in favoring of dismissing the  
 20 indictment. *See Black*, 733 F.3d at 308 (observing that Government participation of  
 21 longer duration is "of greater concern" than short-term involvement).

22 The Government also misapprehends the law. In assessing whether the  
 23 Government has engaged in outrageous conduct, the focus is solely on the its  
 24 actions—not the defendants. *Restrepo*, 930 F.2d at 712. It is therefore erroneous to  
 25 justify this fake stash-house scheme based on what Defendants did or did not do.

26 The nature of the ATF's conduct similarly tips the scales against the  
 27 Government. In *Black*, the court noted that the undercover agent "provided no  
 28 weapons, plans, manpower or direction about how to perform the robbery, even when

1 the defendants sought his advice.” *Id.* at 309. But here, the undercover agent  
 2 provided a getaway van, putative safe house, and—most important of all—the entire  
 3 scheme and its fictitious components. He also alleviated Defendants’ logistical and  
 4 safety concerns when he “proposed that he would be inside the stash house at the time  
 5 of the robbery . . . .” (Aff. ¶ 8(i).)

6 Thompson also goaded Defendants to acquire weapons. He repeated several  
 7 times over the course of the two-month ruse that “at least one of the individuals  
 8 [guarding the nonexistent stash house] always carried a firearm.” (*Id.* ¶ 8(e); 8(m)  
 9 (“SA Thompson asked if HUDSON and WHITFIELD’s associates could handle it if  
 10 something happened during the robbery (referring to someone getting shot).”); 11(u)  
 11 (“SA Thompson asked if they could get him something (referring to a firearm), and  
 12 WHITFIELD indicated he could get SA Thompson a little .380.”); 14(o) (“SA  
 13 Thompson asked about WHITFIELD getting him a little ‘strap’ (referring to a firearm  
 14 that was previously discussed) and SA Thompson offered to cash him out (meaning  
 15 pay him for the firearm). WHITFIELD indicted [*sic*] he could get SA Thompson  
 16 something.”); 14(u) (“SA Thompson next mentioned that there was always two  
 17 individuals in the stash house and at least one of them was always armed, but as far as  
 18 he knew, both could be armed.”); 14(*ll*) (“SA Thompson later indicated that the  
 19 occupants of the stash house may not go down very easy.”); Opp’n Ex. 2 at 28 (“Like  
 20 I said the one fool he is always strapped, but the other dude I think he might be, I just  
 21 don’t know.”).) With Thompson continually sounding the war horn, it is not  
 22 surprising that Defendants showed up to the final meeting with two weapons.

23 The undercover agent’s continued participation, assurances, and suggestions  
 24 over the course of the two-month period made him “a partner in the criminal activity”  
 25 rather than a mere “observer.” *See Black*, 733 F.3d at 308. His input was likewise  
 26 “necessary” for Defendants to carry out their doomed plan, since but for Thompson’s  
 27 imagination, there would have been no fictitious stash-house robbery to begin with—  
 28 let alone the need for guns and extra associates. *See id.* at 309.

1 In these stash-house cases, the Government’s “participation in the offense  
 2 conduct” is what makes them particularly repugnant to the Constitution. Everything  
 3 about the scheme—and therefore almost everything bearing upon a defendant’s  
 4 ultimate sentence—hinges solely on the Government’s whim. Why were there not 10  
 5 kilograms in the stash house? Or 100? Or 1,000? Why were the guards allegedly  
 6 armed—necessitating that Defendants bring weapons along with them? All of these  
 7 factors came down to the ATF and the undercover agent alone. That sort of  
 8 arbitrariness offends the Constitution’s due-process demands. *See Collins v. City of*  
 9 *Harker Heights, Tex.*, 503 U.S. 115, 127 n.10 (1992) (“[T]he Due Process Clause, like  
 10 its forebear in the Magna Carta, was intended to secure the individual from the  
 11 arbitrary exercise of the powers of government . . . .” (citation omitted) (internal  
 12 quotation marks omitted)); *Black*, 733 F.3d at 317 (Noonan, J., dissenting) (“[I]t is a  
 13 violation of due process for sentences to be at the arbitrary discretion of the ATF.”).

14 The Ninth Circuit has also remarked that these fake stash-house cases draw  
 15 dangerously close to another criminal-justice issue: sentencing entrapment. The court  
 16 stated,

17 In fictional stash house operations like the one at issue here, the  
 18 government has virtually unfettered ability to inflate the amount of drugs  
 19 supposedly in the house and thereby obtain a greater sentence for the  
 20 defendant. In fact, not only is the government free to set the amount of  
 21 drugs in a fictional stash house at an arbitrarily high level, it can also  
 22 minimize the obstacles that a defendant must overcome to obtain the  
 23 drugs. The ease with which the government can manipulate these factors  
 24 makes us wary of such operations in general, and inclined to take a hard  
 25 look to ensure that the proposed stash-house robbery was within the  
 26 scope of [the defendant’s] ambition and means.

27 *United States v. Briggs*, 623 F.3d 724, 729–30 (9th Cir. 2010) (citation omitted). In  
 28 fact, the Ninth Circuit was so concerned with sentencing entrapment in stash-house

1 cases that the court formulated a specific test to apply in these scenarios: “in the case  
2 of fictitious stash house robberies, the defendant need only show a lack of intent *or*  
3 lack of capability to deal in the quantity of drugs charged” to establish sentencing  
4 entrapment. *United States v. Yuman-Hernandez*, 712 F.3d 471, 474–75 (9th Cir.  
5 2013), *cert. denied*, 134 S. Ct. 261 (2013).

6 While case law has thus made it slightly easier for a defendant to establish a  
7 sentencing-entrapment defense, the defense only comes into play if a defendant rolls  
8 the dice and goes to trial. In this Court’s own experience with these fictitious stash-  
9 house cases, that is not a likely scenario. With the capriciously selected amount of  
10 drugs, a defendant has the proverbial Sword of Damocles hanging over his head. He  
11 is not likely to let it fall and face the considerable prison time that surely awaits him if  
12 he loses at trial—especially when the Government has spent, like in this case, months  
13 recording conversations inculcating him in the trumped-up conspiracy.

14 It is also no accident that the ATF selects the amount of drugs that it does. If a  
15 defendant is convicted of possessing five kilograms or more of cocaine with intent to  
16 distribute, he faces a 10-year mandatory-minimum sentence. 21 U.S.C.  
17 § 841(b)(1)(A). The defendant also faces another five years imprisonment for  
18 possessing a firearm in connection with a drug-trafficking offense. 18 U.S.C.  
19 § 924(c)(1)(A). Twenty to twenty-five kilograms in the fake stash house puts the  
20 defendant at a base offense level of 34, U.S.S.G. § 2D1.1(5), (c), with an upward  
21 adjustment of two for possessing a dangerous weapon in connection with the offense,  
22 *id.* § 2D1.1(b)(1). A fake stash-house defendant with a criminal-history category of  
23 one—a very unlikely scenario—therefore faces about 15 to 20 years’ imprisonment  
24 for a crime entirely dreamed up by the Government.

25 At the hearing on the Motion, the Government proffered a rather curious  
26 justification for the arbitrary drug amount the undercover agent selected. The  
27 Government argued that based on Special Agents Moore and Thompson’s training and  
28 experience, the 20 to 25 kilograms at issue is commensurate with real stash houses in

1 the Southern California area. Thompson had to select this amount in order to establish  
2 his credibility as a purported drug courier—the amount being within the “realm of  
3 reality” for people “in this line of work” per the Government.

4 But the Government’s rationalization is hopelessly circular. The Government  
5 seeks to prosecute Dunlap for a fake crime it cut from whole cloth. To justify the  
6 serious sentence Dunlap faces as the result of its imagination, the Government  
7 attempts to use its creation of the crime, including the need to establish the undercover  
8 agent’s credibility, as the validation for the amount of drugs. The amount of drugs  
9 then justifies the sentence. But since the Government created each necessity and  
10 justification, the sentence no longer bears a proportional relationship to the  
11 defendant’s culpability—just the Government’s imagination. Something more than  
12 mere bootstrapping is needed for the Government to take 15-plus years away from  
13 Dunlap’s life.

14 The Government’s argument also proves the problem with this whole scheme.  
15 The Government asserts that it dreams up these stash-house robberies to catch people  
16 inclined to commit home invasions. But the Government must make the robbery  
17 scheme tempting enough to nab a potential criminal. The Government thus sets the  
18 drug amount at a level apparently it knows that no poverty-ridden individual could  
19 pass up. So the Government essentially admits that this ruse is not meant to simply  
20 skim off those individuals likely to commit similar crimes; rather, it is designed to  
21 never fail. And the high number of fake stash-house convictions the Government has  
22 attained confirms this strategy.

23 The Court thus finds that the Government’s extensive, essential participation in  
24 the offense conduct in this case tips the scales of justice in Dunlap’s favor. Society  
25 does not win when the Government stoops to the same level as the defendants it seeks  
26 to prosecute—especially when the Government has acted solely to achieve a  
27 conviction for a made-up crime.

28 ///

1           6.     *Nature of the crime being pursued and necessity for government's*  
2                     *actions*

3           Zero. That's the amount of drugs that the Government has taken off the streets  
4 as the result of this case and the hundreds of other fake stash-house cases around the  
5 country. That's the problem with creating crime: the Government is not making the  
6 country any safer or reducing the actual flow of drugs. But for the Government's  
7 action, the fake stash house would still be fake, the nonexistent drugs would still be  
8 nonexistent, and the fictional armed guards would still be fictional. *See Black*, 733  
9 F.3d at 302–03 (finding the Government's entire fiction to be “troubling”). Instead,  
10 the Government comes close to imprisoning people solely because of their thoughts  
11 and economic circumstances rather than their criminal actions.

12           Reverse stings actually serve to benefit real stash-house operators. As the  
13 famed Law and Economics jurist Judge Richard Posner observed,

14           The effect of a fictitious stash house sting, when the person stung is . . . a  
15 real stash house robber, is therefore to make stash houses more secure by  
16 reducing the likelihood of their being robbed. A sting both eliminates  
17 one potential stash house robber (unless the defendant was entrapped)  
18 and deters other criminals from joining stash house robberies, since they  
19 may turn out to be stings. The greater security that fictitious stash house  
20 stings confer on real stash houses—security obtained at no cost to the  
21 operators of stash houses—reduces their cost of self-protection, which is  
22 a principal cost of the illegal-drug business. The lower a business's  
23 costs, the lower the prices charged consumers, and so the greater the  
24 demand for illegal drugs and the more sales and consumption of them.  
25 The operators of stash houses would pay law enforcement to sting  
26 potential stash house robbers.

27     ///

28     ///

1 *United States v. Kindle*, 698 F.3d 401, 416 (7th Cir. 2012) (Posner, J., concurring and  
 2 dissenting), *reh'g en banc granted, opinion vacated* (Jan. 16, 2013), *cert. denied*, 133  
 3 S. Ct. 1743 (2013).

4 But these stash-house cases do cost someone money: federal taxpayers. As of  
 5 the date of this Order, there are 215,566 inmates in federal detention. Statistics,  
 6 Federal Bureau of Prisons, [http://www.bop.gov/about/statistics/population\\_](http://www.bop.gov/about/statistics/population_statistics.jsp)  
 7 [statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp) (last visited Mar. 10, 2014). According to the Bureau of Prisons, the  
 8 average cost to incarcerate a federal inmate in 2011 was \$28,893.40. Annual  
 9 Determination of Average Cost of Incarceration, 78 Fed. Reg. 16711, 16711 (Mar. 18,  
 10 2013). In fictitious stash-house cases, the ATF usually seeks a 15-year sentence.  
 11 *Black*, 733 F.3d at 317 (Noonan, J., dissenting). These fake robberies therefore cost  
 12 federal taxpayers approximately \$433,401 per defendant in incarceration costs  
 13 alone—not to mention investigative, prosecutorial, defense, and judicial resources.  
 14 That number only continues to skyrocket if a defendant is subject to a higher criminal-  
 15 history category and aggravating factors.

16 Society must question whether the astronomical cost associated with  
 17 prosecuting fake crime is worth it. In a recent *Wall Street Journal* article, United  
 18 States District Judge Michael A. Ponsor remarked, “Today, we imprison more of our  
 19 people than any other country in the world. . . . Either our fellow Americans are far  
 20 more dangerous than the citizens of any other country, or something is seriously out of  
 21 whack in the criminal-justice system.” Hon. Michael A. Ponsor, *The Prisoners I Lose*  
 22 *Sleep Over*, *The Wall Street Journal*, Feb. 12, 2014. When the nation imprisons  
 23 people solely because the Government dreams up a too-good-to-turn-down robbery  
 24 and then targets people it knows are eager to make an easy buck, Judge Ponsor’s  
 25 concerns are only further borne out.

26 The Court in no way decries all reverse-sting operations as a matter of law.  
 27 Used properly, they can be a powerful tool for law enforcement to catch dangerous  
 28 individuals plotting serious crime before they succeed and harm others. But when the



1 goal of the reverse sting becomes landing convictions alone, the Government loses the  
 2 justification for employing this crime-fighting tool. Wherever the line is drawn, this  
 3 case falls on Dunlap's side. Due process demands that much.

#### 4 **C. Inherent supervisory power**

5 In his Motion, Dunlap also mentions another, alternative basis for the Court  
 6 dismissing the indictment: the Court's inherent supervisory power. The Court may  
 7 exercise this power for three reasons: "to remedy a constitutional or statutory  
 8 violation; to protect judicial integrity by ensuring that a conviction rests on  
 9 appropriate considerations validly before a jury; or to deter future illegal conduct."  
 10 *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991); *see also*  
 11 *United States v. Hasting*, 461 U.S. 499, 505 (1983). But neither Dunlap nor the  
 12 Government fully briefed this issue, so the Court declines to opine whether its  
 13 supervisory powers likewise warrant dismissing the indictment in this case.

### 14 **V. CONCLUSION**

15 The Court is mindful of the Supreme Court's admonition in *Russell*: the federal  
 16 judiciary does not have "a 'chancellor's foot' veto over law enforcement practices of  
 17 which it did not approve. The execution of the federal laws under our Constitution is  
 18 confided primarily to the Executive Branch of the Government, subject to applicable  
 19 constitutional and statutory limitations and to judicially fashioned rules to enforce  
 20 those limitations." 411 U.S. at 435. The Executive Branch's enforcement obligation  
 21 is certainly a difficult one, as people will always find new ways of evading law-  
 22 enforcement detection and carrying out their criminal enterprises. This ever-shifting  
 23 landscape demands that law-enforcement agencies employ creative tactics to ferret out  
 24 crime and keep society safe.

25 But it is not the role of the Judicial Branch to merely rubberstamp whatever  
 26 imaginative device the ATF and other agencies dream up. Rather, it is the duty of the  
 27 courts "to declare all acts contrary to the manifest tenor of the Constitution void.

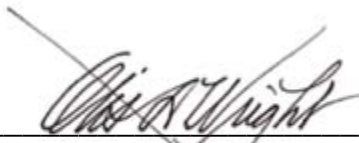
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1 Without this, all the reservations of particular rights or privileges would amount to  
2 nothing.” *The Federalist No. 78* (Alexander Hamilton).

3 The time has come to remind the Executive Branch that the Constitution  
4 charges it with law enforcement—not crime creation. A reverse-sting operation like  
5 this one transcends the bounds of due process and makes the Government “the  
6 oppressor of its people.” 733 F.3d at 318 (Noonan, J., dissenting). In this case, the  
7 Constitution will not tolerate subjecting an individual to prosecution for an imaginary  
8 crime subject to a very real punishment—a punishment which rests entirely on ATF  
9 agents’ whims. Since it is the Court’s sworn duty to uphold the Constitution, the  
10 Court **GRANTS** Dunlap’s Motion to Dismiss the Indictment. (ECF No. 92.) Dunlap  
11 shall be **RELEASED** from custody **FORTHWITH** barring any other holds.

12 **IT IS SO ORDERED.**

13  
14 March 10, 2014

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17 **OTIS D. WRIGHT, II**  
18 **UNITED STATES DISTRICT JUDGE**

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**Cc: USM**