II. The Investigation Involved No Outrageous Government Misconduct

The defendants also claim that their rights under the Due Process Clause were violated, renewing their motion to dismiss the Indictment based on "outrageous government misconduct" during the investigation of this case. They argue that the Government overparticipated in the investigation, directing "every detail of a highly dramatic and frightening — but entirely fake — terrorist plot." JC Mot. at 1. Dismissal is warranted, according to the defense, "because the government created the criminal then manufactured the crime." *Id.* The line is catchy, but not convincing. The weakness of the defense's outrageous government misconduct claim is all the more apparent now that the trial is over. There was ample support for the jury's guilty verdicts, as demonstrated above, and the evidence also made clear that the investigation in this case was an entirely lawful sting operation.

The legal threshold for dismissal of an indictment on the ground of outrageous government misconduct is extremely high. Indeed, the Second Circuit has never approved the dismissal of an indictment for that reason. For dismissal, the law would seem to require a showing of some type of coercive action, outrageous violation of physical integrity, or other egregious government conduct. Yet, even now, after the trial, the defendants do not (and cannot) point to conduct even resembling what is required. They argue only this: (1) that the Government was overinvolved in the offenses, which is a variation of the entrapment arguments that the jury has already rejected; and (2) that the CI used his greater knowledge of the tenets of Islam to exploit Cromitie's religious beliefs and psychologically coerce him. The record does not support either of these claims. Nor would these facts, even if true, constitute "outrageous

government misconduct" under the law. Accordingly, the renewed motion to dismiss should be denied without a hearing.

A. Applicable Law

The notion that government misconduct could warrant dismissal of an indictment traces back to the Supreme Court's remark in *United States* v. *Russell*, 411 U.S. 423, 431-32 (1973), that it "may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Only three years later, in *Hampton* v. *United States*, 425 U.S. 484 (1976), a plurality of the Court appeared to reject such a concept, noting that "[i]f the police engage in illegal activity in concert with a defendant beyond the scope of their duties the remedy lies, not in freeing the equally culpable defendant, but in prosecuting the police under the applicable provisions of state or federal law." *Id.* at 490 (plurality opinion). In an opinion concurring in the judgment, however, Justice Powell preserved the idea that due process might set some outer limit on government involvement in criminal conduct. *See id.* at 491-95. But he emphasized that "[p]olice overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction." *Id.* at 495 n.7.

Since *Hampton*, only one Court of Appeals has ever invalidated a conviction on the basis of outrageous government misconduct. *See United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978); *see also United States* v. *Lakhani*, 480 F.3d 171, 181 (3d Cir. 2007) (noting that *Twigg* is the only appellate decision to have "recognized a violation of due process as set out by Justice Powell in *Hampton*"). As the Second Circuit has observed, outrageous government misconduct is "an issue frequently raised that seldom succeeds." *United States* v. *Schmidt*, 105 F.3d 82, 91

(2d Cir. 1997); *accord United States* v. *LaPorta*, 46 F.3d 152, 160 (2d Cir. 1994) ("Such a claim rarely succeeds."); *see also United States* v. *Santana*, 6 F.3d 1, 4 (1st Cir. 1993) ("The banner of outrageous misconduct is often raised but seldom saluted."). In light of this record, the defense has been called "moribund," *United States* v. *Santana*, 6 F.3d at 4; "hanging by a thread," *United States* v. *Nolan-Cooper*, 155 F.3d 221, 230 (3d Cir. 1998); and even "[s]tillborn," *United States* v. *Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). Although courts recognize the doctrine hypothetically, "[b]e that as it may, the doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity." *Santana*, 6 F.3d at 4. Courts have even questioned whether the doctrine still exists, *see United States* v. *Tucker*, 28 F.3d 1420, 1425-26 (6th Cir. 1994), and the Seventh Circuit has gone so far as to reject it altogether, *see United States* v. *Boyd*, 55 F.3d at 241 (holding that "the doctrine does not exist in [the Seventh C]ircuit").

The Second Circuit has recognized that, "in principle," government overinvolvement in criminal activity could rise to the level of a due process violation, *United States* v. *Rahman*, 189 F.3d 88, 131 (2d Cir. 1999), but it has never found such a violation in practice. It has cautioned that "only Government conduct that shocks the conscience can violate due process," *id.* (internal quotation marks omitted), and it has repeatedly observed that "[o]rdinarily such official misconduct must involve either coercion or violation of the defendant's person," *United States* v. *Schmidt*, 105 F.3d at 91 (citations omitted); *accord United States* v. *Rahman*, 189 F.3d at 131.

A sting operation — even an "elaborate" sting operation — does not violate due process where it merely "creat[es] . . . an opportunity for the commission of crime by those willing to do so." *United States* v. *Myers*, 692 F.2d 823, 837 (2d Cir. 1982); *see also id.* at 843 (noting that

"Due process challenges to an undercover agent's encouragement have been rejected when one defendant was solicited twenty times before committing an offense and when another defendant was tempted by a million-dollar cash deal and prodded by veiled threats." (citing cases)); *Schmidt*, 105 F.3d at 92 (rejecting a due process challenge even though the Government's "involvement in [the] plan was extensive"). "Especially in view of the courts' well-established deference to the Government's choice of investigatory methods, the burden of establishing outrageous investigatory conduct is very heavy." *Rahman*, 189 F.3d at 131 (citations omitted). To show a due process violation, a defendant must show some "type of coercive action or outrageous violation of physical integrity or other egregious or outrageous government conduct." *United States* v. *Jackson*, 345 F.3d 59, 67 (2d Cir. 2003). As the Second Circuit has explained, "We have rarely sustained due process claims concerning government investigative conduct, stressing that the conduct involved must be most egregious . . . and so repugnant and excessive as to shock the conscience." *United States* v. *Duggan*, 743 F.2d 59, 84 (2d Cir. 1984) (internal quotation marks omitted). The Second Circuit has stated that "[t]he paradigm examples of conscience-shocking conduct are egregious invasions of individual rights . . . [such as] breaking into suspect's bedroom, forcibly attempting to pull capsules from his throat, and pumping his stomach without his consent." *Rahman*, 189 F.3d at 131.

Conceivably, "[e]xtreme physical coercion" and "psychological torture" by law enforcement agents would provide a basis to dismiss the indictment, but mere "psychological manipulation" — "efforts to win [defendant's] friendship and trust through the creation of a phony . . . relationship" — does not. *United States* v. *Chin*, 934 F.2d 393, 398-99 & n.4 (2d Cir. 1991). This is because "an essential element of the effectiveness of an undercover agent [or

informant] is the promotion and engendering of trust in dealing with contacts," and "[t]he more effective the agent's performance in this respect, the greater the likelihood of his or her success." *United States* v. *Cuervelo*, 949 F.2d 559, 568 (2d Cir. 1991). To put a finer point on it: "Short of [extreme, conscience-shocking physical or psychological coercion], government agents may lawfully use methods that are neither appealing nor moral if judged by abstract norms of decency." *Labensky* v. *County of Nassau*, 6 F. Supp. 2d 161, 174 (E.D.N.Y. 1998) (internal quotation marks omitted). *Compare Watts* v. *Indiana,* 338 U.S. 49, 52-54 (1949) (round-the-clock interrogation and sleep deprivation rose to the level of psychological coercion) *with United States v. Ayeki*, 289 F. Supp. 2d 183, 189-90 (D. Conn. 2003) (allegations by a defendant that the government witnesses "badger[ed] and cajole[d] the defendant to commit crimes" and "offer[ed] to share money with" him were insufficient to raise specter of outrageous government conduct).

Finally, only in very rare cases where claims of government misconduct are shocking do the allegations "warrant a hearing so that the precise facts may be ascertained." *United States* v. *Cuervelo*, 949 F.2d at 567 (granting a hearing where defendant claimed that a federal agent engaged in outrageous conduct involving sexual relations with her). "Nothing in *Cuervelo*," however, "requires a District Court to conduct a hearing every time a defendant alleges outrageous government conduct." *United States* v. *LaPorta*, 46 F.3d at 160.

B. Discussion

1. The Government's Involvement Was Far from Outrageous

"Whatever may be the due process limit of governmental participation in crime, it was not reached here." *United States* v. *Myers*, 692 F.2d at 837. It is true that the Government, through a confidential informant, provided the defendants with weapons of mass destruction,

transportation, money, and plenty of logistical direction. It is also true that the sting operation was, by law enforcement standards, relatively elaborate. But it was no more — and arguably less — elaborate than the Abscam investigation at issue in *Myers*, discussed below, which the Second Circuit found was "not even close to the line." *Id.* at 843; *see also id.* (citing with approval one case rejecting a due process challenge to undercover operations where a "defendant was solicited twenty times before committing an offense" and another where the defendant "was tempted by a million-dollar cash deal and prodded by veiled threats"); *Schmidt*, 105 F.3d at 92 (rejecting a due process challenge where the Government's involvement in the defendant's plot was "extensive"). Nor did the Government coerce the defendants to commit these crimes by physical force, actual or threatened. *See United States* v. *Al Kassar*, 582 F. Supp. 2d 488, 492 (S.D.N.Y. 2008) (denying claim of outrageous government misconduct in elaborate government-initiated international weapons transaction, where defendants "were not forced or coerced into agreeing to participate . . . , no threats were made, no violence was used, and there [was] no indication that defendants agreed to participate in the transaction unwillingly").

At most, it could be said that the Government's investigation in this case "creat[ed] . . . an opportunity for the commission of crime by those willing to do so." *Myers*, 692 F.2d at 837. As the Second Circuit's precedents make clear, however, that does not a due process violation make. *See, e.g.*, *Rahman*, 189 F.3d at 131 (holding that a government informant's involvement in a conspiracy to bomb targets in New York City, allegedly consisting of lending direction, technical expertise, and critical resources, did not shock the conscience, and noting that "[u]ndercover work, in which a Government agent pretends to be engaged in criminal activity, is often necessary to detect criminal conspiracies"); *Schmidt*, 105 F.3d at 91-92 (rejecting a due process

challenge where law enforcement officers posed as hit men and actually conducted a controlled breakout of the defendant from a mental observation jail unit where she had been held, and remarking that "there are occasions when the government is required to appear to participate in a criminal conspiracy in order to gather evidence of illegal conduct"); *LaPorta*, 46 F.3d at 160 (finding no due process violation where a government informant provided a government-owned car to the defendant to be burned); *see also United States* v. *Lakhani*, 480 F.3d at 182-83 (holding that due process was not violated by a sting operation even though the Government acted as both the buyer and seller in a supposedly illegal arms transaction and a Government informant first suggested the criminal activity to the defendant).

The defendants maintain that "without the government's guiding hand, no crime would or could have occurred." JC Mot. at 22. They point to what the Government supplied — "missiles, bombs, training, money, plans, expertise, storage, transportation, targets, maps, etc.," *id.* at 21 — and claim, by contrast, that they "did little more than ride around in [the CI's] fancy cars and follow his orders to carry bags from one location to another," *id.* at 22. The plot moved ahead, according to the defense, only because of the Government's "reward in two ways" or "cash for jihad" strategy. *Id.* at 11, 21. But these are largely the same facts that were cited by the defense at trial in support of their entrapment arguments. They fall well short of establishing outrageous government misconduct.

In rejecting what amounted to a recast entrapment claim, the Second Circuit took care to distinguish entrapment from outrageous government misconduct:

> [W]hether investigative conduct violates a defendant's right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law.

> Rather, the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it "shocks the conscience," regardless of the extent to which it led the defendant to commit his crime.

United States v. *Chin*, 934 F.2d at 398 (quoting *Rochin* v. *California*, 342 U.S. 165, 172 (1952)); *see also Cuervelo*, 949 F.2d at 565 ("The outrageousness of the government's conduct must be viewed 'standing alone' and without regard to the defendant's criminal disposition . . . ." (citing *Chin*, 934 F.2d at 398)); *accord United States* v. *Mosley*, 965 F.2d 906, 910 (10th Cir. 1992) (due process argument not "intended merely as a device to circumvent the predisposition test in the entrapment defense").[5] As the Second Circuit reasoned: "were we to accept Chin's suggestion that governmental instigation of criminal activity violates the due process rights of even predisposed defendants, we would undermine the [Supreme] Court's consistent rejection of the objective test of entrapment by permitting it to reemerge cloaked as a due process defense." *Chin*, 934 F.2d at 398 (citation and internal quotation marks omitted).

The defendants' motion fails for the same reason. The question here is no longer whether the Government entrapped the defendants — the jury answered that question in the negative; it is whether any of the things that the Government did during the investigation meets the much higher standard for outrageous government misconduct. Clearly, they do not. It can hardly be said that the Government's conduct in this investigation was "fundamentally unfair or shocking to our traditional sense of justice," *Schmidt*, 105 F.3d at 91, or was "'so outrageous' that common

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[5] The defense of outrageous misconduct is distinct from the defense of entrapment in that "the entrapment defense looks to the state of mind of the defendant to determine whether he was predisposed to commit the crime for which he is prosecuted, [while] [t]he outrageous conduct defense, in contrast, looks at the government's behavior." *United States* v. *Mosley*, 965 F.2d at 909 (affirming narcotics conviction and rejecting defendant's outrageous government misconduct claim).

notions of fairness and decency [were] offended," *id.* (citation omitted), or was "'so repugnant and excessive' as to shock the conscience," *United States* v. *Jackson*, 345 F.3d at 67 (citation omitted), or was "shocking, outrageous, and clearly intolerable," *Mosley*, 965 F.2d at 910. The Due Process Clause "is not to be invoked each time the government acts deceptively or participates in a crime that it is investigating." *Id.* Because agents often "need to play the role of criminals in order to apprehend criminals, ... [w]ide latitude is accorded the government to determine how best to fight crime." *Id.*

The principle is illustrated by cases in which elaborate sting operations were deemed *not* to constitute outrageous government misconduct. In *United States* v. *Russell*, agents both supplied the defendant with a scarce ingredient necessary for the manufacture of methamphetamine and purchased the narcotics he made with it. *See* 411 U.S. at 425-26. As a result, the entire transaction was a closed loop that began and ended with Government involvement: "In this case, the chemical ingredient was available only to licensed persons, and the Government itself had requested suppliers not to sell that ingredient even to people with a license. Yet the Government agent readily offered, and supplied, that ingredient to an unlicensed person and asked him to make a certain illegal drug with it. The Government then prosecuted that person for making the drug produced with the very ingredient which its agent had so helpfully supplied." *Id.* at 448-49 (Stewart, J., dissenting). The defendant urged the Supreme Court to adopt "a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels,'" and the Court declined. *Id.* at 431 (quoting the defendant).

Because gathering evidence of past narcotics crimes is "all but impossible," law enforcement properly turned to the techniques of "infiltration" and "limited participation." *Id.* at 432. "Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them." *Id.*[6]

Along similar lines, the Second Circuit rejected the appeal of a defendant who, locked in a mental ward at Rikers Island, planned the assassination of the federal agents who transported her to court by soliciting hit men from her fellow inmates. *Schmidt*, 105 F.3d at 84-85. The government obliged by sending an undercover agent to pose as an assassin, and the defendant was later convicted of attempted murder when she took the bait. *Id.* at 85-86. On appeal, she complained "the government should not have undertaken its elaborate sting operation," because, had it not done so, "she would have simply remained in the mental observation unit, talking to anyone who would listen to her." *Id.* at 91-92. The court rejected that: "[I]t is also possible that she would have eventually found an inmate willing to help her carry out her detailed instructions to kill federal agents and assist her in an escape beyond this country's borders. While the government did far more here than simply follow up the defendant's proposed crime, there are occasions when the government is required to appear to participate in a criminal conspiracy in

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[6] In *Hampton* v. *United States,* the Supreme Court affirmed a conviction where the defendant contended that the very heroin he was convicted of selling to the government came from an informant, and the government's role was, therefore, "more significant." 425 U.S. at 489.

order to gather evidence of illegal conduct, or, as here, to prevent it." *Id.* at 92 (finding that the government could lawfully facilitate a criminal offense begun by another).

Finally, there is the Abscam operation, an "elaborate undercover 'sting' operation" where "three FBI agents and a private citizen . . . purported to be representatives of two Middle Eastern sheiks operating a fictitious entity," and who were interested in bribing public officials to obtain immigration benefits for their principals. *Myers*, 692 F.2d at 827. There, the government's con-man-turned-informant allegedly coached Congressman Myers (through intermediaries) to say he would introduce private immigration bills, but that he would never have to deliver on any of his promises, in effect guiding him step-by-step on how to accept a bribe. *Id.* at 838. Myers contended that the "coaching" was "outrageously coercive"; but the Second Circuit said it "barely qualifies as any inducement at all." *Id.* at 842-43. Without the con-man and his script, his sham company, and the "sheiks" and their yacht, the Congressmen may never have taken the bait. *Id.* at 829-30 (describing the elaborate investigation). No matter: Whatever the standard for government overinvolvement in the offense, "the facts of the Abscam investigation are not even close to the line." *Id.* at 843; *see also id.* at 837-38 (rejecting claim that $50,000 bribe and promises to finance multi-million dollar projects in the Congressmen's districts" were "excessive" inducements); *id.* at 842 (citing other cases where substantial inducements were offered). There, too, the defendant complained that "the Government created the crimes," but "[t]hough the 'sting' was surely elaborate, its essential characteristic was the creation of an opportunity for the commission of crime by those willing to do so." *Id.* at 836-37.

The defendants rely heavily on *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), in which a divided Third Circuit panel set aside narcotics convictions because of what it viewed as

the highly excessive governmental involvement in the crime of illegal manufacture of methamphetamine. *See* JC Mot. at 24-25. *Twigg* stands alone as the only appellate case since *Hampton* to find a due process violation from government involvement in criminal activity, and there is reason to question the Third Circuit's finding of a due process violation, if only because it relied on cases predating the Supreme Court's decision in *Hampton*. *See, e.g.*, *United States* v. *Beverly*, 723 F.2d 11, 12 (3d Cir. 1983) (noting that the majority in *Twigg* had relied on *United States* v. *West*, 511 F.2d 1083 (3d Cir. 1975), which was "limited by Hampton"); *see also, e.g.*, *United States* v. *Tucker*, 28 F.3d at 1425-26 (Sixth Circuit noting that *Twigg* "has been greatly criticized, often distinguished and . . . [even] disavowed in its own circuit" (citing *United States* v. *Beverly*, 723 F.2d at 12)); *see also United States* v. *Nolan-Cooper*, 155 F.3d at 224.

But even if *Twigg* is still good law in the Third Circuit, it does not state the law of the Second Circuit, and in any event, it is easily distinguished from the facts of this case, principally, because the cooperating witness in *Twigg* reached out to one of the defendants and "suggested the establishment of a speed laboratory." 588 F.2d at 380. Here, on the contrary, the CI had never seen, heard of, or spoken to Cromitie before Cromitie *approached him* at the mosque on June 13, 2008. Tr. 674-683. Likewise, Agent Fuller had never heard of Cromitie before that date. Tr. 141-42. Thereafter, unlike the cooperator in *Twigg*, Cromitie was the one who right off the bat said he wanted "to do something" to America. Tr. 682. Far from "deceptively implant[ing] the criminal design in [the defendant's] mind," as the court suggested the agents did in *Twigg*, 588 F.2d at 381, the CI here was not targeting Cromitie and did not even know who he was when Cromitie said that he wanted to commit a violent act against the United States. Moreover, the defendants here were much more involved than the defendants in *Twigg*:

notwithstanding the CI's assistance and direction, the defendants actively participated in all of the key stages of the plot, and themselves often took control of the operational planning in its latter stages. *See, e.g.* GX 120-E2-T, at 2-3 (David Williams telling CI and Cromitie that the missile should be fired "from the other side" of the airport because the previously selected spot was "not safe"), GX 125-E1-T, at 2 (Payen telling CI that the team needed a leader), GX 125A-E1, at 3-5 (all four defendants agreeing that, while everyone would have input, Cromitie would be the leader), GX 126-E4-T, at 8-13 (defendants convincing CI to push back the time of the operation), GX 127-E1-T, at 1-7 (Onta Williams leading discussion about respective assignments and avoiding police detection). In short, *Twigg* is of no aid to the defendants.

The defendants' motion is to a great extent premised on the belief that they were incapable of committing these crimes without the Government's assistance. *See* JC Mot. at 23. But this is largely a distraction. To be sure, the defendants most likely could not have acquired weapons of mass destruction on their own, but the defendants demonstrated, to a man, that they were perfectly able to seize the opportunity to use those weapons, and as the events of May 20, 2009 established, each of the defendants was able to perform his respective function in a terrorist plot successfully. As the cases discussed above make clear, the Government is allowed to provide ready and willing people with the opportunity to commit even a complex crime that will require a degree of Government participation, whether it be to play the role of both the buyer and the seller in a supposedly illegal arms transaction, *see Lakhani*, 480 F.3d at 182-83, or to lend direction, technical expertise, and critical resources, *see Rahman*, 189 F.3d at 131, or to pose as an assassin, *see Schmidt*, 105 F.3d at 84-85, or to provide exotic items like bombs and Stinger missiles, as the case was here.

The defendants claim, in a footnote, that the Government "manufacture[d]" federal jurisdiction and that this fact by itself amounts to outrageous government misconduct. JC Mot. at 22 n.13. This argument can also be rejected. It is based on *United States* v. *Archer*, 486 F.2d 670, 681 (2d Cir. 1973), in which the Second Court reversed a conviction under the Travel Act on the ground that the Government had improperly "manufactured" federal jurisdiction over a crime that was really "local" in nature. *Archer* was not even a due process case. *See LaPorta*, 46 F.3d at 160. It is also easily distinguished from the present case since it involved both an extraordinary set of facts — in which government informants lied not only to the targets of the investigation, but also to "local law enforcement officials, prosecutors, grand juries, and judges," *United States* v. *Wallace*, 85 F.3d 1063, 1065 (2d Cir. 1996) — and significant federalism concerns that are completely absent here, *see United States* v. *Archer*, 486 F.2d at 677-78. In addition, the decision has never been followed, has frequently been criticized, *see, e.g.*, *United States* v. *Podolsky*, 798 F.2d 177, 180-81 (7th Cir. 1986) (citing cases), and has "limited precedential force" even in this Circuit, *United States* v. *Wallace*, 85 F.3d at 1067.

Indeed, in *Wallace*, the Second Circuit explained

> that the "manufactured jurisdiction" concept is properly understood not as an independent defense, but as a subset of three possible defense theories: (i) the defendant was entrapped into committing a federal crime, since he was not predisposed to commit the crime in the way necessary for the crime to qualify as a federal offense; (ii) the defendant's due process rights were violated because the government's actions in inducing the defendant to commit the federal crime were outrageous; or (iii) an element of the federal statute has not been proved, so federal courts have no jurisdiction over the crime.

Id. at 1065-66 (citations omitted); *see also LaPorta*, 46 F.3d at 160 (discussing *Archer*); *United States* v. *Lau Tung Lam*, 714 F.2d 209, 210-11 (2d Cir. 1983) (same). Here, none of these defense theories is available. The defendants argued the first of the three defense theories identified in *Wallace* — entrapment — to the jury, and it was rejected. The second of the three defense theories fails for the reasons stated above. And the third is inapplicable because the defendants' own ready responses to the opportunity to commit the crimes — namely, their willingness to travel across state lines to acquire weapons of mass destruction and their voluntary participation in a terrorist plot to use those weapons — satisfied the federal jurisdictional element, as the jury necessarily found. As the Second Circuit explained in *Wallace*, "Courts have refused to follow *Archer* when there is *any* link between the federal element and a voluntary, affirmative act of the defendant." 85 F.3d at 1066 (emphasis added). That is, "when confronted with situations in which (i) the [Government] introduces a federal element into a non-federal crime and (ii) the defendant then takes voluntary actions that implicate the federal element, this Court has consistently held that federal jurisdiction has not been improperly 'manufactured' and that the statutory elements have been met, despite the surface similarity to *Archer*." *Id.* (citing cases); *see also United States* v. *Lau Tung Lam*, 714 F.2d at 210-11 (finding *Archer* inapplicable where the defendant, who had previously distributed drugs only within Europe, demonstrated in response to Government inducement his "willing[ness] to bring narcotics to this country for sale").

The defendants also criticize the Government, as they did at trial, for not recording the first several meetings between Cromitie and the CI. *See* JC Mot. at 4-5. But far from being "outrageous misconduct," decisions about whether to record suspects are well within standard

law enforcement prerogatives. *See United States* v. *Agudelo*, 254 Fed. Appx. 833, 835 (2d Cir. 2007) (summary order) ("[T]here is no support in the case law for the proposition that the government must record meetings between defendants and confidential informants in order to prove a crime beyond a reasonable doubt."). The irony of the defense argument is striking: as the defendants claim that the Government overreached, overparticipated, and was generally overly aggressive in the conduct of this investigation, they contend here that the Government's early decision not to employ the tactic of recording was not aggressive enough. The reality is, as Agent Fuller demonstrated during his testimony, the Government's approach to this investigation was far more measured than the defense is willing to acknowledge. For example, Agent Fuller did not task the CI to target anyone in particular, or record conversations in the mosque at any time, much less on June 13, 2008 when Cromitie first appeared. It was only after the CI's first meeting with Cromitie — where the CI heard statements that he had "never heard . . . from anybody before," Tr. 2452 — that Agent Fuller directed the CI to meet with Cromitie again, *see* Tr. 142-43. And it was not until September 2008, after several more meetings in which Cromitie repeated his anti-American sentiments and expressed a predilection for violent jihad, that Agent Fuller and his supervisors decided to open a formal investigation. *See* Tr. 150. Only then did the recording start. The recording decisions were completely by the book.

2. Cromitie Was Not Psychologically Coerced

The defendants argue in the alternative that the CI used his greater knowledge of Islam to engage in "shameless exploitation of Cromitie's religious inclinations as a vehicle for persuading him to become a member of [the CI's] terrorist sting operation so that he could be charged with a crime." JC Mot. at 19. The defendants add that the CI "invoked his supposed status as a

Pakistani religious sage to get Cromitie to trust him" and that the CI "repeatedly employed religion to convince Cromitie that hatred of Jews was an essential precept of Islam." *Id.* Not only do the facts fail to bear out this claim, these allegations — even if true — would not rise to the level of outrageousness required to dismiss the indictment.

First, the CI was neither the shaman, nor Cromitie the pacifist acolyte, that the defendants portray. As discussed above in Point I, the evidence showed that Cromitie presented himself to the CI as a rabid anti-American, Jew-hating radical Muslim with a healthy penchant for violence and a deeply held desire to avenge the injustices that in his eyes had befallen Islam and Islamic people around the world. Significantly, both the CI's testimony and recorded conversations established that it was Cromitie who approached the CI on June 13, 2008, outside a mosque, and linked Islam to violence. *See* GX 109-E3-T, at 16 (Cromitie: "So you already knew I was like that. It wasn't you who was talking to me, I talked to you about it. When we first met in the parking lot, I talked to you about it. I said, 'Did you see what they did to my people over there? . . . [I]n Afghanistan. . . . And you knew I wanted to get back. You knew I did."); GX 129-E1-T at, 2-3 (Cromitie: "It wasn't you who said anything, it was me, right?"). Within minutes of introducing himself to the CI on June 13, 2008, Cromitie told the CI that he wanted to "do something to America." Tr. 682. On July 3, 2008, in only their third meeting, the CI claimed to Cromitie that he, the CI, was involved with Jaish-e-Mohammed, which he explained was "fighting in Afghanistan and Pakistan as a terrorist organization"; without hesitation, Cromitie responded by telling the CI that he, Cromitie, would be interested in joining Jaish-e-Mohammed. Tr. 691.

Cromitie was not an eager, naive pupil, merely following the CI's religious guidance. The early recorded meetings with the CI were dominated by sermons from Cromitie, who ranted about how his warped version of Islam justified his hatred of the Jews and the United States. *See e.g.*, GX 101-E2-T through GX 102-E5-T (October 12 & 19, 2008). No religious psychological coercion was required to get Cromitie to make these statements and state that he was willing to engage in jihad. There can be no dispute that, very early in the investigation, Cromitie hated Jews and the United States government and was not shy about expressing either sentiment. While the CI certainly played along and offered Cromitie a willing ear, there is no support for the defense claim that the CI somehow coerced Cromitie into *forming* his deeply held, passionately hate-filled feelings. Since it was Cromitie who "sought to initiate an intimate . . . relationship" with the CI on religious grounds, his outrageous government conduct claim must fail. *United States* v. *Mahon,* No. CR 09-712 PHX-DGC, 2010 WL 4038763, at *8-*10 (D. Ariz. Oct. 14, 2010).

Second, even if it were true, as the defense contends, that the CI intruded into Cromitie's religious beliefs as part of a campaign to get him to commit a crime, that was not "an 'egregious invasion of individual rights.'" JC Mot. at 20. The exploitation of a defendant's warped religious beliefs in violence sails far below the threshold of coercion that would be necessary for a viable claim of outrageous government misconduct. "[T]he deceptive creation and/or exploitation of an intimate relationship does not exceed the boundary of permissible law enforcement tactics. . . . To win a suspect's confidence, an informant must make overtures of friendship and trust and must enjoy a great deal of freedom in deciding how best to establish a rapport with the suspect." *United States* v. *Simpson*, 813 F.2d 1462, 1466 (9th Cir. 1987) (FBI

manipulated an informant into providing sexual favors to the defendant in order to lure him into selling heroin to undercover agents). Exploiting a criminal's emotional or psychological vulnerability, in an effort to gain trust and further the investigation, is not by itself outrageous. *See, e.g.*, *Nolan-Cooper*, 155 F.3d at 234-35 (romantic relationship between undercover agent and defendant, including "dinners, nightclubbing, [and] partying," which was "directed at establishing and maintaining a close relationship between agent and suspect," was not "egregious enough to make out a due process violation"); *United States* v. *Nicely*, 922 F.2d 850, 859 (D.C. Cir. 1991) ("[T]he cases line up squarely against" defendant who moved to dismiss based on agent's conduct in "first dangling out enormous sums of money to a poor businessman, and then later making veiled threats of physical harm when the [illegal] transfer was delayed."); *United States* v. *Emmert*, 829 F.2d 805, 810 (9th Cir. 1987) (no outrageous conduct where government approached and offered $200,000 to a college student to secure a supply of cocaine for a government agent and threatened him in the course of the investigation as a bargaining tactic); *United States* v. *Mahon,* 2010 WL 4038763, at *8-*10 (no outrageous conduct where "the government deliberately chose to present [d]efendants with a younger, sexually attractive female to win their confidence," and she "knew that her attractiveness was a part of the plan to secure admissions, sought to appear friendly and attractive to [d]efendants, wore arguably immodest clothing around [d]efendants, mailed [d]efendants sexually suggestive photographs, and engaged in sexual banter with [d]efendants").

Accordingly, routine claims of manipulation have no traction. For example, this Court previously explained how the Second Circuit rejected such a claim in the child pornography case of *United States* v. *Chin*:

> After defendant Chin responded to a mailing that landed him on the Government's target list, a postal inspector struck up a friendly correspondence with Chin, which led to his sending child pornography through the mails. His entrapment defense having failed at trial, defendant argued on appeal that the postal inspector had employed "psychological manipulation" in the course of his investigation, which was "as evil as beatings and physical torture" and warranted dismissal of the indictment. The Court of Appeals was not convinced . . . .

Opinion Denying Defense Pretrial Motions at 4 (May 18, 2010) ("Pretrial Op.") (quoting 934 F.2d at 398). Although the *Chin* court agreed that "extreme physical coercion," like the conduct in *Rochin*,[7] could shock the conscience, "[t]he type of psychological manipulation at issue here — in particular, [the postal inspector's] efforts to win Chin's friendship and trust through the creation of a phony pen pal relationship — poses far less serious concerns." 934 F.2d at 399. Physical coercion like that in *Rochin* is unconstitutional because "it causes injuries that are brutal and . . . offensive to human dignity. . . . By contrast, the 'injury' inflicted [in *Chin*] was limited to the feelings of betrayal Chin experienced when he realized that his sense of security in conspiring to violate the law was unfounded." *Id.* (internal quotation marks omitted). Continuing, the Court of Appeals explained that "[t]his sort of harm can hardly be said to 'shock the conscience' as would physical coercion or torture." *Id.*

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[7] In *Rochin* v. *California*, deputy sheriffs had some information that a suspect was selling narcotics, and entered the open door of his house and then forced open the door to Rochin's room on the second floor. 342 U.S. at 166. The sheriffs then tried to forcibly extract capsules that the suspect had swallowed, but could not do so. Then, the sheriffs handcuffed the suspect, took him to the hospital, and one sheriff directed a doctor to force "an emetic solution through a tube into Rochin's stomach against his will. This 'stomach pumping' produced vomiting." *Id.* at 166. The vomited matter contained two capsules that proved to contain morphine. The Court reversed Rochin's conviction, finding a violation of the Due Process Clause.

To be sure, the CI's effective role playing as a Jaish-e-Mohammed terrorist recruiter and financier could conceivably have led the defendants to trust him, to express their opinions more openly, and even to yield to impulses they might have restrained in more polite company, but the CI's "many months of badgering Cromitie into committing jihad (as defendants put it) can hardly be equated with the six days of intense interrogation that was held to be psychologically coercive in *Watts*." Pretrial Op. at 10 (referring to *Watts* v. *Indiana*, 338 U.S. at 53).

Whether the defendants would have committed the offense without the CI's religious manipulation may have been relevant to the entrapment defense, but it has no part in an outrageous government misconduct analysis. *See Chin*, 934 F.2d at 398 ("[D]efendant's right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law."). The defense's argument — which, as noted above, are often entrapment arguments that are now reemerging "cloaked as a due process defense" — relate to how the Government's conduct in this case supposedly led Cromitie and the other defendants to commit the crime. *Id.* at 398. But the inquiry must rather be whether the governmental conduct complained of — "standing alone"— is so offensive that it shocks the conscience. *See id.*

The defense has suggested that the CI's conduct is analogous to the alleged conduct in *Cuervelo*, where the defendant was accused of having sexual relations with an undercover agent (as distinguished, the court noted, from an informant) on 15 occasions. *See* 949 F.2d at 567. But *Cuervelo* did *not* decide that such conduct shocked the conscience; it remanded for a hearing, at which the defendant was required to show "at a minimum" among other things, "that the government consciously set out to use sex as a weapon in its investigatory arsenal, or acquiesced

in such conduct for its own purposes upon learning that such a relationship existed," and that the undercover agent had "initiated a sexual relationship, or allowed it to continue to exist, to achieve governmental ends." *Id.*

And even if *Cuervelo* is read to hold that the use of sexual intercourse by a law enforcement agent as a law enforcement tool can be conscience-shocking conduct, that squares well within other cases involving violations of bodily integrity, like *Rochin,* because of the physical component to sexual intercourse. But sexual intercourse is clearly more invasive than the CI's *agreement* with Cromitie that he, too, hated Jews and the United States, in order to gauge Cromitie's reaction. Even if the CI used an emotional subject like religion to stoke Cromitie's preexisting rage, and even if he did it to manipulate Cromitie, that conduct alone simply falls far short of a Due Process violation, because it is irrelevant to this analysis whether Cromitie and the defendants would have committed the offense without that manipulation. Instead, "[t]he outrageousness of the government's conduct must be viewed 'standing alone' and without regard to the defendant's criminal disposition." *Cuervelo*, 949 F.2d at 565 (citing *Chin*, 934 F.2d at 398). Since the only conceivable injury to Cromitie and the other defendants from that conduct is the kind the Second Circuit has dismissed — "feelings of betrayal . . . when [they] realized that [their] sense of security in conspiring to violate the law was unfounded," *Chin*, 934 F.2d at 399 — the defendants' motion should be denied.

3. No Post-Trial Hearing Is Required

The defendants ask for a post-trial evidentiary hearing on the motion. JC Mot. at 27. But they present no basis for a hearing. They cite no witness testimony or evidence that they would need to bolster their motion. Indeed, after a two-month trial in which the central players for the

Government — the CI and Agent Fuller — were cross-examined at length, and in which both the Government and the defense had an opportunity to play the numerous recordings, a very comprehensive factual record has been developed, obviating any need for an additional hearing. Only in very rare cases, where the allegations of government misconduct are shocking, do the allegations "warrant a hearing so that the precise facts may be ascertained." *Cuervelo*, 949 F.2d at 567 (granting a hearing where the claim was that a federal agent engaged in outrageous misconduct involving sexual relations with the defendant).

Citing *Cuervelo*, the defendants contend that an evidentiary hearing is required to determine if the government explicitly instructed the CI "to invoke religion as a tool for getting Cromitie to commit criminal acts." JC Mot. at 21 n.12. The request should be denied for two reasons. First, in *Cuervelo*, there was a hotly disputed fact at the center of the question of the government's conduct — *i.e.*, whether the undercover agent and the defendant had actually engaged in sexual relations (he said never; she said they had on at least 15 occasions). *Cuervelo*, 949 F.2d at 561, 563. The defendants identify no central factual question here that has yet to be fleshed out. Second, the allegations of outrageous government misconduct in *Cuervelo* were, simply put, much more serious than those alleged here. The Second Circuit has emphasized that "nothing in *Cuervelo* requires a District Court to conduct a hearing every time a defendant alleges outrageous government conduct." *LaPorta*, 46 F.3d at 160. There is no basis to do so here.

Accordingly, the Government respectfully submits that the Court should deny the defendants' motion to dismiss, without a hearing.