

JUDGE ROBERT J. BRYAN

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	No. CR16-5110RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	DISMISS INDICTMENT
)	
DAVID TIPPENS,	)	<i>Evidentiary Hearing Requested</i>
	)	<i>Oral Argument Requested</i>
Defendant.	)	NOTED: September 2, 2016
)	

UNITED STATES OF AMERICA,	)	No. CR15-387RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	DISMISS INDICTMENT
)	
GERALD LESAN,	)	<i>Evidentiary Hearing Requested</i>
	)	<i>Oral Argument Requested</i>
Defendant.	)	NOTED: September 2, 2016
)	

UNITED STATES OF AMERICA,	)	No. CR15-274RJB
)	
Plaintiff,	)	MOTION AND MEMORANDUM IN
	)	SUPPORT OF MOTION TO
v.	)	DISMISS INDICTMENT
)	
BRUCE LORENTE,	)	<i>Evidentiary Hearing Requested</i>
	)	<i>Oral Argument Requested</i>
Defendant.	)	NOTED: September 2, 2016
)	

1 **I. MOTION & INTRODUCTION**

2 David Tippens, through his attorney Colin Fieman; Gerald Lesan, through his
3 attorney Robert Goldsmith; and Bruce Lorente, through his attorney Mohammad
4 Hamoudi, all respectfully move the Court pursuant to Fed. R. Crim. R. 12(a)(3) and the
5 Court’s supervisory powers for an order dismissing the indictment in this case, with
6 prejudice, based on outrageous government conduct.

7 From February 19, 2015, through March 4, 2015, the United States Government
8 was the world’s largest distributor of child pornography on the Tor network. As part of
9 the unfortunately named “Operation Pacifier,” the Government actively aided and
10 abetted more than 100,000 users in posting, viewing, and sharing illegal pictures and
11 videos. The FBI itself distributed as many as 1,000,000 pictures and videos of child
12 abuse, causing harms greater than that of any distribution defendant who has ever been
13 prosecuted in this district.

14 This operation is impossible to reconcile with the Government’s long-established
15 position that each and every viewing of child pornography re-victimizes the abused
16 child. Ironically, the prosecution of approximately 186 cases nationwide as a result of
17 “Operation Pacifier” pales in comparison to the hundreds of thousands of re-
18 victimizations that the FBI has enabled. Under Supreme Court precedent, the Court can
19 and should dismiss the indictment in this case.

20 **II. STATEMENT OF FACTS**

21 The facts relating to this case are set forth in detail in the defendants’
22 accompanying Motion to Suppress. The relevant facts for purposes of this dismissal
23 motion begin with the FBI’s assumption of direct and exclusive control of the Playpen
24 website on February 19, 2015. FBI agents briefly shut down the site while they moved
25 it to a government server in Virginia, then re-launched, maintained and operated it until
26 at least March 4, 2015.

1 According to the discovery, approximately 100,000 users logged in to the site
2 during that time (about 50,000 per week). *See* exh. A (*United States v. Michaud*,
3 CR15-05351RJB, dkt. 109 (Govt. Response to Order Compelling Discovery)) at 4.
4 There were approximately 1,000,000 total logins during the same time period (with
5 some users logging in multiple times). *Id.*

6 Prior to the FBI's operation of the site, the average number of weekly visitors
7 had been just 11,000. *See* Defendants' Motion to Suppress, exh. A. at ¶ 19. Despite
8 several requests for an explanation, the Government has refused to disclose how it
9 increased the traffic to the FBI's site fivefold.

10 The FBI's operation of the site included facilitating the uploading and
11 redistribution of child pornography onto the Internet. From a technical standpoint,
12 these actions require the approval of, and substantial technical assistance from, whoever
13 is administering a site that hosts pictures and videos.

14 The Government has not provided the exact distribution numbers involved in
15 this enterprise. Instead, the Government has acknowledged that it distributed a
16 minimum of 22,000 pictures, videos and additional links to child pornography. *See*
17 exh. A at 2-3. However, the Government has also maintained that it is unable to
18 account for all of the content that was posted on its site. For example, according to the
19 Government, most of the content was available only for a "limited time" and was not
20 tracked by the FBI, and many of the links on the site contained multiple images and
21 videos. *Id.* at 3.

22 Given the limited information that has been disclosed so far, a reasonable
23 estimate is that the FBI actually distributed somewhere in the range of 1,000,000
24 pictures and videos. As noted, there was a total of approximately 1,000,000 logins to
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1 the FBI's site (with some of the 100,000 users logging in multiple times).¹ Assuming
2 that the site was dedicated to child pornography as the Government has claimed, then it
3 would be fair to assume that visitors downloaded or posted at least one picture or video
4 during their visits. This results in a conservative estimate that the FBI distributed
5 somewhere in the range of 1,000,000 images of child abuse.²

6 Another particular disturbing detail that has emerged from the discovery is that
7 the FBI also maintained a "How To" advice section on how to go about sexually
8 abusing children and avoid detection, as part of an effort to enhance Playpen's
9 credibility as an illicit site. New postings were added to this section throughout the
10 time the FBI was operating the site.

11 The Government has also conceded that, unlike a typical "reverse sting"
12 operation, law enforcement agents made no attempt to control or curtail the
13 redistribution of any of the Playpen contraband. This is true despite the fact that the
14 child pornography on the site was located in specific subdirectories and the FBI had the
15 technical means of allowing visitors to access those parts of the site while blocking
16 them from downloading any of the pictures found there.

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21 ¹ "From the inception of the website in August of 2014 until March 4, 2015, site data
22 indicate that its more than 100,000 users aggregately spent approximately seven million
23 hours logged into the site." Exh. A at 4.

24 ² As set forth in the Defendants' Motion to Suppress, the defendants believe that the
25 FBI misrepresented the fact that Playpen "advertised" itself a child pornography site.
26 However, the Government cannot have it both ways by maintaining that Playpen was a
massive distributor of child pornography for purposes of obtaining search warrants, but
then seek to minimize the FBI's distribution of pornography from the site in response to
discovery demands and this motion.

1 **III. ARGUMENT**

2 **A. THE GOVERNMENT’S GLOBAL DISTRIBUTION OF CHILD**
3 **PORNOGRAPHY IS OUTRAGEOUS CONDUCT THAT**
4 **WARRANTS DISMISSAL OF THE INDICTMENT.**

5 **1. The Law Permits Dismissal of the Indictment in Cases**
6 **Where the Government Acts in an Outrageous Fashion.**

7 The remedy the defense is seeking is extraordinary, but only because the
8 Government’s conduct in this case is unprecedented and would appall the average
9 citizen. Criminal investigations should seek to contain and mitigate the harm caused by
10 illegal activity, not perpetuate that harm and (according to the Government’s own oft-
11 repeated statements) “re-victimize” the children depicted in the images that it
12 distributed.

13 The Supreme Court has long held that the federal judiciary has the power to
14 evaluate a criminal case’s entire proceedings to determine whether they “offend those
15 canons of decency and fairness which express the notions of justice of English-speaking
16 peoples even toward those charged with the most heinous offenses.” *Rochin v.*
17 *California*, 342 U.S. 165, 169 (1952) (quoting *Malinski v. People of State of New York*,
18 324 U.S. 401, 416-17 (1945)). When the Government violates these standards of
19 “decency and fairness” due process concerns are implicated. *See id.* Thus government
20 conduct that “shocks the conscience” may constitute a due process violation, requiring
21 dismissal. *Rochin* at 172.

22 Government conduct that is so outrageous that it offends our shared canons of
23 decency to a degree warranting dismissal of an indictment is rare, and the standard for
24 dismissal on this ground is “extremely high.” *United States v. Smith*, 924 F.2d 889, 897
25 (9th Cir. 1991). An indictment can be dismissed only where the Government’s conduct
26 is “so grossly shocking and so outrageous as to violate the universal sense of justice.”
United States v. Stinson, 647 F.3d 1196, 1209 (9th Cir. 2011) (quoting *United States v.*

1 *Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991)); *accord*, *United States v. Pedrin*, 797 F.3d
2 792, 795–96 (9th Cir. 2015) (quoting *Stinson*). The facts surrounding “Operation
3 Pacifier” meet that standard.

4 **2. The Government has Long Argued that Possession or**
5 **Distribution of Child Pornography is a Heinous Crime.**

6 The Court should find that the Government’s conduct during the investigation of
7 this case warrants dismissal. While other potential remedies have been presented to the
8 Court through the defendants’ Motions to Suppress and Exclude, an order merely
9 excluding evidence would not adequately convey the level of disapproval with which
10 the FBI’s actions should be met.

11 The Court need only consider some of the Government’s own pronouncements
12 about the harm caused by the proliferation of child pornography to fully realize how
13 troubling “Operation Pacifier” is. While the defense does not necessarily agree with
14 some of the Government’s more extreme statements about the impact of downloading
15 or distributing illicit pictures, it is impossible to reconcile the Playpen operation with
16 the Government’s own view of the harm caused by the distribution of child
17 pornography.

18 For example, the Department of Justice’s website states the following:

19 [V]ictims of child pornography suffer not just from the sexual abuse
20 inflicted upon them to produce child pornography, but also from knowing
21 that their images can be traded and viewed by others worldwide. *Once an*
22 *image is on the Internet, it is irretrievable and can continue to circulate*
23 *forever*. The permanent record of a child’s sexual abuse can alter his or
her live (*sic*) forever. Many victims of child pornography suffer from
feelings of helplessness, fear, humiliation, and lack of control given that
their images are available for others to view in perpetuity.³

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25 ³ Available at: <http://www.justice.gov/criminal-ceos/child-pornography>. This statement
26 appears as part of the mission statement for the Child Exploitation and Obscenity
Section (CEOS), which apparently approved and supervised the Playpen operation.

1 (Emphasis added). DOJ also routinely emphasizes in its press releases that possessing
2 and circulating pornographic images re-victimizes the children depicted in them. *See,*
3 *e.g.*, DOJ Press Release, *Ellettsville Man Charged with Production of Child*
4 *Pornography*, April 15, 2015 (“Producing and distributing child pornography re-
5 victimizes our children every time it is passed from one person to another.”)⁴

6 Indeed, the Government has expressed the view that even looking at an image of
7 child pornography re-victimizes children. *See, e.g.*, FBI.gov, *Defendant Sentenced for*
8 *Possession of Child Pornography*, November 5, 2013 (justifying a 108 month sentence
9 for a U.S. Air Force airman who possessed child pornography on the ground that “he
10 caused the young children in these disgusting images to be re-victimized every time he
11 looked at the pictures.”)⁵ More recently, *see* Dept. of Justice, Federal and State
12 Authorities Charge 11 Men with Trading Child Pornography (Apr. 6, 2016) (quoting
13 FBI supervisor stating “[t]he children depicted in these images that were illegally
14 shared are victimized time and time again.”)⁶

15 The harm caused by simply possessing, let alone distributing, illegal pictures is
16 one that is also routinely emphasized by the Government. In fact, the Supreme Court
17 has fully embraced that logic, explaining that circulating child pornography “renew[s]
18 the victim’s trauma” and makes it difficult for victims to recover from abuse. *Paroline*
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20 ⁴ Available at: [http://www.justice.gov/usao-sdin/pr/ellettsville-man-charged-production-](http://www.justice.gov/usao-sdin/pr/ellettsville-man-charged-production-child-pornography)
21 [child-pornography](http://www.justice.gov/usao-sdin/pr/ellettsville-man-charged-production-child-pornography).

22 ⁵ Available at: [https://www.fbi.gov/atlanta/press-releases/2013/defendant-sentenced-for-](https://www.fbi.gov/atlanta/press-releases/2013/defendant-sentenced-for-possession-of-child-pornography)
23 [possession-of-child-pornography](https://www.fbi.gov/atlanta/press-releases/2013/defendant-sentenced-for-possession-of-child-pornography). It should be noted here that several studies have
24 determined that most child pornography possession and distribution offenders have no
25 history of molesting minors and pose no significant future risk of doing so in the future.
See, e.g., Endrass et al, *The Consumption of Internet Child Pornography and Violent*
Sex Offending, BMC Psychiatry (2009).

26 ⁶ Available at [https://www.justice.gov/usao-cdca/pr/federal-and-state-authorities-](https://www.justice.gov/usao-cdca/pr/federal-and-state-authorities-charge-11-mentrading-child-pornography-through-use-peer)
[charge-11-mentrading-child-pornography-through-use-peer](https://www.justice.gov/usao-cdca/pr/federal-and-state-authorities-charge-11-mentrading-child-pornography-through-use-peer).

1 *v. United States*, 134 S. Ct. 1710, 1717 (2014) (victim’s suffering was “compounded by
2 the distribution of images of her abuser’s horrific acts, which meant the wrongs
3 inflicted upon her were in effect repeated; for she knew her humiliation and hurt were
4 and would be renewed into the future as an ever-increasing number of wrongdoers
5 witnessed the crimes committed against her”); *see also, e.g., United States v. Gilliam*,
6 CR13-5028RJB, Dkt. 48 (Govt. Sentencing Memo) at 6 (“Every participant in the chain
7 – producer, distributor, consumer – sustains the market for these images, and each
8 victim, whether identified or not, suffers not only when an image is created, but each
9 and every time an image is viewed”).

10 Indeed, in recent pleadings, the Government has insisted that the people who run
11 child pornography sites are more culpable than people who view the pornography.
12 According to the Government itself, site operators make the pornography available to
13 far more people than average picture collectors and they “directly participate” in an
14 illegal marketplace.⁷

15 The Government has also emphasized that maintaining a child pornography
16 website “encourages” the production and circulation of new pornography. In this case,
17 the FBI has apparently made no effort to determine if the pictures and videos posted on
18 Playpen while under its control were “known” images that had been previously
19 circulated or if it was aiding and encouraging the production and distribution of new
20 images. The FBI’s conduct is all the more troubling in light of the fact that it somehow
21 managed to increase the number of visitors to Playpen while it was under Government
22 control from an average of 11,000 weekly visitors to approximately 50,000 per week.

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26 ⁷ A copy of the sealed sentencing memo in which these points appear can be made
available to the Court upon request.

3. The Ends of this Investigation Cannot Justify the Means.

The issue here is how, while decrying the long-term and widespread consequences to victims of allowing someone to even view illicit images, the Government can justify its massive distribution of child pornography. It is no answer that the FBI did this as part of an effort to apprehend people. That end does not (and was never going to) justify the means. This is simply because the FBI could not investigate, much less prosecute, 100,000 or so Playpen visitors in a timely fashion. Predictably, the Government ended up spreading far more child pornography, and enabled many more crimes, than it could ever investigate and prosecute.

Moreover, as a practical matter, the FBI had other ways of targeting Playpen visitors who wanted to access illegal content. For example, in other investigations, the FBI has monitored child pornography sites and posted links to pictures or videos with explicit titles. When a visitor to the forum clicked on a link, a “Network Investigative Technique” could seize identifying data about the visitor, but the link itself would be blocked or an “error” message would appear.

Alternatively, investigators can use a “spoofing” system, where visitors to a target site are secretly redirected to a server with a facsimile of the site, minus any content or links that investigators do not want accessible or downloadable. The Government has also used child erotica or “virtual” child pornography to lure targets in other cases, which would address any concerns agents might have had about “tipping off” suspects if sexual content was removed from the site entirely. *See* Corey Young, *FBI Allowed for More Victimization by Permitting a Child Pornography Website*, The New York Times (January 27, 2016) (discussing some of the investigatory alternatives and criticizing the “immoral and inexcusable” Playpen operation).⁸

⁸ Available at: <http://www.nytimes.com/roomfordebate/2016/01/27/the-ethics-of-a-child-pornography-sting/fbi-allowed-for-more-victimization-by-permitting-a-child-pornography-website>.

1 Worse yet, the Government maintains that it was authorized to search the
2 personal computers of anyone who merely visited Playpen’s home page. If that is true,
3 there was no investigatory need for the FBI to allow visitors to post new child
4 pornography on the site or download the pornography that was available in specific
5 subdirectories.

6 While law enforcement agents often use contraband, like drugs or guns, as part
7 of undercover “buys” or to execute a sting operation, they only do so when necessary.
8 They also make every effort to control, track and recover the contraband they are using.
9 Here, by contrast, what the Government did is comparable to flooding a neighborhood
10 with heroin in the hope of snaring an assortment of low-level drug users.

11 Given these facts, Operation Pacifier bears a striking resemblance to the “Fast
12 and Furious” scandal. There, federal agents allowed guns to pass into the hands of gun
13 smugglers and perpetuated the very crimes they were supposed to be preventing. *See*
14 Dept. of Justice, Office of the Inspector General, *A Review of the ATF’s Operation*
15 *Fast and Furious and Related Matters* (Sept. 2012) (criticizing DOJ’s handling of “gun
16 walk” investigations that resulted in the uncontrolled distribution of firearms). As one
17 senior agent told Congress at the time, “What the persons approving this debacle failed
18 to realize is that the end does not justify the means.” *See* Katherine Eban, *The Truth*
19 *About the Fast and Furious Scandal*, *Fortune*, June 27, 2012 (detailing how these type
20 of investigations require senior approval and some of the disciplinary consequences that
21 flowed from the debacle).

22 That lesson appears to have been lost on the FBI, even as it seeks to vastly
23 expand its power to investigate cybercrimes. Absent at least additional discovery and a
24 full evidentiary hearing on this motion, the Government may well any avoid public
25 accountability for its actions.

1 **4. Federal Law Explicitly Forbids the Government from Distributing**
2 **Child Pornography.**

3 The Government's conduct was not just morally reprehensible, it was flatly
4 illegal. There is no statute that allows the Government to distribute child pornography,
5 regardless of the circumstances. In addition, multiple statutes govern how law
6 enforcement is permitted to interact with such materials. None allow for its
7 distribution, even as part of a misguided "reverse sting."

8 For instance, 18 U.S.C. § 3509(m) expressly requires that "any property that
9 constitutes child pornography . . . shall remain in the care, custody and control of the
10 Government" or a court. As a rule, defense counsel cannot independently possess such
11 images, even subject to a protective order. Attorneys have even been charged and sued
12 civilly for making fake child pornography as trial exhibits. *See Pat Murphy, Court:*
13 *Lawyer must play \$300k for child porn trial exhibits*, Detroit Legal News (Nov. 22,
14 2012).⁹

15 Other statutes addressing the Government's duties with regard to child
16 pornography include 18 U.S.C. § 1466A(e), 18 U.S.C. § 2252(c), 18 U.S.C. § 2252A(c)
17 and 18 U.S.C. § 2258C(d)-(e). None of these provisions permit the Government to
18 publicly distribute that material. And given that Playpen was open to anyone all over
19 the world, the Government likely violated dozens of international child pornography
20 laws as well. *See, e.g.,* R.S.C. 163.1(3) (Canadian law barring distribution of child
21 pornography); Protection of Children Act, 1978, 1(1)(b) (same, United Kingdom).

22 **5. The Government Also Violated its own "Investigative Principles."**

23 Online investigations are especially sensitive and problematic because agents
24 have no ability to control the redistribution of pictures, malware or other contraband
25 once they are introduced to the Internet. As a result, the Department of Justice (DOJ)

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⁹ Available at <http://www.legalnews.com/detroit/1369660>.

1 itself cautions its attorneys and agents about the harms that can arise from online
2 investigations and requires special approval for operating any type of “online
3 undercover facility.” DOJ, *Online Investigative Principles for Federal Law*
4 *Enforcement Agents* (available at: [https://info.publicintelligence.net/DoJ-](https://info.publicintelligence.net/DoJ-OnlineInvestigations.pdf)
5 [OnlineInvestigations.pdf](https://info.publicintelligence.net/DoJ-OnlineInvestigations.pdf)). DOJ’s investigative principles emphasize that law
6 enforcement agencies must consider several sensitive issues when determining whether
7 to approve the establishment of an online undercover facility:

8 First, online undercover facilities that offer the public access to
9 information or computer programs that may be used for illegal or harmful
10 purposes may have greater capacity than similar physical-world
11 undercover entities to cause unintended harm to unknown third parties.
Because digital information can be easily copied and communicated, it is difficult to control distribution in an online operation and so limit the harm that may arise from the operation.

12 *Id.* at 44 (p. 57 of the PDF) (emphasis added).

13 The statement of principles goes on to caution that the use of online undercover
14 facilities raises complex legal and policy issues, “especially if law enforcement agents
15 seek to use the system administrator’s powers for criminal investigative purposes.”
16 These include “unique and sensitive policy issues involving privacy, international
17 sovereignty, and unintended harm to unknown third parties.” *Id.* at x (p. 11 of the
18 PDF).

19 Because of these concerns, DOJ requires any investigation involving an online
20 undercover facility to undergo a special review and approval process. *Id.* The
21 Government has refused to disclose its review and approval records in this case.

22 DOJ’s guidelines also compares online “sting” operations with other operations
23 employing tools of criminality. Using an example of selling “cloned phones,” DOJ
24 pointed out that agents “can prevent or minimize the potential for harm caused by their
25 activities by, for example, arresting targets before they can use the phones or requesting
26 the cellular carrier to block or limit access by these particular phones to the cellular

1 network.” *Id.* at 44 (p. 57 of the PDF). Even when that cannot occur, the harm is
2 constrained by the fact that “a single ‘clone phone’ can only be used by one individual
3 at a time and cannot be duplicated and redistributed to multiple users.” *Id.*

4 Similar limits, however, are difficult or impossible to impose on online
5 undercover operations, as DOJ cautions in its policy statement:

6 [T]he online facility is likely to be automated, making it difficult for the
7 agents to limit who obtains the tools or the damage that the tools end up
8 causing to innocent third parties. Further, unlike the clone phone, the
9 hacker tools can be *endlessly replicated and distributed to others in a
10 manner that law enforcement agents cannot easily control.*

11 *Id.* at 45 (p. 58 of PDF) (emphasis added).

12 In this case, the FBI took no measures whatsoever to control the replication and
13 distribution of pictures and videos from its undercover website. It also appears from the
14 available discovery that the FBI did not identify or make timely reports to the National
15 Center for Missing and Exploited Children about any new images of child abuse that
16 were introduced through Playpen.

17 **6. The Government has Refused to Meet its Statutory Restitution 18 Obligations to Victims.**

19 Finally, the Government has so far denied that it has any responsibility to the
20 victims depicted in the pictures that it has distributed. Its own mission statements
21 explain that it harmed the lives and mental health of thousands of victims by
22 distributing child pornography. Accordingly, like any entity that distributes or
23 possesses child pornography, it has an absolute statutory obligation under 18 U.S.C. §
24 2255 to make restitution to known victims. An evidentiary hearing on this motion will
25 help provide victims with the facts and notice that will allow them to seek restitution.

26 **IV. CONCLUSION**

For the reasons stated above, the Court should schedule an evidentiary hearing
to determine the extent of the harm caused by the Government’s investigatory tactics

1 and dismiss the indictment if the Court finds that the governmental conduct leading to
2 the charges against the defendants cannot be reconciled with fundamental expectations
3 of decency and fairness.

4 DATED this 22nd day of August, 2016.

5 s/ *Colin Fieman*
6 Attorney for David Tippens

7
8 s/ *Robert Goldsmith*
9 Attorney for Gerald Lesan

10 s/ *Mohammad Hamoudi*
11 Attorney for Bruce Lorente

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered with the CM/ECF system.

s/ Amy Strickling, Paralegal
Federal Public Defender Office

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Plaintiff,)	[PROPOSED ORDER] GRANTING
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Defendant.)	

1 The Defendants' having brought a Motion to Dismiss Indictment, and the Court
2 having considered the arguments, memoranda, and evidence presented both in support
3 of and in opposition to the motion, now, therefore,

4 ORDERS that the Indictment be DISMISSED with prejudice.

5 DONE this _____ day of September, 2016.

8 _____
JUDGE ROBERT J. BRYAN
9 UNITED STATES DISTRICT JUDGE

10 Presented by:

11 s/ Colin Fieman
12 Colin Fieman
13 Attorney for David Tippens

14 s/ Robert Goldsmith
15 Robert Goldsmith
16 Attorney for Gerald Lesan

17 s/ Mohammad Hamoudi
18 Mohammad Hamoudi
19 Attorney for Bruce Lorente