Nos. 14-50129, 14-50285

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ANTUAN DUANE DUNLAP,
JOSEPH CORNELL WHITFIELD,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
DISTRICT COURT NO. CR 13-126-ODW

GOVERNMENT'S OPENING BRIEF

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I

QUESTION PRESENTED

In *United States v. Black*, 733 F.3d 294 (9th Cir. 2013), *reh'g en banc denied,* 750 F.3d 1053 (9th Cir. 2014), this Court continued a long-running streak of affirming the propriety of using stash-house-robbery stings to locate and apprehend dangerous individuals willing and able to carry out violent crimes in residential neighborhoods. In this case,

which materially differs from *Black* only in ways that underscore the propriety of the investigation, the defense urged the district court to ignore the *Black* majority and "go with the dissent." The court agreed, and—citing liberally from that dissent—dismissed the indictment on the ground that the stash-house sting in this case was outrageous government conduct.

Did the district court err by following the *Black* dissent and rejecting the majority, and by ruling for the first time ever that this well-established, long-approved sting technique "violate[d] the universal sense of justice"?

II

STATEMENT OF THE CASE

It is February 5, 2013—the day of the planned stash-house robbery—and defendant-appellee Joseph Cornell Whitfield is gesturing to a loaded, pistol-grip shotgun: "That's my baby right here." (GER 71, 359.[1]) "I'll blow a hole this big in that door," he brags; then, gesturing

[1] "CR" refers to the Clerk's Record in the district court and is followed by the docket number. "GER" refers to the Government's Excerpts of Record and is followed by the relevant page(s). "HPSR" refers to co-defendant Cedric Hudson's Presentence Investigation (continued . . . .)

to the mid-section of a man he believes to be a drug courier, "In you, I'll blow all this out. . . . [F]rom the neck down, all that's gone." (GER 72, 362.) A gun like that, Whitfield explains, is good for one thing: killing. (GER 72.) It is the kind of "big" gun the robbers have always planned for Whitfield to wield while leading the way into the stash house (GER 133, 310), a weapon he can use to "knock some shit down" if anyone tries to stop them (GER 144).

The shotgun is not the only weapon the robbery crew has brought; there is also a pistol and over 100 rounds of ammunition. (GER 73.) Nor are guns their only robbery tools: masks, gloves, a police uniform and a SWAT vest, duffel bags for hauling off the drugs, and—in the pockets of defendant-appellee Antuan Duane Dunlap—zip ties for restraining any guards who are taken alive. (GER 73-74.) All of this, too, is according to the defendants' well-developed plan. (*See, e.g.*, GER 140, 308, 312 (masks); GER 129, 148, 306 (uniforms); GER 314 (zip ties).) That the defendants are so familiar with the tools and

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Report ("PSR") and "WPSR" refers to defendant-appellee Joseph Whitfield's PSR, both filed under seal; they are followed by the relevant paragraph(s).

techniques of the trade is unsurprising: for them, this is the culmination of violent criminal careers, including prior robberies, indeed, including prior stash-house robberies. (*See infra* pp. 10, 13, 19-20, 29-30.) Everything is proceeding exactly as they have hoped ever since co-defendant Cedric Marquet Hudson—the crew's ringleader—first approached an acquaintance and asked him if he knew of any good robbery opportunities. (GER 44-45.)

Unfortunately for the robbery crew, that acquaintance was an ATF informant. And, further unfortunately for them, the man they believed to be a drug courier was an undercover ATF agent. Thus, once the defendants were safely away from their weapons, just as they were finishing preparations for the stash-house robbery, just as they were fantasizing about what they would do with the stolen cocaine (GER 369)—ATF agents burst in (GER 370). Without any violence, the robbery crew was arrested, and the conspiracy was over. (GER 370.)

The conspiracy was real; the guns were real; the defendants' intent to use them to violently rob a cocaine stash house was real; and the defendants' criminal histories were real. But, unbeknownst to them, the drugs and stash house were not. The sting—honed by the

ATF over hundreds of operations and approved by Courts of Appeals in dozens of opinions, first in *United States v. Sanchez*, 138 F.3d 1410 (11th Cir. 1998), and recently by this Court in *United States v. Black*, 733 F.3d 294 (9th Cir. 2013)—had succeeded in its goal of "find[ing] and arrest[ing] crews engaging in violent robberies of drug stash houses" through a "safer technique" than catching them robbing real drugs from real houses. *Black*, 733 F.3d at 298.

But the very fiction that had ensured the safety of the community, the ATF agents, and indeed the defendants themselves prompted the district court to adopt the *dissent* from *Black* and throw out the case as "so grossly shocking and so outrageous as to violate the universal sense of justice." (GER 6.) The government respectfully submits that by departing from decades of precedent, by following the *dissent* in an indistinguishable controlling case, and by dismissing the indictment, the district court erred. This Court should reverse.

A. Jurisdiction, Timeliness, and Bail Status

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291. The district court dismissed the indictment as to Dunlap on March 10,

2014 (GER 1), and as to Whitfield on June 16, 2014 (GER 31, 493); the government filed timely notices of appeal on March 10, 2014 (GER 396), and June 17, 2014 (GER 492). *See* Fed. R. App. P. 4(b). Dunlap and Whitfield are in custody pursuant to this Court's emergency stays of the orders releasing them from pre-trial detention, to which they previously submitted.

B. Statement of Facts and Procedural History

Pursuant to a long-established and long-judicially-approved investigative framework, the Bureau of Alcohol, Tobacco, and Firearms sought out home-invasion robbery crews whose crimes pose an extraordinary danger to the community. During that ongoing effort, Hudson—a known member of a violent street gang—approached an ATF informant and asked the informant whether he knew of any robbery opportunities. The informant put Hudson in contact with an undercover ATF agent posing as a drug courier.

Hudson—along with first Whitfield and then Dunlap (both hardened criminals and gang members)—met with the agent, boasted of prior robbery experience (including prior stash-house robberies), and laid out a plan to rob the stash house from which the "courier" collected

drugs. The defendants repeatedly expressed their eagerness to commit the crime, their skill in planning it, and their willingness to engage in deadly violence—including against police officers—to carry it out. No encouragement was necessary; to the contrary, even in the face of *discouragement*, such as reminders of the dangers they would face from stash-house guards, the defendants voiced their enthusiasm. Nor did the government provide critical know-how or hard-to-get supplies: the plans and essentially all the supplies, including the guns, came from the defendants.

Ultimately, after the robbery crewmembers repeatedly articulated and confirmed their plan, and brought the tools to carry it out, they were arrested.

1. The Conspiracy to Violently Rob a Cocaine Stash House

a. Hudson and Whitfield Seek Out the Stash-House Robbery Opportunity

In November 2012, Hudson approached an acquaintance and asked whether he knew "about any good 'come-ups,'" a slang term for

"robbery opportunit[ies]."[2] (GER 45; *see also* GER 224, 227, 243, 271.) Unbeknownst to Hudson, the man he reached out to was a paid ATF/LAPD informant. (GER 44-45 & n.1.) The informant—who knew Hudson as "T-Bone," a member of the violent Eight Trey Crips street gang (GER 224)—informed his LAPD handler, Detective Erik Shear, about Hudson's request (GER 44-45).

On November 29, 2012, Detective Shear directed the informant to call Hudson about the "possible robbery that [Hudson] inquired about."[3] (GER 224.) Hudson confirmed that he had a "crew"—called a "wrecking crew" by the informant—that could carry out the crime. (*Id.*) Later that same day, again at Shear's direction, the informant called Hudson,

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[2] *See State v. Covington*, 2007 WL 2773680, *10 (Ohio App. 2007) ("[A]ppellant stated the murders were a 'come up,' meaning a robbery."); *People v. Coleman*, 2012 WL 734055, *3, *6 (Cal. App. 2012) ("come up" used to refer to a robbery in which money and drugs were taken); *Rawls v. Hall*, 2010 WL 4739937, *9 (D. Or. 2010) (defense counsel explaining that "a comeup" is, "in street lingo," a "robbery"); *People v. Richardson*, 2009 WL 904153, *2 (Cal. App. 2009) ("A 'come-up' is slang for getting money from somebody, and can include robbery."); *State v. Holder*, 2002 WL 31862684 (Ohio App. 2002) ("'[A] come up' means to '[t]ake money from somebody.'").

[3] This call, and the calls, text messages, and meetings that followed, were all recorded and transcribed. The transcripts and recordings are in the record.

who confirmed that his crew was "some serious shit" prepared for a "big thing." (GER 225.) The informant told Hudson that he would talk to "[his] people" and get back to Hudson "probably . . . next week." (*Id.*) Sometime between that call and the next call, the government identified "T-Bone" as Hudson (GER 225, 227), though the record is silent as to any additional investigative steps taken regarding his background.

On December 18, 2012, the informant called Hudson regarding "that thing you asked me about." (GER 227.) The informant told Hudson that "[his] people" wanted to meet with Hudson in person. (*Id.*) Hudson agreed. (*Id.*) Two days later, the informant arranged a meeting at a Denny's. (GER 230.)

Hudson brought Whitfield to the December 20 Denny's meeting. (GER 45, 238-79.) The informant brought Special Agent ("SA") Dan Thompson, a highly trained and experienced agent who "had worked in an undercover capacity in numerous other investigations." (GER 215.) SA Thompson was posing as "a cocaine courier who wishe[d] to steal the cocaine [he was] expected to deliver from [the] stash house" where it was kept. (*Id.*)

Before any discussion about possible criminal activity, Whitfield immediately introduced himself as "Baby Flip," another member of the Eighty Trey Crips who had spent "six years in the pen."[4] (GER 240.) And before broaching the stash-house robbery scheme, SA Thompson made a point of offering Hudson and Whitfield the opportunity to back out: "[I]f it ain't your get down, it ain't your get down. Just let me know." (GER 242.) Here, as they would again and again over the course of the investigation, the defendants voiced their strong enthusiasm. (GER 242-43.) Thompson also asked whether Hudson and Whitfield were the entire crew, and Hudson said there were additional crewmembers. (GER 243-44.)

SA Thompson then explained the scenario: he was a cocaine courier; the cocaine stash was moved from house to house; it typically

[4] Whitfield's PSR later confirmed this statement. In 2004, he forcibly raped a 15 year-old-girl and pleaded guilty to attempted rape, receiving a one-year jail sentence and 36 months of probation. (WPSR ¶ 45.) In 2006, while serving that probation, he was convicted of being a felon illegally in possession of a firearm, and received a 32-month sentence. (WPSR ¶ 46.) In 2009, he was convicted of selling crack and received a four-year sentence. (WPSR ¶ 47.) In 2012, he served a month after fleeing arrest on a parole violation. (WPSR ¶ 48.) In total, considering early releases, he probably served around six years.

contained 20 to 25 kilograms; and the drugs were guarded by men with guns. (GER 243-47.) As soon as Thompson described these basics, Whitfield interjected that there would be "[o]ne [guard] by the front door for sure, one by the merchandise for sure, . . . one by the back." (GER 248.) From there, Whitfield and Hudson began setting the framework of a plan to rob the stash house. Whitfield asserted that "[t]he best thing is to draw down on everybody . . . all of them," while Hudson noted that when they entered the house they might only see one guard and that "[w]e've got to hold him hostage, and get the other dude . . . . [S]een that shit a couple times." (GER 249.)

In response, SA Thompson asked, "So I mean you've been here. You've done this shit before?" (GER 249.) Hudson replied, "Yeah." (GER 250.) Thompson asked whether Whitfield and Hudson had also previously moved that quantity of drugs. (GER 251.) Whitfield replied affirmatively, and Hudson said he had done so once. (*Id.*) Whitfield said he could move his in Las Vegas, while Hudson said that they had "a lot of homies that push weight." (GER 252.) Whitfield explained that it was important to sit on the drugs and not distribute them all at once, to avoid detection by the victims of the stash-house robbery. (GER

252.) Thompson then asked how the proceeds of the robbery should be distributed, and both Hudson and Whitfield called for an even split. (GER 253.)

The conversation turned back to planning the robbery. Hudson explained that he would take everything out of everyone's pockets, including SA Thompson's, to make it appear that Thompson was a victim. (GER 256.) Whitfield explained that they would tie Thompson up for the same reason. (*Id.*) Hudson then suggested that they go from the robbery site to a safe house. (*Id.*)

SA Thompson then asked, again, whether Hudson and Whitfield would be bringing a crew. (GER 257.) Whitfield replied that they had "some homies" that were "real shit" and "don't talk." (*Id.*) Hudson elaborated that these were "homies . . . that do that shit, that rob banks, dope dealers, and all that shit." (*Id.*) The conversation then veered to bank robberies, with Hudson and Whitfield describing how their gang had been involved in bank robberies since the 1980s, how Hudson had worked as a getaway driver in an Arizona bank robbery, and—from there—to how robbing jewelry stores was more lucrative. (GER 257-60; *see also* GER 49.) Thompson explained that he did not

need to get to know the crew, but he did need "them to see [his] face" so that they would not shoot him during the robbery. (GER 261.)

SA Thompson then asked, again, whether they had "done some shit like this before." (GER 262.) Both Whitfield and Hudson confirmed that they had. (*Id.*) Thompson noted this was not robbing "a liquor store," at which point Hudson cut him off: "This is way easier because when I was doing it, it was no inside job." (GER 262.) Hudson described the difficulty of the stash-house robberies he had carried out in the past, specifically the challenge of either gaining entrance or catching the courier coming in or out. (GER 262-63.) Hudson repeated: "When we was doing it it was no inside job." (GER 263.)

Hudson said that he would be the getaway driver (as he had been in the past) because he had a Lexus. (GER 265.) SA Thompson replied that he could supply a car via a contact he had with a rental car company. (*Id.*) After discussing carrying out the robbery in January, the conversation turned to the money they would get, and how they would manage it. (GER 266-70.) Whitfield talked about buying an AK-47. (GER 269.)

SA Thompson again urged them to back out if they wanted to: "Like I said man if it ain't like your get down at all man and [you're] like fuck that, just walk away." (GER 271.) Hudson reminded Thompson that he (Hudson) had contacted the informant "about the shit," and he assured Thompson that this was his "get down." (*Id.*) Whitfield added, "I feel good about it too." (*Id.*)

The conversation turned back to the robbery plans. Whitfield explained that he had been raised by a "firearms fanatic" and that he grew up hunting "every weekend" and "skinning animals." (*Id.*) Hudson quipped that Whitfield could "ski[n] [his] enemies." (*Id.*) After an inaudible exchange between Whitfield and Hudson,[5] the informant asked them to confirm that they would supply the guns, which they said they would. (GER 272.) Whitfield immediately broached the need for one big gun. (*Id.*) Hudson explained that they should be cautious about wearing masks: "[T]hink about the neighbors, the next door neighbors and all that too, know what I'm saying, [if] they see motherfuckers

[5] While inaudible on the recording, clearly it was audible to the participants, and it appears from context that Whitfield and Hudson were talking about guns.

going in the house with masks on [they will] call the police." (GER 272-73.) Whitfield said he would leave his mask off "until we get to the door." (*Id.*)

SA Thompson then asked, "So how many dudes we need, you think?" (GER 273.) Hudson responded that they "need[ed] like three. Me and him [Whitfield], and somebody else." (*Id.*) Whitfield confirmed that they "need[ed] like one more person." (*Id.*) When the informant asked whether four might be better, Hudson and Whitfield reiterated that only three were necessary. (*Id.*)

They then talked more about money, with Hudson and Whitfield describing how much they could get by selling the stolen drugs. (GER 274.) Whitfield told SA Thompson and the informant, "I appreciate ya'll for this opportunity." (GER 276.) Hudson and Whitfield then left. (GER 278.)

b. Hudson and Whitfield Continue to Plan the Stash-House Robbery at the Second Meeting

Following text messages (GER 283) and phone calls (GER 287-88, 290-91), Whitfield and Hudson met again with SA Thompson and the informant, on January 10, 2013, this time at a Starbucks. (GER 52, 295.) Immediately, Whitfield described a large scar from when he was

stabbed during a prison brawl. (GER 297-98.) Thompson then again gave them an opportunity to withdraw, noting that time had passed and their feelings might have changed. (GER 300.) Hudson replied that he had tried calling Thompson, but that Thompson had not answered; he and Whitfield then reiterated their interest. (*Id.*)

They returned to planning the robbery, with Hudson and Whitfield repeating the need for a safe house. (GER 301-02.) Whitfield said that he had "a couple safe houses" and offered them for use; he also repeated his story about growing up "hunting since I was like six" and revealed that he was a "sharp-shooter." (GER 302-03.) Whitfield and Hudson said that they had been "shopping," including for guns. (GER 303.) Hudson also mentioned that he had been "thinking about . . . buy[ing] FBI outfits" or "police outfits," which would cause the stash-house guards to "freeze up" when they see "the badge." (GER 306.)

SA Thompson asked about the last member of the crew, reminding them that he needed to "meet up with him too so all of us are on that same" page; Hudson and Whitfield confirmed that the third member was armed and "waiting." (GER 305-06.) Hudson promised that "he ain't gonna say nothing" and that "[t]his is what my boys do, man."

(GER 307.) Whitfield agreed that they should meet in person, which Hudson added was important to make sure "everyone's mind is still on the same page." (*Id.*)

The conversation then turned back to police uniforms, which Hudson believed would give them a critical edge. The guards would "freeze up" rather than "shoot the police" and "[o]ne hesitation is enough." (GER 308.) When SA Thompson suggested that the guards, working with a cartel, might not hesitate, Whitfield cut him off, explaining that with "the shit that I got . . . they gonna know we mean business." (*Id.*) He also described wearing an intimidating ski-mask that would fit his face like a glove. (*Id.*)

Hudson and Whitfield then questioned SA Thompson about his routine when entering the stash house, and mused about how long they should wait before following him in. (GER 309.) Whitfield suggested "a good seven, eight-minute window." (*Id.*) He then described how every day he would "lock [him]self in a room in the dark" thinking about how to pull off the robbery. (GER 310.)

Based on Whitfield's evident eagerness and stated prowess with guns, SA Thompson asked whether he would "be first." (GER 310.)

Hudson replied that Whitfield would indeed enter first, and that "[h]e gonna have the big thing." (*Id.*) Whitfield again boasted of his talent for killing, stating that he would employ "flanking like the military." (GER 310.) Hudson and Whitfield repeated that they would announce themselves as law enforcement, but quickly made clear that if the ruse failed, they would simply kill the guards. "Somebody don't put their hands up he got to go," explained Whitfield. "I ain't got time to be playing no games." (GER 311.) Hudson briefly interjected that they should try to avoid killing, but both he and Whitfield quickly returned to the use of lethal force. (*Id.*) Hudson declared, "We got to do what we got to do," and Whitfield agreed that "if they reach for something you got to lay them down." (*Id.*)

They then turned to other ways to disguise their identity and conceal that it was an inside job. Whitfield proposed that they could yell out "blood, blood"—*i.e.*, falsely implying they were Bloods rather than Crips. (GER 312.) They discussed waiting a few minutes after SA Thompson entered to make clear they were not coming in with him. (GER 313.) Whitfield then explained that they would need to treat Thompson no differently from the guards: "We got to tie him up. He's

got to stay." (GER 314.) When Hudson proposed handcuffs, Whitfield said, "Nah, zip ties. . . . Much easier than handcuffs." (*Id.*) Thompson suggested that perhaps he should also have a gun, which they discussed. (*Id.*)

Whitfield then again stated that he had been shopping for supplies, and added that he was "laying low and just staying out of the way" to avoid being arrested before the robbery. (GER 315.) Hudson and Whitfield then revealed they were both on parole. (GER 316.) They assured SA Thompson that this would not interfere: "[P]arole ain't shit," Whitfield explained. (*Id.*) Hudson agreed: "What can they do[?] Ah [s]omebody rob this—what can they do?" (*Id.*) Both then assured Thompson that their parole officers were lazy, incompetent, and indifferent to whether they continued violating, even though they were on "high-risk parole" and even though they were gang members. (GER 316-17.) Hudson added that he "did eight years of [youth authority]" time, as well as years of parole.[6] (GER 317.)

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[6] Hudson and Whitfield were indeed both on parole at the time. (GER 72.) Hudson was also accurately describing his criminal history. At age 13, he was caught with a loaded, concealed gun, and put on probation. (HPSR ¶ 42.) After a string of arrests for child sex offenses, (continued . . . .)

Whitfield and Hudson then repeated how pleased they were with the opportunity, and they described another stash-house robbery they knew of. (GER 319-20.) Hudson then explained that the third member they hoped to bring to the crew—"Baby Rowdy"—traveled "in and out of town . . . jacking motherfuckers," and that he was built like a "body builder" and was younger. (GER 322.) Hudson had met "Rowdy" while in Denver committing robberies; "he's a jack—" Hudson began, before Whitfield interrupted, "That's the way he get down." (GER 323.) When the informant noted that some people deal drugs and some people commit robberies, Hudson explained that "Rowdy" was a robber, whereas "I do both." (*Id.*) Whitfield added, "I rob motherfuckers." (*Id.*) They then talked again about what they would do with the stolen drugs. (GER 323-24.)

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he was sentenced for a home-invasion rape to nine years in youth authority, from which he was paroled after eight years. (HPSR ¶¶ 43, 69.) As an adult, he went on to garner convictions for a variety of offenses, including carrying a concealed weapon in connection with a street gang (HPSR ¶ 47) and possessing crack for sale, twice (HPSR ¶¶ 51, 58). He was also arrested repeatedly for robbery, drug and firearm offenses, and assault with a deadly weapon. (HPSR ¶¶ 69-70.)

SA Thompson asked whether he should get a car or a van as a getaway vehicle; Hudson said a van would be "more low key." (GER 324.) Whitfield proposed tinted windows. (*Id.*) Hudson explained that they could hide from the police more easily in a van. (*Id.*) Whitfield then vowed—referencing the highly publicized North Hollywood shootout in 1997 in which two bank robbers shot and wounded 11 police officers while attempting to escape—that any getaway would "be like the two German dudes that robbed that bank in Hollywood." (GER 58, 325-26.)

In response to Whitfield's reference to the shoot-out, the informant asked whether he was "down to smoke some cops." (GER 326.) Whitfield began to describe what he would do if they completed the robbery but "g[o]t pulled over," but Hudson cut him off: if the robbery was successful but in carrying it out they "had to kill somebody, and the cops are behind us," then "I already know I got life [so] I would shoot the police." (*Id.*) Whitfield added, "The police get behind us, I'm gonna bust out the car['s] back windshield and tear them up." (GER 326.) As the conversation wound down, Whitfield explained, "That's why I got that gun." (GER 327.)

c. Hudson and Whitfield Recruit Dunlap, Who Eagerly Joins the Conspiracy

On January 27, 2013, SA Thompson called Hudson to confirm he was still interested. (GER 335.) "I'm with it," Hudson replied, "Believe that." (*Id.*) The next day they spoke again to arrange another meeting. (GER 337-38.) They then spoke again on January 30, and hammered out the details of a meeting that would include the third crewmember. (GER 342.) They met later that day, at an ATF front business in a warehouse. (GER 60.)

Hudson and Whitfield brought the third crewmember, Dunlap, to the meeting. (GER 349.) Dunlap introduced himself as a member of a different criminal street gang.[7] (GER 349; *see also* GER 61.) While he was not the Denver robber that had been discussed previously, both Hudson and Whitfield vouched for him as a "real jack boy" who had committed robberies, including bank robberies, in the past. (GER 128.)

[7] A criminal history report confirms that Dunlap was a gang member with the moniker "Lilshooter." (GER 554, 558.)

"Jack boy" is a slang term "used to describe someone that has experience committing robberies."[8] (GER 121.)

During the meeting, the robbery crew finalized the details of their plan, with Hudson and Whitfield taking the lead and Dunlap occasionally chiming in.

First, Hudson and Whitfield repeated their plan to restrain and rob SA Thompson to conceal the inside job. (GER 127-28.) "We gonna put the gun on you." (GER 128.) They then repeated that they had guns and were getting "the police uniforms and all that." (GER 129.) When Thompson recalled Hudson's hope that the uniforms would cause the guards to hesitate, Whitfield began suggesting that it would come to violence, anyway. (GER 129-30.) Hudson cut him off, "We ain't gonna shoot nobody unless—" "We have to," finished Whitfield, with Hudson

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[8] *See Evans v. Dept. of Corrections*, 703 F.3d 1316, 1324 (11th Cir. 2013) (prisoner bragged "he was a 'jack boy' because he 'robb[ed] drug dealers'"); *Rivera v. Georgetown City Police Dept.*, 2012 WL 3746269, at *2 (D.S.C. 2012) (describing "a robbery group known as the 'Jack Boys'" who "'specialized in robbing . . . people involved in illegal activities'"); *People v. Luckey*, 2012 WL 1957283, *1 (Cal. App. 2012) (unpublished) (defendants were "'Jack Boys' who 'jacked' or 'robbed' people"); *State v. Earl*, 702 N.W.2d 711, 715-16 (Sup. Ct. Minn. 2005) (home-invasion robbery by self-described "Jack Boys").

agreeing. (GER 130.) Next, they insisted that they would need to be fast, especially given that neighbors might see them. (*Id.*) Recalling Hudson's description of his prior stash-house robberies, in which gaining entry had been the most difficult part (GER 262-63), both Whitfield and Hudson repeatedly told Thompson that having the door unlocked was imperative (GER 131-32).

After Hudson and Whitfield's planning, SA Thompson asked Dunlap, "Are you good with all that?" Dunlap answered, "I'm great." (GER 132.) When Thompson started to explain that everyone had to be on board, Whitfield replied: "None of that. It's all good." (*Id.*)

Hudson then explained that, "We going in with the big guns first." (GER 133.) Whitfield agreed: "[T]he big shit coming in first." (*Id.*) He discussed a high-power .30-30 caliber rifle he wanted to use. (*Id.*) Hudson returned to the importance of the door being unlocked. (GER 133-34.) Dunlap chimed in that having the door unlocked was critical because it would "make too much noise if we bust it down." (GER 134.)

They then discussed ways of dividing the stolen drugs for redistribution. (GER 134-36.) In the course of this discussion, Hudson explained that he had been "putting everything together . . . . [I]t's the

only thing I really be focused on . . . . [We] ready man." (GER 136.) The conversation turned to the vehicle they would use, with Hudson again recommending a van to avoid being pulled over. (GER 138.) Whitfield and Hudson explained the importance of obeying all traffic laws and having the vehicle's paperwork in order to avoid traffic stops. (GER 138-39.)

SA Thompson again asked Dunlap whether he was "good with it." (GER 139.) Dunlap assured him that he was, but Thompson told them to let him know "if it ain't your get down, it ain't your come up." (*Id.*) Both Whitfield and Hudson immediately replied, "It's my get down." (*Id.*) Indicating Dunlap, Whitfield then explained: "This is his get down too, trust me, I don't fuck with a lot of people, if it wasn't he wouldn't be here." (*Id.*) Hudson confirmed that Dunlap was Whitfield's "boy." (*Id.*) "My n****r's[9] down, trust me," Whitfield confirmed. (*Id.*) Whitfield explained that he had already gotten a "jump suit," "ski mask," and "gloves." (GER 140.)

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[9] The government has omitted the n-word because of its uniquely offensive nature.

Whitfield then turned back to the plan. After again noting the importance of keeping the door open, he explained that he intended to use duct tape to blindfold SA Thompson and any guards. (GER 141.) Hudson replied that duct tape was too slow, and that they should pull beanies over their faces instead. (*Id.*) Both underscored that they needed to be in and out in "no more than three minutes." (*Id.*) Hudson explained that out of the three crewmembers, "one gonna have them [*i.e.*, the guards] with the gun," while "two go . . . getting the birds [*i.e.*, the drugs]." (*Id.*)

Whitfield explained the importance of casing the house and making sure that no one else was there; Hudson said they might find more drugs that way; and Whitfield explained that the key thing was to restrain everyone with zip ties before searching the house. (GER 142.) Hudson agreed: "[W]hen we get them on the ground, we'll be like who else in the house, who else in the house, hit that motherfucker across the head, who else in the house. They're gonna they're gonna tell." (GER 142-43.) "Hell yeah," Whitfield agreed. (GER 143.)

Hudson expressed his hope that the guards would surrender: "Nobody gonna die really over no birds. . . . [S]ome people would but

you like, you got no connection to the birds, you ain't gonna die for that." (*Id.*) SA Thompson suggested that the guards might not "go down like that easy" because "[t]hey're not like no kind of push-over type dudes." (*Id.*) Whitfield cut him off: "That's why I'm willing to knock some shit down when I get there. You know what I'm saying?" (*Id.*)

Hudson reminded Whitfield that there was no need "to do all that shooting," suggesting instead that merely brandishing the gun (or perhaps pistol-whipping) would "let motherfuckers know you ain't bullshitting." (GER 143.) Whitfield immediately interjected "But—" and soon both he and Hudson agreed they would "do what we gotta do" and shoot the guards "if they reach for something" (Whitfield) or "try to wrestle up" (Hudson). (GER 144.)

Whitfield then said that he would tell them to "put your hands up," and Hudson added that he would tell them that "[a]ll we want is the birds." (*Id.*) Dunlap interjected to express concern that instantly demanding the drugs would reveal it was an inside job. (*Id.*) Whitfield explained that there was no avoiding that suspicion, but the key was to keep the guards from knowing who they were. (*Id.*) He added: "That's

why we got to tie [SA Thompson] up too." (*Id.*) Dunlap agreed: "He might have to be the first one we tie up." (GER 145.)

Whitfield again returned to the importance of leaving the door unlocked. (GER 145.) Dunlap said that if it was not unlocked, they could always knock it down, and Whitfield agreed. (*Id.*) Dunlap proposed that, alternatively, they could wait until SA Thompson opened the door to leave. (*Id.*) "Then they're gonna be like oh shit." (GER 146.)

SA Thompson yet *again* confirmed their willingness to rob the stash house: "It's cool right? I mean—" (GER 146.) Whitfield, evidently exasperated by the constant confirmation of their willingness, cut him off: "This shit's perfect." (*Id.*) Hudson and Whitfield then walked through the plan: pulling up in the van; where to stop the van to avoid drawing neighbors' attention; ideal weather conditions; and so forth. (GER 147-48.) The crew, including Dunlap, mulled the relative benefits of going in wearing law-enforcement uniforms or, instead, simply seeming to be "some regular street thug-ass n****rs . . . going in there and hitting that shit." (GER 148.)

The conversation then moved through various topics, including providing SA Thompson with a gun, ensuring that the guards' and Thompson's faces were covered with beanies, the rewards from carrying out the crime, and the importance of the door being unlocked. (GER 149-51.) Dunlap asked whether the stash house was always the same spot, and Thompson explained that it was in a different location each time. (GER 151.)

SA Thompson warned that while things might sound easy, they could turn out harder than expected. (GER 153.) Dunlap replied that he had assumed that prior robberies were "gonna be hard" but then they turned out to be easy. (*Id.*) He recounted robbing a Western Union with a Taser (GER 153-55) and a Nix check-cashing store with two guns[10] (GER 156-58). He explained a gun's usefulness: "[I]f you

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[10] No PSR has been prepared for Dunlap. His criminal history report lacks the detail necessary to tell whether he was arrested for or convicted of these crimes. This report does reveal, however, that, among many other convictions and arrests, he was found as a juvenile to have committed grand theft, robbery, and brandishing a "replica firearm," and as an adult he was convicted of robbery and assault with a firearm, and arrested for robbery and being a felon in possession (repeatedly). (GER 554-60.) While the record is silent as to what independent information the government had about the defendants' criminal histories during the investigation, the PSRs and criminal

(continued . . . .)

know that motherfucker ain't playing . . . [y]ou ain't gonna take no chances with it. I mean a dumb motherfucker will. [But] if you value your life and you got kids and shit ain't no way in hell you're going to fight that shit." (GER 156.) Dunlap also talked about fencing stolen goods. (GER 158.)

After Dunlap explained his robbery experiences, Whitfield reminded SA Thompson that Dunlap was a "jack boy" and not a drug dealer. "[H]e don't know nothing about no dope like we do, so you know what I'm saying like I'm gonna bust his down for him. . . . He's a jack boy, he don't know nothing about no drugs." (GER 159-60.) Thompson then checked whether Dunlap in fact wanted to be involved and was agreeable to Whitfield moving his drugs for him. "Man, I'm good," Dunlap replied. (GER 160.)

The planning closed by discussing timing again, with Dunlap confirming additional details about whether the door would be unlocked. (GER 162.)

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history reports confirm in hindsight the reasonableness of crediting the robbery crew's self-reporting. *See Black*, 733 F.3d at 307 n.10 ("[T]he agents reasonably relied on the defendants' own, credible representations that they had committed these robberies in the past.").

d. Hudson, Whitfield, and Dunlap Arrive at the Staging Area with Guns, Ammunition, Zip Ties, Disguises, and Other Robbery Tools

On February 5, 2013, the robbery crew met with SA Thompson and the informant for the last time at the ATF warehouse. (GER 69.)

The crew arrived in Hudson's Lexus, parking next to the van that SA Thompson had provided. (*Id.*) The crew got out and admired the van, with Whitfield especially pleased with the tinted windows. (GER 358.) They inspected the van for where to store the guns (GER 70, 358), at which point Hudson took a rifle bag from where Dunlap had been sitting and moved it to the van (GER 70). Whitfield moved other gear over, as Hudson opened the bag to reveal the guns: a loaded, pistol-grip, 12-gauge shotgun and a loaded .38 caliber revolver. (GER 70.)

Whitfield twice described the shotgun as "my baby." (GER 71, 359.) Recalling Whitfield's promise to carry the "big" gun, SA Thompson remarked, "Yeah, that's big enough." (GER 359.) Whitfield responded that it was loaded with buckshot. (*Id.*) He later elaborated: "It's only 9 pellets in each shot . . . they're this big. I'll blow a hole this big in that door." (GER 72, 362.) Gesturing to Thompson, he added, "In you, I'll blow all this out. Dome shot from the neck down, all that's

gone." (*Id.*) He described the gun as only useful for killing. (GER 72.) The crew also discussed the rest of the gear, including the bags to transport the drugs and the fake police uniforms. (GER 359-60.) Whitfield and Hudson gave Dunlap the zip ties that would be used to restrain Thompson and any guards who were not killed. (GER 71.)

The group then left the van to go eat and drink in a break room in the warehouse. (GER 72.) They discussed what they would do with the cocaine once it was stolen. (GER 369.) And then ATF agents burst in and arrested them. (GER 72.)

After the arrest, it was discovered that both Hudson and Whitfield were wearing electronic-tracking bracelets pursuant to their parole. (GER 72.) A search of the robbery crew's equipment revealed the two guns, over 100 rounds of ammunition (including .30-30 ammunition for the rifle that Whitfield described but did not bring), the police uniform and SWAT vest, ski masks and gloves, the zip ties, and bags for transporting the drugs. (GER 73-74.)

In post-arrest interviews, Dunlap admitted that Whitfield was his close friend, but denied knowing Hudson or what the crime would entail. (GER 75.) Hudson also admitted that he had recruited

Whitfield, had come up with the idea of wearing police uniforms, and knew about the guns, but said the plan was for no one to get hurt. (GER 75-76.) Whitfield declined to answer questions. (GER 76.)

2. Procedural History

a. Preliminary Matters

The defendants were initially charged in a complaint (GER 40-77), and then—on February 25, 2013—in a six-count indictment (GER 78-92). The indictment charged all the defendants with conspiracy to possess with intent to distribute 20 to 25 kilograms of cocaine in violation of 21 U.S.C. § 846 (count one),[11] conspiracy to commit Hobbs Act Robbery in violation of 18 U.S.C. § 1951 (count two), and use of firearms in furtherance of a drug crime and a crime of violence in violation of 18 U.S.C. § 924(c)(1)(A) (count three), and each defendant with a single count of being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. § 922(g)(1) (counts four through

[11] This Court has long made clear that factual impossibility is not a defense to a conspiracy charge arising out of a stash-house sting operation. *See, e.g.*, *United States v. Rodriguez*, 360 F.3d 949, 957 (9th Cir. 2004).

six). The defendants all submitted to being detained pending trial. (CR 8, 13, 21.)

b. Hudson Pleads Guilty and Is Sentenced

Hudson pleaded guilty to counts two and three of the indictment pursuant to a written plea agreement. (CR 41.) A career offender, he faced a mandatory minimum sentence of five years on the gun count and a Guidelines range of 262 to 327 months. (HPSR ¶¶ 37-38.) He contended, however, that he was a victim of "sentencing entrapment," criticized stash-house-robbery sting operations, and asked for a 62-month sentence. (CR 52.) Pursuant to the plea agreement, the government and the Probation Office recommended a 200-month sentence. (CR 57.)

At the sentencing hearing, the district court "seiz[ed]" upon Hudson's attacks on stash-house-robbery stings, and—declaring that this Court in "Pasadena [will] do what it will"—described Hudson's offenses as not "a real crime" but instead a fiction created via an "irresistible lure." (GER 501, 510.) The court criticized the sting as "unfair" and "ludicrous," so tempting that Hudson "literally [could not] refuse it." (GER 501.) During the hearing, as part of a self-serving and

unsworn allocution, Hudson claimed that he committed the crime in order to pay for a drug-rehabilitation program, and also that the informant had suggested the robbery as a way for Hudson to pay back "some money that I owe[d] him," though he simultaneously claimed that the informant "was intimidated by me."[12] (GER 512-13.)

Ultimately, the court declared that it "ha[d] a problem with us being in [the] business" of "dangl[ing] . . . a [financial] lifeline" in front of Hudson and then punishing him (GER 509), and imposed a sentence of 12 months on the drug conspiracy and the lowest legal sentence on the gun charge (60 months). (GER 517.)

c. Black Reaffirms the Propriety of Stash-House Robbery Stings and Whitfield Pleads Guilty

On October 23, 2013, this Court decided *United States v. Black*, 733 F.3d 294 (9th Cir. 2013), and—over a dissent—reaffirmed that the ATF stash-house-robbery sting operation is not outrageous government conduct. Immediately following the decision, Whitfield's attorney

[12] As set forth above, when not arguing for leniency from a court and when unaware that he was being recorded, Hudson empathically stated that he was the one "hitting [the informant] up about the" robbery opportunity. (GER 271.)

advised him that "the facts in the *Black* case are much more favorable to the defendants than the facts in your case, and that nevertheless, the defendants in the *Black* case still lost their appeal." (GER 409.) Accordingly, "based on the legal standard described in the *Black* case, it is my opinion that if we file a Motion to Dismiss the Indictment Based on Outrageous Government Conduct in your case, the motion will be denied." (*Id.*) Defense counsel urged Whitfield to plead guilty, rather than moving to dismiss, in order to get the significant benefits of the plea agreement offered by the government. (GER 408-10.)

Whitfield then pleaded guilty pursuant to that plea agreement. (CR 78, 79.)

d. Dunlap Successfully Moves to Dismiss

On January 28, 2014, Dunlap moved to dismiss the indictment on the grounds of outrageous government conduct. (GER 93-105.) While Dunlap recognized that the threshold for outrageousness was extremely high (GER 97), he argued that because the stash-house robbery was based on a fiction and because (he inaccurately claimed) there was no evidence that the robbers "were ever personally involved or part of a criminal enterprise engaged in stash house robberies," the investigation

was outrageous. (GER 98-99.) The motion relied upon pre-*Black* caselaw and the *Black* dissent, and advised the district court that there was a petition for rehearing en banc pending in *Black*. (GER 100-01.)

The government opposed the motion (GER 106-115), and explained that it had no merit under *Black*, which controlled (GER 112-13). The government attached a video recording and transcript of the meeting in which Dunlap was introduced to SA Thompson. (GER 117-66.)

At the hearing, the district court again sharply criticized the investigation. It began by asserting that "the only reason that Mr. Dunlap is involved in this thing is because when . . . the undercover agent threw out his initial net, he only got a couple of fish, and this entire operation really wasn't worth just an arrest of two guys, right? So we need to add to this crew, right?" (GER 172.) The government replied that SA Thompson had merely asked Hudson and Whitfield how large their crew was.[13] (*Id.*)

[13] The government had not yet furnished the court with the recordings or transcripts for that meeting or the other meetings and calls.

The court then accused the government of having "engineered" the crime (GER 174) as a means of targeting people simply for being poor, unemployed, and "not very bright," rather than targeting "people who've shown a predisposition for home invasion robberies" (GER 179). The court rhetorically asked if the sting did not "violat[e] a universal sense of justice . . . , what would?" (GER 175.) In response, the government described the numerous opportunities the defendants had to withdraw, but the court replied that such opportunities were meaningless unless the government also offered the defendants lawful employment. (GER 175-77.) The government added that the structure of this sting operation was little different from those routinely used by vice squads. (GER 178.)

The government then noted that the investigation began when *Hudson* approached the informant looking for robbery opportunities, not vice versa. (*Id.*) The amount of fictitious drugs to be stolen was selected because it was "the typical amount" found in cartel stash houses. (GER 181.) The government explained that Whitfield and Hudson had vouched for Dunlap as a "jack boy," and that Dunlap himself described prior robberies that he had carried out (GER 182-83);

because of the focus on Dunlap, the government neglected to remind the court that Whitfield and Hudson had told SA Thompson that they had carried out stash-house robberies before, though this was in the affidavit. The court responded that the government should have realized that Dunlap was just engaged in "puffery" akin to claiming to have "ripped off Fort Knox." (GER 183.) The government replied that, given that Dunlap described those robberies as proof of his interest in committing the stash-house robbery, it was reasonable to give them some weight. (*Id.*)

The court then mused whether "come up" in fact, "[i]n the parlance of the streets," meant robbery. (GER 184.) Later, the court asked, "What is a jack boy? I went to parochial school, so I'm completely out of touch." (GER 196.) Defense counsel replied by "guess[ing]" that it means "a person that robs, that jacks cars," although there was nothing whatsoever in the record to suggest that it meant a carjacker. (GER 196-97.) Defense counsel then speculated that "it could mean anything" including, simply, "my main man." (GER 197.)

Defense counsel characterized the court's concerns as "exactly what" the *Black* dissent described and lamented that, but for the *Black* majority, "there wouldn't be any problem with dismissal today." (GER 190.) He urged the court to "follow your feelings" and "take the stand that you agree . . . with the dissent." (*Id.*) The government, in turn, argued that controlling circuit precedent foreclosed relief. (GER 198-99.) Furthermore, the government offered to provide the court with all the recordings and transcriptions. (GER 202.)

The court agreed to review the government's additional evidence, and then suggested that defense counsel provide additional legal authority, as the court complained that this Court had "basically turned its back" on the pre-*Black* caselaw on which Dunlap had relied. (GER 202-03.) In response, defense counsel reiterated: "[G]o with the dissent, follow that." (GER 203.) The court agreed that it would "go [its] own way" and declared that "[t]his is why they have the phrase luck of the draw." (*Id.*)

Following the hearing, on Thursday, March 6, 2014, the government submitted a supplemental filing that included the numerous additional transcripts and recordings. (GER 205-370.) On

Monday, March 10, 2014, the district court dismissed the case as to Dunlap. (GER 1.)

In the order, the court followed defense counsel's urging and began by quoting the *Black* dissent: "'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." (GER 1.) The order repeatedly cited that dissent, and ended by quoting it again, this time for the proposition that the government had become "'the oppressor of its people.'" (GER 18, 22, 24.)

Invective and the *Black* dissent aside,[14] the order purportedly analyzed the six factors identified by the *Black* majority: "(1) known criminal characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of

[14] The government's currently pending Motion for Reassignment of District Court Judge addresses the district court's apparent hostility to the government, its failures to adhere to this Court's directives, its failures to allow for orderly appellate review of its release orders, and the need for repeated emergency stays from this Court.

conviction; (4) the government's encouragement of the defendants to commit the offense conduct; (5) the nature of the government's participation in the offense conduct; and (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue." (GER 7 (quoting *Black*, 733 F.3d at 303).) In analyzing these factors, however, the court misstated both the record and the law.

With respect to the first two factors, the court asserted that the government lacked "any knowledge" about the defendants' "criminal background or propensity" prior to initiating the sting (GER 9), and that "there is no evidence that [the defendants] were previously involved—or even suspected of being involved—in stash-house robberies" (GER 11). But, as set forth above, the sting began *after* Hudson, a known gang member, approached the informant and inquired about robbery opportunities. Before the government broached the stash-house robbery opportunity, Hudson had described himself as having a robbery crew that was "serious shit," and Whitfield—a member of that crew—had identified himself as a violent gang member who had spent six years in custody. (*See supra* p. 10.) Moreover, there

was ample evidence that both Hudson and Whitfield had engaged in stash-house robberies, namely, their repeated statements that they had done so, combined with their logistical knowledge of how to carry one out. (*See supra* pp. 11-13.) The court seemed to have not listened to the recording or read the transcript of the first meeting, because it incorrectly asserted that "at no point did . . . [Hudson or Whitfield] indicate that they had previously engaged in home invasions or drug stash-house robberies." (GER 5.)

As for Dunlap in particular, the court blasted the government because, "[a]bsent a crystal ball," the ATF could not have known anything about Dunlap in particular when initiating the sting, because he was not added to the robbery crew until later. (GER 9; *see also* GER 10 (complaining that the government "did not learn about Dunlap's alleged past crimes until after Dunlap joined").) In so noting, the district court rejected *Black*'s holding that "it would undermine law enforcement's ability to investigate and apprehend criminals if its otherwise acceptable conduct became outrageous merely because an individual with no known criminal history whom the government did not suspect of criminal activity joined the criminal enterprise at the last

minute at the behest of codefendants." 733 F.3d at 307 n.11. The court also dismissed Dunlap's description of his prior robberies as puffery (GER 10), even though *Black* expressly held that "the government was entitled to rely on the defendants' representations of their past criminal conduct." *Id.* at 307 n.10.

Turning to the third factor, the court concluded that "there [was] no indication that Hudson, Whitfield, and Dunlap had any previous criminal affiliation between them" (GER 13)—even though (1) Hudson and Whitfield were fellow gang members, (2) Hudson and Whitfield both vouched for Dunlap as a "jack boy," (3) Hudson described himself as having a pre-existing "serious shit" crew ready to carry out a "big thing," and (4) Hudson brought Whitfield with him to the first meeting as a member of that crew. Further, despite these facts and the fact that Hudson was already on the prowl for a robbery opportunity for his crew, the district court concluded that "[b]ut for the undercover agent's imagination . . . there would be no crime." (GER 13.) The court also noted that the government provided the safe house and getaway vehicle (*id.*), which was true but overlooked the fact that the government only supplied them *after* Hudson made clear he could provide the getaway

vehicle (GER 265) and Whitfield made clear he could provide a safe house (GER 302-03).

As to the government's "encouragement" of the defendants—the fourth factor—the court concluded that the government had employed "economic coercion" by "target[ing] people who are poor." (GER 14.) As to the fifth factor, the government's participation, the court complained that the investigation was "drawn-out" because it lasted two months; the court again refused to consider the defendants' eagerness in carrying out the offense. (GER 16.) The court also claimed that by promising to be an inside-man and providing a safe house and a getaway car, SA Thompson had furnished the critical aspects of the crime. (GER 17.) The court further faulted the government for telling the defendants there would be guards, thus creating the need for guns. (*Id.*) Finally, as to the sixth factor, the court asserted that stash-house stings were not worth pursuing because they targeted stash-house robbers rather than drugs, and thus got no drugs off the street and in fact made things easier for drug cartels. (GER 21.) The court then complained that the operations were very expensive, including in terms

of the cost of incarceration, and that this cost was a basis for dismissing. (GER 22.)

The court accordingly granted Dunlap's motion to dismiss.[15] (GER 23-24.)

e. Whitfield Withdraws From His Plea, and Successfully Moves to Dismiss

Following Dunlap's successful motion to dismiss, Whitfield moved to withdraw from his plea on the grounds of ineffective assistance of counsel. (GER 396-405.) Whitfield's counsel explained that she had performed ineffectively by advising him that he would lose a motion to dismiss because the outrageous-government-conduct claim was much weaker here than in *Black*. The government opposed. (GER 411-22.)

At a hearing, the district court praised the "superb" representation Whitfield's counsel had provided. (GER 430-31.) The court explained that counsel could not possibly have foreseen that the

[15] The district court also ordered Dunlap released forthwith. The procedural history and issues involved in the court's efforts to release Dunlap and Whitfield (which involved this Court issuing multiple emergency stays to halt their releases), are addressed in the government's currently pending bail appeals.

court would dismiss the indictment, "particularly in light of the *Black* decision" given that "the Ninth Circuit ha[d] weighed in." (GER 426.) "[N]ine lawyers out of ten—maybe ten lawyers out of ten" would have concluded that *Black* controlled. (GER 430.) Accordingly, the court denied the motion. (GER 431.)

But on April 28, 2014, less than a month after denying the motion, the court *sua sponte* vacated Whitfield's sentencing date and asked for briefing on whether Dunlap's dismissal "stop[s] the judicial machinery against Whitfield as well." (GER 434.) On May 2, 2014, this Court denied rehearing en banc in *Black*, 750 F.3d 1053.

In response to the court's order, Whitfield "joined" in Dunlap's motion to dismiss and moved for reconsideration of the motion to withdraw. (GER 435-59.)

The government responded to the court's order by noting that Whitfield had waived his right to challenge the indictment by pleading guilty after being fully advised of his ability to bring an outrageous-government-conduct motion. (GER 464-71.) In an additional filing (GER 474-91), the government reiterated its waiver arguments (GER 482-87) and opposed dismissing the case as to Whitfield, noting his

eagerness, his repeated statements of criminal experience, and his promises to carry out violence, including against police officers. (GER 487-91.)

Immediately before the hearing on Whitfield's motion, this Court stayed the district court's order dismissing as to Dunlap. (CR 167.)

The court then held a four-minute hearing as to whether the case should be dismissed as to Whitfield. (GER 27-29.) The court declared it would throw "the baby [out] with the bath water," providing the following explanation:

> [I]f the Ninth Circuit is saying, "All right. We're restoring this to the status quo," before I dismissed the indictment; fine. The indictment is now alive and well.
>
> The Government's conduct still exists. I'm still going to make the same ruling with respect to the Government's conduct. I am.
>
> Now, if Mr. Whitfield wants to withdraw on that basis, fine; I'll permit him to withdraw his guilty plea.

(GER 29.)

The court then issued a written statement of reasons. (GER 31-39.) After lengthier sections explaining why Whitfield could properly withdraw and had not waived a claim of outrageous government conduct (GER 31-37), the district court declared that it "need not revisit

the outrageousness of the Government's conduct" because its ruling regarding Dunlap "appl[ied] equally to Whitfield" (GER 37). To the extent the court engaged in any new analysis, it was to state: (1) Whitfield's revelations of his criminal history were irrelevant because they came after the sting began; and (2) his eagerness and participation in the conspiracy were irrelevant because only the government's conduct mattered. (GER 38.) The court allowed Whitfield to withdraw from his plea and granted his motion to dismiss. (GER 39.)

III

SUMMARY OF ARGUMENT

The stash-house-robbery sting employed by the ATF in this case was not outrageous government conduct. To the contrary, it was a safe, sensible, and long-approved method used to investigate a known member of a violent gang who was seeking out robbery opportunities for himself and his crew. As Whitfield's counsel admitted, the facts here are far stronger for the government than they were in *Black*, in which this Court rejected the claim that an ATF stash-house-robbery sting was outrageous government conduct. As Dunlap's counsel admitted, to

hold that the sting in this case was outrageous requires following the *Black* dissent and rejecting the majority.

Only twice have Courts of Appeals ruled that government conduct was outrageous, and not once in the past 35 years. Far from breaking new ground in some appalling manner that "shocks the universal sense of justice," the ATF's investigation in this case followed a playbook employed—and approved of by courts, including this Court—in hundreds of investigations over 20 years. Using those techniques was not outrageous here; it was a proper and effective way of catching a "serious shit" robbery crew that was ready to carry out a "big thing." This district court erred in concluding otherwise, and this Court should reverse.

IV

ARGUMENT

A. Standard of Review

This Court "review[s] de novo the district court's [granting] of a motion to dismiss an indictment due to outrageous government conduct," and it does so "view[ing] the evidence in the light most

favorable to the government."[16] *United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013), *reh'g en banc denied,* 750 F.3d 1053 (9th Cir. 2014).

B. As *Black* Makes Clear, the Stash-House-Robbery Sting Was Not Outrageous Government Conduct

This case is squarely controlled by *Black*, which approved an ATF stash-house-robbery sting under facts that were, as Whitfield's counsel conceded (GER 409), far less favorable to the government. Dunlap's counsel similarly admitted that dismissal was possible only by following the *Black* dissent and ignoring the majority. (GER 190.) But the majority must be followed. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

The result in *Black*, moreover, was no outlier. This Court has only found outrageous government conduct once, and the high standard set by precedent is insurmountable absent a degree of wanton overreaching

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[16] Clear-error review applies to any factual findings. *Black*, 733 F.3d at 301. Exactly how clear-error review of a finding *adverse* to the government would work in tandem with viewing the evidence in the light most *favorable* to the government is a tricky question, but one that need not be answered here because the court made no findings and simply reached mixed conclusions of fact and law. That it would make no findings is logical: because there was no evidentiary hearing, the evidence consisted of uncontradicted, sworn affidavits and unimpeachable recordings.

totally absent from the ATF's sting in this case. Moreover, the general contours of that sting have been approved of by every Court of Appeals to consider the issue, such that it cannot possibly be said to offend a "universal sense of justice."

1. The "Extremely High Standard" Defendants Must Meet

The standard for finding that an investigation constitutes "outrageous government conduct" is as demanding as any standard applied by this Court. The government's conduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice," *United States v. O'Connor*, 737 F.2d 814, 817 (9th Cir. 1984), and must contravene "fundamental fairness," *United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir.2003). Only the most "flagrant, scandalous, intolerable and offensive" conduct will meet that "extremely high" standard. *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993).

The doctrine is "limited to extreme cases." *Gurolla*, 333 F.3d at 950. "[S]uccessful assertion of the outrageous government conduct defense is extremely rare." *United States v. Simpson*, 2010 WL 1611483, *6 (D. Ariz. 2010) (Murguia, J.). Indeed, so demanding is the

standard that "there are only two reported decisions in which federal appellate courts have reversed convictions under this doctrine." *Black*, 733 F.3d at 302. Those two cases are this Court's decision in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971), and the Third Circuit's decision in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978).[17] In the 35 years since *Twigg*, no Court of Appeals has held that the "extremely high standard" for outrageous government conduct was satisfied.

a. The Extraordinary Facts of the Only Two Published Appellate Decisions Finding Outrageous Government Conduct

Far from supporting the district court's application of the outrageous-government-conduct doctrine, *Greene* and *Twigg* show just how "extremely high" the standard is.

In *Greene*, the government carried out a years-long operation in which it bullied criminals—who had apparently been previously scared straight—into returning to moonshining, while also serving as their

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[17] The Sixth and the Seventh Circuits reject the doctrine altogether. *See United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995); *United States v. Tucker*, 28 F.3d 1420, 1425, 1428 (6th Cir. 1994). Other circuits acknowledge the doctrine but have never found it applicable. *See United States v. Dyke*, 718 F.3d 1282, 1287 (10th Cir. 2013) (collecting examples).

supplier and sole customer. One of the defendants had previously run a still, but had stopped following a "raid and arrest" and conviction. 454 F.2d at 787. Nevertheless, upon his release, an undercover agent re-initiated contact with him and the other defendants. In the face of their evident reluctance to run a still, the agent—posing as a "big-time gangster"—employed a "veiled threat" of gangland retaliation "to prod [them] into production of bootleg alcohol." *Id.* at 784-86. To make that production possible, the government "offered to provide a still, a still site, still equipment, and an operator" and "provided two thousand pounds of sugar at wholesale." *Id.* at 786. The government maintained this "illegal operation" over the course of 2.5 or 3.5 years (depending on how it was reckoned); the whole time, the government was not only the defendants' supplier but "the only customer of the illegal operation [it] had helped to create." *Id.* at 786-87.

Without articulating any standard or test, the Court—over a dissent—reversed the convictions. The government had not only "become enmeshed in criminal activity, from beginning to end," it had also "reestablish[ed], and then . . . sustain[ed], criminal operations which had ceased with the first convictions." *Id.* at 787. "We do not

believe the Government may involve itself so directly and continuously over such a long period of time in the creation and maintenance of criminal operations, and yet prosecute its collaborators." *Id.*

In the Third Circuit's divided *Twigg* decision, an informant—acting at the government's direction—contacted an old friend of his (Henry Neville) and proposed setting up a laboratory to manufacture speed. 588 F.2d at 375. The informant would acquire "the necessary equipment, raw materials, and a production site," while Neville would "rais[e] capital and arrang[e] for distribution." *Id.* In fact, there was never any distribution and Neville raised little money: the government bought the chemical precursors as well as lab equipment, and provided a lab site. *Id.* at 375-76 & n.4. William Twigg was brought into the operation so that he could repay a debt to Neville. *Id.* at 376. The informant "was completely in charge of the entire laboratory," and the "minor" assistance provided by Neville and Twigg was "at the specific direction" of the informant. *Id.*

The majority found that the investigation crossed the line because, on the one hand, the defendants:

- lacked "the know-how with which to actually manufacture [speed]";

- had "no apparent criminal designs";

- were not "engaged in any illicit drug activity" when targeted by the government but were instead "lawfully and peacefully minding [their] own affairs"; and,

- in the case of Twigg, "contributed nothing in terms of expertise, money, supplies, or ideas" and "would not even have shared in the proceeds from the sale of the drug,"

while, on the other hand, the government and its informant:

- "suggested the establishment of a speed laboratory";

- "gratuitously supplied about 20 percent of the glassware and the indispensable ingredient" when it was "unclear whether the [defendants] had the means or the money to obtain [that ingredient] on their own";

- "made arrangements with chemical supply houses to facilitate the purchase of the rest of the materials";

- "purchased all of the supplies with the exception of a separatory funnel," which was secured at the government's direction;

- solved the defendants' problems "in locating an adequate production site . . . by providing an isolated farmhouse well-suited for the location of an illegally operated laboratory"; and,

- "[a]t all times during the production process, . . . was completely in charge and furnished all of the laboratory expertise."

Id. at 380-82 & n.9.

These two unique cases—which have borne no fruit for 35 years—are wholly unlike this case. Moreover, they are the outliers in a field where outrageous-government-conduct claims have been broadly denied.

b. A Sampling of the Numerous Ninth Circuit Cases Holding that Aggressive Investigative Techniques Were Not Outrageous Government Conduct

In contrast to the unique outliers of *Greene* and *Twigg*, it is helpful to consider the conduct that this Court has held *not* to be outrageous in some of the dozens of cases rejecting the claim. *See Simpson*, 2010 WL 1611483 (collecting cases showing that "the Ninth Circuit has frequently found that the government conduct in question was *not* outrageous").

Outside of cases approving of stash-house-robbery stings—discussed in the next section—the most instructive case is *United States v. Emmert*, 829 F.2d 805 (9th Cir. 1987). There, without any meaningful suspicion, the government targeted two undergraduate students, and—using a $200,000 carrot and the stick of gangland threats—persuaded them to broker a cocaine transaction, then prosecuted them. The investigation began when an informant saw a

student (Thomas Powell) "atten[d] a party at which cocaine was used." *Id.* at 807. The informant, offering $200,000, asked Powell if he knew of anyone who could broker a large-scale cocaine sale. *Id.* Powell told the informant that another student, Walter Emmert, "might know someone who could help find a [cocaine] supplier." *Id.* There was "no evidence that Emmert or Powell had been involved in prior drug transactions." *Id.* at 812. An undercover officer—posing as a member of a Detroit Mafia and making various threats—offered them a $200,000 finder's fee to broker a cocaine transaction. *Id.* at 806. Powell and Emmert, apparently fearing for their lives, agreed, but insisted the money be put into their safe deposit as a "'life insurance policy.'" *Id.* at 807-08.

This Court held there was no outrageous government conduct. "[T]hreats of the kind [made by the officer] here—scarcely more than bluster—are ordinary bargaining tactics in drug deals" and were necessary to "maintain [the officer's] cover" and convince Emmert that the officer "was a 'mobster.'" *Id.* at 812. As for the $200,000 finder's fee, "large sums of money are common to narcotics enterprises and necessary to create a credible" sting. *Id.* The money was not "bait for college students" but "a method to smoke out a supplier capable of

selling large quantities of cocaine." *Id.* Furthermore, there was no problem with selecting apparently innocent students as targets because they willingly and voluntarily met with the informant:

> Even though [the informant] did not know whether Powell was a drug dealer, he knew Powell was probably in a position to know someone who was by virtue of attending a party where cocaine was served. Under these circumstances, asking Powell whether he knows a drug supplier is not outrageous. Emmert did not become a target of the investigation until he voluntarily accepted Powell's invitation to meet with [the informant]. At that first meeting between Emmert and [the informant], Powell introduced Emmert as someone who could arrange a drug sale. Targeting Emmert was thus the result of Powell's and Emmert's own voluntary conduct, and was not outrageous.

Id. All together, "the criminal investigation in this case, including the threats, intimidation, large finder's fee, and targeting of Powell and Emmert for investigation" was not outrageous government conduct. *Id.*

The Court also rejected the argument that the government had improperly "fabricated the drug transaction." *Id.* The Court held that the government's creation of the scheme was fine because Emmert voluntarily entered into it upon Powell's introduction:

> Emmert was drawn into this conspiracy by Powell. When the government agents first targeted Emmert for investigation, he had expressed interest in receiving a portion of the finder's fee in exchange for brokering cocaine

> . . . . He was therefore contemplating criminal activity and further investigation was appropriate.

Id.

Also instructive is *Shaw v. Winters*, 796 F.2d 1124 (9th Cir. 1986). There, a police officer targeted the operator of a bar (Ronald Shaw)—with no apparent basis for suspecting him of illegal activity—and became a regular customer at Shaw's bar. *Id.* at 1125. Shaw helped find steeply discounted clothes for the officer, who in turn sold Shaw a cheap microwave. *Id.* Without any "evidence that Shaw had dealt in food stamps before," the officer then proposed that they go into business selling stolen food stamps. *Id.* The officer "took the lead in offering the stamps and in arranging the sales," "gave Shaw some hints on how to pass the stamps," and sold them to him "at forty per cent of their face value." *Id.* The officer "told Shaw that the stamps were stolen but that Shaw would have 'no problem' with them." *Id.* With these assurances, Shaw agreed to buy them. *Id.* The sting continued "[o]ver a period of several months." *Id.* The district court held that the sting was outrageous government conduct, but this Court reversed, tersely dismissing the defendant's arguments and noting that the "police

involvement in the illegal activity here was not as long or as deep as it was in" in *Greene* and *Twigg*. *Id.* at 1125-26.

An example of other kinds of aggressive tactics that this Court has held not to be outrageous is *United States v. Simpson*, 813 F.2d 1462 (9th Cir. 1987). There, the FBI hired a heroin-addicted prostitute to pose as a stranded traveler and "entic[e]" the defendant to give her a ride into town. *Id.* at 1464. She then went with him to his apartment and "became sexually intimate." *Id.* Afterward, she told him that she had friends who wanted to buy drugs, and directed him to sell the drugs to undercover FBI agents. *Id.* Following "an eight-day evidentiary hearing," the district court found that the government had manipulated the prostitute into becoming an informant, had improperly used her against the defendant after learning they had become sexually intimate, and had improperly continued to use her as an informant despite knowing she was committing other crimes. *Id.* This, the court concluded, was outrageous government conduct. *Id.* The government appealed, and this Court reversed, holding that "the FBI's conduct in recruiting and using [the prostitute] as an informant is not 'shocking to

the universal sense of justice.'" *Id.* at 1471; *see also United States v. Slaughter*, 891 F.2d 691 (9th Cir. 1989) (similar sting).

These cases—and others from sister Circuits[18]—show that when this Court says that it will dismiss for "only the most intolerable government conduct," *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991), those words have real meaning. The government takes no pleasure in reciting the unpleasant facts of prior investigations; it is sadly true—as this Court has long recognized—that to protect the community and "apprehend those engaged in serious crime," the government sometimes must "use methods that are neither appealing nor moral if judged by abstract norms of decency." *United States v. Bogart*, 783 F.2d 1248, 1438 (9th Cir. 1986).

As explained below, there was nothing "[un]appealing," "[im]moral," or contrary to "abstract norms of decency" in this case. But, as the cases above establish, even if there were, that would still not entitle the defendants to relief.

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[18] *E.g.*, *United States v. Esch*, 832 F.2d 531 (10th Cir. 1987) (holding that it was not outrageous government conduct to create a pedophilic organization, advertise for members, and encourage those members to create child pornography).

2. In Black, this Court Recently Addressed and Approved the Same Form of Sting at Issue Here

This Court's decision last year in *Black* is neither the first nor the last time the Court has approved of ATF stash-house-robbery stings. Indeed, the Court routinely rejects outrageous-government-conduct claims regarding such stings, as well as the related claims of entrapment and factual impossibility.[19] Other Circuits have approved of stash-house stings as well. *See, e.g.*, *United States v. Corson*, 579 F.3d 804, 806 (7th Cir. 2009); *United States v. Orisnord*, 483 F.3d 1169, 1176 (11th Cir. 2007). Nevertheless, *Black* provides a particularly thorough framework for assessing the defendants' claim.

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[19] *See United States v. Sangalang*, 2014 WL 2884553, *1 (9th Cir. June 26, 2014); *United States v. Hullaby*, 736 F.3d 1260, 1262-63 (9th Cir. 2013); *United States v. Johnson*, 534 Fed. Appx. 592, 593-94 (9th Cir. 2013); *United States v. Velasquez-Lopez*, 510 Fed. Appx. 559, 560-61 (9th Cir. 2013); *United States v. Mondragon-Hernandez*, 546 Fed. Appx. 693, 694 (2013); *United States v. Lopez-Mejia*, 510 Fed. Appx. 561, 563 (9th Cir. 2013); *United States v. Hurth*, 507 Fed. Appx. 731, 732 (9th Cir. 2013); *United States v. Jackson*, 459 Fed. Appx. 639, 641 (9th Cir. 2011); *United States v. Spentz*, 653 F.3d 815, 820 (9th Cir. 2011); *United States v. Briggs*, 397 Fed. Appx. 329, 332 (9th Cir. 2010); *United States v. Williams*, 547 F.3d 1187, 1201 (9th Cir. 2008); *United States v. Rodriguez*, 360 F.3d 949, 957 (9th Cir. 2004).

The facts of *Black*, 733 F.3d at 298-301, are similar to those here, though—as Whitfield's attorney recognized (GER 409)—considerably less favorable to the government.

That sting began with the ATF sending an out-of-state informant into "bars in 'a bad part of town'"—an area "defined only by [poor] economic and social conditions"—to ask if anyone wanted to commit a stash-house robbery. *Id.* at 299, 303. The informant "was *not* instructed to look only for particular individuals, such as those who were already involved in an ongoing criminal operation or . . . about to commit a crime." *Id.* at 299 (emphasis added). Knowing nothing about him, the informant "approached a man named Curtis at the bar to see if he would be interested in doing a home invasion. Curtis was not interested." *Id.* Instead, he referred the informant to Shavor Simmons, who then became the ATF's target. *Id.* Knowing nothing more about Simmons, the informant asked him if he would be "interested in putting a crew together" to rob a stash house; Simmons agreed. *Id.*

An undercover ATF agent then met with Simmons and gave him roughly the same cover story used here. *Id.* As in this case, the agent "chose details that demonstrated a particularly high potential for

danger and violence to ensure that only individuals who 'are truly involved in this type of crime' would agree to it." *Id.* at 300. Simpson agreed and said that he had "goons" who would kill guards if necessary, though Simpson indicated he had no idea how many "goons" were necessary and repeatedly asked the undercover agent for guidance. *Id.* Simpson indicated that he and one of his "goons" had previously robbed a stash-house, though—unlike here—there is no indication that he showed operational knowledge of how to do so. *Id.* Simpson—like Hudson, Whitfield, and Dunlap—self-reported an extensive criminal history. *Id.*

Simpson then brought in Cordae Black. *Id.* Black "proposed several robbery plans," more or less the same ones proposed by Hudson and Whitfield here. *Id.* Like Whitfield, Black asserted that he had thought a lot about how to carry out the robbery. *Id.* Unlike in this case, however, it was the agent who told them to get guns, which they said they did not have and could not get. *Id.* Eventually they agreed to obtain them. *Id.*

Unlike in this case, Simpson and Black repeatedly indicated that they did not think a larger crew was necessary, and only grudgingly

agreed to expand the crew. *Id.* At the next meeting, the crew had bloated to five men, three of them totally unknown to the government. *Id.* The crew then failed to show up to the next meeting. Eventually some of them (but not Simpson) showed up. *Id.* The ATF agent provided a safe house (as in this case), and when the crew (minus Simpson) showed up, they were arrested. *Id.* They had four guns, but the opinion does not indicate whether they had other robbery supplies as in this case. *Id.*

This Court held the sting was not outrageous government conduct. *Id.* at 310. The Court laid out a totality-of-the-circumstances approach guided by six general factors (analyzed in the next section). *Id.* at 303-04. The Court also announced several principles, mostly disregarded by the district court here:

- "The government need not have individualized suspicion of a defendant's wrongdoing before conducting an undercover investigation." *Id.* at 304. (*Compare* GER 11 ("The Court declines the invitation to endorse this nab-first-ask-questions-later approach.").)

- Even where the government invents a sting and targets defendants knowing nothing about them, that can be "counterbalanced by the defendants' enthusiastic readiness to participate in the stash house robbery, by their representations that they had committed stash house robberies in the past, by their independent role in planning the crime and by the

absence of government coercion or pressure." *Id.* at 305-07 & n. 8. (*Compare* GER 9-10 ("[T]his Court's concerns are not so easily mitigated."); GER 38 ("[Th]e government again impermissibly attempts to validate its conduct . . . by reiterating [the defendants'] participation in the ruse.").)

- The government may "reasonably rel[y] on the defendants' own, credible representations that they had committed these robberies in the past." *Id.* at 307 & n.10. (*Compare* GER 10 (refusing to credit Dunlap's "braggadocio" and ruling that "[t]he Government cannot bootstrap this *post hoc* knowledge to justify the scheme").)

- "[M]ere [government] encouragement [is] of lesser concern than pressure or coercion." *Id.* at 308. (*Compare* GER 14-16 (offering poor defendants money was "economic coercion" tantamount to "extortionate threats")[20].)

- Defendants who are "recruited by other defendants" can hardly complain of government inducement. *Id.* at 307. (*Compare* GER 8 (rejecting the argument that "[a]ny issues that [Dunlap] has regarding how he entered into the conspiracy lie solely with Hudson and Whitfield").)

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[20] The district court's reasoning also contradicted *Emmert*'s holding that a $200,000 finder's fee offered to undergraduate students was not improper pressure because "large sums of money are common to narcotics enterprises and necessary to create a credible cover" story. 829 F.2d at 812. To be clear, the defendants undeniably were poor men who hoped to get rich by the robbery. This is a common motive. *Cf.* USSG § 5H1.10 (forbidding consideration of poverty at sentencing). But while most robbers may be poor, the government respectfully rejects the district court's conclusion that "no poverty-ridden individual could pass up" the chance to rob a stash house. (GER 20.)

- "Stash house robberies are largely unreported crimes that pose a great deal of risk of violence in residential communities," and the ATF sting operation is a worthy means of safely addressing those crimes. *Id.* at 309. (*Compare* GER 21-22 (stash-house-robbery stings are worthless because they do not get drugs off the street, benefit stash-house operators, and cost a lot of money).)

- Concerns about government overreaching are mitigated when the sting operation is recorded, as it was here. *Id.* at 310.

While the Court had some concerns about the initiation of the sting operation—since it cast a wide net based simply on socio-economic class and since the government knew nothing about the defendants before proposing the stash-house robbery to them, *id.* at 305—these concerns were outweighed by the fact that the defendants soon said they had carried out stash-house robberies before, were eager to carry out the crime, and handled most of the planning, *id.* at 307-09.

Here, as explained below, the concerns in *Black* are absent, while the counterbalancing factors are far stronger.

3. It Was Not Outrageous to Employ a Stash-House Sting to Catch a Violent Gang Member Seeking Out Robbery Opportunities and His "Serious Shit" Crew of Hardened Criminals

a. Each Investigative Step Was Appropriate

As *Black* and *Emmert* make clear, this Court does not weigh the entire investigation against what the government knew at its inception. Rather, while the Court considers the totality of the circumstances, each investigative phase is assessed against its contemporaneous factual backdrop. Tracing this sting through its phases reveals sensible investigative decisions, not outrageous overreaching.

Contrary to the district court's invective (GER 179), this case began not with the government "trolling" for poor, uneducated defendants, but rather with Hudson—a known gang member—approaching an informant and asking him about robbery opportunities.[21] (GER 45, 224, 227, 243, 271.) Indeed, Hudson

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[21] The district court baselessly speculated that—contrary to the sworn affidavit (GER 45), the term's usage in recordings (*e.g.*, GER 224, 242), and criminal parlance (*see supra* p. 8 n.2)—"come up" might have meant something other than robbery opportunity. (GER 2.) If this was a finding, it was clearly erroneous and failed to consider the evidence in the light most favorable to the government. (*Compare* GER 43, 218 (setting forth qualifications of Detective Shear, a 16-year veteran of the

(continued . . . .)

emphasized that he had taken the lead as proof of his enthusiasm. (GER 271.) It was not the most "flagrant, scandalous, intolerable and offensive" conduct possible, *Garza-Juarez*, 992 F.2d at 904, for the ATF to sound him out and learn more about the robberies he was trying to commit.

Before the government broached the possibility of robbing a stash house, Hudson said that he had a robbery crew that was "serious shit" and was ready for a "big thing." (GER 225.) Indeed, before it was broached, Hudson had already brought in Whitfield as part of his crew, and Whitfield had already described himself as a violent gang member who had spent six years in prison. (GER 240.) It was not "grossly shocking," *O'Connor*, 737 F.2d at 817, for the ATF to continue the conversation to learn more about this "serious" robbery crew of hardened, violent gang members.

LAPD who "regularly investigates gang members and persons suspected of committing armed robberies, shootings, attempted murders, narcotics trafficking, illegal possession of firearms, and other gang and narcotics-related violations"), *with* GER 196 (district court's acknowledgment that with respect to criminal parlance, "I went to parochial school, so I'm completely out of touch").)

Immediately after the undercover ATF agent mentioned the possibility of robbing a stash house, Hudson and Whitfield did two things. First, they revealed operational knowledge of how to carry out such a robbery, including where guards would be stationed. (GER 248-49, 256, 271-73.) Second, they declared that they had carried out stash-house robberies before. (GER 250-51, 262-63.) Both repeatedly described themselves as experienced robbers, with Whitfield holding himself out as a seasoned gunman eager to kill. (GER 72, 257-60, 271, 310-11, 326.) Hudson offered to be the getaway driver since he had a car. (GER 265.) The agent asked whether the two of them were the entire crew; Hudson revealed he had ties to other professional robbers; and Hudson and Whitfield both stated that they would need one more crewmember to carry out the crime. (GER 243-44, 257, 273.) It did not "violat[e] fundamental fairness," *Gurolla*, 333 F.3d at 950, to further investigate these self-described experienced stash-house robbers and the rest of their seasoned robbery crew.

In the next meeting, after Whitfield described being in a prison brawl (GER 297-98), Whitfield and Hudson continued honing the plan (GER 301-02, 306, 308-09, 312-14, 324). For example, they discussed

how to restrain the guards, and Whitfield overruled Hudson's suggestion of using handcuffs, explaining that zip ties were better. (GER 313.) Whitfield repeated that he was a "sharp-shooter" who would burst in first with a big gun. (GER 302-03, 310.) They described the third crewmember, an armed professional robber. (GER 305-06, 319-22.) They demonstrated willingness—for Whitfield, *eagerness*—to use lethal force. (GER 310-11.) Both would kill police officers if necessary. (GER 325-27.) Both described themselves as robbers by trade; Hudson said he was also a drug dealer. (GER 323.) Both admitted to being on "high-risk parole"; both showed hardened lawlessness in scoffing at that supervision. (GER 316-17.) Hudson elaborated on his criminal history by boasting of eight years in youth authority and years on parole. (GER 317.) The Due Process Clause did not require the ATF to give up its investigation after hearing this.

At the next meeting, Whitfield and Hudson introduced Dunlap, vouching for him as a "real jack boy"—another robber by trade. (GER 121, 128, 159; *see supra* p. 23.) Dunlap identified himself as a gang member (GER 61, 349) and described in detail past armed robberies, boasting of the intimidating power of a gun. (GER 153-58.) He also

advised on various logistical aspects of the plan, including how to gain entry while concealing that it was an inside job. (GER 134, 144-45, 148.) The crew discussed restraining and blindfolding (GER 141-42, 145), beating (GER 142-43), and killing (GER 143-44) the guards. They planned other aspects of the robbery, such as Whitfield's charging in "with the big guns." (GER 133, 138-39, 141, 147-51, 162.) Then, as at every stage of the sting, they emphatically expressed their eagerness to carry out the crime. (*E.g.*, GER 132, 140, 146, 160, 242-43, 271, 276, 300, 319-20.) It did not "violate the universal sense of justice," *O'Connor*, 737 F.2d at 817, for the ATF to see if they would show up as planned with their guns and supplies to rob the stash house.

On the day of that robbery, the crew brought those guns—including Whitfield's "baby": a powerful pistol-grip shotgun—and other robbery tools, including police uniforms, zip ties, and other supplies that the crew had identified as necessary when planning the robbery. (GER 70-74.) It was not outrageous to arrest and charge them.

This is not a case, as the district court claimed (GER 20), in which the government "stoop[ed] to the same level as the defendants it seeks to prosecute . . . solely to achieve a conviction for a made up crime." To

the contrary, the government *prevented* violent crime by intervening when Hudson—the leader of a robbery crew that was "serious shit"—was on the prowl for his next "big thing." (GER 225.) The defendants' description of their criminal backgrounds was not—as the district court suggested (GER 183)—mere "puffery." Hudson and Whitfield are career criminals with histories of violence and drug-dealing, and Dunlap's criminal history is replete with guns and robberies. (*See* HPSR ¶¶ 42-70; WPSR ¶¶ 45-56; GER 554-60.) While the record is silent as to when the government ran criminal-history checks, these histories nevertheless underscore the reasonableness of crediting the defendants' self-descriptions. *See Black*, 733 F.3d at 307 & n.10.

Through a series of careful steps, the ATF responsibly and precisely targeted the recidivist violent offenders—ready, eager, and able to commit a violent robbery—that the sting operation was properly designed to catch. *Id.* at 309. At each step, the ATF had far more justification for its actions than this Court held sufficient in *Emmert*, 829 F.2d at 812, and *Black*. At each step, the decision to continue the sting was not outrageous. To the contrary, "[i]t would have been poor

police work indeed . . . to have failed to investigate this behavior further." *Terry v. Ohio*, 392 U.S. 1, 23 (1968).

b. Compared to the Investigation Approved in Black, the Sting Here is Plainly Not Outrageous

Finally, simply comparing the facts of this case to those in *Black*, using *Black*'s framework, confirms the sting's propriety.

Factor	***Black***	**Here**
	Initiation	
Known Criminal Characteristics	None.	Hudson's gang membership; Whitfield's gang membership and six years' custody.
Individualized Suspicion	None.	Hudson approached informant asking for robbery opportunities, said he had a crew, and brought Whitfield as a crewmember.
Government's Role in Creating the Crime	Asked Simpson to form a crew and commit robbery, told crew to get guns, repeatedly urged a larger crew, created general scenario.	Created only general scenario.
Mitigating Factors	Defendants' "enthusiastic readiness to participate in the stash house robbery," "representations that they had committed stash house robberies in the past," and "independent role in planning the crime," plus the "absence of government coercion or pressure."	Same, plus their purchasing of additional supplies such as zip ties and police uniforms.

	Post-Initiation	
Encouragement of Defendants	Economic incentive to poor defendants plus urging defendants' "to do something real quick."	Economic incentive to poor defendants.
Government's Participation	Month-long sting; provided safe house.	Two-month-long sting; provided safe house after Whitfield offered to provide one, and getaway vehicle after Hudson offered to provide one.
Crime Being Pursued and Necessity for Government's Actions	Stash-house sting to stop robberies generally.	Stash-house sting to stop to an identified gang-member already seeking robbery opportunities

Unlike in *Black*, the ATF initiated this sting not by trawling through a general population with a "wid[e] net"—which "concern[ed]" the Court in *Black*, 733 F.3d at 305, 307—but rather by casting a lure at a specific criminal who was actively seeking out a robbery opportunity. The initiation thus resolved the Court's concerns, while what followed—as in *Black*—fell "within the bounds of law enforcement tactics that have been found reasonable." *Id.* at 302.

The only factors here that are arguably less favorable for the government are: (1) providing a getaway vehicle, and (2) investigating for two months rather than one. But the government's getaway vehicle was neither "difficult-to-obtain" nor "necessary," *id.* at 309: Hudson had already volunteered his Lexus as the getaway car. (GER 265.) And the extra month—which so troubled the district court (GER 16)—is nothing like the years-long still operation in *Greene*, which is what *Black*, 733 F.3d at 308, cited when holding that "participation of longer duration [is] of greater concern than intermittent or short-term government involvement." *Compare Shaw*, 796 F.2d at 1125 (approving several-months-long sting).

Given the significantly more targeted initiation of this sting, it cannot be that "the government did not cross the line" in *Black*, 733 F.3d at 310, but somehow "violate[d] the universal sense of justice" here, *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011).

V

CONCLUSION

By holding that the ATF's sting operation "violate[d] the universal sense of justice," the district court defied not only *Black* and this Court's

other stash-house-robbery-sting cases, but also decades of precedent defining the limits of acceptable investigative techniques. This Court should reverse and remand for Whitfield (who has withdrawn from his plea) and Dunlap to face trial.

DATED: July 23, 2014

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STATEMENT OF RELATED CASES

The government states, pursuant to Ninth Circuit Rule 28-2.6(a) and (c), that the following appeals are related because they "arise out of the same . . . case[] in the district court" and/or "raise the same or closely related issues":

United States v. Hudson, No. 13-50514 (co-defendant's appeal stayed by this Court until October 24, 2014);

United States v. Flores et al., No. 14-50227 (government's appeal of dismissal order following district court's decision here);

United States v. Whitfield, No. 14-50296 (government's appeal of defendant-appellee's release order); and

United States v. Dunlap, No. 14-50297 (government's appeal of defendant-appellee's release order).

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28-4, 29-2(c)(2) and (3), 32-2 or 32-4[1] for Case Number 14-50129+

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Signature of Attorney or Unrepresented Litigant: /s/ MARK R. YOHALEM

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