Docket No. 14-1107

In the Supreme Court of the United States

October Term 2014

Malik Price; Cedrick R. Jones; and Ben Carter,

Petitioners,

v.

UNITED STATES of America,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT

The University of San Diego School of Law
26th Annual National Criminal Procedure Tournament
November 6-9, 2014 – San Diego, California
Contact: Sdcrimpro@gmail.com

Table of Contents

Excerpts of Record

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Items within this packet must be cited under the Excerpts of Record ("EOR") notation in brackets (*e.g.,* the second page of Exhibit One is "[EOR 2.])"

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UNITED STATES DISTRICT COURT

DISTRICT OF APATE

UNITED STATES OF AMERICA, PLAINTIFF, V. MALIK PRICE; CEDRICK R. JONES; BEN CARTER, DEFENDANTS.	)	Nos. 13-cr-12193, 13-cr-12194, 13-cr-12234 **ORDER:** **(1) GRANTING DEFENDANT BEN CARTER'S MOTION TO SUPPRESS THE CONTENTS OF HIS BACKPACK; AND** **(2) GRANTING DEFENDANTS' MOTION TO DISMISS THE INDICTMENT FOR OUTRAGEOUS GOVERNMENT CONDUCT.**

I. INTRODUCTION

In April 2013, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") ensnared Defendants Malik Price, Cedrick R. Jones, and Ben Carter into planning and committing a robbery of a drug stash house that did not exist.[1] Defendants were arrested and charged with various federal crimes, including conspiracy to possess twenty-five kilograms of cocaine with intent to distribute, multiple counts of possessing a firearm in furtherance of a drug trafficking offense, multiple counts of attempted murder, and conspiracy to commit arson.

[1] A "drug stash house" is a piece of property where drug trafficking organizations temporarily store large amount of drugs for concealment, repackaging, and distribution.

Defendants bring two motions. First, Defendant Ben Carter moves to suppress the contents of his backpack under the Fourth Amendment. He argues an ATF agent seized him by the use of deadly force without probable cause, thus making the later discovery of his backpack's contents the fruit of an unlawful seizure subject to exclusion. Second, Defendants collectively move to dismiss the indictment under the Fifth Amendment. They argue due process bars the government from obtaining a conviction in this case because the fake robbery was the product of outrageous government conduct. The government timely opposed both motions.

The Court heard oral argument on May 29, 2013, and took the motions under submission. Both parties have since filed supplemental briefing, which the Court has thoroughly reviewed.

After balancing the interests, the Court agrees with Defendants' positions on both issues. While fighting crime is an important and difficult task entrusted to the Executive Branch, ATF's targeted and deceptive actions in this case are dangerous and unacceptable. The only way to effectively control the government and defend vital Constitutional rights afforded to all United States citizens is to (1) suppress the contents of Defendant Carter's backpack under the Fourth Amendment, and (2) dismiss the indictment against Defendants under the Fifth Amendment.

The Court accordingly **GRANTS** both motions. Defendants shall be **RELEASED** from custody **IMMEDIATELY** barring any other holds.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Operation Gideon and Its Commencement in Green Ridge

In May 2009, ATF implemented Operation Gideon, conducting a series of reverse-sting operations designed to find and arrest people engaging in violent home robberies of drug stash houses in residential neighborhoods.[2] As an alternative to planting fake drugs and confronting armed robbers once they broke into the house, ATF developed what it considered a safer technique in arresting suspects before they reached the house.

The reverse-sting operations generally worked as follows: When ATF identified someone it believed was going to steal from drug dealers, it would send in an undercover agent posing as a

[2] A "reverse-sting" occurs when the government sets up a fictitious crime and arrests people as they begin to carry out what they believe is a real crime.

disgruntled drug courier or stash house security guard to pitch the idea of stealing a drug shipment from his boss's stash house. The shipment was usually larger than five kilograms of cocaine – enough drugs to fetch hundreds of thousands of dollars on the street, or to trigger mandatory sentences of ten or more years in federal prison. Once the robbery plan was developed and the suspect was en route to commit the fictitious robbery, he and anyone else he brought with him were arrested and charged with various federal crimes carrying long-term prison sentences. These stings were not cheap. A single case often went on for months and required dozens of federal agents and local police officers.

Over the past five years, ATF has imprisoned more than 1,000 people in twenty-two states by enticing them to rob drug stash houses that did not exist. While most stings took place in Miami (Florida), Chicago (Illinois), Phoenix (Arizona), and Los Angeles (California), ATF has recently shifted its focus to cities located in the state of Apate.

In August 2012, ATF set up a number of reverse-stings across four metropolitan areas in Apate. ATF conducted these stings along with other law enforcement operations in response to an increased number of shootings, kidnappings, and other criminal activity that occurred during the summer months of that year. ATF concentrated the majority of its operations to the city of Green Ridge, which was the largest and most racially diverse of the four areas.

Green Ridge is home to approximately 1,200,000 residents and is eighty-five miles north of the Mexico-United States border. Green Ridge has a predominately black population (55%), but also has a large white population (30%). Green Ridge has a relatively small middle class and a growing disparity between the rich and poor classes. The city is also home to over 8,000 gang members, in 74 separate gangs.

ATF's operations in Green Ridge have had some positive results, but there are also serious concerns. Over the past year, its reverse-stings have led to a correlative decrease in the level of violence and number of kidnappings that have become associated with stash house robberies. On the other hand, the stings have led to the injuries and deaths of suspects, federal agents, and innocent bystanders, often resulting in civil lawsuits against the federal government. Further, and central to the Court's primary concern in this case, ATF has seemingly directed its

stings to ensnare previously untargeted young black men in poor and crime-ridden areas of Green Ridge rather than known or notorious targets in criminal organizations.

B. ATF's Confidential Informant Meets Terrance Price in the "Worst Part of the City"

Defendants' investigation and arrest involved a confidential informant ("CI")[3] working with Special Agent Antonio Miller, an undercover ATF agent. ATF paid the CI to fly from Chicago to Green Ridge for the sole purpose of finding potential targets for its sting operations. The CI had worked for the past two years in Chicago and had never been to Green Ridge before, so ATF briefed him on the communities and neighborhoods of the City and its demographics. ATF paid the CI $250 per day for his work, and paid for his housing and food.

The CI's role was to find people that were willing to commit a home invasion robbery. He was to talk with such individuals, tell them that a friend had all the information about the robbery, and then set up a meeting between that person and Agent Miller. Miller would then meet with interested people to determine whether they were actually willing to get involved in that type of crime. If Miller determined the person was willing, then he would provide details about the fictitious house robbery and the sting would commence.

ATF did not instruct the CI to look only for particular people, such as those who were already involved in known criminal operations or ones he knew were about to commit a crime. Instead, ATF's goal was street crime in general and any person who showed an interest in robbing a drug stash house was fair game. The CI testified in oral argument that he found targets by going to block parties and bars and meeting shady people, who he then approached about possibly becoming involved in robbing a stash house. The CI specifically targeted the Southside area – *i.e.*, the part of Green Ridge ATF identified as the "worst part of the city."

On March 8, 2013, the CI went to a block party in Southside, Green Ridge to meet people as part of his work with ATF. He approached Defendant Malik Price at the party, and asked him if he was interested in a big payday. Malik replied yes, and asked the CI whether it was a good come up. The CI pitched the idea of robbing a stash house. Malik laughed dismissively and walked away. About ten minutes later, Terrance Price approached the CI and asked him if he

[3] The CI's identity is not at issue in this case and shall remain confidential for purposes of this opinion.

knew of any good "come ups."[4] The CI told Terrance he had a friend with info on a house that possibly had some really good dope in it. The CI asked Terrance if he would be interested in putting a crew together to rob the house and walking away with over $500,000 after splitting the drug money. Terrance agreed he would do it, and the CI set up a meeting between Miller and Terrance.

C. Terrance Meets with Agent Miller, Brings in More People, and the Plan Develops

On March 12, 2013, Agent Miller, Terrance, and the CI met in a diner on the outskirts of the City to talk about the robbery.[5] Miller proceeded to tell Terrance his cover story: He was a cocaine courier who transported drugs for a group of Columbian drug dealers and was unhappy with the pay he was receiving. He was interested in robbing his dealers as retribution for his low pay. Terrance agreed, and Miller described the house, the security guards, and the large amount of cocaine available inside. Terrance agreed he would assemble his crew to meet up again.

On March 19, 2013, Terrance met with Miller and the CI for a second time outside a thrift store in Southside, Green Ridge. Terrance brought along his friend, Defendant Cedrick R. Jones, and told Miller and the CI that he and Jones were the robbery crew. Jones proposed several ways to rob the stash house. Miller said he was not impressed by the proposals and told Terrance and Jones to brainstorm better ideas. Miller also told them to get more crew members. Terrance asked if Miller had any better weapons for them to use. Miller said no, and questioned their desire and ability to carry out an armed robbery. Terrance assured Miller everything would work out if he got a friend from out of state, the "Tinderman," to join the robbery. Miller agreed to move forward if they could find a way to get this friend involved.

On March 22, 2013, Terrance and Jones met with Miller and the CI for a third time. Terrance and Jones brought along a third member of their crew, DeAndre Ingram. Terrance explained to Miller that Ingram was not his friend from out of state, the Tinderman, but he was

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[4] Terrance (older) and Malik (younger) are brothers, which was unknown to the CI during the block party. To avoid confusion, the Court refers to them in this order by their first name, whereas all other parties are addressed by their last name.

[5] All of Agent Miller's conversations with Terrance and his robbery crew were recorded on audio or video, whereas the CI's initial conversation with Terrance and Malik at the block party was not.

just as good, if not better, at supplying materials and being able to commit the robbery. Terrance boasted about Ingram's bank robberies and arsenal of weapons. Ingram demanded to know the stash house's address and layout before committing to the robbery. Miller called his fictional drug boss and relayed to the robbery crew that the house was located in an affluent North Green Ridge neighborhood. He also gave them an address and other details about the house. The robbery crew agreed to commit the robbery two weeks later when the drug shipment was ready to be moved. Ingram said he had a failsafe plan for the robbery. According to Ingram, all Miller had to do was unlock the front or back door when he entered the home to pick up the drugs, and the robbery crew would take care of the rest.

D. The Crew and Miller Drive to the Fictitious Stash House to Commit the Robbery

On April 4, 2013, around 8:35 a.m., agent Miller met up with Terrance and Jones at the thrift store. Terrance brought along his younger brother Malik. Around 8:45 a.m., Ingram pulled up in a white unmarked van and told everyone to get in. He drove to a nearby park, parked the van, and the robbery crew spent the next hour or so discussing the robbery plan. Several crew members had a brief discussion on what they planned to do with their share of the money. Around 10:00 a.m., the crew and Miller left the park and began the drive north towards the stash house. About five miles or so from the house, Miller told Ingram to pull over into a nearby parking lot to wait for the dealer's phone call.

At 10:40 a.m., Miller's phone rang and he stepped outside the van to answer the call. Miller walked away from the van while talking on the phone. When he was about twenty feet away, ATF agents rushed in and one agent threw a stun grenade at the van's driver side door. After the grenade exploded, a passenger door of the van swung open and Terrance emerged holding a pistol. Terrance turned toward the agents and shot several times before being mortally wounded in the chest. One of his shots hit ATF Special Agent Sarah Nelson in the back and severed the lower part of her spinal cord, leaving her paralyzed from the waist down.

Before agents could rush in and apprehend the other crew members, Ingram stepped on the van's accelerator and fled the scene with Jones and Malik as passengers. Ingram led ATF and local police on a two mile chase through neighborhood streets before he crashed into a

electrical pole at an estimated 50mph. Ingram died on impact. Authorities rushed in and arrested Jones and Malik, who were alive but critically injured.

ATF agents searched the van and found some items in a hidden compartment in the trunk. Inside the compartment were six empty duffel bags and one full duffel bag. Agents opened the full duffel bag and found one loaded pistol, two airsoft guns that looked like pistols, a red oversized wrench tool, and a box full of red plain T-shirts and bandanas.

E. The Anonymous Tip of Two "Suspicious Men" Loitering Near the Stash House

Several minutes later, ATF agents at the collision site got word from local police that an anonymous caller reported two "suspicious looking" men loitering on the street corner near the fictitious stash house. The caller said the men wore baggy clothes and "hoodies" that covered their faces, and had been loitering on the street corner for over thirty minutes. The caller also reported that one of the men was wearing a large black backpack and the other kept fidgeting with something in his pocket.

Special Agents Bradley Holder and Brett Martin went to investigate. The agents drove to the stash house, wearing blue jackets with the words "ATF Special Agent" on the front and back. As the agents turned north on Wilshire Avenue heading toward Garden Street, they saw two men dressed in grey hoodies and blue jeans standing on the corner looking west in the direction of the stash house. The men's backs were towards the agents, and the agents could not see their faces. Agent Holder parked the car about 150 feet behind them. The agents got out and walked over to the street corner. When they arrived, Holder asked the two men, "what's going on today gentlemen?" The men looked at the agents and almost immediately started running north, away from the stash house. During that brief moment, agents noticed the men were black and young, and one man had tattoos on his neck. Holder yelled to the men, "Federal agents! Stop and put your hands up!" But the men kept running. The agents pursued them on foot.

After running 600 feet, the man without the backpack stopped in the middle of the street. He pulled something out of his pocket, pointed it up in the air, and turned towards agents with his other hand up as well. He yelled, "this is a fake gun, please don't shoot me!" Agents pulled out their pistols and told him to drop his weapon immediately. The man lowered the object

down towards the ground but pointed in the agents' direction. Holder reacted, and shot him in the chest. The man, later identified as Michael Roby, fell to the ground and dropped the object on the street.[6] Agent Martin radioed for backup and told Holder to pursue the other suspect wearing the backpack.

After chasing the man with the backpack for 700 feet, Holder noticed him change course from one side of the street to the other, heading towards a lone parked car. Holder again identified himself and yelled for the man to stop, but the man kept running.

When the man was about twenty feet away from the car, he slowed down, looked over his shoulder at Holder, and reached into his pocket to grab something. Holder reacted and shot three times at him. The man screamed in pain, started noticeably limping, and pulled a small object from his pocket. It was a car key. The man opened the car and fled before Holder could stop him. Holder radioed ATF and local police about the suspect's escape and provided a description of the man and the car. Law enforcement kept a look out for the man and the car he was driving for several hours but had no sightings or leads.

At 3:45 p.m., a local police officer stumbled across a car matching the description of the suspect's getaway car crashed into a deep drainage ditch on the side of the road. The officer went into the ditch and saw that the driver's door was wide open but the driver was not in sight. Both front seats were drenched in blood, and blood-dried paint rags were scattered about the car's interior.

The keys were still in the ignition and the officer turned on the car to see if it was working. The car turned on with no apparent engine problems and the gas tank was over half full. The officer turned and observed a large black backpack in the car's backseat area. It was open and its contents were strewn across the backseat floor. These contents included two plastic vodka bottles, a small canister of gasoline, a butane lighter, and plain paint rags. One of the vodka bottles was half empty, and the butane lighter had the word "Tinderman" engraved on it. Police later determined the ditch was approximately one mile away from the stash house.

[6] Agents later confirmed the object Roby held was a "pellet gun" which contained metal BBs, not lethal bullets. Agent Holder testified at oral argument that the object looked like a real gun at the time. Roby passed away at a nearby hospital several hours later.

A police accident reconstructionist found that, based on the car's location in the ditch and soft tire marks in the grass leading up to it, the driver was going about 30mph when he crashed. The reconstructionist also found the driver did not apply the brakes or make a sharp turn to avoid a crash. There were no witnesses to the crash.

Nearly ten hours later, local police received a phone call from an ICU nurse reporting a patient matching the description of the suspect. She said the patient had severe blood loss and two bullets lodged in his right leg, and was being prepared for surgery. Two ATF agents arrived on scene. When the patient came out of surgery, agents identified him as the fleeing suspect.

Agents waited twenty-four hours for the suspect to recover from surgery before they arrested him. Agents read him his Miranda rights, got a clear acknowledgment of those rights from him, and questioned him about his actions and suspected role in the robbery. The man said his name was Ben Carter and that he was in Apate for business purposes. He said police were "crazy to shoot him" because he was not armed. Agents asked him if he was involved with Terrance and the robbery crew. Carter replied he did not know what they were talking about. One agent showed Carter the butane lighter and asked if it belonged to him. Carter did not answer. The other agent showed him the black backpack and asked if he owned it. Carter then asked to talk to a lawyer.

On April 24, 2013, a Grand Jury indicted Defendants for alleged violations of numerous federal laws, carrying a mandatory sentence of at least fifteen years in prison. On April 30, 2013, Defendant Carter moved to suppress the contents of the backpack under the Fourth Amendment. On May 2, 2013, Defendants moved to dismiss the indictment under the Fifth Amendment. These motions are now before the Court.

III. DISCUSSION

A. The Backpack's Contents must be Suppressed under the Fourth Amendment

To prevail on his Fourth Amendment claim, Carter must show: (1) a physical "seizure" occurred when Agent Holder's bullet hit him, despite his subsequent escape; (2) Holder lacked probable cause to use deadly force; and (3) his abandonment of the backpack was a direct result of the unlawful seizure. See United States v. Dupree, 617 F.3d 724, 730 (3d Cir. 2010). The

Court concludes a physical seizure occurred, Holder lacked probable cause to use deadly force, and Carter's abandonment was a direct result of the unlawful seizure.

1. Carter was "Seized" when the Bullet Hit Him, Despite His Subsequent Escape

As Justice Warren explained in Terry v. Ohio, the Court's "first task is to establish at what point in [an] encounter the Fourth Amendment becomes relevant." 392 U.S. 1, 16 (1968). This means the Court must determine "whether and when" a seizure occurs." Id.

The Fourth Amendment guarantees individuals the right to be free from unreasonable governmental searches and seizures. U.S. Cons. amend. IV. It applies to all "seizures" of the person, including arrests and brief detentions. Terry, 392 U.S. at 16-17. A person is generally "seized" by the police and thus entitled to challenge the government's action under the Fourth Amendment when an officer, "by means of physical force or show of authority," terminates or restrains his freedom to walk away. Id. at 16; Brendlin v. California, 551 U.S. 249, 254 (2007); Florida v. Bostick, 501 U.S. 429, 434 (1991); see also United States v. Mendenhall, 466 U.S. 544, 554 (1980) (a seizure may only occur if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

Circuit Courts disagree about whether a fleeing felon who is shot by police, but later escapes police control, is "seized" under the Fourth Amendment. The specific point of disagreement turns on the Supreme Court's definition of a physical seizure. Compare Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989) with California v. Hodari D., 499 U.S. 621, 624 (1991).

Here, the government argues that, based on the Supreme Court's dicta in Brower and its progeny, Carter was not "seized" under the Fourth Amendment because the gunshot did not produce his stop or terminate his movement. The Court rejects this narrow view.

In 1989, the Supreme Court addressed the topic of a fatal show of authority seizure of a fleeing felon in Brower v. County of Inyo. 489 U.S. 593. In Brower, police officers killed a suspect after a twenty mile high-speed car chase by concealing a roadblock behind a bend in the road and blinding the suspect by aiming headlights at his windshield. 489 U.S. at 594. The lower courts ruled the suspect had not been "seized" under the Fourth Amendment when he hit

the roadblock because he had not submitted to any of the officers' "shows of authority" at any time in the chase, though "[h]e had a number of opportunities to stop his automobile prior to impact." Id. at 595. The Supreme Court reversed, holding the suspect's decision to flee, and his success at fleeing, were irrelevant to the reasonableness of the means used to terminate his flight. Id.

But in coming to that conclusion, the Brower Court overreached. The Court stated that since "[v]iolation of the Fourth Amendment requires an intentional acquisition of physical control," for purposes of plaintiff's excessive force claim, it had been "enough for a seizure that [the suspect] be stopped by the very instrumentality set in motion or put in place to achieve that result." Id. at 599. In other words, the Court suggested all Fourth Amendment seizures require actual and successful apprehension.

Two years later, the Supreme Court resolved the problem posed by the Brower dicta when it ruled that actual "physical control" is not an "essential element of every seizure." Hodari D., 499 U.S. at 626. Adopting the common law approach to seizures as well as its exceptions, the Hodari D. Court decided that a seizure can occur with "the mere grasping or application of physical force . . . *whether or not it succeeded in subduing the arrestee*." 499 U.S. at 624-25 (emphasis added). Or, stated another way, a seizure is an "application of physical force to restrain movement, *even when it is ultimately unsuccessful.*" Id. at 626 (emphasis added).

Hodari D. thus ruled physical seizures are not subject to the strict requirement of actual and successful apprehension; rather, that requirement is reserved only for "show of authority" seizures. Id.; see also Terry, 392 U.S. at 16, 19 ("[I]t is quite plain that the Fourth Amendment governs 'seizures' of the person which do not eventuate a trip to the station house and prosecution for a crime – 'arrests' in traditional terminology . . . ."). For purposes of physical force seizures, what matters is physical force is applied to the suspect's person with the intent to restrain movement, not the success of the effort to restrain. Hodari D., 499 U.S. at 626. Additionally, a physical seizure is even more evident when deadly force is used. See Garner, 471 U.S. at 7 ("While it is not always clear just when minimal police interference becomes a

seizure, there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.") (internal citation omitted). Most Circuit Courts follow Hodari's definition of a physical seizure.

The Court finds that Carter was "seized" for purposes of the Fourth Amendment when Agent Holder shot him, despite his subsequent escape. Holder shot because he thought Carter was pulling out a gun; however, it is Holder's intent and the physical contact of his gunshot that governs the Court's "seizure" analysis. See Hodari D., 499 U.S. at 626. Holder intended his gunshot to restrain Carter, and the physical contact of the bullet substantially impaired Carter's movement. The fact that Holder or another law enforcement officer did not apprehend Carter directly after shooting him does not change this analysis. See Brown, 448 F.3d at 245.

Having determined that Carter was physically seized by agent Holder's gunshot, the Court must decide whether Holder had probable cause to use deadly force to stop Carter's flight.

2. Agent Holder did not have Probable Cause to Use Deadly Force

The use of deadly force to make an arrest implicates the Fourth Amendment protection against unreasonable seizures. Graham v. Connor, 490 U.S. 386, 395 (1989). The objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (internal quotation marks omitted); accord United States v. Place, 462 U.S. 696, 703 (1983).

"Reasonableness" is analyzed from the perspective "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," based on the totality of the circumstances. Id. The Court must "allo[w] for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." Id. at 396-97.

In the context of shooting a fleeing felon or suspect, the Supreme Court has set out several factors that justify the use of deadly force:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens an officer with a

> weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Garner, 471 U.S. at 11. The Court finds these factors appropriate and persuasive to use in this case.

The government attempts to frame the incident at the corner of Wilshire and Garden Street as an attempted armed robbery. It argues agents Holder and Martin were provided a corroborated tip of suspicious characters near the scene of a planned robbery. When the men immediately turned and fled upon inquiry, Holder reasonably believed they were part of Terrance's robbery crew. The government also argues when Carter's alleged accomplice, Michael Roby, brandished a gun-like object and pointed it in the agents' direction, agents reasonably believed both men were armed and dangerous. The Court rejects these arguments.

First, the anonymous tip that the two men were "suspicious" was unsubstantiated and dubious at best. Cf. Illinois v. Gates, 462 U.S. 213, 230-32 (1983). While flight coupled with other "specific knowledge on the part of the officer relating the suspect to the evidence of a crime" may be considered in assessing the officer's actions, Sibron v. New York, 392 U.S. 40, 66-67 (1968), the only suspicious thing known at the time to Agent Holder when he arrived was that the two men were standing nearby the fictional stash house. The hour (11:00 a.m.) was early; there was no exchange or presence of drugs, money, or weapons; there was no sign or indication of gang affiliation or activity; neither of the men were fidgeting with anything in their pocket; and the agents could not determine with any precision how long the men had been there. The anonymous call said thirty minutes, but there is no evidence to support that claim.

Rather, in line with the government's alternative argument, the agents jumped at the men's flight and immediately connected them to the robbery crew because their dress, skin color, and age made them appear out of place in the affluent Green Ridge neighborhood. The Court declines to countenance such bare assertions – especially those based on profiling young black men as being suspicious simply because agents reasoned they were not from the area. Cf. People v. Brower, 24 Cal.3d 638, 649 (Cal. 1984) (fact that a white man is observed by police with a group of black men, started moving hurriedly away raises no inference of criminal activity).

Second, going beyond the anonymous tip and initial encounter with agents, there was no immediate need to use deadly force to protect the public and agents or stop Carter's flight.

When looking at the totality of the circumstances, Carter's conduct did not present a reasonable basis for the agent to believe Carter was an immediate threat or danger to the agent or others around him.[7] As the Supreme Court stated in Garner, "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . ." 471 U.S. at 11.

Further, Carter's situation is easily distinguishable from the cases the government cites as support for the use of deadly force. For example, Holder never saw Carter carrying or holding anything on his person that looked like a deadly weapon. Cf. Penley v. Eslinger, 605 F.3d 843, 854 (11th Cir. 2009). Also, at this point in time, Carter had not lead law enforcement on a high speed chase that endangered the public. Cf. Scott v. Harris, 550 U.S. 372, 382-84 (2007); Plumhoff v. Rickard, 134 S. Ct. 2012, 2021-22 (2014).

The Court also firmly rejects the Eleventh Circuit's decision in Long v. Slaton, 508 F.3d 576, 581-83 (11th Cir. 2007) (officer was reasonable in fatally shooting plaintiff's son who was suffering from a "psychotic episode" when, after his father called police to his home to restrain his son, he evaded handcuffs, jumped in the officer's cruiser, and attempted to drive off). As the dissent in Long correctly points out, there is "no arguable probable cause [to justify using deadly force] in this case. To be sure, with the deceased in possession of a patrol car, the outcome of these events is uncertain, but the possibility that a nonviolent fleeing felon will later pose a threat of physical harm to others is remote and highly speculative." 508 F.3d at 586 (Forrester, D.J. sitting by designation, concurring and dissenting). In this Court's view, the law does not, and must not, provide a means to shoot a nonviolent suspect simply because he enters a car and might, at some later time, become violent by leading officers on a car chase that may endangering the public. Police are not clairvoyant, and neither are courts.

[7] By contrast, the Court acknowledges that Holder had reasonable cause to use deadly force on Roby. The threat was present, imminent, and reasonable; even though illusory.

The Court finds Holder lacked probable cause to use deadly force to stop Carter's flight. Carter was not an imminent danger to Holder or the public before reaching the car, and he would not become one simply by driving away. Thus, Carter was unreasonably seized.

3. Discovery of the Backpack's Contents is a Direct Result of the Unlawful Seizure

Finding that Carter was unreasonably seized under the Fourth Amendment does not end the Court's inquiry. Not all evidence obtained though illegal police action must be excluded. Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). The test is not whether the evidence would have come to light but-for the illegality, but whether it was obtained as a direct result, or exploitation of the illegality. If the evidence was obtained by sufficiently independent means, or an intervening independent act of the defendant, the "taint" of illegality is purged. Id. at 487-88.

The government argues that Carter failed to show a connection between Holder's gunshot and the discovery of the backpack's contents, as there was no direct link between the shooting and Carter crashing the car and abandoning the backpack a short time later. The Court disagrees.

"[T]he exclusionary [rule] applies to any 'fruits' of a constitutional violation." United States v. Crews, 445 U.S. 463, 470 (1980). Factors to be considered in deciding whether evidence is a product of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official conduct. Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

Where a law enforcement agent illegally shoots a fleeing suspect and wounds him in an effort to stop him, the Court cannot see how the suspect's car crash one mile away could lead to any other conclusion but that abandonment of the backpack was a direct result and exploitation of the officer's illegal conduct. The only intervening circumstance was Carter getting in the car and driving one mile away. There is no evidence he crashed his car from anything other than the loss of blood from the gunshot. The car had no engine trouble and the gas tank was over half full. Carter also crashed without braking or turning the steering wheel. Carter's act of abandoning the evidence when confronted with fast-approaching law enforcement was not a mere coincidence; rather, it was the direct result of the unlawful seizure and his will to escape arrest.

The Court is mindful that "suppression of evidence should be [its] last resort, not its first impulse," Hudson v. Michigan, 547 U.S. 586, 591 (2006), but exclusion of the backpack's contents in this case serves the purpose of the exclusionary rule. Because Holder had no legal ground to shoot Carter as he fled, exclusion of the evidence here serves to deter agents from repeating such conduct in the future.

Accordingly, the unreasonable seizure must lead to exclusion of the evidence under the Fourth Amendment. The Court now turns its attention to the second issue of dismissing the indictment under the Fifth Amendment for outrageous government conduct.

B. The Indictment must be Dismissed under the Fifth Amendment

Defendants collectively move to dismiss the indictment due to outrageous government conduct, arguing ATF's reverse-sting, fake robbery scheme violates their due process rights. The government argues each Defendant manifested a propensity to commit the robbery and many of them admitted to similar conduct in the past, thus justifying the purpose of the sting operation to clean up the streets of Green Ridge. The Court finds the government's actions of targeting young black men in "the worst part of town," creating and orchestrating a fictitious crime, and handing them arbitrary sentences of fifteen years or more in order to lower street crime is contrary to the American sense of justice and does not comport with the Fifth Amendment.

The Fifth Amendment states that "[n]o persons shall . . . be deprived of life, liberty, or property without due process of law." U.S. Const. amend. V. Over forty years ago, the Supreme Court suggested in dicta that due process would bar the government from invoking judicial process to obtain a conviction when its conduct is "outrageous." United States v. Russell, 411 U.S. 423, 431-32 (1973). While the Supreme Court has never specifically approved this principle, nearly all Circuit Courts recognize it.

In evaluating a claim of outrageous government conduct, the Court examines whether "a defendant's due process rights have been violated because the government created the crime for the sole purpose of obtaining a conviction." United States v. Pitt, 193 F.3d 751, 759-60 (3d Cir. 1999). This doctrine permits federal courts to dismiss an indictment under Federal Rule of

Criminal Procedure 12(b)(1) when the government's conduct is "so shocking and so outrageous as to violate the universal sense of justice." United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991). While standards of what constitutes "outrageous government conduct" vary, it is generally behavior that is wrong, evil in itself, or amounts to the engineering and direction of the criminal enterprise from start to finish. United States v. Citro, 842 F.2d 1149, 1153 (9th Cir. 1988).

In determining what constitutes "outrageous government conduct" under the Fifth Amendment, judicial scrutiny focuses solely on the government's actions – not the alleged actions of the criminal defendant. United States v. Restrepo, 930 F.2d 705, 712 (9th Cir. 1991). This doctrine is thus different in that respect from an entrapment defense. Id.

Earlier this year, the Ninth Circuit addressed a similar reverse-sting operation in United States v. Black, 733 F.3d 294, 302 (9th Cir. 2013). The Ninth Circuit used a six-factor totality of the circumstances standard for outrageous government conduct. Black, 733 F.3d at 304 n.7. Those factors include:

> (1) known characteristics of the defendants; (2) individualized suspicion of the defendants; (3) the government's role in creating the crime of 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.

Id. at 303. While helpful, the Court strains to adopt a six-factor test. Instead, the Court assumes the three-part overlay of the factors in Black. 733 F.3d at 304-10. Specifically:

> The degree of (1) the government's initiation of the reverse-sting; (2) the government's post-initiation conduct; and (3) the nature of the crime being investigated.

Id. A careful review demonstrates that each part weighs in favor of dismissing the indictment for outrageous government behavior.

1. Government's Initiation of the Reverse-Sting

Two considerations the Ninth Circuit thought important were (a) "whether a defendant had a criminal background or propensity the government knew about when it initiated its sting

operation," and (b) "whether the government proposed the criminal enterprise or merely attached itself to one that was already established and ongoing. Black, 733 F.3d at 304-05. The Court finds these concerns important and applicable here, with each weighing in Defendants' favor.

a. ATF cast a wide net, looking for low level crooks – without suspicion that any particular person had previously engaged in criminal conduct

The government does not provide any evidence that ATF, agent Miller, local Green Ridge police, or the CI had any knowledge of Defendants' or any of their alleged accomplices' criminal background or propensity to commit crimes before Miller invented the stash house robbery. And the reason for this is clear – none ever existed. At oral argument, Miller could not provide any background about the CI's initial interaction with Terrance Price at the block party. Instead, Miller's testimony suggests Terrance approached the CI unsolicited, presenting himself as someone interested in committing a lucrative robbery. But ATF did not have Terrance on its radar before he approached the CI. ATF also did not believe Terrance or his crew were part of an ongoing criminal enterprise.

Yet the government cites to Black for the proposition that its later-supplied knowledge of Defendants' and their alleged accomplices' self-purported criminal backgrounds overcomes any lack of knowledge at the sting's inception. The Court disagrees.

In Black, the Ninth Circuit confronted a similar situation where an ATF undercover agent learned of defendants' alleged criminal backgrounds only after the agent invented the stash house robbery scheme. 733 F.3d at 307. The Ninth Circuit found the later-supplied knowledge of defendants' criminal backgrounds "mitigated to a large degree" the court's concerns, as their "repeated representations that they had engaged in related criminal activity in the past quickly supplied reasons to suspect they were likely to get involved in stash house robberies." Id.

Here, however, the Court's concerns are not mitigated to any degree by Defendants or their alleged accomplices' stories of their criminal backgrounds. In a situation where an apparently experienced cocaine courier is boasting to some small-time crooks about the chance to hit the lottery, it is only human nature that they are going to try to impress the courier with tall tales of past criminal conduct. It does not make sense to this Court to justify the government's

action at its inception by using uninvestigated and uncorroborated reports of past criminal conduct after-the fact.

Such justification would encourage the government to cast a wide net, looking for crooks in crime and poverty-ridden areas – all without any hard facts to suspect any particular person has committed similar conduct in the past. And if the government happens to get it right and catch someone who previously engaged in crime, courts will place their stamp of approval on the whole fishing expedition.

This case also shares the troubling factor in Black of an informant trolling for potential targets in the "bad part" of the town. 733 F.3d at 299. This Court will not endorse any operation that selectively induces a particular racial and socioeconomic class to commit fictional crimes and obtain long prison sentences. Contrary to agent Miller's testimony in oral argument, this is not a suitable way to "clean up the streets." The Court declines the invitation to endorse this nab-first-ask-questions later approach.

b. ATF manufactured the stash house robbery, and had no intention of infiltrating an ongoing criminal enterprise

The Supreme Court has drawn a line between infiltrating an ongoing criminal enterprise on one hand and manufacturing crime on the other. In Sherman v. United States, the Supreme Court stated the "function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." 356 U.S. 369, 372 (1958). The Supreme Court has since accepted "infiltration [into an ongoing criminal organization] is a recognized and permissible means of investigation." Russell, 411 U.S. at 432; accord Black, 733 F.3d at 305.

But for ATF's imagination, there would be no crime here. ATF invented the stash house robbery, Agent Miller's drug courier character, the fictional stash house, the twenty to twenty-five kilograms of cocaine supposedly inside the house, the two security guards protecting the drugs, the need to carry and use weapons, and the idea of getting more crew members to participate and the elaborate entry plan to get the upper hand on the guards. Miller even offered to provide a getaway car and safe house. The Court cannot find any significant material in the

record that Defendants took an "independent role in planning the crime" like the defendants did in Black. See 733 F.3d at 306 n.8.

Despite the Supreme Court's warnings in Sherman and Russell, ATF manufactured this entire crime. It did not infiltrate an ongoing criminal enterprise, as there is no evidence that Defendants or any of their alleged accomplices had any previous criminal affiliation between them. Complete fiction concocted by the government was exactly one of the Ninth Circuit's concerns in Black. 733 F.3d at 303. Such complete fiction is equally one of the Court's concerns here and weighs heavily in favor of dismissing the indictment.

2. Government's Post-Initiation Conduct

Also relevant is (a) the extent to which ATF encouraged Defendants and their alleged accomplices to commit the robbery and (b) the duration and nature of ATF's participation in the crime, including (c) the necessity of the robbery scheme. See Black, 733 F.3d at 308-09. Each of these interests favor dismissing the indictment for outrageous government conduct.

a. ATF unfairly exploited Defendants' depressed economic circumstances

The government argues mere encouragement is of less concern than pressure or coercion. [citing Id. at 308.] Accordingly, the government contends that similar to the defendants in Black, once agent Miller set the bait, Terrance, Jones, and others responded without any further inducement – thereby demonstrating the government's minimal role in the scheme.

While there is no evidence Miller or the CI threatened Defendants and their alleged accomplices to enter into the conspiracy, there is significant coercion inherent in a fake stash house robbery. The defendants' willingness to participate is just as consistent with their being in need of cash as it is with their propensity to commit crimes – let alone their propensity to commit home invasions.

The conversation between Terrance, Jones, Ingram, Malik, and agent Miller at the park compellingly shows the economic pressures Defendants and their alleged accomplices faced, of which the government took advantage. With ATF dangling the carrot of $500,000 in front of impoverished individuals, it is no surprise they took the bait. Defendants do not deserve fifteen

or more years in prison for a fake crime set up by the government to target poor minority individuals from the wrong side of town.

b. ATF engineered the crime from start to finish

Agent Miller's continued participation, assurances, and suggestions over the course of the month-long period made him "a partner in the criminal activity" rather than a mere "observer." See Black, 733 F.3d at 308. In Black, the Ninth Circuit noted the undercover agent "provided no weapons, plans, manpower or direction about how to perform the robbery," and his actions stood in "stark contrast" to the government's role in other cases. Id. at 309 (citing United States v. Twigg, 588 F.2d 373, 380 (3d Cir. 1978) and Greene v. United States, 454 F.2d 783, 786 (9th Cir. 1971)). But here, Miller offered to obtain a getaway car and a safe house, and provided the house's address, general layout, and the entire robbery scheme and its fictional components. Miller also alleviated Defendants' and their alleged accomplices logistical and safety concerns when he proposed he would help them gain access and be inside the house for the robbery.

Agent Miller also goaded Defendants and their alleged accomplices into acquiring weapons and additional manpower to commit the robbery. Miller threatened at one point to call off the robbery if Terrance and Jones did not acquire more crew members, better weapons, and develop a better robbery plan.

Agent Miller's input in the robbery was necessary for Defendants and their alleged accomplices to carry out their doomed plan. Absent Miller's imaginative scheme, there would have been no stash house robbery to begin with – let alone the need for guns and extra associates. Cf. Black, 733 F.3d at 309 (after soliciting defendants, agents played a minimal role in the crime).

c. ATF's scheme is arbitrary and close to sentencing entrapment

Everything about ATF's scheme here – and thus everything bearing on Defendants' potential mandatory sentence – hinges solely on the government's whim. Why were there not ten kilograms in the stash house? Or 100? Or 1,000? Why were the guards allegedly wearing body armor and holding guns? To make Defendants and their alleged accomplices bring guns and other weapons with them? This sort of arbitrariness alone offends the Due Process Clause of the Fifth Amendment. See Collins v. City of Harker Heights, 503 U.S. 115, 127 n.10 (1992);

Black, 733 F.3d at 317 (Noonan, J., dissenting) ("[I]t is a violation of due process for sentences to be at the arbitrary discretion of [ ] ATF.").

These fake stash house robbery cases also draw close to another criminal justice issue: sentencing entrapment. For example, the Ninth Circuit wrote in United States v. Briggs:

> In fictional stash house operations like the one at issue here, the government has virtually unfettered ability to inflate the amount of drugs supposedly in the house. . . . [I]t can also minimize the obstacles that a defendant must overcome to obtain the drugs. The ease with which the government can manipulate these factors makes us wary of such operations in general.

623 F.3d 724, 729-30 (9th Cir. 2010) (citation omitted). While a defendant may have a sentencing entrapment defense in such cases, the defense only comes into play if he rolls the dice and goes to trial. But his risking fifteen or more years in federal prison to establish this defense, in the Court's view, is not realistic or advisable; especially when the government has spent, as in this case, a month recording discussions incriminating him in the trumped-up conspiracy.

When ATF acts as the puppeteer of a fictitious crime to obtain lengthy convictions for unwitting individuals suspected of general street crime, its conduct is "outrageous."

3. The Nature of the Crime being Investigated

Finally, the Court considers the need for such an investigative technique, in light of the challenges of investigating and prosecuting the type of crime being investigated. See Black, 733 F.3d at 309. The Court finds that any benefit from the sting's supposed deterrence is outweighed by the fact that the operation takes no drugs off the streets, is costly to implement, and adds to the problem of mass incarceration.

When the government manufactures drug crime to ensnare potential criminals, it does not make the country safer or reduce the actual flow of drugs. Absent ATF's scheme, the fake drug house would still be fake, the nonexistent drugs would still be nonexistent, and the fictional guards with body armor and guns would still be fictional. Instead, the government comes dangerously close to imprisoning people solely because of their thoughts and economic circumstances rather than their criminal actions.

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Furthermore, these reverse-sting cases cost federal taxpayers money. As of the date of this Order, there are 215,566 inmates in federal detention. The average cost to incarcerate a federal inmate in 2013 was $28,893, or $79.16 per day. ATF usually seeks a fifteen-year sentence in stash house robbery cases. Black, 733 F.3d at 317 (Noonan, J., dissenting). On the drug charges alone, this fake robbery would cost federal taxpayers approximately $433,401 per Defendant in incarceration costs (not including the investigative, prosecutorial, defense, and judicial resources spent). This number only continues to skyrocket if a defendant is subject to aggravating factors, or if the charges are paired with other related crimes.

The Court wants to clarify, however, that when reverse-sting operations are used properly, they can be a powerful tool for law enforcement to catch dangerous people plotting serious crimes before they harm others. But when the reverse-sting's goal is general street crime and landing a conviction alone, the government loses justification for using this tool. Wherever the line is drawn, this case falls on Defendants' side. Due process demands that much.

IV. CONCLUSION AND ORDER

After carefully reviewing the relevant facts and circumstances here, the Court finds the Fifth Amendment does not allow ATF to prosecute Defendants for an imaginary crime subject to a very real punishment – a punishment that rests entirely on ATF agents' whims. The Court accordingly **GRANTS** both motions. Defendants shall be **RELEASED** from custody **IMMEDIATELY** barring any other holds.

DATED: June 6, 2013

Leslie E. O'Neill
United States District Judge
District of Apate

UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

MALIK PRICE; CEDRICK R. JONES; BEN CARTER,

Defendants-Appellees.

U.S.C.A. Nos. 14-6417
14-6418
14-6424

U.S.D.C. Nos. 13-CR-12193 (LEO)
13-CR-12194 (LEO)
13-CR-12234 (LEO)

OPINION

Appeal from the United States District Court
For the District of Apate

Leslie E. O'Neill, District Judge

Argued and Submitted
January 21, 2014 – Sun Point, Apate

Filed June 17, 2014

Before: Karl B. Schultz, Samantha C. Pollard, and
Phillip L. Reus, Circuit Judges

Opinion by Justice Schultz

Opinion Displayed in Expanded, Marked Print View on EastlawNext

Original Image of Nos. 14-6417, 14-6418, 14-6424 (PDF)

OPINION

SHULTZ, Circuit Judge:

This appeal arises from a botched reverse-sting operation in Green Ridge, Apate by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"). Though ATF designs this type of sting to end in a remote and nonviolent arrest, one bad tactical decision (or several) in this case started a chain of events that left three suspects dead, three others with serious injuries, and one federal agent paralyzed from the waist down. If ATF had access to a magical "do-over" button, it surely would have pressed it by now.

Undeterred, ATF sought convictions for each suspect who lived through the ordeal. On April 24, 2013, a grand jury indicted Defendants for various federal crimes, including conspiracy to possess cocaine with the intent to distribute, multiple counts of possessing a firearm in furtherance of a drug trafficking offense, multiple counts of attempted murder, and conspiracy to commit arson. Prosecutors demanded each Defendant serve time well beyond the fifteen-year mandatory minimum drug charges for their alleged violent crimes.

Before trial, Defendants moved to suppress certain evidence and dismiss the indictment. After a lengthy oral argument and supplemental briefing by both parties, the district court granted both motions in a thorough twenty-two page order, concluding "ATF's targeted and deceptive actions [ ] are dangerous and unacceptable," "contrary to the American sense of justice," and "do[ ] not comport with" due process. The government timely appealed both motions.

We reject the district court's rulings on both motions. First, the court's reading of the term seizure is overly broad; its construction of the facts decrying the use of deadly force is incorrect and unwise; and the circumstances are simply too attenuated to suppress the evidence. Second, its finding of outrageous government conduct is nearly unprecedented – and for good reason. *See United States v. Smith*, 924 F.3d 889, 897 (9th Cir. 1991). Defendants have not shown that the facts underlying their arrest and prosecution are "so extreme" as to "violate[ ] fundamental fairness" or are "so grossly shocking . . . as to violate the universal sense of justice," *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011). We reverse and remand with instructions consistent with this opinion.

I

BACKGROUND

Because the facts of the case are not disputed, the Court hereby adopts and incorporates by reference the facts from the opinion below.

The parties' standing on their respective claims is not in dispute.

II

STANDARD OF REVIEW

We review *de novo* the questions whether and when a seizure occurred, whether law enforcement had probable cause to use deadly force to stop a suspected fleeing felon, and whether abandonment of the evidence was a direct result of an illegal seizure. *See United States v. Massie*, 65 F.3d 843, 847 (10th Cir. 1995). In reviewing a district court's ruling on a motion to suppress evidence, we view the evidence in the light most favorable to the prevailing party and accept the district court's findings of fact unless they are clearly erroneous. *Id.*

We also review *de novo* the district court's grant of a motion to dismiss the indictment due to outrageous government conduct. *See United States v. Black*, 733 F.3d 294, 301 (9th Cir. 2013). In doing so, however, we view the evidence in the light most favorable to the government and accept the district court's factual findings unless they are clearly erroneous. *See United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir. 2003).

III

DISCUSSION

A. The Backpack's Contents Should Not be Suppressed Under the Fourth Amendment

A Fourth Amendment analysis typically proceeds in three stages. First, whether and when a search or seizure occurred. Next, whether that search or seizure was reasonable. If it was not, then whether the circumstances warrant suppression of the evidence. *See United States v. Dupree*, 617 F.3d 724, 730 (3d Cir. 2010). In this case, we must determine: (1) whether Defendant Carter was "seized" under the Fourth Amendment when shot despite his escape, and if so; (2) whether the seizure was unreasonable, and if so; (3) whether the unlawful seizure warrants exclusion of the evidence.

We conclude Carter was not seized when shot. But even if he was seized, agent Holder had probable cause to use deadly force under the circumstances. And even if Holder lacked probable cause to shoot Carter, we decline to suppress the evidence as the shooting is too attenuated to the discovery of the backpack's contents.

1. Defendant Carter was Not "Seized" when Shot

The district court found a fleeing suspect is "seized" for purposes of the Fourth Amendment when shot by a law enforcement officer, despite the suspect's subsequent escape. In coming to this result, the court expansively read *California v. Hodari D.'s* discussion about common law seizure exceptions as being settled, binding law. 499 U.S. 621, 626 (1991). But in relying on *Hodari's* dicta, the district court and the cases it cites ignore the Supreme Court's further explanation:

> We have consulted the common-law to explain the meaning of seizure . . . . [and] neither usage nor common-law tradition makes an attempted seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions.

Id. at 626 n.2. As the Supreme Court later clarified, *Hodari's* holding centered on the proposition that "a police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment," and its common law passage merely illustrated the principle that "attempted seizures" are beyond the Fourth Amendment's scope. *County of Sacramento v. Lewis*, 523 U.S. 833, 844-45 & n.7 (1998). When read in context and in its entirety, *Hodari* stands for the principle that a "show of authority" seizure cannot occur unless the suspect submits to the officer's authority. *See* 499 U.S. at 629. Moreover, as the Supreme Court indicated in *Brower v. County of Inyo*, 489 U.S. 544, 596-99 (1980) and other cases before *Hodari*, some form of intentional acquisition of physical control, through termination of movement by physical force or submission to a show of authority, must occur in flight cases for a seizure to occur. Nothing in *Hodari* shows an intent to overrule *Brower*. Rather, *Hodari* must be reconciled with the holding in *Brower* that "a seizure requires 'intentional acquisition of physical control' and occurs when 'a person [is] stopped by the very instrumentality set in motion or put in place to achieve the result.' " *Thomas v. Durastanti*, 607 F.3d 655, 663 (10th Cir. 2010).

The Tenth Circuit dealt with this precise issue in 2010. *See Brooks v. Gaenzle*, 614 F.3d 1213 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 1045 (2011). In *Brooks*, two men broke into a home with the intent to burglarize it. *Id.* at 1215. Upon the arrival of police officers, the men fled from the home's garage. *Id.* The two officers ran from the garage and witnessed Keith Brooks fleeing from the house and climbing a fence. *Id.* One of the officers yelled "stop!" and fired a gunshot at Brooks, striking him in the lower back. *Id.* Wounded, Brooks continued over the fence and successfully fled police capture. *Id.* Brooks was not captured until three days later. *Id.*

After his criminal trial, Brooks brought several civil claims against the officers, including one for excessive force under 42 U.S.C. § 1983. *Id.* at 1216. Upon granting the officers' motion for summary judgment, the district court specifically held the officer's gunshot constituted only an attempted seizure, and thus did not implicate the Fourth Amendment. *Brooks v. Gaenzle*, 2009 WL 3158138, at *5 (D. Colo. Sept. 29, 2009). The trial court reasoned that while the gunshot likely pained Brooks and slowed his escape, *the shot did not bring him under the government's possession or control*. *Id.* at *6 (emphasis added). The court concluded the gunshot was not tantamount to a seizure because it did not produce a stop. *Id.*

The Tenth Circuit affirmed the district court's conclusion that the gunshot did not constitute a physical seizure. *Brooks*, 614 F.3d at 1220-21. Though the officer shot the man with the purpose and intent of stopping him, no seizure occurred because the shot did not actually stop him and/or the officers did not gain intentional acquisition of control over him. *Id.*

Brook's holding only reinforces the principle explained in *Hodari*: The Fourth Amendment's protections do not contemplate attempted seizures. *See id.* at 1221.

Contrary to the district court's claim here about a "majority" view, this issue is unsettled and subject to a clear split in authority among Circuit Courts. In addition to *Brooks*, many courts share our view of what constitutes a physical seizure.

Consistent with *Brower*, *Brooks*, and other cases listed above, we hold Defendant Carter was not seized when agent Holder shot him. Though the gunshot slowed Carter and made his escape harder, it did not stop him from taking out the key, starting the car, and driving away. *See Brooks*, 614 F.3d at 1220-21. Nothing in the record indicates the gunshot even temporarily stopped Carter's flight from the scene. Holder's gunshot amounted to nothing more than an attempted seizure,

which does not implicate the Fourth Amendment. *See Hodari*, 499 U.S. at 626 n.2.

We could end our Fourth Amendment analysis here as no Fourth Amendment protection attaches to the discovery of the backpack's contents. But in the interest in giving guidance to the lower courts, we will press forward and examine the next question as if we had decided there was a physical seizure.

2. Agent Holder had Probable Cause to use Deadly Force to Stop Defendant Carter's Flight

The district court also concluded Defendant Ben Carter was not "an immediate danger to agent[s] [ ] or the public before reaching the car," and therefore it was unreasonable for agent Holder to use deadly force to stop his escape. In coming to this conclusion, the court suggested neither Holder nor Martin could reasonably connect Carter with the stash house robbery given the circumstances. We disagree with this analysis, and reinforce the principle that the calculus of reasonableness must allow police and law enforcement officers to make split-second decisions to protect human life, including their own. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989). After a careful review with this principle in mind, we find agent Holder acted reasonably under the Fourth Amendment in using deadly force against Carter.

The legal standard for "reasonableness" is relatively lengthy and imprecise, but it ultimately comes down to examining law enforcement's actions objectively under the totality of the circumstances and balancing them against individual's Fourth Amendment interests. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996); *Graham*, 490 U.S. at 397; *Scott v. Harris*, 550 U.S. 372, 384 (2007); *United States v. Place*, 462 U.S. 696, 703 (1983). Its proper application "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396; *see also Tennessee v. Garner*, 471 U.S. 1, 8-9.

The standard for probable cause is similar. Probable cause exists where "the facts and circumstances within [officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Probable cause deals with probabilities. *Illinois v. Gates*, 462 U.S. 213, 232 (1983). In determining probable cause, "the relevant inquiry is not whether a particular conduct is innocent or guilty, but the degree of suspicion that attaches to particular types of non-criminal acts." *Gates*, 462 U.S. at 243 n.13 (internal quotation marks omitted).

Probable cause is designed to balance law enforcement and private citizens' own interests towards effecting arrests and detentions. *Brinegar*, 338 U.S. at 176. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part." *Id.* At the same time, however, "these mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.*

Finally, as "[i]nformants' tips [ ] come in many shapes and sizes from many different types of persons," their indicia of reliability is determined based on the totality of the circumstances. *Gates*, 462 U.S. at 230-31. While an anonymous tip – standing alone – does not establish probable cause, it can become an important consideration in finding probable cause when corroborated by facts and circumstances before police. *See id.* at 227, 241-42.

By the time agents encountered Roby and Carter near the fictional stash house, they had reason to think the men were involved in the robbery. Agents had information that the men had not been seen in the area before; had been standing on the street corner looking in the direction of the stash house for over thirty minutes, wore clothing partially covering their faces in the middle of the day; had a large backpack filled with unknown items; and one of the men had been seen holding and/or manipulating something in his pants pocket. These descriptions were reported to law enforcement *at the precise time* Terrance and his robbery crew were supposed to be at the stash house. When agent Holder and Martin arrived on scene, they personally observed and confirmed the majority of the caller's descriptions. When they asked the men a simple question, the men turned towards them and instantly became nervous; presumably from seeing agents in their blue ATF jackets. Without hesitation, the men sprinted away without answering. During that brief moment of eye contact, agents noticed the men were similar in age and ethnicity as the robbery crew. Under the totality of the circumstances, agents had probable cause to detain the men. *See Sibron v. New York*, 392 U.S. 40, 66-67 (1968).

Agents also had probable cause to believe the men were armed and/or dangerous. When the men fled and did not submit to the agents' show of authority, agents knew the

potential for danger was no longer latent, it was real: Two people believed to be part of an armed robbery were fleeing from law enforcement officers down public neighborhood streets. The prospect of harm arising from a potential shootout was substantial, especially considering the number of families and young children in the area.

This concern was further borne out when Carter's alleged accomplice stopped running and pulled a gun from his pocket. Agents had no time to determine if the gun was real or fake, and agent Holder testified that the gun looked very real to him despite Roby's pleas to the contrary. A reasonable officer at the time would believe Roby's act confirmed Holder's suspicion that both men were armed and dangerous. When Carter mimicked Roby's movement and reached into his pocket to pull something out, Holder had every reason to think he was reaching for a gun like his accomplice.

In any event, agent Holder had to make an immediate decision whether to prevent a possible attack before it happened. He was not required or expected to wait to see if Carter actually pulled a gun from his pocket before deciding to use deadly force. Instead, there was sufficient probable cause to use deadly force even if Carter's hand was concealed in his pocket and Holder could not see a weapon. *See Ryder v. City of Topeka*, 814 F.2d 1412, 1419 (10th Cir. 1987). Holder reasonably thought Carter posed a significant threat of physical harm to agents and others in the area at the time, and justifiably reacted to that threat with deadly force.

The district court attempts to distinguish the shooting by examining: the unreliability of the anonymous tip; agents profiling the men as suspicious based on superficial factors, such as their age, ethnicity, and dress; and agents having different interactions with the suspects during their flight.

However, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. "Not every push or shove, even if it may later seems unnecessary in the peace of a judge's chambers violates the Fourth Amendment." *Id.* (internal citation and quotation marks omitted). Instead, police officers must often make split-second judgments in tense and uncertain circumstances regarding the appropriate amount of force for the situation. *Id.* The law supports Holder's actions as appropriate from the perspective of a reasonable officer on the scene.

Lastly, the district court's attempt to minimize the apparent and pressing danger by saying Carter was reaching for his car key rather than a gun does not change this analysis. Given Carter's suspected connection to the robbery scheme, the next logical step if Carter was able to drive away was a dangerous police chase through neighborhood streets. Like the earlier situation with the robbery crew leading ATF on a high speed chase for two miles before crashing into a wooden electrical pole, Carter's access to the vehicle created an additional and substantial danger to the public at large. Case provides latitude for officers to make split-second judgments to use deadly force in order to protect themselves and the public. *See, e.g.*, *Scott*, 550 U.S. at 382-84; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2021-22 (2014); *Ridgeway v. City of Woolwich TWP Police Dept.*, 924 F. Supp. 653, 657-62 (D.N.J. 1996). As the Eleventh Circuit recognized, this danger can justify the use of deadly force even before the suspect drives off in the car and creates the danger. *See Long v. Slaton*, 508 F.3d 576, 581-83 (11th Cir. 2007). Again, probable cause is a fluid concept and it must not handcuff law enforcement from making plain and necessary judgments in the field to protect themselves and the public.

We find that agent Holder had probable cause to use deadly force to stop Carter's flight under the Fourth Amendment. Our analysis of this issue might be different if the anonymous tip was not corroborated by agents' direct observations or if the events were truly independent from the men being part of the home invasion. But the record shows the events were sequential and reasonably linked to the date and time of the robbery. Agent Holder had every reason to use deadly force here, and this Court will not second guess agent Holder's decision to protect the public from an apparent and imminent danger.

Again, we could stop here in our Fourth Amendment analysis. But instead we decide to continue. For the next question, we assume the gunshot constituted a seizure and Holder lacked probable cause to shoot Carter.

3. The Gunshot is too Attenuated to the Discovery of the Backpack's Contents to Apply the Exclusionary Rule

As the district court correctly noted, not all evidence obtained through illegal police conduct must be excluded. Rather, the test for exclusion is whether the evidence was gained as a direct result or exploitation of the police illegality. *Wong Sun v. United States*, 371 U.S. 471, 487, 88 (1963). Suppression of evidence should also not be a court's first impulse; rather it should be its last resort. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006). This is because "the exclusionary rule generates 'substantial social costs,' which sometimes include

setting the guilty free and the dangerous at large." *Id.* (internal citation omitted).

Here, the discovery of the backpack's contents is too attenuated from the alleged illegal gunshot to warrant suppression of the evidence. No evidence in the record details how long Carter traveled in the car before crashing it in the drainage ditch, whether the loss of blood caused him to crash, or whether the items found on the backseat floor actually came from the backpack. Too many uncertainties exist to conclude the gunshot directly caused the discovery of backpack's contents.

Suppressing the evidence in this case would generate wholly unnecessary social costs. Social policy demands that law enforcement officers timely respond to dangerous and unpredictable situations by applying the appropriate amount of force to protect themselves and the public from harm. Excluding the backpack's contents would not deter unlawful police activity; rather, it would only create more uncertainty for law enforcement officers in carrying out their necessary duties in protecting the community they serve. *See Gates*, 462 U.S. at 258 (White, J., concurring).

Accordingly, given the limitations and social costs of the exclusionary rule, we decline to apply it in this case. Therefore, all three stages of our Fourth Amendment analysis lead to the conclusion that excluding the backpack's contents is unwarranted and unnecessary. The District Court's opinion fails on all three fronts.

B. ATF's Actions did not Constitute Outrageous Government Conduct under the Fifth Amendment

Defendants also contend ATF's reverse-sting operation constituted outrageous government conduct and, therefore, the indictment against them should be dismissed. While this claim has an "extremely high standard," *Smith*, 924 F.3d at 897, and is seldom recognized by courts, *Black*, 733 F.3d at 302, the district court nevertheless found Defendants met the standard and dismissed the indictment. We reject the court's finding of outrageous government conduct and reverse.

The standard for outrageous government conduct is very strict: "Outrageous government conduct" only occurs "when the actions of law enforcement officers or informants are 'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.' " *Black*, 733 F.3d at 302 (citing *United States v. Russell*, 411 U.S. 423, 431-32 (1973)). Dismissing an indictment for outrageous government conduct is "limited to extreme cases" in which the defendant can demonstrate that the government's conduct "violates fundamental fairness" and is "so grossly shocking and so outrageous as to violate the universal sense of justice." *Stinson*, 647 F.3d at 1209 (internal quotation marks omitted). This is an "extremely high standard." *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993) (citing *Smith*, 924 F.2d at 897 (internal quotation marks omitted). Indeed, only two reported federal appellate court decisions have reversed convictions under this doctrine. *See United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *see also State v. Lively*, 130 Wash.2d 1 (1996)).

There is no litmus test for determining when law enforcement conduct crosses the line between acceptable and outrageous, so "every case must be resolved on its own particular facts." *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986), *vacated in part on other grounds sub nom. United States v. Wingender*, 790 F.2d 802 (9th Cir. 1986). While this is an issue of first impression for this Court, the Ninth Circuit has dealt with this issue before and developed some relevant ground rules to follow. For example, it is outrageous for government agents to "engineer[ ] and direct[ ] a criminal enterprise from start to finish, *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008) (internal quotation marks omitted), or for the government to use "excessive physical or mental coercion" to convince an individual to commit a crime, *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995). On the other hand, it is not outrageous to infiltrate a criminal organization, to approach individuals who are already involved in or contemplating a criminal act, or to provide necessary items to a conspiracy. *See United States v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985). Nor is it outrageous for the government to "use 'artifice and stratagem to ferret out criminal activity.' " *Bogart*, 783 F.2d at 1438; *Sorrells v. United States*, 287 U.S. 435, 441 (1932). We adopt these rules and apply them to the facts in this case.

ATF's reverse-sting operation here mainly falls within the bounds of law enforcement tactics that have been held reasonable. *See Black*, 733 F.3d at 308-09. Once presented with the fictitious stash house robbery proposal, Terrance, Jones, and Ingram (and later, Malik, Roby, and Carter) readily acted as willing participants with a professed ability to plan, supply, and carry out a dangerous armed robbery. The government also implemented this sting operation for an important social goal, namely to lower the high rate of shootings and kidnappings associated with home invasions in Green Ridge over the past couple of years.

Though the district court adopted a modified version of the Ninth Circuit's six-factor test in *Black*, we think the more apt standard is the test's bedrock rule: Whether ATF's conduct was reasonable under the totality of the circumstances. We could impose factors to illustrate what the court considers important, but the standard always comes back to what is reasonable. *Cf. Black*, 733 F.3d at 303-04.

1. Defendants Made Repeated Representations of Related Past Criminal Activity

The government does not contend it had any individualized suspicion of Defendants or their alleged accomplices when it dispatched the CI into the field to find persons willing to participate in the stash house robbery. The only factor the CI used to select targets was to go to Southside, where the crime rate was high and persons engaged in "criminal activity" were likely to gather. Additionally, agent Miller and the CI invented the stash house robbery and set the parameters for how it was supposed to be carried out.

However, once ATF had set its bait, Defendants and their accomplices responded without any further inducement. As evidenced by their enthusiastic and undeterred readiness to participate in the robbery, they were contemplating criminal activity and were not coerced into joining the conspiracy. *See United States v. Bagnariol*, 655 F.2d 887, 882 (9th Cir. 1981); *United States v. Emmert*, 829 F.2d 805, 807, 812 (9th Cir. 1987). Members of the robbery crew who spoke to agent Miller and the CI before executing the robbery said very early and often that they had engaged in similar criminal activity in the past. For example, Terrance bragged that his robbery crew had done stash house robberies before. Jones boasted he had done "hit and run" robberies similar to the stash house robbery and had it "down to a system." Terrance told Miller and the CI that Ingram had done several stash house robberies before and was able to supply materials to carry out another one. These conversations were recorded on audio tape and video. Therefore, even if there is some evidence of overreaching, this concern is easily mitigated by members of the robbery crew's repeated representations that they were likely to get involved in stash house robberies. *See Black*, 733 F.3d at 307 & n.11. Defendants and their alleged accomplices were eager to commit the robbery, and they touted their ability to carry it out.

2. ATF did not Pressure or Coerce Defendants to Plan and Carry out the Robbery

The Ninth Circuit noted that "[t]he extent to which the government encouraged a defendant to participate in the crime is important, with mere encouragement being of less concern than pressure or coercion." *Id.* at 308; *see also Shaw v. Winters*, 796 F.2d 1124, 1125 (9th Cir. 1986).

There is little to no evidence of government coercion or pressure here. Rather, the government simply proposed the stash house robbery and the defendants eagerly jumped at the opportunity. In fact, agent Miller threatened to call off the robbery at one point and Terrance pleaded for him to stay involved. Defendants have not presented any evidence the government engaged in inappropriate activity, threats, or coercion to encourage them to engage in the robbery. Indeed, two of the Defendants were recruited by other members the robbery crew, not ATF or its agents.

Defendants urge this Court to view the lucrative nature of the robbery and their depressed economic situation as evidence of inherent government pressure and coercion. We decline to do so, as most home invasion robberies stem from people hoping to land a large payday. ATF just replicated a typical stash house robbery scenario, and the amount of drugs inside the house is consistent with the amount of drugs found in other reported related robberies.

3. ATF Played a Minimal Role in the Robbery once it Proposed the Idea to Terrance and his Robbery Crew

Some other aspects of the government's participation in the crime is relevant too. As the Ninth Circuit stated in *Black*:

> [First], the *duration* of the government's participation in a criminal enterprise is significant, with participation of longer duration being of greater concern than intermittent or short-term government involvement. . . .
>
> [Second] the *nature* of the government's participation – whether the government acted as a partner in criminal activity, or more as an observer of the defendant's criminal conduct – including any particularly offensive conduct taken by the government during the course of the operation. . . .
>
> [Third], the *necessity* of the government's participation in the criminal enterprise – whether the defendants would have had the technical expertise or resources necessary to commit such a crime without the government's intervention. . . .

733 F.3d at 308-09 (internal citations and quotation marks omitted). These three considerations constitute the crux of an "outrageous government conduct" claim as the government may not orchestrate a criminal enterprise from start to finish in any sort of sting.

Here, while the CI took the initiative of approaching Defendants and their alleged accomplices and proposing the stash house robbery, ATF thereafter played a minimal role in the crime. Agent Miller provided no weapons, plans, manpower or direction on how to perform the robbery, even when Terrance and others sought his advice. The nature of the ATF's involvement thus stands in stark contrast to the government's role in cases like *Twigg* and *Greene*, where the government provided difficult-to-obtain and necessary materials for criminal activity. *See Twigg*, 588 F.2d at 380; *Greene*, 454 F.2d at 786.

Defendants argue agent Miller's insistence on obtaining better guns, a larger robbery crew, and a detailed plan to enter the house was clear evidence of substantial government participation in the crime. We reject this argument because those demands were necessary to recruit only those people who were ready and willing to risk their lives to participate in a home invasion robbery. They could have said no or stopped at any time during the process, but they did not.

4. This Sting Operation Serves an Important Executive Purpose, and this Court will Not Interfere with the Decision to use this Investigative Tactic

Finally, one other important consideration must be addressed: The need for the investigative technique used in light of the challenges of investigating and prosecuting the type of crime being investigated. *See Black*, 733 F.3d at 309.

As the government noted in its brief, stash house robberies are largely unreported crimes that pose a great risk of violence in residential neighborhoods. Many home invasions related to drug deals involve disputes between rival gangs, and trying to arrest one gang in the act of robbing another can lead to shoot-outs and hostage taking. ATF specifically designed this reverse-sting tactic to avoid these risks to the public and law enforcement officers by creating a controlled scenario that unfolds to capture people willing to commit an armed robbery without taking the final step of an actual home invasion. That being said, the risks involved are very real and the government must monitor and safeguard its operations to ensure that the safety of officers, suspects, and the public are protected. And because the operation is fictional, courts must remain vigilant that the government does not go too far to obtain criminal convictions.

We want to emphasize in this case the existence of tape and video recordings to prove what was actually said and done has weighed heavily in our review of the record. We would be faced with a much different case if all we had to rely on was the credibility of the conflicting after-the-fact testimony of the government and defense witnesses.

Finally, absent an overwhelming necessity to correct a Constitutional injustice, we are required to adhere to the properly defined balance of powers between branches of government. ATF and the Executive Branch must decide how to conduct their affairs, and the Judicial Branch must respect this decision even if it disagrees and would have reached a different conclusion. Accordingly, this Court is not going to disturb ATF's executive function and determine how to best manage its law enforcement and investigative tactics.

We are satisfied ATF did not cross the line into outrageous government conduct here. The government's conduct was not "so grossly shocking and so outrageous as to violate the universal sense of justice." *Stinson*, 647 F.3d at 1209.[7]

IV

CONCLUSION

Based on the foregoing, we reverse and remand these matters to the district court with instructions consistent with this opinion. Defendants are to be placed back into custody.

REVERSED AND REMANDED

Docket No. 14-1107

In the Supreme Court of the United States

October Term 2014

Malik PRICE; Cedrick R. Jones; and Ben Carter,

Petitioners,

v.

UNITED STATES of America,

Respondent.

The Court granted Defendants' Petition for Certiorari from judgment entered by the Thirteenth Circuit Court of Appeals on May 13, 2014.

The Court grants argument limited to the following questions:

A. Under the Fourth Amendment:

1. Whether Defendant Ben Carter was "seized" when shot in the leg despite escaping law enforcement's possession and control;

2. Whether ATF Special Agent Bradley Holder had probable cause to use deadly force against Defendant Ben Carter; and

3. Whether law enforcement's discovery of the backpack's contents was a direct result of the shooting.

B. Under the Fifth Amendment:

1. Whether ATF's actions constituted "outrageous government conduct."

EXHIBIT B

** SEALED DOCUMENT **

PLAYERS LIST

Federal Law Enforcement and Its Agents

Name: Antonio Miller
DOB: 6/13/1985
Position: ATF Special Agent
Status: Active

Name: Bradley Holder
DOB: 09/09/1983
Position: ATF Special Agent
Status: Paid suspension until 01/01/15

Name: N/A
DOB: **/**/1992
Position: ATF Confidential Informant
Status: Active

Name: Brett Martin
DOB: 11/02/1979
Position: ATF Special Agent
Status: Active

Name: Sarah Nelson
DOB: 11/02/1982
Position: ATF Special Agent
Status: Part-time; moved to fraud department, clerical division

Defendants and the Robbery Crew

Name: Terrance Price
DOB: 08/12/1988
Occupation: Unemployed
Prior Criminal History: Drug possession with the intent to distribute [*Felony, May 2008*]
Possession of an unlicensed firearm [*Misdemeanor, May 2010*]
Status: Deceased

Name: Cedrick R. Jones
DOB: 12/02/1991
Occupation: Unemployed
Prior Criminal History: Marijuana possession [*Infraction, January 2010*]
Shoplifting [*Misdemeanor, March 2011*]
Status: In custody

Name: DeAndre Ingram
DOB: 07/09/1986
Occupation: N/A
Prior Criminal History: Burglary [*Felony, September 2005*]
Theft [*Felony, July 2007*]
Theft [*Misdemeanor, January 2011*]
Status: Deceased

Name: Malik Price
DOB: 04/19/1994
Occupation: Grocery Store Stock Clerk
Prior Criminal History: No criminal history
Status: In custody

Name: Michael Roby
DOB: 08/10/ 1991
Occupation: Unemployed
Prior Criminal History: Shoplifting [*Misdemeanor, October 2011*]
Status: Deceased

Name: Ben Carter
DOB: 01/29/1989
Occupation: Construction worker
Prior Criminal History: Drug possession with the intent to distribute; violation of 18 U.S.C. § 521 [*Felony, November 2006*]
Transporting Alcohol into State Barring Sale [*Felony, May 2008*]
Status: In custody

EXHIBIT C1

TRANSCRIPT EXCERPTS OF FIRST MEETING

3/12/13, 0948 hours at Peggy Sue's Diner, East Green Ridge, Apate.

AGENT ANTONIO MILLER, THE CI, AND TERRANCE PRICE PRESENT

AGENT MILLER: Hey, what's good?

THE CI: Yo Tony, this is the cat I was talking 'bout. He's straight.

AGENT MILLER: Yeah? You interested boss?

T. PRICE: Maybe. [The CI] said you were pissed and wanted to do something about it. Said it was easy and a good come up.

AGENT MILLER: I got something. But I'm not spilling details to some random [expletive] from Southside. How do I know you're not a narc?

T. PRICE: [(Sound of Laughter)] no way man. Do I look like a [expletive] fed?

THE CI: Ya Tony, he's straight. Just tell him what's up.

AGENT MILLER: Cool. I got cha'. Okay, check this out. I'm Tony and I move dope for some Columbian guys each month. They been pinching me the past couple months; they barely pay me half of what they used to do the same job. It's bull[expletive]. But I got an idea. See, these guys call me at the beginning of each month to move drugs. They always give me some random house to go to up North. I just go in, wait for some dude to go to the back room and stack 6 to 8 kilos in a duffel bag, he brings them to me and tells me where to move them, and I bail. No problem, no mess. I've moved for about 2 or 3 years on the reg, I got the routine down.

T. PRICE: Wait, hold up. You just want 6 to 8 kilos? . . . Just take them yourself.

AGENT MILLER: No, man! Way more. See, when I go into these houses, 5 or 7 kilos is

		nothing. I mean, every time I pass by the living room where they package the stuff, I see about 20 to 25 kilos sitting right there. That's over a mil on the street. A mil. Ever seen a mil? You can't even stack that many hundreds on this table. And who knows what's in the back room dude. It could be even more dope . . . other good stuff. We could be set for life if we get into the house. These dudes won't know what hit them.
THE CI:		Tony, slow down. Tell him 'bout the big dudes up front.
AGENT MILLER:		Oh yeah, that's where you come in my man. See, [the CI] can't be there cause' he moves at different times than me. And I'm the key into the house. So we need you and your crew to take out these security guys. I mean, every time I move the drugs there's two of them. They are big, stocky dudes – bouncer types – who have dealt with this [expletive] before. They wear plates on their chest and tuck a gat under their belts. I know they got a side room with some bigger firepower too . . . but if I can get in and you and your crew can nix those dudes before they alert others or get to the side room, we can walk away with 30 or more kilos and bounce.
T. PRICE:		Damn, that's what's up. But what 'bout you? Those Columbian guys will just track you down and take the money back or blast you.
AGENT MILLER:		I thought of that. You guys will tie me up and give me a black eye, make it look like I was jumped. That way, I can play dumb and leave the biz after it is all said and done. I'll just say I have some mental [expletive].
THE CI:		Yeah Terrance, this is a once of a lifetime thing . . . that big payday we always wanted. This [expletive] dope is pure like no other. Pure cocaína. We don't just come up to anyone to pull this job. We see potential in you.
T. PRICE:		For real?
THE CI:		Yeah. As long as you get your crew involved and make a plan, we got this. You do have homies who can ride along, don't you?
T. PRICE:		Yeah. I talked to a couple of them yesterday 'bout it.

AGENT MILLER: Don't think for a second this will be easy boss. Do you and your dudes have the balls to ride into a firefight? Could you handle if something bad happened? Like your boy getting shot? There's no coming back from that.

T. PRICE: Yeah, I think so.

AGENT MILLER: I mean, the guards are big, wear body armor, have some serious firepower. They have definitely laid down some dumbasses trying to do the same thing without a legit plan or large enough crew. Still good to ride?

T. PRICE: Yeah, I'm straight. No problem.

AGENT MILLER: And your homies – are they down to ride? I don't want no punks backing down at the last minute. It's ride or die here.

T. PRICE: [Expletive] man, no. They are straight. Chill.

AGENT MILLER: Don't tell me to chill. I'm [expletive] serious. I can ask any dude off the street to do this job but you got the experience. Isn't that right?

T. PRICE: Yeah. People in my crew have done stuff like this too. I have been locked up a couple of times for dealing. Also one time for a having stolen piece.

AGENT MILLER: Okay. Do you have one on you now?

T. PRICE: Nah. Mine's at my place, but my homies in Southside got everything. Masks, glocks, rope, money – you name it. They know what to do in these kind of situations . . . like robbin' some random liquor store.

AGENT MILLER: No, it's diff –

T. PRICE: I got a question for you Tony. What do you mean by take out the security guards? Do you want us to blast em'?

AGENT MILLER: I don't care. As long as they are dealt with.

T. PRICE: Okay, cause' some of my homies wanted to know. Like are "we just going to shoot up the joint or just go robbin'."

AGENT MILLER: Again, I don't care. It's your call.

T. PRICE: How many people do I need?

AGENT MILLER: As many as it takes. Your call.

T. PRICE: But –

AGENT MILLER: Did I stutter? This is your [expletive]. I get you into the house, you get the job done.

T. PRICE: Aight.

AGENT MILLER: Don't worry man, we are a team. In fact, my girl has a hook up at a rental car company for a car to use. My buddy also has a house for us to stay in for a week or two, or as long as it takes. We can sell the dope from there.

T. PRICE: We need the house, but no car. We already got the right whip for the job.

AGENT MILLER: Legit. You got it. Yo, one more thing – you and your crew need to think outside the box to get the security guards down and to get the dope out of the house undetected . . . otherwise, we're all [expletive]. Especially me.

T. PRICE: I know what's up. This is my family business. The job will be just like any other . . . just like the one in February. No one got hurt. It was clean.

AGENT MILLER: Alright. Let's meet up soon to talk more. Bring your crew next time.

T. PRICE: Cool. Let's do this thing. [(*Sound of a pound hug*)]

AGENT MILLER: Here's my number. Call me in a day or two and let's meet up.

- End of Selected Transcript -

EXHIBIT C2

TRANSCRIPT EXCERPTS OF SECOND MEETING

3/19/13, 1348 hours at Quik Mart, Southside, Apate.

AGENT MILLER, THE CI, PRICE AND CEDRICK R. JONES PRESENT

T. PRICE: What's good?

AGENT MILLER: Who's your bud?

T. PRICE: This is Cedrick, my right hand gunner. We always ride together.

AGENT MILLER: Is that right? Do you understand what we're doing?

JONES: Yeah man. Rob some people. No biggie.

AGENT MILLER: Kinda. Let me explain . . . .

** Agent Miller spends 5 minutes repeating cover story and desire to rob stash house **

AGENT MILLER: What you think?

JONES: Yeah man. I've robbed before. Can do it again. I'm no [expletive.]

AGENT MILLER: Cool. The shipment is coming in early April.

THE CI: Terrance, is this everyone you're planning to ride with?

T. PRICE: Yes. My other homie bailed.

THE CI: Let's talk. Do you have any idea how you're going to do this?

JONES: I got an idea. Terrance and I talked 'bout it last night. Check it out: So when the security guards let Tony into the house and one of them leaves to get the drugs, Tony will distract the other guard in the main room while Terrance and I rush in the open front door. We take out the guard in the main room, and wait for the other guard to come back to blast him too. Get 'em by surprise. We can knock them out if that's easier. [expletive],

		we could even take one of the guards hostage and have him show us where the drugs in the back are. We can take him out later.
	THE CI:	Do you think that will work?
	JONES:	Hell yeah man. I've done hit-and-run stuff like this on the street before. Never went wrong. I got it down to a system.
	AGENT MILLER:	Pffft. Bull[expletive]. I thought you were serious about robbing this place.
	JONES:	[Expletive] you bro. We are.
	AGENT MILLER:	Well that plan will get you killed. Those guards have wrecked plenty of idiots coming in that way. You guys need to be creative if you actually want to survive this [expletive]. And another thing, two riders is not enough – you need a bigger crew.
	JONES:	Fine. We'll get more people . . . and think of another plan. Whatever.
	THE CI:	How many gats do you have ready to use?
	T. PRICE:	We need to talk 'bout that. Cedrick and I got pieces, but they're old. Plus mine jams sometimes. I don't know. Do you have any good ones to use?
	AGENT MILLER:	No. That's why we have you. If we had guns to use, we would just do the robbery ourselves. What's not getting through to you guys?
	JONES:	Shut the [expletive] up homie. You're talking mad [expletive] and it's bull[expletive]. What have you done so far? You could be a narc for all we know. Put some skin in so we know you're serious 'bout this too.
	AGENT MILLER:	You know, if you guys aren't going to take this seriously, I'm gonna find new riders who know what they're doing. I'm not risking getting my ass lit up because ponytails can't figure this [expletive] out.
	T. PRICE:	Everyone chill. Stop bitching. Tony, we'll get the guns. I have a friend in Cali who can give us all the [expletive] we need.
	AGENT MILLER:	Yeah? And what's his name?
	T. PRICE:	Everyone just calls him the "Tinderman." He knows how to do this kind of stuff. I'll hit him up to see if he's interested.

AGENT MILLER: Fine, get that guy involved or I'm calling it off and finding new people. I'll call you this time to meet up. Let's plan later this week. 'Til then, you need to think of a new plan on how to get the upper hand on the big guys guarding the dope. I don't want to pick up after you.

T. PRICE: I'll figure it out Tony, don't worry.

AGENT MILLER: You better.

- End of Selected Transcript -

EXHIBIT C3

TRANSCRIPT EXCERPTS OF THIRD MEETING

3/22/13, 1104 hours at Quik Mart, Southside, Apate.

AGENT MILLER, THE CI, PRICE, JONES AND DEANDRE INGRAM PRESENT

T. PRICE: Yo dudes, I got another rider. His name is DeAndre.

THE CI: Is this the guy you were talking about? The Tinderman?

T. PRICE: No, but he is even better than him. Straight enforcer. As good as they get. DeAndre robs banks, steals cars, murcs fools, and all that [expletive].

INGRAM: Yeah, I got a Desert Eagle and a .45 glock for the crew to use. I got lots of ammo too. I can probably get another piece or two later this week.

AGENT MILLER: Good. Let me catch you up then if they haven't filled you in yet . . .

** Agent Miller spends 5 minutes repeating cover story and desire to rob stash house **

AGENT MILLER: Got all that? You down? Got any questions?

INGRAM: Of Course. Yeah. How is this going down?

AGENT MILLER: You tell me bro. I mean, this is your gig. I don't know how to do this [expletive]. I'm just getting you in the house.

INGRAM: Aight. Well, I got some ideas, but I need more info.

THE CI: What info do you need?

INGRAM: Like details about the house.

AGENT MILLER: I don't know anything about the house until the day of the pickup. I get no details until the phone call.

INGRAM: Yeah, that's not good enough. If you want my crew, you need to give me an address and layout of the house now. I'm not going to have my men go in shooting from the hip.

AGENT MILLER: Fine. Let me make a phone call. Maybe I can get an address.

** Agent Miller walks to nearby alley to make a phone call. Miller returns 5 minutes later **

AGENT MILLER:	Okay, listen up. The address is 3425 Garden Street in North Green Ridge.
	My hookup said the house is in a rich neighborhood.
INGRAM:	Anything more?
AGENT MILLER:	Yeah. He said the driveway goes along the house to the garage, near the
	backyard. There's also a wooden deck next to the back door.
INGRAM:	Cool. Does anyone live there, or is it just a stash house?
AGENT MILLER:	No clue. Probably just a transport and repackage spot . . . I don't know.
INGRAM:	Okay, looks like the house is up the hill on Wilshire street.
AGENT MILLER:	How do you know that?
INGRAM:	Google maps, man. I can't see the backyard, but I do see the driveway
	leading the garage. Okay Tony, I think we can do this.
AGENT MILLER:	What's the plan?
INGRAM:	All you gotta do is unlock the front or back door. We take care of the rest.
AGENT MILLER:	That's not good enough for me. I'll be just a sittin' duck.
INGRAM:	Yeah, but what else do you got? Don't worry, nothing will go wrong if
	you do your job. The robbery'll be clean, fast, and none of our [expletive]
	will be left behind. You're getting professional help at a discount, so chill.
T. PRICE:	Yeah Tony, what's your share?
AGENT MILLER:	Just an even split. 50/50.
INGRAM:	[(*pauses*)] We got a deal. [(Sound of a pound hug).]
INGRAM:	Tony, when is the shipment coming in?
AGENT MILLER:	On April 4th. I think it's a Thursday.
INGRAM:	Tight. I will pick up everyone around 8:00am that day at this spot. Be
	ready to go. Here's my cell if you need to reach me before then.
AGENT MILLER:	Thanks.
INGRAM:	I'll work on getting those extra gats too.
THE CI:	Sounds good bro.

- End of Selected Transcript -

EXHIBIT C4

TRANSCRIPT EXCERPTS OF DISCUSSIONS EN ROUTE TO ROBBERY

4/4/13, 0850 hours at Kate Sessions Park, Southside, Apate.

AGENT MILLER, TERRANCE PRICE, JONES, INGRAM and MALIK PRICE PRESENT

JONES:	Yo Ter, what you gonna do with your share? Buy a new whip?
T. PRICE:	Not sure. I can't imagine having that much dough.
JONES:	I know what I'm doing with my share . . . with $200K to my name, I'm moving out of Southside and getting a place for me and my girl. I'm tired of being broke.
M. PRICE:	For sure bro.
INGRAM:	Focus on the job guys. We can talk about this later.
T. PRICE:	I am focusing Andre . . . the score is all I got. It's my only way out.
AGENT MILLER:	Listen to your bro. You guys can daydream after the job is done.

- End of Selected Transcript -

EXHIBIT C5

TRANSCRIPT EXCERPTS OF CEDRICK R. JONES'S INTERROGATION

4/24/13, 1520 hours at Downtown Sheriff's Office, Green Ridge, Apate.

JONES AND UNKNOWN FEDERAL AGENTS ("UFA") PRESENT

UFA NO. 1:	Give it up. Your homie already told us about Ben Carter. Or should I say, Tinderman.
JONES:	I don't know what the [expletive] you're talking 'bout.
UFA NO. 2:	Cedrick we just want to get information to help you out later. If you don't talk to us, you're going to spend a long time in prison, do you understand?
JONES:	I don't trust you . . . especially after the [expletive] you guys pulled. My best friend is [expletive] dead because of you [expletive] [expletive]!
UFA NO. 1:	You think we give a crap about you and him? You both planned to murder several people! What kind of sick [expletive] are you?!
JONES:	[Expletive] you! You don't know [expletive]!
UFA NO. 2:	Then tell us Cedrick . . . we need to know. What happened?
JONES:	No, I'm not saying anything.
UFA NO. 1:	Of course you won't because your guilty as [expletive]! Give me a break, I can smell your lies before you even open your fat mouth! We need a [expletive] air freshen-
JONES:	It's not that [expletive] hard! . . . If you tell three broke dudes there's over a million dollars being guarded by only two dudes, what do you think is gonna happen?!

- End of Selected Transcript -

EXHIBIT D

** REDACTIONS MADE FOR PRIVACY INTERESTS **

STREET VIEW OF 3425 GARDEN LANE, NORTH GREEN RIDGE, APATE

EXHIBIT D

SATELLITE VIEW OF 3425 GARDEN LANE, APPROXIMATE LOCATION OF MICHAEL ROBY AND BEN CARTER ON THE STREET CORNER, AND THEIR ALLEGED LINE OF SIGHT TO STASH HOUSE

EXHIBIT D

STREET VIEW OF MICHAEL ROBY AND BEN CARTER'S ALLEGED LINE OF SIGHT TO STASH HOUSE

EXHIBIT D

STREET VIEW OF ATF AGENTS BRADLEY HOLDER AND BRETT MARTIN'S PERSPECTIVE OF MICHAEL ROBY AND BEN CARTER ON STREET CORNER

EXHIBIT D

SATELLITE VIEW OF THE MICHAEL ROBY AND BEN CARTER'S PATH FROM ATF AGENTS BRADLEY HOLDER AND BRETT MARTIN, AND APPROXIMATE LOCATION OF WHERE THE MEN WERE SHOT

EXHIBIT E

** REDACTIONS MADE **

PHOTOGRAPH #1:

DEANDRE INGRAM'S WHITE VAN AT CRASH SITE

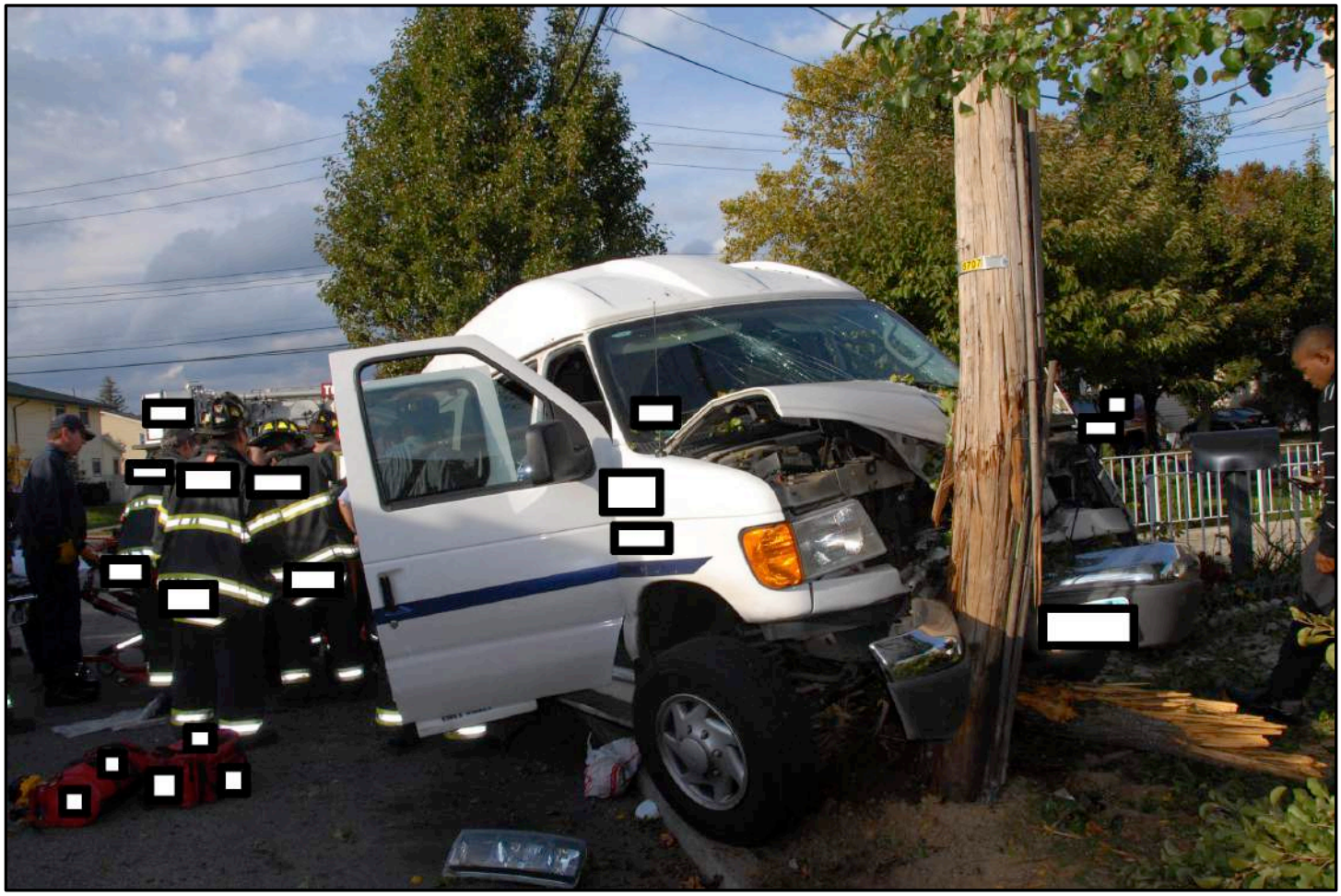

EXHIBIT E

PHOTOGRAPH #2 (SET OF PHOTOS):

EVIDENCE FOUND IN DEANDRE INGRAM'S WHITE VAN

Loaded Pistol

Airsoft Guns

Large Red Wrench Tool

Box of Red T-Shirts and Bandanas; Individual Pieces

NOT PICTURED:

- **Empty Duffel Bags**
- **Duffel Bag Filled with Photograph #3 Evidence**

EXHIBIT E

PHOTOGRAPH #3:

MICHAEL ROBY'S PELLET GUN

EXHIBIT E

WARNING: GRAPHIC MATERIAL

PHOTOGRAPH #4:

THE 1964 MERCEDES-BENZ'S FRONTSEAT INTERIOR; TAKEN AT INVENTORY

EXHIBIT E

** REDACTIONS MADE **

PHOTOGRAPH #5 (SET OF PHOTOS):

EVIDENCE FOUND IN BACKSEAT AREA OF 1964 MERCEDES-BENZ

Vodka Bottles

Small Canister of Gasoline

Butane Lighter

Unused Paint Rags

NOT PICTURED:

- **Large Black Backpack**

EXHIBIT F

TRANSCRIPT EXCERPTS OF ORAL ARGUMENT BEFORE THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF APATE

05/29/13, JUDGE LESLIE E. O'NEILL PRESIDING

** 9:05 a.m.: Defendant Ben Carter Called to the Stand **

***

DEFENSE ATTY: When you were running away from the agents, were you armed?

CARTER: What?

DEFENSE ATTY: Did you have a gun on your person?

CARTER: No. I never carry. I don't even own a gun.

***

JUDGE O'NEILL: I have one question. Ben, why did you look over your shoulder before reaching into your pocket?

CARTER: To see who was running with me. I thought it was Roby.

***

PROSECUTOR: Isn't it true you drove the car around the area for thirty minutes before crashing into the ditch?

CARTER: I have no idea. I don't remember much after I was shot. I was woozy.

***

** 10:20 a.m.: The CI called to the stand **

***

DEFENSE ATTY: Isn't it correct you target people off the street for these types of stings without knowing if they were actually involved in stash house robberies?

THE CI: Technically, yes. I found targets by going to block parties and bars,

talking around, and trying my best to meet shady people. I would not initiate a sting unless I determined a person probably committed similar robberies in the past and was interested in committing another.

DEFENSE ATTY: Well, you didn't have that here . . . . Did you even know at the time the person you talked to before Terrance was his younger brother Malik?

THE CI: No, I had no idea.

***

PROSECUTOR: So what was generally your role in these reverse-stings?

THE CI: ATF paid me to go high crime areas and find people who were willing to commit a home invasion robbery. I would engage them, gauge their interest, and then send them to Agent Miller if they were interested.

PROSECUTOR: Then Miller would confirm your beliefs?

THE CI: Yeah. He would also ask questions to determine whether or not the person was actually involved in that type of crimes. Like robberies and stuff.

PROSECUTOR: ATF reassigned you from Chicago to Green Ridge?

THE CI: Yes.

PROSECUTOR: Did ATF tell you what parts of Green Ridge were high crime areas?

THE CI: Yes. Some agents gave me information about several areas, but they told me to focus on Southside area. Agents kept telling me it was the worst part of the city, so we really needed to focus our efforts there … I'm going to the area where the crimes are happening. There's more dangerous people there. Why would I go anywhere else in Green Ridge? I wouldn't be able to do my job effectively in other parts of the City.

***

PROSECUTOR: What do you remember from the block party on March 8, 2013?

THE CI: That it was just a typical sting recruiting session for me. I approached a young guy and asked him if he was interested in a big payday. He agreed and asked if it was a good come up, which is slang for a good robbery

opportunity. I gave him details about the house and my Mexican drug bosses, but he soon lost interest. I think he actually laughed, said "whatever you say bro," and walked away.

PROSECUTOR: Okay. What happened next?

THE CI: About ten minutes later this other guy randomly came up to me and asked if I knew about any good come ups. I explained to him that I had info on a house possibly with some really good dope in it and if he was interested in putting together a crew to rob it. I also explained we would both have 500K after splitting the drug money. He loved the idea and did not want to stop talking about it. He was ready to do the robbery then.

***

** 1:15 p.m.: ATF Special Agent Antonio Miller Called to the Stand **

***

DEFENSE ATTY: Agent Miller, isn't it true you had no information about Terrance's criminal history when you met with him on March 12, 2013?

MILLER: I knew that [the CI] cleared him for the sting.

DEFENSE ATTY: But nothing more than that?

MILLER: Yes, nothing more than that.

***

DEFENSE ATTY: You told Terrance and other members of the robbery crew that there was twenty-five kilograms or more of cocaine in the house to give them longer mandatory sentences, is that correct?

MILLER: No, I did that to make sure they understood the extent of the robbery. This is the typical amount of cocaine usually stolen in real stash hou-

DEFENSE ATTY: Really? Do you have any proof of that?

MILLER: Only from what my supervisors tell me.

** 3:30 p.m.: ATF Special Agent Bradley Holder Called to the Stand **

***

PROSECUTOR: Agent Holder, let me take you back to when you responded to the informant's tip. What happened once you drove to the house?

HOLDER: Brett and I saw the two suspects standing on the street corner. We confirmed most of the caller's descriptions at that time. We couldn't see their faces and their hands were in their pockets, so to be safe I parked the car about fifty yards behind and walked up on foot.

PROSECUTOR: What happened next?

HOLDER: I approached the men and asked them, "what's going on today gentlemen?" They both turned and their eyes got really big. Immediately, and without saying anything, the men bolted north away from us.

PROSECUTOR: Did you see the men's faces?

HOLDER: Yes. They were both young African American males. The man wearing the backpack also had several tattoos on his neck.

PROSECUTOR: What did you do next?

HOLDER: I yelled "Federal agents! Stop and put your hands up!" But the men did not stop or comply with that command. Brett and I were concerned that someone was going to get hurt, so we pursued them on foot. After 200 yards, one of the men stopped running, turned around to face us, pulled an object from his pocket and put his arms up.

PROSECUTOR: What was the object?

HOLDER: It looked like a pistol. The man said it was fake, but it looked very real.

PROSECUTOR: Did the man say the object was a pellet gun?

HOLDER: No, he said, "this is a fake gun, please don't shoot me!" We told him to drop the weapon, but when he started to lower in my direction I had to take necessary action.

PROSECUTOR: And that action was using deadly force?

HOLDER: Yes. He could have shot Brett or me if I did not shoot him first.

***

JUDGE O'NEILL: When the first suspect was shot and fell to the ground, did you understand at that time the gun was fake?

HOLDER: No. Brett and I were responding to the situation and did not have time to check the gun. Brett, my supervisor, ordered me to pursue the other suspect right after the first suspect fell to the ground. There was no time. Plus, Brett was more experienced. And I'd just recently transferred over from Hartford, Connecticut, so I was new.

***

PROSECUTOR: Why did you shoot the second suspect when he reached into his pocket?

HOLDER: I had reason to believe he was reaching for a gun. I shot him to stop him from possibly shooting Brett, me, or an innocent bystander.

PROSECUTOR: So you personally thought your life was in danger?

HOLDER: Yes. I did what was right. The danger was right there. It was real.

- End of Selected Transcripts -

Supplemental Document: Slang Translation

While writing the problem, we recognized not every participant may understand the slang terms used in the C exhibits.

Accordingly, we decided to attach a loose translation guide in back of the packet:

Slang Term	Plain Meaning	Slang Term	Plain Meaning
"What's good?"	What's going on	*"Chill"*	Relax
"Cat"	Person / Individual	*"Dealing"*	Selling drugs
"He's straight"	He is cool / interested.	*"Joint"*	Place
"Boss"	Another word for man or dude	*"Hook up"*	Connection
"Come up"	Robbery opportunity	*"Whip"*	Car
"Narc" or "Fed"	Undercover officer	*"Aight"*	Okay
"Dope"	Cocaine	*"Biggie"*	Big deal
"Pinching"	Not paying enough	*"Bailed"*	Left / is not coming
"Kilos"	Unit of measurement; in this case, cocaine	*"Bitching"*	Complaining
"Reg"	Routinely	*"G"*	Gangster
"Mil"	Million	*"Murc"*	Murder
"Moves or Moving"	Transporting drugs from a stash house to another location	*"Ammo"*	Ammunition
"Plates"	Body armor	*"Gig"*	Job
"Gat," or "piece, "or "glock" or "burner"	Gun	*"Dough"*	Money
"Bounce"	Leave	*"Homies"*	Friends / Acquaintances
"Blast you"	Shoot you dead	*"Ride along"*	Come along
"Biz"	Business	*"Riders"*	People to come along
"Cocaína"	Really pure cocaine	*"Firefight"*	Shootout
		"Legit"	Legitimate
		"Punk"	Worthless person