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Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA  
SACRAMENTO DIVISION

UNITED STATES OF AMERICA,  
Plaintiff,

v.

HARRISON ULRICH JACK; GENERAL  
VANG PAO, aka Pao Vang, aka Vang Pao;  
LO CHA THAO; LO THAO, aka President Lo  
Thoa, aka Xia Lo Thao; YOUA TRUE  
VANG, aka Joseph Youa Vang, aka Colonel  
Youa True Vang; HUE VANG; CHONG  
YANG THAO; SENG VUE; CHUE LO;  
NHIA KAO VANG; and DANG VANG, aka  
David Vang,  
Defendants.

Case No. 2:07-CR-0266 FCD

**DEFENDANTS' MOTION TO DISMISS  
FOR OUTRAGEOUS GOVERNMENT  
CONDUCT**

Date: April 6, 2009  
Time: 1:30 pm  
Judge: Hon. Frank C. Damrell, Jr.

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## I. INTRODUCTION

Like most recent so-called “terrorism” prosecutions, this one started with bold proclamations about how government agents had saved us from a gathering threat. In its June 2007 press release about the arrests, the government trumpeted that the ATF—“and in particular a very brave and dedicated agent of the ATF”—in cooperation with the FBI and the Joint Terrorism Task Force, had thwarted “an audacious plan to overthrow the government of Laos[.]” According to the government, this “Hmong insurgency planned to use AK-47 automatic rifles, Stinger missiles, LAW rockets, anti-tank rockets and other arms and munitions to topple [the] Lao government and reduce government buildings in Vientiane to rubble.” “Fortunately,” it assured the public, “we were able to disrupt their activities before their plot evolved into a coup against a country with which the United States is at peace.”

The first holes in that story appeared almost immediately when the government produced its initial discovery materials, which demonstrated that the supposed “coup plot” lacked any realistic financing, organization, or plan. Now that the government has provided more discovery, however—including interview reports and dozens of hours of wiretap recordings—a far more disturbing story has come to light. That evidence demonstrates that the agents in this case made numerous false statements and material omissions in their sworn affidavits, which have fundamentally mischaracterized the defendants’ alleged conduct—and that the prosecuting attorneys repeated many of those misstatements, even while they held clear and irrefutable evidence contradicting them. For example:

- In at least 19 sworn affidavits, the agents attested that this case started when defendant Colonel Harrison Jack contacted a “defense contractor” and tried to purchase weapons. The prosecutors have repeated this allegation many times, and have underscored how dangerous this supposed contact was, telling the Court that the person Jack called was a “legitimate defense contractor,” and “not a fake one, a real one who has government contracts in Iraq, who has business in Iraq and other places.” But the evidence shows that this person was *not* a “defense contractor” at all, nor apparently involved in arms sales in any way. Rather, he

1 sells specially processed water, which he claims (and Colonel Jack apparently  
2 believed) can cure leukemia, prostate cancer, shingles, and numerous other  
3 ailments. Moreover, Jack's alleged conversation with this person did not concern  
4 weapons to use in any "coup plot," but rather for persecuted Hmong villagers to  
5 use *solely* for self-defense.

- 6 • While the agents attested in their affidavits that the defendants formulated a plan  
7 for an "insurgent military operation" in Laos, in fact, this one alleged  
8 conversation between defendant Jack and a purveyor of miraculous healing water  
9 is the *only* part of the supposed "coup plot" that the government did not propel  
10 and direct itself. When the undercover agent eventually contacted Jack—four  
11 months later—Jack had forgotten about the entire affair. And when the agent  
12 rekindled the idea, Jack emphasized that all that he wanted was to arrange safe  
13 passage out of Laos for Hmong victims of genocide; that he was *not* interested in  
14 overthrowing the Lao government; and that preferably *no force at all* would be  
15 used while the persecuted Hmong villagers escaped from the country.
- 16 • The agents omitted from their affidavits the leading role that the undercover ATF  
17 agent himself played in encouraging, formulating, and directing the alleged "coup  
18 plot"—from inflaming the defendants' passions about the horrific genocide  
19 occurring in Laos, to dashing any hope they had of a peaceful solution, to assuring  
20 them that the CIA and the U.S. government would support them if they overthrew  
21 the communist Lao regime, to suggesting the weapons they should use, to setting  
22 the dates, and on, and on.
- 23 • The agents *fabricated* supposedly incriminating exchanges between the  
24 undercover ATF agent and defendant General Vang Pao, which appear nowhere  
25 on the tape recording of the single occasion on which they met.
- 26 • Perhaps even more astonishingly, while the agents and prosecutors have alleged  
27 and charged an organized conspiracy, they have failed to apprise the Court of  
28 extensive evidence demonstrating that Hmong elders, including General Vang

1 Pao, assailed the idea of an insurgency in Laos and *forbade* anyone to participate  
2 in such a plan, giving explicit instructions that there must not be “any other  
3 violence whatsoever.” The wiretap recordings that the government has produced  
4 are replete with statements that General Vang Pao “is against this plan a lot,” that  
5 he “doesn’t want the plan to go on,” and that he is trying to “stop” the plan and  
6 “destroy[]” the plan. Yet—while possessing this evidence—the prosecutors told  
7 the Court that General Vang Pao rallied the “conspirators” in *support* of the plan,  
8 and denied that he opposed it.

- 9 • As recently as October 2008, the prosecutors described in pleadings filed with the  
10 Court an interview they conducted of a retired CIA agent—with three defense  
11 counsel present—who, according to the government, told them about a meeting  
12 where “[General] Vang Pao and his associates outlined for hours their operational  
13 concept for military operations in Laos against the Lao government and Lao  
14 soldiers.” But that account was completely false, as the retired CIA officer  
15 explained in a sworn declaration. In fact, at that meeting General Vang Pao  
16 *rejected* the idea of any military action in Laos (even if the U.S. government were  
17 backing it), and said that he was interested only in a political solution to the  
18 genocide unfolding there—and the retired CIA agent told the prosecutors this  
19 when they interviewed him.

20 In *United States v. Russell*, 411 U.S. 423 (1973), the Supreme Court recognized that,  
21 when the government engages in outrageous conduct, the defendants’ Due Process rights are  
22 violated, and the indictment should be dismissed. Courts have applied that rule numerous times  
23 to dismiss indictments in cases like this one, where government agents orchestrated and directed  
24 the “crimes” that the government falsely and misleadingly attributed to the defendants in its  
25 charging documents. That is the appropriate remedy here.<sup>1</sup>

26  
27 <sup>1</sup> Defendants bring this motion now—before they have received all of the government’s  
28 discovery, and while an important motion to compel discovery is pending—because the evidence  
that has come to light already demonstrates government misconduct so egregious that it justifies  
dismissal of the indictment. If the case is not dismissed now, however, defendants will renew

## II. FACTS<sup>2</sup>

### A. Harrison Jack contacts an acquaintance—not a defense contractor—and asks about purchasing guns for Hmong villagers to use in self-defense.

In its sworn affidavits, the government has repeatedly contended that it learned of the so-called coup plot when defendant Harrison Jack contacted a “defense contractor” in the fall of 2006 and asked about purchasing 500 AK-47 rifles.<sup>3</sup> According to the government’s own investigation report, however, Jack in fact contacted an acquaintance named Namon Hawthorne.<sup>4</sup> Hawthorne is hardly a “defense contractor.” He is an inventor and small businessman whose principal venture is a company that sells “kinetically charged” water, and posts “testimonials” on its website claiming that its water can cure leukemia, prostate cancer, shingles, and many other ailments.<sup>5</sup> As set forth below, Jack believed Hawthorne’s claims, and his faith in Hawthorne’s abilities may explain why he approached Hawthorne for help. The government has produced, and defendants have uncovered, no evidence suggesting that Hawthorne is involved in any way with arms sales.

Moreover, according to the government’s investigation report, when Jack approached Hawthorne, he was not contemplating any sort of military offensive. Instead, he wanted weapons that Hmong villagers in Laos could use purely for self-defense. Jack told Hawthorne that he hoped to buy “rifles to be used to support Laotians who are being slaughtered in Laos,” explaining that “there is a genocide taking place in Laos and he needed to help those persons being ethnically cleansed by providing them with firearms *to protect themselves*.”<sup>6</sup>

---

this motion with any new evidence from the remaining discovery and will seek an evidentiary hearing, as well as a hearing on a motion to suppress the fruits of the government’s illegal searches under *Franks v. Delaware*, 438 U.S. 154 (1978).

<sup>2</sup> The factual recitation in this motion presents the version of facts most favorable to the government’s case that the government could attempt to prove in light of its evidence. Nothing herein is an admission of any fact by any defendant.

<sup>3</sup> See, e.g., Affidavit of Special Agent [REDACTED] in Support of a Criminal Complaint at ¶ 8, attached as Exh. 1 to the Declaration of Galia A. Phillips (“Phillips Dec.”).

<sup>4</sup> Phillips Dec., Exh. 2, ATF Report of Investigation re Namon Hawthorne dated 9/29/06 (“Hawthorne Report”) at 1 [TarnEgl 034614].

<sup>5</sup> See Phillips Dec., Exh. 3, Excerpts from [www.kinesiswater.com](http://www.kinesiswater.com).

<sup>6</sup> Phillips Dec., Exh. 2, Hawthorne Report at 1 (emphasis added) [TarnEgl 034614].

1 Presumably, Jack was responding to reports such as those by the United States State  
 2 Department, Amnesty International, Human Rights Watch, and other organizations, which have  
 3 documented the horrific genocide that the communist Lao government is perpetrating against the  
 4 defenseless Hmong hill people, as retaliation for the Hmong's support of the United States  
 5 during the Vietnam War.<sup>7</sup> As these organizations have reported, the Lao government's  
 6 campaign of ethnic cleansing against the Hmong has intensified in recent years, and has included  
 7 massacres of unarmed Hmong women and children, widespread malnourishment, torture,  
 8 "reeducation" camps, and sexual enslavement of Hmong women and girls.<sup>8</sup>

9 At this point in the factual recitation, the Court should pause and reflect that this single  
 10 alleged act—talking to a purveyor of miraculous water about weapons that Hmong villagers  
 11 could use to *defend* themselves against these unspeakable crimes—is the *only* part of the  
 12 supposed "audacious plan to overthrow the government of Laos" that occurred before the "plan"  
 13 was taken over, propelled, and directed by the ATF agent himself.

14 **B. The ATF deploys an undercover agent who encourages and orchestrates an**  
 15 **offensive action in Laos.**

16 Proving that he was no arms dealer, water-salesman Hawthorne reported Jack's inquiry to  
 17 the FBI, which presumably recognized it for what it was, and did nothing.<sup>9</sup> Hawthorne then  
 18 went to the ATF, and later—*four months* after Jack's initial call to Hawthorne—an undercover  
 19 ATF agent contacted Jack. By that time, however, Jack had forgotten about the entire affair.  
 20 When the undercover agent told Jack that he had "talked to . . . Namon quite a bit about your  
 21

22 <sup>7</sup> See, e.g., Phillips Dec., Exh. 4, Amnesty International Press Release, 3/23/07; Exh. 5, Amnesty  
 23 International Public Statement, 9/13/04; Exh. 6, Amnesty International Urgent Action Report,  
 24 1/05; Exh. 7, Amnesty International Report, 3/07; Exh. 8, Amnesty International Report, 6/07;  
 25 Exh. 9, Amnesty International Public Statement, 5/4/06; Exh. 10, 2006 U.S. State Department  
 26 Report on Human Rights Abuses in Laos; Exh. 11, 2005 U.S. State Department Report on  
 27 Human Rights Abuses in Laos. The communist Lao government is carrying out this genocidal  
 28 campaign against the Hmong population in retribution for the Hmong's support of the United  
 States during the Vietnam War, led by defendant General Vang Pao. See Phillips Dec., Exh. 12,  
 Andrew Perrin, *Welcome to the Jungle*, Time, April 28, 2003, at 1-2; Exh. 9, Amnesty  
 International Public Statement, 5/4/06 at 2.

<sup>8</sup> *Id.*

<sup>9</sup> Phillips Dec., Exh. 13, Affidavit of Undercover Agent in Support of Continued Application to  
 Wiretap Harrison Jack's Phone ("HJ Cont. Wiretap Affidavit") at 19:7-9 [TarnEgl 034804].

1 problem,” Jack responded by asking the agent, “what problem are you talking about?” When the  
2 agent explained that he meant the “problem in East Asia. [The] AK’s,” Jack said, “*Oh. Oh.*  
3 *Okay. Okay. Golly sakes, that’s a long time ago.*”<sup>10</sup>

4 The agent, however, was undeterred. He arranged a meeting with Jack at a local  
5 restaurant, and over the next six months, he met primarily with Jack and defendant Lo Cha Thao  
6 at various restaurants and bars, where alcohol flowed freely.

7 At Jack’s very first meeting with the agent, on January 25, 2007, he emphasized once  
8 again that his sole desire was to help the Hmong villagers *defend* themselves against genocide—  
9 *not* to take any offensive action, or even to use force at all if it could be avoided. Jack told the  
10 agent that he was in contact with a group of concerned Hmong people in the United States who  
11 were “seriously considering promoting free democratic elections inside Laos as soon as  
12 possible.” When the agent asked if this group was “willing to use force,” Jack responded,  
13 “*Preferably not. They want to do it differently . . .*” He explained that “their primary objective  
14 is to get their people out of Laos and across the border into Thailand. *They don’t care about*  
15 *taking over the government. They don’t want to do that.*” When the agent pressed, reiterating  
16 “To try to overthrow the government,” Jack repeated: “*No. No. No. They’re trying to*  
17 *survive.*”<sup>11</sup>

18 The agent, however, had other ideas. Over the ensuing weeks and months, he goaded and  
19 pressed the so-called “conspirators” to do more—to aim higher, to move more quickly, and to  
20 use more, and more powerful, weapons. Jack, for his part, continued to insist that the “optimum  
21 situation” was to use no force at all.<sup>12</sup> But the agent was quick to dash any hope of a peaceful  
22 end to the genocide. He assured Jack that the United Nations was “not going to do anything,”  
23

24 <sup>10</sup> Phillips Dec., Exh. 14, Jack’s Calls, 1/22/07 at 2:17-3:4.

25 <sup>11</sup> Phillips Dec., Exh. 15, Transcript of January 25, 2007 Meeting (“1/25/07 meeting”) at 51:23-  
54:24.

26 <sup>12</sup> Phillips Dec., Exh. 16, Transcript of February 7, 2007 Meeting (“2/7/07 meeting”) at 18:8-  
19:1. (“The optimum situation would be if I can generate some political, via the international  
27 leverage, where they cut the genocide off, okay, and declare a mutual (inaudible), where these  
28 people could be escorted. That’s the optimal, rather than having to fight their way out. . . . We  
got women and children. I mean this is like, uh, Chief Joseph, okay, moving the Nez Perce  
Tribe.”)

1 even as he fanned the embers of outrage, comparing Laos's genocidal campaign against the  
2 Hmong to "the German's final solution."<sup>13</sup>

3 On the other hand, the agent told Jack, if Laos's brutal communist government were  
4 overthrown and replaced with a democratic one, the United States government would certainly  
5 support that:

6 Agent: Oh, the U.S. has no choice but to support a democratic  
7 government. **They will support it.**

8 ...

9 Jack: You think so?

10 Agent: Oh, yeah. **No doubt in my mind.** . . .

11 ...

12 Agent: I'm willing to bet, Harrison, that the CIA is aware of  
13 what's going on there. You know what I mean? ... They  
14 know what the hell's going on. They don't want to get in  
15 another Vietnam, but if Vang Pao goes in there and takes  
16 over the freaking country and then wants a—and—and gets  
17 things squared away and then wants to have democratic  
18 elections, that's gonna be like that, **I have no doubt in my  
19 mind.**

20 Jack: Okay.

21 Agent: **No doubt in my mind.**

22 Jack: That's good to hear. That's good to hear.

23 ...

24 Agent: We've got a different CIA today than you had then,  
25 Harrison. I think that, uh, I think they'll step in there and  
26 go, "Hey, you know, this is what we can do, and this is why  
27 we can do it, **because we have the backing of our  
28 Government and not just our agency, and we want to  
back your political endeavor of democracy.**"<sup>14</sup>

Since these assurances came from someone who claimed to have deep and ongoing  
connections with the U.S. government, the so-called "conspirators" had every reason to believe

<sup>13</sup> Phillips Dec., Exh. 15, 1/25/07 meeting at 19:18-20:2; Phillips Dec., Exh. 17, Transcript of March 5, 2007 Meeting ("3/5/07 meeting") at 24:25-25:16.

<sup>14</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 48:12-18, 49:6-23, 50:8-15.

1 them.<sup>15</sup> And the record is replete with evidence that they did believe that the U.S. government  
 2 would support an effort to overthrow the Lao government, if only tacitly. Jack repeatedly told  
 3 the agent that Two-Star Generals were working with him to support the Hmong, and that they, in  
 4 turn, were communicating with “senior Congressional officials.”<sup>16</sup> Jack and Lo Cha Thao also  
 5 reported on Lo Cha Thao’s meetings with the CIA, in which the CIA agreed to provide tacit  
 6 assistance for an effort to aid the Hmong people in Laos. Jack told the agent, for example, that  
 7 Lo Cha Thao had met with two “deputy directors” of the CIA, and that they were “basically  
 8 supportive,” and “also mentioned that they had some funding available.”<sup>17</sup> Jack also said that the  
 9 CIA officials warned that “[y]ou can’t count on the UN. . . . You need to take care and protect  
 10 yourself on the field, and we’ll support you on that.”<sup>18</sup> Similarly, Lo Cha Thao told defendant  
 11 David Vang that “this is the Americans, they are doing it through their channels. It’s not like we  
 12 are stealing or something.”<sup>19</sup> The agent heard many such comments, but he never expressed any  
 13 doubt or surprise that the government was backing their efforts.<sup>20</sup>

14  
 15 <sup>15</sup> The agent told Jack and Lo Cha Thao, for example, that he was a former Naval special warfare  
 16 operative with experience in Iraq. Phillips Dec., Exh. 15, 1/25/07 meeting at 22:23-23:4, 24:24-  
 17 25:1. He also told them that he would fly the weapons he would deliver out of Beale Air Force  
 18 base, and suggested that Jack fly POWs from Laos into either Travis or Beale Air Force Base.  
 19 Phillips Dec., Exh. 17, 3/5/07 meeting at 58:6-59:24, 63:2-3. Similarly, he assured them that it  
 20 would be no problem if he were stopped at security checkpoints in Thailand, leading Jack to  
 21 believe that “[h]e is working with the Thai military,” “training them,” and “providing them  
 22 equipment directly.” Phillips Dec., Exh. 18, Transcript of May 3, 2007 Meeting (“5/3/07  
 23 meeting”) at 12:15-013:21; Phillips Dec., Exh. 19, Transcript of the wiretap recording of  
 24 Harrison Jack’s telephone (“Jack’s Calls”), 5/9/07, 5:25:43 p.m. at 3:14-4:4.

20 <sup>16</sup> See, e.g., Phillips Dec., Exh. 16, 2/7/07 meeting at 14:8-18 (“I’ve got people at a two-star  
 21 level, and I’ve got senior Congressional officials that will eventually be brought into the general  
 22 concept of this.”); Phillips Dec., Exh. 17, 3/5/07 meeting at 31:4-13 (“I got another two-star I  
 23 work with. He called up Feinstein’s office, and, uh, her staff is going to be meeting with him  
 24 this Friday. . . . [T]hey set up meetings with, uh, congressional reps in Minnesota and Wisconsin  
 25 . . .”).

23 <sup>17</sup> Phillips Dec., Exh. 20, Jack’s Calls, 3/28/07, 10:40 a.m. at 1:7-25.

24 <sup>18</sup> Phillips Dec., Exh. 21, Jack’s Calls, 4/3/07, 4:28:00 p.m. at 1:22-3:4.

25 <sup>19</sup> Phillips Dec., Exh. 22, Hmong to English transcript of the wiretap recording of a Lo Cha Thao  
 26 telephone call (“LCT’s Calls”), 5/20/07, 16:48:00 p.m. at 28 [TarnEgl 037500].

26 <sup>20</sup> *Id.* To be sure, the agent also discussed with Jack—though *not* with other defendants—that  
 27 their plans should be kept from the police. But that alone is not inconsistent with the belief that  
 28 the U.S. government tacitly supported them. See, e.g., Phillips Dec., Exh. 21, Jack’s Calls,  
 4/3/07, 4:28:00 p.m. at 2:12-19 (stating that the CIA had offered financial support, but that “they  
 would not be able to use dollars” because “they didn’t want any trace on the thing.”) Moreover,  
 Lo Cha Thao was told by a lawyer that a weapons exchange was legal if it occurred outside the

1           Meanwhile, the agent pressed the “conspirators” to buy more, and more powerful,  
 2 weapons. At the first meeting with Harrison Jack, he offered to provide more than 500 AK-47s,  
 3 and also suggested M-16s.<sup>21</sup> A week later, in a call on February 1, 2007, he suggested additional  
 4 artillery, including anti-armor weapons.<sup>22</sup> At a February 7 meeting, he offered much more,  
 5 including grenades and claymore mines.<sup>23</sup> Soon he was suggesting AT-4 antitank rockets and  
 6 Stinger missiles.<sup>24</sup> And he pushed Jack and Lo Cha Thao to buy bigger quantities of weapons—  
 7 warning them, for example, that his “partner was not happy with the size of the first order.”<sup>25</sup>

8           The government’s attempt to inject Stinger missiles into the alleged scheme is typical of  
 9 its methods. Jack told the agent that the Lao government had begun spraying Hmong villagers  
 10 with what appeared to be “yellow rain”—a chemical weapon—and that “people are starting to  
 11 drop.”<sup>26</sup> The agent helpfully volunteered that he had recently acquired three Stinger missiles,  
 12 and suggested that the villagers could use the missiles to shoot down the helicopters that were  
 13 spraying them.<sup>27</sup> Alleging that some of the defendants responded with interest, the government  
 14 charged nine defendants with conspiring to receive and possess missile systems capable of  
 15 destroying aircraft in violation of 18 U.S.C. § 2332g—a charge that carries a mandatory  
 16 *minimum* sentence of 25 years.

17           Indeed, the agent repeatedly stoked and exploited the so-called conspirators’ outrage  
 18

---

19 United States, and he reportedly conveyed this advice to others. *See* Phillips Dec., Exh. 23,  
 20 Jack’s Calls, 5/9/07, 12:44 p.m., at 25:14-28:24; *Id.* at 32:21-33:16; Phillips Dec., Exh. 24, FBI  
 21 302 re Salen Tong Va Lor Interview, dated 6/11/07 (“STVL Interview”) at 33, 64-65 [TarnEgl  
 035943 and 035974-75]. Presumably, the government monitored these calls, and it *knew* that Lo  
 Cha Thao had received this advice, but the agent never told him it was incorrect.

22 <sup>21</sup> Phillips Dec., Exh. 15, 1/25/07 meeting at 3:25-4:8; Phillips Dec., Exh. 25, ATF Report of  
 1/25/07 meeting at ¶ 6 [TarnEgl 034616-17].

23 <sup>22</sup> Phillips Dec., Exh. 26, Jack’s Calls, 2/1/07 at 3:24-4:2. *Id.* at 6:7-10.

24 <sup>23</sup> Phillips Dec., Exh. 16, 2/7/07 meeting at 17:1-23; *See also*, Phillips Dec., Exh. 27, ATF  
 Report of 2/7/07 meeting at ¶ 1 [TarnEgl 034707] (list of weapons provided by agent).

25 <sup>24</sup> Phillips Dec., Exh. 28, Jack’s Calls, 3/7/07 at 4:19-25; Phillips Dec., Exh. 18, 5/3/07 meeting  
 at 10:6-11:4.

26 <sup>25</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 32:20-22.

27 <sup>26</sup> Phillips Dec., Exh. 28, Jack’s Calls, 3/7/07 at 1:13-22.

28 <sup>27</sup> Phillips Dec., Exh. 28, Jack’s Calls, 3/7/07 at 4:13-5:16; Phillips Dec., Exh. 1, Agent’s  
 Affidavit at 16:23-27; Phillips Dec., Exh. 29, Jack’s Calls, 4/13/07, 5:35:16 p.m. at 8:19-25.

1 about the genocide to lure them towards his goal. In meeting after meeting, he listened while the  
 2 “conspirators” decried the brutal atrocities that the Lao government was perpetrating against  
 3 their family members. He listened to reports of a “genocide order,” which adopted an official  
 4 policy of genocide toward the Hmong, and the terror that this document had struck in the Hmong  
 5 community.<sup>28</sup> Sipping his bourbon and coke, he listened as Lo Cha Thao and others described  
 6 how Lao soldiers had raped eight Hmong girls, ages 11 to 16, and how the Lao government was  
 7 now searching for the girls in a Hmong refugee camp in Thailand to prevent them from sharing  
 8 their story with aid organizations—a desperate game of cat-and-mouse that Lo Cha Thao would  
 9 raise again in a wire-tapped call with Jack a week later, pleading for help for the girls and their  
 10 families.<sup>29</sup> And the agent listened as the “conspirators” racked their brains to come up with any  
 11 means to stop the genocide—from supporting a documentary film to raise the world’s awareness,  
 12 to smuggling jars of yellow rain to a laboratory in the U.S. to get evidence of the Lao  
 13 government’s abuses.<sup>30</sup>

14 But the agent, serving his own agenda, encouraged them to believe that what would  
 15 finally bring relief to the Hmong people suffering in Laos was force. In one exchange, for  
 16 example, he enticed Jack with the promise that Jack could finally deliver humanitarian aid to the  
 17 people who were starving: “You go in there and you see the Hmong that have been treated  
 18 badly—and are starving or—*you can start propping them up and getting the support and*  
 19 *helping them.*”<sup>31</sup>

22 <sup>28</sup> Phillips Dec., Exh. 15, 1/25/07 meeting at 13-15. *See also id.* at 31:9-16; Phillips Dec., Exh.  
 23 30, Jack’s Calls, 4/9/07, 5:21:09 p.m. at 1:24-3:18; Phillips Dec., Exh. 31, Jack’s Calls, 4/17/07,  
 4:48:51 p.m. at 3:24-4:11.

24 <sup>29</sup> Phillips Dec., Exh. 32, Transcript of May 23, 2007 Meeting (“5/23/07 meeting”) at 1:19-2:2,  
 25 76:2-84:17; Phillips Dec., Exh. 33, Translation of 5/23/07 meeting at 18:4-19:9; Phillips Dec.,  
 Exh. 34, Jack’s Calls, 6/3/07, 10:25:49 p.m. at 1:21-7:16.

26 <sup>30</sup> *See, e.g.,* Phillips Dec., Exh. 35, Jack’s Calls, 3/30/07, 2:06:35 p.m. at 4:11-23; Phillips Dec.,  
 27 Exh. 36, Jack’s Calls, 4/16/07, 6:15:31 p.m. at 4:4-5:16. Phillips Dec., Exh. 37, Jack’s Calls,  
 4/4/07, 10:46:12 a.m. at 5:4-6:16 and 9-14; Phillips Dec., Exh. 38, Jack’s Calls, 4/9/07, 1:10:17  
 p.m. at 1:18-5:10.

28 <sup>31</sup> Phillips Dec., Exh. 18, 5/3/07 meeting at 60:15-18.

1 **C. The alleged conspirators demonstrate their inability to concoct even a rudimentary**  
 2 **plan, so the agent directs the “scheme” himself.**

3 The agent provided more than encouragement and assurances, however. He also  
 4 provided the direction and the most rudimentary operational competence needed to form the  
 5 alleged scheme. The government has pointed to Jack—a former military officer—as possessing  
 6 that competence.<sup>32</sup> But if so, he certainly did not display it here. And, more to the point, the  
 7 government failed to apprise the Court of a vast amount of evidence that contradicts that  
 8 assertion.

9 To begin with, as already noted, Jack did not approach a “defense contractor” to discuss  
 10 weapons that Hmong villagers could use to defend themselves, but rather Namon Hawthorne.  
 11 He apparently did this because of his faith in Hawthorne’s miraculous abilities—a faith with  
 12 which the agent was thoroughly familiar. Jack expounded at length to the agent about  
 13 Hawthorne’s power, using his specially processed water, to cure diabetes and radioactivity  
 14 poisoning.<sup>33</sup> The agent was kind enough to go along with these claims, but told Jack that there is  
 15 “no money in curing that though,” which Jack apparently believed.<sup>34</sup>

16 Similarly, the government has pointed to Jack’s request that an associate named “Lisa”  
 17 perform what it characterized as a “background check” on the agent “through sources at her  
 18 disposal.”<sup>35</sup> But the government did not reveal what those “sources” are. According to the  
 19 government’s own investigation report, “Lisa” is an “herbalist/nutritionalist who also does  
 20 muscle mapping/testing,” and she acquires information by running “metaphysical tests” using  
 21 “pendulum and kinesiology systems.”<sup>36</sup> The pendulum is “a crystal used to ask[] questions of

22 <sup>32</sup> Phillips Dec., Exh. 39, Transcript of the July 12, 2007 Bail Hearing (“Bail Hearing”) at 44:3-  
 23 23. (“Harrison Jack probably knows better than the undercover agent exactly how this operates,  
 24 because he was a Lieutenant Colonel in the United States Army, a Ranger, Airborne Infantry  
 25 Office, did tours in Southeast Asia. He’s not someone who just fell off the turnip truck.”).

25 <sup>33</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 99:24-102:25.

25 <sup>34</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 82:3-4.

26 <sup>35</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 33:8-13; Phillips Dec., Exh. 39, Bail Hearing at  
 27 62:2-5; Phillips Dec., Exh. 65, Government’s Opposition to Defendants’ Motion for Bail (Doc.  
 28 76) at 3:7-12.

28 <sup>36</sup> Phillips Dec., Exh. 41, ATF Report of Investigation re Lisa Navarro, 8/15/07 (“Navarro  
 Report”) at ¶¶ 2 and 3. [TarnEgl 034767].

1 and based upon it[s] reaction answers can be determined.”<sup>37</sup>

2 Jack’s faith in the supernatural is commensurate with his and Lo Cha Thao’s utter *lack* of  
3 competence for any realistic planning. The evidence of this permeates the transcripts of their  
4 meetings with the agent, which occurred at various restaurants and bars, where they would drink  
5 beer and hard liquor, and engage in boastful and patently ludicrous talk about replacing the  
6 repressive Lao government—the essence of the alleged crimes in this case. In one such meeting,  
7 for example, Lo Cha Thao assured the agent that they would encounter no resistance when they  
8 carried weapons through Lao border checkpoints (“Even though you have a whole trunk full of,  
9 ah—um, ammo, weapons, they won’t even check. . . . No, I mean, they don’t care. They don’t  
10 even care.”).<sup>38</sup> He also insisted that there is no security at Lao government buildings or at the  
11 airport,<sup>39</sup> and that Vientiane, the capital of Laos, has a population of only twenty or thirty  
12 thousand (National Geographic lists its population as 716,000).<sup>40</sup> He maintained that the military  
13 would simply give up in the face of any challenge (“They’re just going to take off their uniforms  
14 . . . .”).<sup>41</sup> Jack concurred that the Lao military would support an overthrow of the government.<sup>42</sup>

15 At another such session, when the agent asked Lo Cha Thao about GPS coordinates for  
16 drop sites, Lo Cha Thao responded that he did not know what a GPS was, and was concerned  
17 that it would cost more than \$50.<sup>43</sup> The agent told him he could get one at Fry’s Electronics, and  
18 helpfully reminded him to get batteries too.<sup>44</sup>

19 While the “conspirators” drank and boasted, however, the agent moved things along. He  
20  
21

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22 <sup>37</sup> *Id.*

23 <sup>38</sup> Phillips Dec., Exh. 42, Transcript of May 11, 2007 Meeting (“5/11/07 meeting”) at 62:7-21.

24 <sup>39</sup> Phillips Dec., Exh. 42, 5/11/07 meeting at 20:12-25; 60:19-25.

25 <sup>40</sup> Phillips Dec., Exh. 42, 5/11/07 meeting at 59:17-60:15; Phillips Dec., Exh. 43, (National Geographic webpage).

26 <sup>41</sup> Phillips Dec., Exh. 42, 5/11/07 meeting at 25:11-15.

27 <sup>42</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 47:9-18; Phillips Dec., Exh. 28, Jack’s Calls, 3/7/07 at 3:7-4:1.

28 <sup>43</sup> Phillips Dec., Exh. 32, 5/23/07 meeting at 30:3-31:24.

<sup>44</sup> *Id.*

1 suggested all manner of weapons.<sup>45</sup> He told them what types of medical supplies they needed.<sup>46</sup>  
 2 He demanded maps of the area, and when the “conspirators” proved incapable of procuring any  
 3 useful ones, he provided them himself.<sup>47</sup> He pushed Jack and Lo Cha Thao to hold a “planning  
 4 meeting,” telling them they had better have one “sooner rather than later.”<sup>48</sup> And he pressed  
 5 them to produce a written operational plan—resulting in the farcical “POPCORN” plan attached  
 6 as Exhibit 1 to the Complaint, which was drafted not by Jack, the supposed tactical brains of the  
 7 operation, but by an out-of-work drafter of business documents.<sup>49</sup>

8 Besides demonstrating their operational incompetence, the “conspirators” demonstrated  
 9 an utter inability to finance the alleged scheme. According to the government, the financing  
 10 efforts consisted of such things as placing a clear collection jar at a booth at a rally in  
 11 Washington, and promises to write thank-you notes to everyone who donated.<sup>50</sup> Whatever was  
 12 done, however, the evidence produced in discovery reveals that, despite an alleged total budget  
 13 of \$9.8 million,<sup>51</sup> Lo Cha Thao raised—at most—approximately \$24,000.<sup>52</sup>

14 **D. Wiretaps and interviews disclose that the so-called “conspirators” are deeply**  
 15 **divided, but the government suppresses this information.**

16 The government’s pre-indictment investigation revealed more than just a lack of  
 17 direction, competence, or financing for the alleged coup plot—it revealed staunch opposition.  
 18 For instance, at a critical meeting on June 2, 2007, Hmong elders, including General Vang Pao,

19 <sup>45</sup> See p. 9, *infra*.

20 <sup>46</sup> Phillips Dec., Exh. 42, 5/11/07 meeting at 53:2-56:11.

21 <sup>47</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 64:22-67:2.

22 <sup>48</sup> *Id.*; Phillips Dec., Exh. 28, Jack’s Calls, 3/7/07 at 4:2-4.

23 <sup>49</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 10:2-10; Phillips Dec., Exh. 44, Indictment, at ¶  
 GG; Phillips Dec., Exh. 45, David Vang’s Memorandum In Support Of Bail, filed 6/19/07, at 5-  
 6.

24 <sup>50</sup> Phillips Dec., Exh. 46, ATF Report of Investigation re Rolling Thunder [TarnEgl 034710-11];  
 Phillips Dec., Exh. 47, Jack’s Calls, 4/5/07, 8:29:59 p.m. at 6:4-11.

25 <sup>51</sup> Phillips Dec., Exh. 1 Agent’s Affidavit at 24:17-27.

26 <sup>52</sup> Phillips Dec., Exh. 24, STVL Interview at 24 [TarnEgl 035934] (“And, right now we[] got  
 \$24,000.00 dollar[s].”); Phillips Dec., Exh. 48, Documents Seized from Search Warrant of Nhia  
 27 Kao Vang’s Home (“Nhia Kao Vang Docs.”) [TarnEgl 030221, 22, 27]. See also *id.* at 24 (Note  
 28 dated the day before the arrests, June 3, 2007, stating that “24k on hand as [of] now.”). See also  
 Phillips Dec., Exh. 49, LCT’s Calls, 5/31/07, 13:27:13 p.m. at 6 [TarnEgl 039722] (“[W]e are  
 going to do it by ourselves, but what about the money? Where are we going to get it?”).

1 the leader of the Hmong community, assailed the plan, berated Lo Cha Thao and defendant Lo  
2 Thao for discussing it, and insisted that no one participate. Astonishingly, the government has  
3 denied that these events occurred, but the evidence that they did—evidence that the government  
4 has held for well over a year—is overwhelming and irrefutable.

5 Even before the critical June 2, 2007 meeting, numerous intercepted telephone calls  
6 demonstrated that General Vang Pao and other Hmong elders opposed any coup plan. In a May  
7 12, 2007 call, for example, a messenger informed Lo Cha Thao that the General forbade any  
8 violence in Laos whatsoever:

9 [B]ut the old man [Vang Pao] emphasized . . . this morning that he  
10 think strongly about these work . . . . [T]he owners of this country  
11 [US government] had already hold hands [with Laos], **so that's**  
12 **that. We don't have to make trouble.** . . . What he emphasize I  
13 think is, that part and this work contradict . . . . [H]e emphasize  
14 very strong that . . . that guy still considers that he is active for . . .  
15 the owner of this country [US government] and with the policy he  
16 already have an agreement so that is how our duty is going to go.  
17 **There will not be any other violence whatsoever. So that is**  
18 **what has been approved.**<sup>53</sup>

19 This was hardly an isolated occurrence. References to General Vang Pao's opposition to  
20 any violence in Laos permeate the wiretapped phone calls. In a May 18, 2007 call, for example,  
21 Lo Cha Thao said that this is “our mission, we are going to go ahead with it. *VP cannot stop all*  
22 *of us.*”<sup>54</sup> In another call a few days later, he explained that General Vang Pao wanted a political  
23 solution to the genocide,<sup>55</sup> and that the General had insisted that defendant Lo Thao resign as  
24 President of the 18 Clan, a Hmong organization, if he went along with any plan to use violence.<sup>56</sup>  
25 Lo Cha Thao even worried that, if any plan was put into effect, General Vang Pao would warn

23 <sup>53</sup> Phillips Dec., Exh. 51, LCT's Calls, 5/12/07, 20:05:43 at 4-5 [TarnEgl 036238-9] (emphasis  
24 added).

25 <sup>54</sup> Phillips Dec., Exh. 52, LCT's Calls, 5/18/07, 8:07:50 a.m. at 8 [TarnEgl 037216].

26 <sup>55</sup> Phillips Dec., Exh. 22, LCT's Calls, 5/20/07, 4:48 p.m. at 21 [TarnEgl 037493]. *See also id.* at  
27 8-9 [TarnEgl 037480-81]. Lo Cha Thao also discussed the General's decision to work for a  
28 political solution—and his opposition to Lo Cha Thao's plan—on a call on May 18, 2007.  
Phillips Dec., Exh. 53, LCT's Calls, 5/18/07, 10:00 a.m. at 6-8 [TarnEgl 037256-58]; *see also*  
Phillips Dec., Exh. 54, LCT's Calls, 6/3/07, 20:39:17 p.m. at 17-18 [TarnEgl 037804-05].

<sup>56</sup> Phillips Dec., Exh. 22, LCT's Calls, 5/20/07, 4:48 p.m. at 12-13 [TarnEgl 037484-85].

1 the Thai and Lao governments.<sup>57</sup>

2 And after the June 2, 2007 meeting, Lo Cha Thao complained bitterly and repeatedly that  
 3 the General had treated him too harshly. He said that “[the General] turned to scold at me that I  
 4 shouldn’t be doing these things,”<sup>58</sup> and that the General “*is against this plan a lot. He doesn’t*  
 5 *want the plan to go on.*”<sup>59</sup> Friends sympathized that no one had come to his defense (“[T]hey  
 6 just let you bear the fire. The old man discredited you and scolded you, and they just stayed  
 7 put.”).<sup>60</sup> To some, he boasted that he had stood up to the General (“*[T]he old man demanded*  
 8 *that I stop.* I said ‘I don’t hold any position in the 18 clan organization . . . . I work for  
 9 myself.’”).<sup>61</sup> He lamented, “General, these kids found a way and how come you did not help  
 10 plan it? *How come you are destroying it like this?*”<sup>62</sup> And he and Lo Thao resolved to break  
 11 away from the General (“[We] won’t get him involved anymore. I am telling you, as a young  
 12 guy, we will not get him involved anymore. He can say whatever. . . . We will not get him  
 13 involved.”).<sup>63</sup> But they fretted about whether they could win supporters (“We will have to think  
 14 about and see if people follow us more or the old man more. So if the majority sides with us,  
 15 then continue to do it because right now, there are only two ways.”).<sup>64</sup>

16 The government has held the tape recordings containing these clear statements—and  
 17 *many* more like them—for more than twenty months. And if they were not enough to

18 \_\_\_\_\_  
 19 <sup>57</sup> Phillips Dec., Exh. 55, LCT’s Calls, 6/2/07 at 17:07:17 p.m. at 12-13 [TarnEgl 39826-27];  
 20 Phillips Dec., Exh. 22, LCT’s Calls, 5/20/07, 4:48 p.m. at 28 [TarnEgl 037500]; Phillips Dec.,  
 21 Exh. 56, LCT’s Calls, 6/2/07, 18:32:52 p.m. at 37 [TarnEgl 39914] (“[W]hat if the old man  
 22 report it to the enemy? . . . He will not kill, but he reports to the enemy and the enemy knows  
 23 one’s plans so ones will be dead by oneself.”).

24 <sup>58</sup> Phillips Dec., Exh.55, LCT’s Calls, 6/2/07, 17:07:17 p.m. at 3 [TarnEgl 039817].

25 <sup>59</sup> Phillips Dec., Exh. 54, LCT’s Calls, 6/3/07, 20:39:17 p.m. at 11 [TarnEgl 037798].

26 <sup>60</sup> Phillips Dec., Exh. 57, LCT’s Calls, 6/2/07, 20:37:49 p.m. at 3 [TarnEgl 036590].

27 <sup>61</sup> Phillips Dec., Exh. 55, LCT’s Calls, 6/2/07, 17:07:17 p.m. at 7 [TarnEgl 39821]. Lo Cha Thao  
 28 also compared the General to Saddam Hussein after the June 2 meeting (“When [the General]  
 has power, then he does it like Saddam Hussein. . . . If anyone doesn’t obey him then they die.  
 As for the old man, he doesn’t kill, but he block you, he scold you. He will say things about you  
 and do things to you to destroy you.”). Phillips Dec., Exh. 58, LCT’s Calls, 6/2/07, 21:13:47  
 p.m. at 21-22 [TarnEgl 036619-20].)

<sup>62</sup> Phillips Dec., Exh.54, LCT’s Calls, 6/3/07, 20:39:17 p.m. at 25 [TarnEgl 37812].

<sup>63</sup> Phillips Dec., Exh. 59, LCT’s Calls, 6/3/07, 07:32:45 a.m. at 6-7 [TarnEgl 036630-31].

<sup>64</sup> Phillips Dec., Exh. 58, LCT’s Calls, 6/2/07, 21:13:47 p.m. at 8 [TarnEgl 036606].

1 demonstrate that the government's charges in this case are indefensible, interviews that the  
2 agents conducted on June 4, 2007, the day of the arrests, revealed the same information. For  
3 example, Salen Tong Va Lor told an ATF agent that Lo Cha Thao never said he was acting on  
4 behalf of the General,<sup>65</sup> that Lo Cha Thao did not have to report to the General,<sup>66</sup> and that the  
5 General opposed the plan.<sup>67</sup> He explained that when Lo Cha Thao first told him of the plan, Lo  
6 Cha Thao said that the General did not know about it, and that he did not want him to know  
7 because the General might try to stop it.<sup>68</sup> Through repeated questioning by the agent, Lor also  
8 described how Lo Thao had told him after the June 2nd meeting that the plan was "separate"  
9 from General Vang Pao, and that the General opposed it:

10 Agent: You have to clarify that, will you explain that to me cause I  
11 didn't understand. **How come General Vang Pao was not in  
agreement with uh the plan, Lo Thao's plan?**

12 STVL: Yeah, like I said before, because General Vang Pao is the top  
13 Hmong leader right? Yeah so that's why Lo Thao gonna do  
something else, like he had his own plan.

14 Agent: Okay. Separate from General Vang Pao.

15 STVL: Yeah **separate from General Vang Pao**, that is why he does  
not agree.

16 Agent: And this was expressed to you by Lo Thao? Lo Thao said that  
to you?

17 STVL: Yes

18 Agent: President Thao?

19 STVL: Yeah, President Thao

20 Agent: Okay, when did he tell you this? Was it a phone call?

21 STVL: Phone call

22 Agent: Before June 2<sup>nd</sup> on June 2<sup>nd</sup>?

23 STVL: Uh before June 3<sup>rd</sup>

24 Agent: Before June 3<sup>rd</sup>? So before his meeting with the General he had  
a phone call.

25 STVL: Oh after, after he, he meet in meeting with General Vang Pao.

26 <sup>65</sup> Phillips Dec., Exh. 24, STVL Interview at 20 [TarnEgl 035930].

27 <sup>66</sup> Phillips Dec., Exh. 24, STVL Interview at 40 [TarnEgl 035950].

28 <sup>67</sup> Phillips Dec., Exh. 24, STVL Interview at 20 [TarnEgl 035930].

<sup>68</sup> Phillips Dec., Exh. 24, STVL Interview at 36 [TarnEgl 035946] ("I talked to him and then well  
if we go under General Vang Pao that would be good. He [Lo Cha Thao] said well because  
those old man is uh, is uh old generation . . . . [W]e don't want to tell him right away that we are  
gonna do this or that. If we tell him maybe he gonna stop . . . .").

1 Agent: After he met.

2 STVL: That's why he can tell me that.<sup>69</sup>

3 These statements are consistent with the statement of General Vang Pao himself after his arrest  
4 that he knew about the plan but did not support it.<sup>70</sup> Likewise, in Jack's arrest interview, Jack  
5 said "I can't speak to General Vang Pao very well ... and I've heard it's even going, you know,  
6 another direction, I mean he's not that directly involved in this effort."<sup>71</sup>

7 Moreover, as the government knew, General Vang Pao's ultimatum against violence was  
8 consistent with a notorious public proclamation that he gave in November 2003 declaring that  
9 the Hmong must try to make peace with the Lao government, and "[t]he era of killing must  
10 stop."<sup>72</sup> That directive opened a deep rift in the Hmong community. Six months after General  
11 Vang Pao gave it, his son's house was firebombed while his wife and three young daughters  
12 slept inside, and the house where another associate was caring for his elderly mother was sprayed  
13 with gunfire.<sup>73</sup> Yet with full knowledge of the attacks that General Vang Pao and his supporters  
14 have endured for calling for dialog with Laos, the government has charged them with conspiring  
15 to do just the opposite, and misrepresented the evidence proving that they did no such thing.

16 For example, at the bail hearing—where the government argued that every one of the

17 <sup>69</sup> Phillips Dec., Exh. 24, STVL Interview at 62 [TarnEgl 035972].

18 <sup>70</sup> Phillips Dec., Exh. 60, ATF Report of Investigation regarding the interview of General Vang  
19 Pao on June 4, 2007 ("GVP Arrest Interview") at ¶¶ 8, 11 [TarnEgl 036084-85] ("Vang stated  
20 that after the meeting he warned Thao not to purchase the weapons from the American because it  
21 was not 'official.' Vang further stated to Thao that it was against American law to purchase the  
22 weapons and smuggle them out of the United States. . . . Agent Diaz asked Vang how the  
23 weapons were going to be smuggled from Thailand into the Hmong camps, Vang stated that he  
24 did not know anything about that.").

25 <sup>71</sup> Phillips Dec., Exh. 61, Video of Harrison Jack Arrest Interview, dated 6/4/07 at 17:36-17:47.  
26 While Jack and Lo Cha Thao boasted to the agent about their close relationship with the General,  
27 that talk was obviously bluster—as the government knew from the phone calls it was secretly  
28 monitoring. There are *no* wiretapped phone calls between General Vang Pao and either Jack or  
Lo Cha. When the ATF interviewed Jack's wife, Carol Jack, she said that the only Hmong that  
Jack regularly interacted with is Lo Cha Thao. Phillips Dec., Exh. 62, ATF Report of  
Investigation re Carol Jack dated 6/6/07 ("Carol Jack Report") [TarnEgl 034731]. Likewise,  
when Lo Cha Thao was interviewed after his arrest, he said that he does not have regular contact  
with the General and does not speak with him one on one. Phillips Dec., Exh. 63, FBI 302 re Lo  
Cha Thao Arrest Interview, dated 6/4/07 ("FBI 302 re LCT Arrest"), at 5 [TarnEgl 036028].

<sup>72</sup> Phillips Dec., Exh. 64, New Republic Magazine article, titled "*Hmong Friends*", written by  
Joshua Kurlantzick, dated February 5, 2007 ("New Republic article") at 6.

<sup>73</sup> *Id.* at 1-2.

1 defendants, including old and sick men, should remain in custody because they posed a danger to  
2 others or the community that no conditions of release could abate—the prosecutors falsely  
3 informed the Court that the defendants were united in support of the “coup plan,” and that  
4 General Vang Pao had *endorsed* the plan at the June 2, 2007 meeting, not attacked it. Although  
5 Assistant U.S. Attorney Endrizzi, who oversaw the investigation, was presumably familiar with  
6 the government’s evidence, in their brief opposing bail the prosecutors stated, “If Vang Pao . . .  
7 had said, ‘No. Stop,’ then the co-conspirators would have stopped. **He didn’t say ‘No.’ He  
8 said ‘yes’ . . . .**”<sup>74</sup> The prosecutors then reiterated this representation at the hearing:

9 In the moving papers from last night, it was suggested, as the government well  
10 knows, General Vang Pao engaged in a multi-hour harangue—I’m  
11 paraphrasing—to tell the folks they shouldn’t be doing what they planned on  
12 doing. First of all, **the government doesn’t know that at all.**<sup>75</sup>

13 . . . .

14 Now, contrary to the defense position that what General Vang Pao was trying to  
15 do—and I don’t want to put words in the defense mouth—as I understand the  
16 defense position, that General Vang Pao was trying to talk the folks in that  
17 meeting out of engaging in this activity. **We believe exactly the opposite.**<sup>76</sup>

18 . . . .

19 **That doesn’t seem even remotely like General Vang Pao haranguing all the  
20 others that they were doing something illegal and had to stand down.** That  
21 sounds much more to me like General Vang Pao exercising commands and  
22 saying: This is your mission. You’ve been entrusted with this mission. If you  
23 don’t accomplish this mission, there’s going to be a problem.<sup>77</sup>

24 . . . .

25 A more reasonable interpretation, however, is that the haranguing was not about  
26 what to do, but how to do it. That’s the reasonable interpretation. So the  
27 suggestion that General Vang Pao—certainly that the government knew, which is  
28 what was in the moving papers, “as the government well knew.” Well, we did not  
29 well know. **We don’t know now and we don’t think that’s what happened.  
30 We don’t think that’s a reasonable interpretation of what happened at all.**<sup>78</sup>

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31 <sup>74</sup> Phillips Dec., Exh. 65, Government’s Opposition to Defendants’ Motion for Bail (Doc. 76) at  
32 13:22-25.

33 <sup>75</sup> Phillips Dec., Exh. 39, Bail Hearing at 52:6-11.

34 <sup>76</sup> Phillips Dec., Exh. 39, Bail Hearing at 53:4-9.

35 <sup>77</sup> Phillips Dec., Exh. 39, Bail Hearing at 58:5-11.

36 <sup>78</sup> Phillips Dec., Exh. 39, Bail Hearing at 58:23-59:6.

1 **E. The agents submit false and misleading sworn affidavits.**

2 While the foregoing describes what emerges from the government’s evidence, the  
3 undercover ATF agent told a startlingly different story in his sworn affidavits. Those  
4 affidavits—and 19 more signed by another agent, Erik Crowder, who echoes the undercover  
5 agent’s story—are riddled with false statements and misleading omissions, creating a version of  
6 the “plot” that is more fiction than reality.

7 First, the undercover agent stated that Harrison Jack came to the ATF’s attention because  
8 “he reached out to a defense contractor.”<sup>79</sup> Agent Crowder repeated this allegation in each of his  
9 affidavits.<sup>80</sup> This was clearly intended to suggest that Jack had legitimate connections with arms  
10 merchants, and therefore posed a serious threat of obtaining weapons and delivering them to  
11 Laos. But as explained above, the statement is pure fantasy. As the undercover agent was well  
12 aware—having engaged in lengthy conversations with Jack about the subject—Namon  
13 Hawthorne was not a “defense contractor,” but a purveyor of “kinetically charged” water, which  
14 Jack believed could cure radiation poisoning, diabetes, and a host of other conditions. The  
15 agents also omitted from their affidavits that Jack wanted guns not for any offensive purpose, but  
16 for besieged Hmong villagers “*to protect themselves.*”<sup>81</sup> And they omitted any mention of Jack’s  
17 statements that the people Jack was connected to *preferred not to use force, and did not care*  
18 *about taking over the government, but rather, were simply “trying to survive.”*<sup>82</sup>

19 \_\_\_\_\_  
20 <sup>79</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 4:4-6.

21 <sup>80</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 4:4-6; Phillips Dec., Exh 13, HJ Cont. Wiretap  
22 Affidavit at 19:3-14 [TarnEgl 034804]; Phillips Dec., Exh. 66, Affidavit of Undercover Agent in  
23 Support of Application to Wiretap Harrison Jack’s Phone (“HJ Wiretap Affidavit”) at ¶ 49  
24 [TarnEgl 035396]; Phillips Dec., Exh. 67, Affidavit of Undercover Agent in Support of  
25 Application to Wiretap Lo Cha Thao’s Phone (“LCT Wiretap Affidavit”) at 17:17-27 [TarnEgl  
26 034954]; *See also* Phillips Dec., Exh. 68, Excerpts from the Applications and Affidavits of ATF  
27 Special Agent Erik W. Crowder in Support of fifteen Search Warrants (“Pages from 15 other  
28 Affidavits”) at ¶ 13 [TarnEgl 000305], *id.* at ¶ 14 [TarnEgl 002021], *id.* at ¶ 13 [TarnEgl  
000008], *id.* at ¶ 13 [TarnEgl 000912], *id.* at ¶ 13 [TarnEgl 000107], *id.* at ¶ 13 [TarnEgl  
000202], *id.* at ¶ 13 [TarnEgl 001279], *id.* at ¶ 13 [TarnEgl 001664], *id.* at ¶ 13 [TarnEgl  
001786], *id.* at ¶ 13 [TarnEgl 000789], *id.* at ¶ 13 [TarnEgl 000406], *id.* at ¶ 13 [TarnEgl  
001002], *id.* at ¶ 13 [TarnEgl 001156], *id.* at ¶ 13 [TarnEgl 000525], *id.* at ¶ 13 [TarnEgl  
001400].

<sup>81</sup> Phillips Dec., Exh. 2, Hawthorne Report at 1 (emphasis added) [TarnEgl 034614]; Phillips  
Dec., Exh. 15, 1/25/07 meeting at 51:23-55:13.

<sup>82</sup> Phillips Dec., Exh. 15, 1/25/07 meeting at 51:23-54:24. *See also* Phillips Dec., Exh. 16, 2/7/07

1 The undercover agent's affidavit goes on to describe a meeting on February 7, 2007.  
 2 Agent Crowder repeated this description in each of his affidavits.<sup>83</sup> This meeting is critical to the  
 3 government's case—it is the only time the agent met General Vang Pao. But the agents'  
 4 descriptions of it include pure fabrications that find *no* support in the tape recordings of the  
 5 meeting, and gross mischaracterizations of the dialog that the tapes do reflect.

6 The February 7<sup>th</sup> meeting occurred at a crowded Thai restaurant, where a large retinue of  
 7 Hmong people (including the General's wife and many others) were eating lunch at two tables.  
 8 In describing the meeting, the agents repeatedly and misleadingly attribute supposedly  
 9 incriminating statements to "Jack and General Vang Pao" collectively, as though both were  
 10 actively discussing the supposed coup plot at the meeting. In fact, General Vang Pao—whose  
 11 English is poor and who requires a translator—said virtually nothing to the agent at the lunch  
 12 meeting. The only exchange between General Vang Pao and the agent that appears on the tape  
 13 of the lunch meeting is the following:

14 Vang Pao: How do you do? General Vang Pao.

15 Steve: Nice to meet you.

16 Vang Pao: Yeah.<sup>84</sup>

17 Moreover, much of the agents' description of the dialog attributed to "Jack and General  
 18 Vang Pao" is simply fabricated, corresponding to *nothing* on the tape recordings. For example,  
 19 the undercover agent said in his affidavit, "During the meeting at the restaurant on February 7,  
 20 2007, I told Jack and General Vang Pao that I needed to have them show me on maps exactly  
 21  
 22 meeting at 18:8-19:1.

23 <sup>83</sup> Phillips Dec., Exh. 1, Agent's Affidavit at 8:13-12:5; Phillips Dec., Exh. 13, HJ Cont. Wiretap  
 24 Affidavit at 23:20-27:5 [TarnEgl 034808-812]; Phillips Dec., Exh. 66, HJ Wiretap Affidavit at ¶¶  
 25 62-69 [TarnEgl 035400-403]; Phillips Dec., Exh. 67, LCT Wiretap Affidavit at 21:25-25:11  
 26 [TarnEgl 034958-962]; *See also* Phillips Dec., Exh. 68, (Pages from 15 other Affidavits) at  
 27 ¶¶ 25-34 [TarnEgl 000309-313], *id.* at ¶¶ 26-35 [TarnEgl 002025-29], *id.* at ¶¶ 25-34 [TarnEgl  
 28 000012-16], *id.* at ¶¶ 25-34 [TarnEgl 000914-18], *id.* at ¶¶ 25-34 [TarnEgl 000111-15], *id.* at  
 ¶¶ 25-34 [TarnEgl 000206-10], *id.* at ¶¶ 25-34 [TarnEgl 001283-1287], *id.* at ¶¶ 25-34 [TarnEgl  
 001668-72], *id.* at ¶¶ 25-34 [TarnEgl 001790-94], *id.* at ¶¶ 25-34 [TarnEgl 000793-97], *id.* at  
 ¶¶ 25-34 [TarnEgl 000410-14], *id.* at ¶¶ 25-34 [TarnEgl 001038-1042], *id.* at ¶¶ 25-34 [TarnEgl  
 001160-1164], *id.* at ¶¶ 25-34 [TarnEgl 000535-539], *id.* at ¶¶ 25-34 [TarnEgl 001404-1408].

<sup>84</sup> Phillips Dec., Exh. 16, 2/7/07 meeting at 8:12-14.

1 where they needed me to insert both the troops and munitions, . . . [and] [t]hey stated that they  
 2 understood and could provide me with maps showing the points of insertion, as well as the  
 3 placement of insurgent troops and Lao government troops.”<sup>85</sup> But the tapes reveal no discussion  
 4 at all like this at the lunch meeting. Nor is there any support for the undercover agent’s  
 5 statement in his affidavit that “I told Jack and General Vang Pao that I needed to get an  
 6 operational briefing from someone doing the operations planning for their insurgent operation, as  
 7 well as copies of the operations plan.”<sup>86</sup> The agent simply made this up.

8 The undercover agent also attests that Jack and General Vang Pao described to him what  
 9 appeared to be a serious insurgency plan:

10 Jack and General Vang Pao advised me that the plan was **to provide arms to**  
 11 **insurgents who were in place in Laos, and to initiate hostile military action in**  
 12 **the very near future against military forces of the government of Laos.** I was  
 13 advised that the insurgents would **attack Lao government soldiers and positions**  
 14 and attempt to gain control of certain areas of the border between Laos and  
 15 Thailand.<sup>87</sup>

16 But the taped record contains no statements like this either. Jack said at the meeting that he was  
 17 “trying to get these people [i.e., the Hmong victims of genocide] out from an area where they’re  
 18 encircled in,” and that he wanted to “secure tight border crossings and avenues” for them to  
 19 escape.<sup>88</sup> But he made clear that the “optimum situation” was not to use force at all.<sup>89</sup> And  
 20 there was no mention of “insurgents” or of initiating a “hostile military action” at all—only of  
 21 escape.

22 At the bail hearing on July 12, 2007, defendants asked the government to explain these  
 23 contradictions between the agent’s account of the February 7 meeting in his affidavit and the  
 24 taped records of the meeting. The government responded that it was reviewing the recordings

25 <sup>85</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 9:22-10:1.

26 <sup>86</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 10:2-5.

27 <sup>87</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 9:4-10.

28 <sup>88</sup> Phillips Dec., Exh. 16, 2/7/07 meeting at 16:12-21, 19:8-12.

<sup>89</sup> Phillips Dec., Exh. 16, 2/7/07 meeting at 18:8-19:1. Jack also discussed the genocide documents with the agent and told the agent that he was “coordinating all the media.” Phillips Dec., Exh. 16, 2/7/07 meeting at 12:19-13:9.

1 and would provide an explanation.<sup>90</sup> It has never done so.

2 In addition to fabricating seemingly damning evidence, the agents omitted numerous  
3 exculpatory facts. They said nothing about the so-called conspirators' apparent belief that  
4 elements of the U.S. government, including the CIA, Two-Star Generals, and senior  
5 Congressional leaders, knew of and supported their efforts—or of the undercover agent's own  
6 actions to encourage that belief. They also did not disclose the undercover agent's efforts to  
7 goad the “conspirators” to do more and use more weaponry, or their obvious ineptitude when it  
8 came to doing any realistic planning.<sup>91</sup>

9 Nor did the agents explain how General Vang Pao and other Hmong came to be in this  
10 country, while thousands of their brethren remained in Laos to become defenseless targets of  
11 extermination by the Lao government. The undercover agent said that he researched General  
12 Vang Pao, and therefore he must have known that, during the Vietnam War, Vang Pao led a  
13 CIA-backed “secret army” of Hmong forces which fought on behalf of the United States in  
14 Laos.<sup>92</sup> Under General Vang's leadership, this force fought more bravely and effectively than  
15 anyone had imagined it could, holding the North Vietnamese and communist Pathet Lao forces  
16 to a standstill.<sup>93</sup> But it did so at an enormous cost, suffering massive casualties to advance  
17  
18

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19 <sup>90</sup> Phillips Dec., Exh. 39, Bail Hearing at 65:4-9.

20 <sup>91</sup> The most lurid allegation in the undercover agent's affidavit is his assertion that, on one  
21 occasion, Lo Cha Thao said that he wanted the destruction in Laos to be “like September 11th.”  
22 Phillips Dec., Exh. 1, Agent's Affidavit at 47:25-48:23. But the agent did not provide the  
23 context for this statement. He did not disclose that the conversation took place in a bar where all  
24 three men were drinking alcohol. Phillips Dec., Exh. 42, 5/11/07 meeting at 1:4-6, 4:2-17. Nor  
25 did he describe the other absurd boasting that Lo Cha Thao was engaging in during the  
26 conversation, such as that the Lao military was going to lay down its arms and give up, *id.* at  
27 25:11-15; that Vietnam and Russia would be incapable of intervening, *id.* at 27:25-28:25, 46:4-  
28 47:4; that the Lao government would flee, *id.* at 10:11-12:7; and that Lo Cha Thao was going to  
set up Laos to be a neutral county like Switzerland, *id.* at 39:1-4. Nor did the agent disclose the  
facts that reveal Lo Cha Thao's state of mind during this conversation, including his repeated  
bemoaning of the Lao government's genocide, *id.* at 41:1-9 and 69:17-073:11; his comment that  
“we are just defending our people,” *id.* at 97:7-8; and—perhaps most tellingly—the news that his  
own cousin had just been killed. Phillips Dec., Exh. 69, Jack's Calls, 5/10/07, 2:13:27 p.m. at  
1:18-25.

<sup>92</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 33:11-16.

<sup>93</sup> See generally Phillips Dec., Exh. 64, New Republic article.

1 American interests.<sup>94</sup> The agent must also have known that, after the United States ceded Laos  
2 to the communists in the Paris Peace Accord, General Vang Pao and a few thousand others were  
3 allowed to come to this country, while many more Hmong remained in Laos and tried to resume  
4 their simple lifestyle. The communist government was in such disarray that only recently has it  
5 begun in earnest its campaign to punish those remaining Hmong for their support for America.<sup>95</sup>  
6 The agent omitted this history from his affidavit.

7 Moreover, the agents went out of their way to create the impression that all of the  
8 defendants supported the alleged plan, despite the extensive wiretap evidence demonstrating  
9 deep and entrenched opposition. Indeed, in the affidavits, the agents repeatedly and misleadingly  
10 referred to the alleged conspiracy itself as “Neo Hom,” a Hmong organization founded by  
11 General Vang Pao, even while admitting that “at no time has the term ‘Neo Hom’ been used by  
12 any of the suspects in my presence to identify their affiliation.”<sup>96</sup> Their use of this term was  
13 plainly designed to equate Neo Hom and its members with the alleged conspiracy, whereas in  
14 fact—as the agents surely knew—Lo Cha Thao and others deliberately distanced themselves  
15 from Neo Hom (“Neo Hom’s people are just . . . ordinary. None of them can do anything. They  
16 are all just fakes.”).<sup>97</sup> The agents did *not* describe, of course, the May 2007 directive by General  
17 Vang Pao to Lo Cha Thao that there must not be “any other violence whatsoever,” nor the  
18 numerous other statements in wiretapped calls and interviews disclosing that same thing, nor did  
19 they disclose that General Vang Pao had berated Lo Cha Thao and Lo Thao at the June 2  
20 meeting for discussing the plan. To the contrary, the agents’ affidavits misleadingly describe the  
21 press reports about the aftermath of General Vang Pao’s November 2003 speech calling for

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22 <sup>94</sup> *Id.*

23 <sup>95</sup> *Id.*

24 <sup>96</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 8:16-18. The agent states, for example, that he “met  
25 with Jack, General Vang Pao, and approximately twelve suspected Neo Hom leaders concerning  
the sale of weapons to Neo Hom.” Phillips Dec., Exh. 1, Agent’s Affidavit at 8:14-16.

26 <sup>97</sup> Phillips Dec., Exh. 70, LCT’s Calls, 5/20/07, 17:43:02 p.m. at 8 [TarnEgl 037511]. *See also,*  
27 *e.g.*, Phillips Dec., Exh. 71, LCT’s Calls, 5/12/07, 9:32:55 a.m. at 5 [TarnEgl 036147] (“They are  
28 a politic group so they do their part and you do your part. . . . It’s your group. It doesn’t matter  
if it is a group of young people or if there are old people joining with you. You have to have  
your own group, your own political group. . . . This way they won’t bring their authority to force  
you all.”).

1 reconciliation as evidence that he now *favors* violence, despite the evidence that they themselves  
2 intercepted showing just the opposite.<sup>98</sup>

3 The undercover agent also misrepresented his own repeated consumption of alcohol  
4 during his meetings with the alleged “conspirators.” His affidavit states that he consumed  
5 alcohol at the March 5, 2007 meeting with Jack and Lo Cha Thao, suggesting that this was a  
6 noteworthy and isolated event.<sup>99</sup> But he does not disclose that he also consumed alcohol (both  
7 beer and hard liquor) on at least the meetings on April 12, April 24, May 3, May 11, and May  
8 23.<sup>100</sup>

9 **F. The prosecutors repeat the agents’ misstatements.**

10 These misrepresentations have not been limited to the agents’ affidavits. The prosecuting  
11 attorneys have repeated many of the same misstatements, despite holding clear and irrefutable  
12 evidence that contradicted them.

13 At the bail hearing, for example, the prosecutors emphasized the gravity of the charges  
14 and the seriousness of the defendants’ actions (“This is not corporate mergers and acquisitions.  
15 We’re talking about a commissioned officer of the United States Army trying to get a defense  
16 contractor to engage in huge felonies, selling arms out the back door as a side venture.”)<sup>101</sup> To  
17 bolster their argument, the prosecutors repeated to the Court the false allegation that this case  
18 began when Harrison Jack approached a “defense contractor,” and even inflated the allegation  
19 further by stating that the “contractor” had business in Iraq (“It’s also important to recognize  
20

21 <sup>98</sup> Phillips Dec., Exh. 67, LCT Wiretap Affidavit [TarnEgl 034938] at 8:23:9:3; Phillips Dec.,  
22 Exh. 72, Crowder Affidavit in Support of Search Warrant Application #1 [TarnEgl 002019-20]  
23 (“SW App #1”), at 5:21-6:1; Phillips Dec., Exh. 73, Crowder Affidavit in Support of Search  
24 Warrant Application #2 [TarnEgl 001760-61] (“SW App #2”), at 6:27-7:7; Phillips Dec., Exh.  
25 74, Crowder Affidavit in Support of Search Warrant Application #3 [TarnEgl 001638-39] (“SW  
26 App #3”), at 6:27-7:7; Phillips Dec., Exh. 66, HJ Wiretap Affidavit [TarnEgl 035389] at ¶ 24;  
27 Phillips Dec., Exh. 13, HJ Cont. Wiretap Affidavit [TarnEgl 034795] at 10:18-26.

28 <sup>99</sup> Phillips Dec., Exh. 1, Agent’s Affidavit at 13:10-12.

<sup>100</sup> Phillips Dec., Exh. 75, 4/12/07 meeting at 3:1-13; Phillips Dec., Exh. 76, 4/24/07 meeting at  
3:18-4:2, 5:25-6:21; Phillips Dec., Exh. 18, 5/3/07 meeting at 1:17-2:8, 4:19-20; Phillips Dec.,  
Exh. 42, 5/11/07 meeting at 4:2-11, 57:9-12; Phillips Dec., Exh. 32, 5/23/07 meeting at 1:19-2:2.

<sup>101</sup> Phillips Dec., Exh. 39, Bail Hearing at 60:12-16. *See also id.* at 76:4-17; Phillips Dec., Exh.  
77, Government’s Press Release re Operation Tarnished Eagle, 6/4/07; Phillips Dec., Exh. 78,  
Criminal Complaint at ¶¶ 17-34.

1 how the case started, with Harrison Jack approaching a government contractor, *not a fake one, a*  
 2 *real one who has government contracts in Iraq, who has business in Iraq and other*  
 3 *places.*)<sup>102</sup> The prosecutors also claimed, wrongly, that in Jack’s call with the “defense  
 4 contractor,” Jack “outline[d] exactly the plan to buy the arms and logistics . . . .”<sup>103</sup> But  
 5 according to the government’s interview report, Jack did no such thing; he only asked about  
 6 getting 500 AK-47s that Hmong victims of Genocide could use to protect themselves.<sup>104</sup>

7 Likewise, the prosecutors described Jack as a savvy and experienced military  
 8 professional (“*This is a professional defense professional dealing with the defense*  
 9 *professionals.* . . . Harrison Jack probably knows better than the undercover agent exactly how  
 10 this operates, because he was a Lieutenant Colonel in the United States Army, a Ranger,  
 11 Airborne Infantry Officer, did tours in Southeast Asia. *He’s not someone who just fell off the*  
 12 *turnip truck.*”)<sup>105</sup> But as the government knew, Jack may have been knowledgeable about  
 13 supernatural healing and divination, but he was useless when it came to any real-world  
 14 organization or planning.

15 The prosecutors also made misleading statements about the defendants’ ability to finance  
 16 the plan.<sup>106</sup> Discovery that the government provided after the bail hearing shows that, despite an  
 17 alleged total budget of \$9.8 million, the defendants had raised just \$24,000—less than one  
 18 quarter of the amount of that the government alleges was to be made to the agent as a first  
 19 payment.<sup>107</sup> However, the prosecutors told the Court that the defendants had enough money to

20 \_\_\_\_\_  
 21 <sup>102</sup> Phillips Dec., Exh. 39, Bail Hearing at 43:3-9.

22 <sup>103</sup> See *id.* at 43:16-22 (“Mr. Harrison Jack approached a legitimate government contractor and  
 23 asked to buy 500 AK-47s. . . . We have a taped conversation between Mr. Harrison Jack and that  
 24 defense contractor of November of 2006 in which they outline exactly the plan to buy the arms  
 25 and logistics about buying the arms from that defense contractor.”).

24 <sup>104</sup> Phillips Dec., Exh. 2, Hawthorne Report at 1 [TarnEgl 034614].

25 <sup>105</sup> Phillips Dec., Exh. 39, Bail Hearing at 44:3-23.

26 <sup>106</sup> Phillips Dec., Exh. 39, Bail Hearing at 64:10-17.

27 <sup>107</sup> See *supra*, at 13. The defendants’ arguments at the bail hearing were based on a review of the  
 28 discovery provided by the government less than 10 days before the hearing. This discovery  
 included tapes of the meetings between some of the defendants and the undercover agent. As  
 discussed above, the tapes contradicted statements made by the undercover agent in his affidavit  
 in support of probable cause. The day before the hearing, the government produced transcripts  
 of calls between Jack and the undercover agent. The vast majority of the discovery produced to

1 purchase the weapons from the undercover agent (“Did these individuals have enough American  
2 currency to purchase the 125 AK-47s and smoke grenades on the 4th of June? Yes. Did they  
3 have enough American currency to buy a second load of AK-47s and smoke grenades in their  
4 possession on the 4<sup>th</sup> of June? Yes. Did they have enough money to buy the first installment and  
5 a Stinger missile? Yes.”)<sup>108</sup>

6 As already noted, the prosecutors mischaracterized the critical June 2 meeting, alleging  
7 that General Vang Pao *endorsed* the “coup plan” at the meeting, even while the government held  
8 extensive evidence demonstrating that, in fact, the General assailed the plan and forbade others  
9 to participate. And this pattern of misrepresentations continued in the discovery motions heard  
10 in December 2008. In its Opposition to the defendants’ Motion to Compel Discovery, the  
11 government told the Court that Michael Spak, a retired CIA officer, had described to the  
12 government a meeting with General Vang Pao in which the General expressed support for  
13 violence in Laos (“Vang Pao and his associates outlined for hours their operational concept for  
14 military operations in Laos against the Lao government and Lao soldiers”).<sup>109</sup> The government  
15 also stated that Spak discussed the General’s plan with the CIA, that “the CIA would not assist or  
16 approve of the plan,”<sup>110</sup> and that the General knew this.<sup>111</sup>

17 After news organizations brought the government’s account of this meeting to Spak’s  
18 attention, the retired CIA officer felt compelled to correct the record. He submitted his own  
19 declaration explaining that, contrary to the government’s allegations, “General Vang Pao  
20 outlined his *political* plan and never mentioned military operations against the Lao government  
21 or Lao soldiers.”<sup>112</sup> To the contrary, General Vang Pao

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22  
23 date, however, was produced after the hearing, including all the wiretap recordings, all of the  
24 post-arrest statements of the defendants, other witness statements, and the FBI 302 reports and  
ATF reports of investigation. As a result, the defendants did not have access at the bail hearing  
to evidence that contradicted many of the statements made by the government .

25 <sup>108</sup> Phillips Dec., Exh. 39, Bail Hearing at 64:6-17.

26 <sup>109</sup> Phillips Dec., Exh. 79, Government’s Opposition to Motion to Compel Discovery, filed  
10/31/08 (Doc. 344) at 26:14-18.

27 <sup>110</sup> *Id.* at 26:23-27:2.

28 <sup>111</sup> *Id.*

<sup>112</sup> Phillips Dec., Exh. 80, Declaration of Michael Spak in Support of Defendants’ Reply in

1 planned to work within the existing political system. . . . **General Vang Pao was**  
 2 **not interested in a military solution and kept repeating his preference for a**  
 3 **political solution.** General Vang Pao said he was developing political influence  
 4 with the U. S. State Department and the U.S. Congress and **firmly believed the**  
 5 **political route would be successful.** General Vang Pao stated that he had come  
 6 out publicly for peace with the Lao government. . . . In rejecting my advocacy for  
 a military component [with U.S. government approval], **General Vang Pao said**  
**that he was an old man, that he had fought wars for many years, and that he**  
**did not have the energy or resources to get involved in another war.** General  
 Vang Pao also made it clear that he lacked the financial resources for any military  
 component.”<sup>113</sup>

7 Three defense attorneys were present when the government interviewed Spak, and can confirm  
 8 that this is what he related. Once again, the government fundamentally mischaracterized the  
 9 evidence.

### 10 III. ARGUMENT

#### 11 A. Legal Standard: Outrageous government conduct violates the Due Process Clause 12 and requires dismissal of an indictment.

13 The Supreme Court first recognized that outrageous government conduct may warrant  
 14 dismissal of an indictment in *United States v. Russell*, 411 U.S. 423 (1973).<sup>114</sup> In *Russell*, the  
 15 Court stated that there might be situations “in which the conduct of law enforcement officials is  
 16 so outrageous that due process principles would absolutely bar the Government from invoking  
 17 judicial process to obtain a conviction.”<sup>115</sup> Dismissal of an indictment for outrageous  
 18 government conduct may also be predicated on a court’s inherent supervisory powers.<sup>116</sup> Courts

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19 Support of Motion to Compel Discovery at ¶ 21, filed 12/04/08 (Doc. 350) (emphasis added).

20 <sup>113</sup> *Id.* at ¶¶ 9, 11.

21 <sup>114</sup> See *United States v. Batres-Santolino*, 521 F.Supp. 744, 750 n.3 (N.D.Ca. 1981) (“Although  
 22 referred to as a defense in most of the cases cited herein, outrageous government conduct is  
 23 generally considered to be a due process deprivation and, therefore, more properly described as a  
 grounds for dismissal.”); *United States v. Mayer*, 490 F.3d 1129, 1141 (9th Cir. 2007) (dismissal  
 of an indictment may be appropriate when the government has engaged in outrageous  
 misconduct.).

24 <sup>115</sup> *Russell*, 411 U.S. at 431-32. Prior to *Russell*, the Ninth Circuit had adopted a form of the  
 25 defense in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971). See *Batres-Santolino*, 521  
 F.Supp. at 750.

26 <sup>116</sup> See *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir. 1989) (“The dismissal of an  
 27 indictment because of outrageous government conduct may be predicated on alternative grounds:  
 a violation of due process or the court’s supervisory powers.”). The basis for dismissal affects  
 28 the standard of review on appeal. Courts of Appeal review de novo a denial of a motion to  
 dismiss an indictment on due process grounds. *United States v. Williams*, 791 F.2d 1383, 1386  
 (9th Cir. 1986), *cert. denied*, 479 U.S. 869 (1986). A denial based on a refusal to exercise the

1 recognize that a claim of outrageous government conduct differs from the defense of entrapment.  
2 “The issue of entrapment focuses on the intent or predisposition of the defendant to commit the  
3 crime. The concept of outrageous government conduct focuses on the Government’s actions. An  
4 indictment may be set aside because of outrageous government conduct whether or not the  
5 defendant was predisposed to engage in criminal activity.”<sup>117</sup>

6 Courts dismiss cases when “the nature and extent of police involvement in th[e] crime  
7 [is] so overreaching as to bar prosecution of the defendants as a matter of due process of law.”<sup>118</sup>

8 Four factors determine whether the government’s conduct is sufficiently outrageous to warrant  
9 dismissal:<sup>119</sup>

- 10 1. Whether the defendants were active participants in the crime before the  
11 government involvement began.
- 12 2. Whether the defendants would have been able to commit the crime without the  
13 government involvement.
- 14 3. Whether the government entered an ongoing criminal enterprise or the criminal  
15 enterprise was spurred on by the government’s actions.
- 16 4. Whether the misconduct was performed by a government agent or a private  
17 informer.

18 court’s supervisory power is reviewed for abuse of discretion. *United States v. Simpson*, 813  
19 F.2d at 1465 n.2, *cert. denied*, 484 U.S. 898 (1987). Factual findings upon which the decision  
20 was based are reviewed for clear error. *United States v. Emmert*, 829 F.2d 805, 811 (9th Cir.  
1987).

21 <sup>117</sup> *United States v. Gonzales*, 539 F.2d 1238, 1239-40 (9th Cir. 1976); *see also United States v.*  
22 *Garza-Juarez*, 992 F.2d 896, 903 (9th Cir. 1993) (“Outrageous government conduct refers to  
behavior of investigators. This conduct is considered without reference to any predisposition on  
the defendant’s part.”).

23 <sup>118</sup> *United States v. Twigg*, 588 F.2d 373, 377 (3d Cir. 1978).

24 <sup>119</sup> *See Twigg*, 588 F.2d at 377; *Batres-Santolino*, 521 F.Supp. at 751-53. Some courts apply an  
25 analogous five-factor test to determine whether the government’s involvement in a criminal  
26 enterprise was permissible: (1) the defendant was already involved in a continuing series of  
27 similar crimes, or the charged criminal enterprise was already in progress at the time the  
28 government agent became involved; (2) the agent’s participation was not necessary to enable the  
defendants to continue the criminal activity; (3) the agent used artifice and stratagem to ferret out  
criminal activity; (4) the agent infiltrated a criminal organization; and (5) the agent approached  
persons already contemplating or engaged in criminal activity. *See United States v. Bonanno*,  
852 F.2d 434, 437 (9th Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989).

1 **B. All four factors weigh in favor of dismissing the indictment in this case.**

2 **1. The defendants were not active participants in the “crime” before the**  
 3 **government got involved.**

4 As the Northern District of California noted when granting a motion to dismiss for  
 5 government misconduct, “[j]ust as a defendant’s lack of prior criminal involvement is relevant to  
 6 an entrapment defense, so too is it relevant to a claim of outrageous government conduct. In  
 7 neither case is it dispositive, but it is highly relevant to the issue of whether the defendant or the  
 8 government should ultimately be held accountable for the instigation of the crime.”<sup>120</sup>

9 Here, there is no evidence of prior criminal involvement. The *only* alleged activity that  
 10 occurred before the government began orchestrating the so-called conspiracy was a single  
 11 telephone call from Harrison Jack, a person who put his faith in supernatural forces, to Namon  
 12 Hawthorne, a person who purports to harness those forces. And the alleged purpose of this call  
 13 was not to launch any coup attempt, but—at most—to enable Hmong victims of genocide “to  
 14 protect themselves.”<sup>121</sup> These allegations fail to establish any prior criminal involvement by  
 15 defendant Jack, let alone by the remaining defendants.

16 **2. The alleged criminal enterprise was not ongoing at the time the government**  
 17 **got involved.**

18 “Almost all of the cases rejecting an outrageous government conduct defense involve  
 19 defendants who have previously been involved in similar crimes, and/or a criminal enterprise  
 20 that was already in progress at the time government agents became involved.”<sup>122</sup> In this case,  
 21 there was no enterprise in progress whatsoever. When the undercover agent contacted Jack over

22 <sup>120</sup> *Batres-Santolino*, 521 F.Supp. at 751 (internal citations and quotations omitted). As the court  
 23 in *Batres-Santolino* noted, while the lack of prior criminal involvement can demonstrate that the  
 24 government instigated the crime, the existence of prior criminal involvement does not negate the  
 25 government’s egregious conduct. For example, in *Greene v. United States*, 454 F.2d 783 (9th  
 26 Cir. 1971), the convictions were reversed on outrageous-government-conduct grounds even  
 27 though the defendants had previously been convicted of precisely the same crime.

28 <sup>121</sup> Phillips Dec., Exh. 2, Hawthorne Report at 1 [TarnEgl 034614].

<sup>122</sup> *Batres-Santolino*, 521 F.Supp. at 751 n. 6 (citing *United States v. Russell*, 411 U.S. 423  
 (1973)); *United States v. Wylie*, 625 F.2d 1371, 1374 (9th Cir. 1980), *cert. denied*, 449 U.S. 1080  
 (1981); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v. Reynoso-Ulloa*,  
 548 F.2d 1329, 1332, 1338-39 (9th Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *United States*  
*v. Gonzales*, 539 F.2d 1238 (9th Cir. 1976); *United States v. Greenbank*, 491 F.2d 184 (9th Cir.  
 1974).

1 *four months* after Jack’s alleged call to Hawthorne, Jack had forgotten about the entire affair,  
 2 stating “*Oh. Oh. Okay. Okay. Golly sakes, that’s a long time ago.*”<sup>123</sup> There was no  
 3 “enterprise” of any kind until the agent breathed life into it. And even then, Jack insisted that the  
 4 only goal was to save lives, not to overthrow the government, and that preferably no force would  
 5 be used at all.<sup>124</sup>

6 The lack of any ongoing criminal enterprise in this case stands in stark contrast with  
 7 cases where courts have found that the government’s involvement was appropriately limited.  
 8 For example, in *United States v. McQuin*, 612 F.2d 1193 (9th Cir. 1980), *cert. denied*, 445 U.S.  
 9 955 (1980), the court denied McQuin’s motion to dismiss for government misconduct because  
 10 McQuin had already conceived a detailed, well-developed, professional-sounding plan for the  
 11 crime before the agents ever met him.<sup>125</sup> Jack’s one phone call to Hawthorne—a man who Jack  
 12 believed made miraculous healing water—followed by four months of total inactivity, is not  
 13 even comparable.

14 Moreover, in this case, an extensive body of evidence demonstrates not only inactivity  
 15 but staunch opposition to the “crime” by General Vang Pao and others—evidence that the  
 16 government ignored.

17 **3. The defendants would have been unable to commit the “crime” without the**  
 18 **government’s involvement.**

19 Courts have upheld a charge of outrageous government conduct in circumstances where  
 20 the defendants lacked the capacity to commit the crimes with which they were charged without  
 21 the government’s assistance.<sup>126</sup> That is certainly true here. The agent provided all the expertise,  
 22 organization, and direction, while some defendants contributed, at most, delusional wishes, and  
 23 others did not even do that. Harrison Jack’s initial contact was with water-salesman Namon  
 24 Hawthorne, and he allegedly tried to advance the scheme by turning to muscle mapping and

25 <sup>123</sup> Phillips Dec., Exh. 2, Hawthorne Report at 2-3 [TarnEgl 034615-16].

26 <sup>124</sup> *See supra*, pp. 4, 6.

27 <sup>125</sup> *Batres-Santolino*, 521 F.Supp. at 751 (noting that McQuin could not claim that the idea and  
 expertise for the crime came from government participation).

28 <sup>126</sup> *See, e.g., United States v. Lomas*, 706 F.2d 886, 891 (9th Cir. 1983) (citing *Twigg*, 588 F.2d at  
 380-81); *Greene*, 454 F.2d at 786-87.

1 crystal kinesiology—just as he believed he could cure diabetes and radiation poisoning. And Lo  
2 Cha Thao was no more capable. He lacked the most basic knowledge needed to formulate a  
3 realistic plan—such as that there is security at border crossings and the airport, or that the  
4 population of Laos’s capital Vientiane is not twenty or thirty thousand, but 25 times that  
5 number.<sup>127</sup> Nor did he have any understanding of military operations. Indeed, the agent even  
6 had to supply proper maps of Laos after the “conspirators” proved incapable of procuring any.<sup>128</sup>

7 The defendants’ alleged fundraising operation—which consisted of a booth at a rally, a  
8 collection jar, and thank you notes—allegedly raised only \$24,000 out of a budget of \$9.8  
9 million. In the absence of government support, and considering their only source for weapons  
10 other than the government agent was water-salesman Hawthorne, it is inconceivable that the  
11 defendants could have formulated and carried out any part of the alleged plot on their own.

12 Indeed, to the extent the “plan” sounded ominous at all, the undercover agent was  
13 responsible. Not only did the agent offer to supply the indispensable ingredient of the weapons,  
14 but he suggested the weapons they should use, set the timeline for the operation, and told the  
15 defendants to set up planning meetings. When the defendants encountered problems, the agent  
16 provided solutions. When Lo Cha Thao told him that their main problem was getting the  
17 weapons into Laos, the agent said, “it is not a problem me getting it there.”<sup>129</sup> In reality, of  
18 course, even if the defendants could have procured weapons with no money and no actual  
19 supplier, they had no possible means to deliver weapons to Laos.

20 But the agent in this case provided more than planning and logistical support. He coaxed  
21 and prodded the so-called conspirators, stoking their outrage at the Lao government’s horrific  
22 acts of genocide, even as he encouraged them to believe that the U.S. government would support  
23 an effort to overthrow the repressive Lao government with a democracy.<sup>130</sup> In short, the agent  
24 “set [the defendants] up, encouraged [the defendants], provided the essential supplies and

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26 <sup>127</sup> *Supra*, p. 12.

27 <sup>128</sup> Phillips Dec., Exh. 17, 3/5/07 meeting at 64:22-67:2.

28 <sup>129</sup> Phillips Dec., Exh. 81, 4/18/07 meeting at 18:20-21:2.

<sup>130</sup> *See supra*, pp. 7, 8.

1 technical expertise, and when [the defendants and the agent] encountered difficulties in  
2 consummating the crime, [the agent] assisted in finding solutions.”<sup>131</sup>

3 **4. The misconduct was performed by a government agent, not a private**  
4 **informer.**

5 Courts have found that excessive involvement by the government is more culpable  
6 where—as here—the conduct is performed not by a private informer, but by a government agent  
7 who ought to know better. “Passive tolerance . . . of a private informant’s questionable conduct  
8 [is] less egregious than the conscious direction of government agents typically present in  
9 outrageous conduct challenges.”<sup>132</sup> Here, the actions were performed by a government agent,  
10 with an Assistant U.S. Attorney supervising the investigation.

11 **C. This case is similar to others that Courts have dismissed for government**  
12 **misconduct.**

13 In *Batres-Santolino*, the Northern District of California granted a motion to dismiss for  
14 government misconduct based on similar facts to this case. In both cases, the informant/agent  
15 gave the impression of being connected to the government.<sup>133</sup> Also, while prices and quantities  
16 of the illegal items were discussed in both cases, no final arrangements for a sale were made, at  
17 least in part because defendants did not have the money and were not sure whether or how they  
18 could get it.<sup>134</sup> In addition, in both cases the informant/agent pressed the defendants to complete  
19 the sale,<sup>135</sup> and escalated the plan.<sup>136</sup> Likewise, in both cases the defendants’ actions were

20 <sup>131</sup> *Twigg*, 588 F.2d at 381.

21 <sup>132</sup> *United States v. Barrera-Moreno*, 951 F.2d 1089, 1092 (9th Cir. 1991), *quoting*, *Simpson I*,  
813 F.2d at 1468.

22 <sup>133</sup> *Batres-Santolino*, 521 F.Supp. at 748-749 (“Thomas told Batres and Haydon that he had  
23 friends in the DEA, whom he pointed out in his bar, and gave the impression of being a  
24 prominent, well-known figure in Quito.” Also, “Thomas represented himself to defendants as  
25 highly knowledgeable and well-connected with respect to the Ecuadorian government. He had  
contacts in the presidency, the ministry of defense, and the ministry of agriculture. From the  
latter, he could obtain secret details about competitive bids.”). The undercover agent in this case  
likewise led the “conspirators” to believe that he was connected to the government. *See supra*,  
section II. B.

26 <sup>134</sup> *Id.* at 750 (“Defendants’ first meeting with Lopez concluded with no definite terms  
27 established for price or quantity, and no definite agreement about the deal. No cocaine samples  
were ever exchanged.”). As explained *supra*, at p. 13, the defendants here had allegedly raised  
\$24,000 out of \$9.8 million.

28 <sup>135</sup> *Id.* at 749 (“In a late January call, not made in Agent Lopez’ presence, Thomas stated to

1 “ludicrous,” and the defendants were not “the experienced dealers [they] purported to be.”<sup>137</sup>

2 In dismissing the *Batres-Santolino* case, the court reasoned that “[d]efendants here had  
3 never imported cocaine before, and had no foreign source of supply of their own whatsoever. As  
4 obvious novices, it is inconceivable that they could have entered the secretive world of  
5 international drug smuggling on their own. Established drug exporters would have spotted them  
6 instantly as amateurs and dismissed their efforts as ludicrous.”<sup>138</sup> The exact same reasoning  
7 applies here. The “government agent[] ‘manufactured’ a crime that . . . could not and would not  
8 have been committed if [the agent] had not finagled defendants into it and offered to provide  
9 them with an otherwise unavailable source of supply of the illegal [item].”<sup>139</sup> Like in *Batres-*  
10 *Santolino*, “this is not a case where the government is ferreting out ongoing criminal activity. It  
11 is a case where the government, through its agent, went about putting persons into the business  
12 of crime for the first time.”<sup>140</sup>

13 The facts of this case are also similar to those in *United States v. Twigg*, 588 F.2d 373 (3<sup>rd</sup>  
14 Cir. 1978) at 436. In *Twigg*, the court dismissed the case for outrageous government conduct  
15 because the defendants had not begun implementing the scheme before the DEA got involved;  
16 the government, through an informer, was in charge of the operation; the government supplied an  
17 indispensable ingredient, and it was unclear whether the defendants had the means or the money  
18 to obtain the chemical on their own.<sup>141</sup> When the defendants could not locate an adequate site,

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19  
20 Connie that the ‘big man’ was holding him responsible for the delay. Thomas’ intent in making  
21 this statement was to encourage defendants to set a definite date in the near future for their return  
22 to Quito to make arrangements for a cocaine sale.”). *See supra*, at pp. 34, 35 for information on  
23 the agent’s tactics in pressing the defendants to complete the sale soon.

24 <sup>136</sup> *Id.* at 749 (“Defendant Lancaster told Thomas that he had dealt cocaine on a small scale  
25 before, but that he had never handled large quantities and had never imported it. Thomas  
26 cautioned defendants that the ‘big man’ was not easily impressed and was not accustomed to  
27 dealing with amateurs or small-scale dealers, and was only willing to meet with them because of  
28 their connection with Thomas. He encouraged them to represent themselves to Lopez as  
experienced, large scale dealers.”)

<sup>137</sup> *Id.* at 749.

<sup>138</sup> *Id.* at 751.

<sup>139</sup> *Id.* at 751.

<sup>140</sup> *Id.* at 752.

<sup>141</sup> *Twigg*, 588 F.2d at 380-81.

1 the government provided a solution by finding them one. Furthermore, the defendants did not  
 2 have the know-how with which to actually commit the crime, and the informer provided all of  
 3 the expertise.<sup>142</sup>

4 There is even less evidence of predisposition to the crime here than there was in *Twigg*.  
 5 In *Twigg*, the court found that the only evidence that one of the defendants was predisposed to  
 6 commit the crime was his receptivity to the informant's proposal and testimony of the informer  
 7 that he had committed the same crime with the defendant before. However, when the informer  
 8 reestablished contact with the defendant, the latter was not engaged in any illicit activity.<sup>143</sup>  
 9 Likewise, when the agent in this case contacted Jack, he was not engaged in any illicit activity.  
 10 Unlike in *Twigg*, however, Jack had not committed the same crime before. In addition, the  
 11 government has no evidence that any of the other defendants had committed this crime before, or  
 12 were engaged in any criminal enterprise before the agent took over.

13 Similarly, in *Green v. United States*, 454 F.2d 783 (9th Cir. 1981), the Ninth Circuit  
 14 reversed the defendants' convictions and dismissed a case for outrageous government conduct  
 15 where, among other things, the events "reveal[ed] almost unbelievable naivete on the part of  
 16 defendants in accepting [the undercover agent] as a representative of the "syndicate."<sup>144</sup> In  
 17 *Greene*, as here, the defendants indicated they were having difficulty and the agent responded by  
 18 pressuring them to move forward quickly.<sup>145</sup> The agent in *Greene* accomplished this by telling  
 19 the defendants, "the boss is on my back."<sup>146</sup> Here, the agent pressured the defendants by telling  
 20 them, "my partner was not happy with the size of the first order,"<sup>147</sup> that their timeline was too  
 21 far out,<sup>148</sup> and that the plan needed to happen by the beginning of June because the agent was

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22 <sup>142</sup> *Id.*

23 <sup>143</sup> *Twigg*, 588 F.2d at 381.

24 <sup>144</sup> *Greene*, 454 F.2d at 784.

25 <sup>145</sup> *Id.* at 785 ("[The defendants] indicated that they were having difficulty getting into operation.  
 26 At this time [the agent], in an effort to spur production of bootleg whiskey, told [the defendants],  
 'the boss is on my back.'").

27 <sup>146</sup> *Id.*

28 <sup>147</sup> Phillips Dec., Exh. 1, Agent's Affidavit at 32:20-22.

<sup>148</sup> Phillips Dec., Exh. 15, 1/25/07 meeting at 33:6-13.

1 leaving for Iraq.<sup>149</sup> Also, while in *Greene* the defendants took much longer to make a delivery  
2 than they planned,<sup>150</sup> the defendants here were never able to make a weapons purchase. Finally,  
3 in both cases, the defendants “talked in grandiose terms of criminal activity to impress the  
4 [agent].”<sup>151</sup>

5 The factors that the *Greene* court cited in reversing the defendants’ convictions apply  
6 equally here. The agent in *Greene* reinitiated contact with the defendants at a time when they  
7 were not engaged in criminal activity,<sup>152</sup> just as the agent here initiated contact with Jack after he  
8 had forgotten about the alleged call to Namon Hawthorne, and was doing nothing illegal. In both  
9 cases, the agent’s involvement in the criminal activities was not only extended in duration, but  
10 substantial. Also, in both cases, the agent treated the defendants as partners, provided  
11 equipment, supplies and a site (in the *Greene* case) or transportation of the materials (in the  
12 instant case).<sup>153</sup> In both cases the agent prodded and pressured the defendants to commit the  
13 crime.<sup>154</sup> The agents in both cases were principal actors—they “did not simply attach  
14 [themselves] to an on-going operation for the purpose of closing it down and prosecuting the  
15 operators.”<sup>155</sup>

16 The *Greene* court concluded, as this court should likewise conclude: “[w]e do not  
17 believe the Government may involve itself so directly and continuously over such a long period  
18 of time in the creation and maintenance of criminal operations, and yet prosecute its  
19 collaborators. . . . When the Government permits itself to become enmeshed in criminal activity,  
20 from beginning to end, to the extent which appears here, the same underlying objections which  
21

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22 <sup>149</sup> Phillips Dec., Exh. 18, 5/3/07 meeting at 28:12-29:14.

23 <sup>150</sup> *Greene*, 454 F.2d at 785 (“some eight months after they had said they would be in production  
24 in ninety days, [the defendants] made their first delivery of bootleg alcohol to [the agent].”).

25 <sup>151</sup> *Id.* at 786.

26 <sup>152</sup> *Id.*

27 <sup>153</sup> *Id.* at 786 n.5. The *Greene* court noted that had the agent been acting in a private capacity,  
the facts would label him an aider and abettor, and a co-conspirator with the defendants.

28 <sup>154</sup> *Id.* at 787.

<sup>155</sup> *Id.*

1 render entrapment repugnant to American criminal justice are operative.”<sup>156</sup>

2 Because all the factors for dismissal based on outrageous government conduct are present  
3 in this case, and because the facts here mirror or exceed the facts relied upon by the *Greene*,  
4 *Twigg*, and *Batres-Santolino* courts, this Court should dismiss the indictment for outrageous  
5 government conduct

6 **IV. CONCLUSION**

7 The government’s press release about this case said that “[t]his investigation read like a  
8 movie script[.]”<sup>157</sup> In fact, the government’s case is a piece of fiction—one that the government  
9 itself concocted. The government’s conduct has been so egregious—and its misrepresentations  
10 so numerous—that the Court should end this case now, and dismiss the indictment.

11 Respectfully submitted,

12 Dated: March 9, 2009

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27 \_\_\_\_\_  
<sup>156</sup> *Id.*

28 <sup>157</sup> Phillips Dec., Exh. 77, Government’s Press Release re Operation Tarnished Eagle, 6/4/07.

1 Dated: March 9, 2009

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