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2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF CALIFORNIA

4 JUAN ROSALES,
5 Movant-Defendant,
6 v.
7 UNITED STATES OF AMERICA,
8 Respondent-Plaintiff.

Civ. Case No.: 15cv802 BTM
Crim. Case No. 09cr3603 BTM

**ORDER DENYING § 2255
MOTION AND DENYING A
CERTIFICATE OF
APPEALABILITY**

9
10 Defendant Juan Rosales has filed a motion to vacate, set aside, or correct
11 sentence under 28 U.S.C. § 2255. For the reasons discussed below, Defendant's
12 motion is **DENIED**.

13
14 **I. FACTUAL BACKGROUND**

15 This criminal case arises out of a reverse-sting operation involving a fictional
16 robbery of a narcotics stash house containing 25-30 kilograms of cocaine and a
17 fictional kidnaping of the operator of the stash house.

18 According to the Statement of Facts in support of the Complaint filed against
19 Rosales and co-defendants Miguel Angel Guzman, Robert Garcia, and Jose
20 Rodriguez, on or about March 25, 2009, Special Agent Jason R. Weber with the

1 Bureau of Alcohol, Tobacco, Firearms, and Explosives, learned from a Confidential
2 Informant (“CI”) that Guzman operated a group of individuals that actively engaged
3 in armed, home-invasion style robberies of narcotics “stash houses.” Guzman and
4 his crew would then traffic the narcotics stolen from these stash houses.

5 On or about May 5, 2009, Guzman offered to sell the CI and SDPD Detective
6 Raul Delgadillo, who was undercover and introduced to Guzman as the CI’s
7 cousin, a 12-gauge shotgun. During this conversation, Guzman informed the CI
8 that he, Rosales, and an individual identified as Alfredo Cabrera, were en route to
9 conduct a home invasion robbery of a narcotics stash house and asked the CI if
10 the CI could come along to serve as a “look-out.” Reference was also made to the
11 law-enforcement style badges that Guzman, Rosales and Cabrera had with them
12 for use during the home invasion robbery. The CI declined the offer to serve as
13 lookout.

14 On or about June 15, 2009, the CI and Det. Delgadillo met with Guzman to
15 purchase a firearm. At this meeting, Delgadillo asked Guzman about the law
16 enforcement badges and explained that he would need one to conduct a home-
17 invasion style robbery of a narcotics “stash house.” Guzman then told Delgadillo
18 that there was no need for him to “get his hands dirty” and that he and his crew
19 would be willing to take care of any robbery Delgadillo needed him to handle.

20 On or about August 20, 2009, the CI met with Guzman and informed him that

1 Delgadillo had received information that an individual in the San Diego area owed
2 a substantial debt to drug trafficking organizations in Mexico. The CI explained
3 that this individual operated a narcotics “stash house” that contained at least 25-
4 30 kilograms of cocaine and that Delgadillo had received orders to “rip” this stash
5 house. The CI asked Guzman if he would be interested in putting together a crew
6 to conduct the robbery. Guzman expressed interest and asked the CI if he wanted
7 the person kidnaped, taken to Mexico, or killed. The CI responded that the details
8 would have to be worked out with Delgadillo. Guzman reiterated his willingness to
9 conduct the home invasion robbery and said that he would be willing to have dinner
10 with Delgadillo the following week to further discuss the home invasion.

11 On September 3, 2009, Guzman, the CI, and Delgadillo met for dinner.
12 Delgadillo explained to Guzman that there would be at least three armed
13 individuals guarding the stash house. When Delgadillo asked Guzman if he was
14 still willing to go forward, Guzman stated, “This is what I do; this is how I pay my
15 bills.” Guzman told Delgadillo that he would assemble a crew to conduct the home
16 invasion that included two family members. Guzman discussed how Delgadillo
17 should alert him on his cell phone upon gaining access to the stash house.
18 Guzman also suggested that each member of his crew get one or two kilograms
19 of cocaine each and that he and Delgadillo split the remaining cocaine 50/50.

20 Guzman asked Delgadillo if the individual who controlled the stash house

1 was to be kidnapped as well. Delgadillo said that he did not know yet and was
2 awaiting further instructions and orders from Mexico. When Delgadillo asked
3 Guzman if his crew would be willing able to kidnap the individual as well, Guzman
4 stated that his crew would kidnap the individual if Delgadillo wanted them to, but
5 that Delgadillo would have to provide the crew a vehicle to transport the body in.
6 During the course of the meeting, Delgadillo reiterated to Guzman that the
7 individuals at the stash house would be armed. Delgadillo told Guzman that if he
8 did not wish to go forward with the robbery, he did not have to. Guzman repeatedly
9 responded with words to the effect of "this is what I do," and expressed his
10 willingness to plan and orchestrate the home invasion robbery.

11 On or about September 8, 2009, Delgadillo called Guzman and informed him
12 that he had received orders that the kidnaping was to be conducted in addition to
13 the robbery. Guzman again expressed willingness to go forward with the plan.
14 Delgadillo told Guzman he would get in contact with him and arrange for a meeting
15 at a hotel the night before the home invasion was to take place.

16 On or about September 16, 2009, Delgadillo and the CI met Guzman at a
17 hotel in Chula Vista. Guzman was accompanied by Rosales and Garcia. Guzman
18 stated that Rosales would be in charge of the actual home invasion and that
19 Rosales, Garcia, and two other individuals, all of whom would be armed, would be
20 conducting the home invasion. Delgadillo stated that there would be a minimum

1 of two armed guards plus the “boss” inside the house and told Guzman, Rosales,
2 and Garcia that if they were not willing to go forward with the plan, then they should
3 let Delgadillo know. All three men confirmed that they were willing to conduct the
4 robbery.

5 Guzman again instructed Delgadillo how to alert him on his cell phone after
6 he had gained entry into the stash house and determined whether narcotics were
7 present. Guzman stated that if the narcotics were present, Rosales, Garcia, and
8 the two other crew members would enter the house and tell everyone to lie on the
9 ground. Rosales stated that he would be the only one giving instructions.
10 Everyone, including Delgadillo, would be restrained with zip ties, then the “boss”
11 was to be led out of the house and thrown in the waiting vehicle. Rosales stated
12 that if the armed guards did not comply with the given instructions, they would
13 either be shot or beaten until they complied. Rosales asked Guzman what they
14 would do with Delgadillo. Guzman responded that they would take Delgadillo out
15 of the stash house and throw him in the vehicle as well so it would not look like he
16 was involved in the robbery. Delgadillo would then be untied once he was secure
17 in the vehicle.

18 Delgadillo instructed the men to meet him in the morning at a 7-11 located in
19 National City, at which time he would lead the crew to the vehicle he was providing
20 for them. Delgadillo was informed that the vehicle, with the kidnap victim, would

1 then be returned to this location following the completion of the home invasion
2 robbery. Delgadillo told the men that the cocaine they planned to “rip” was
3 packaged in a very distinct way and that they would have to re-package it prior to
4 selling it. The men indicated that they were familiar with how to repackage drugs.

5 On September 17, 2009, Guzman and Garcia, in one car, and Rosales, in
6 another, arrived at the designated 7-11. Guzman then left to pick up Rodriguez.
7 While waiting for Guzman to return, Delgadillo was engaged in conversation with
8 Rosales and Garcia and learned that they had an SKS-type rifle with a pistol grip
9 stock that they planned to use to conduct the home invasion. Once Guzman and
10 Rodriguez returned to the 7-11, Delgadillo went over the final plans for the home
11 invasion robbery with the men.

12 Delgadillo led Rosales and Garcia to the location of the “drop vehicle.” Upon
13 arrival, Garcia removed a large garment-type bag from the car he and Rosales
14 arrived in and put it in the trunk of the “drop vehicle.” At this point, Delgadillo gave
15 a pre-determined signal to an arrest team and Rosales and Garcia were taken into
16 custody. Guzman and Rodriguez were taken into custody shortly afterwards. The
17 bag placed in the “drop vehicle” contained, among other things, one SKS-type rifle,
18 duct tape, and ski masks. In addition, a .38 Spl caliber revolver was located under
19 the “drop vehicle.”

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1 **II. PROCEDURAL HISTORY**

2 On September 18, 2009, a complaint was filed against Guzman, Rosales,
3 Garcia, and Rodriguez. The complaint alleged that Defendants conspired to
4 knowingly and intentionally possess with intent to distribute a controlled substance,
5 to wit, 5 kilograms and more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and
6 846.

7 On September 30, 2009, a grand jury returned an indictment against
8 Defendants. The indictment charged Rosales with knowingly and intentionally
9 conspiring to possess with intent to distribute 5 kilograms and more of cocaine in
10 violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count One); knowingly and
11 intentionally conspiring to kidnap, abduct, seize, confine, carry away, and transport
12 in foreign commerce, an individual, and hold said individual for ransom payment
13 or otherwise, in violation of 18 U.S.C. § 1201(c) (Count Two); and intentionally
14 possessing in and affecting commerce a firearm after having previously been
15 convicted in court of a crime punishable by imprisonment for a term exceeding one
16 year, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 2 (Count Eight).

17 Rosales entered into a Plea Agreement [Doc. 94] and agreed to plead guilty
18 to Count Two (conspiracy to kidnap) of the indictment. In the Plea Agreement,
19 Rosales agreed to waive any right to appeal or collaterally attack the conviction
20 and sentence unless the Court imposed a custodial sentence above the greater of

1 the high end of the guideline range recommended by the government pursuant to
2 the agreement. (Plea Agreement, § XI.)

3 On June 1, 2010, Rosales entered a guilty plea on Count Two. On June 18,
4 2010, the Court issued an order accepting Rosales's guilty plea.

5 On August 20, 2010, the Court sentenced Rosales to 87 months of custody.
6 Judgment was entered on August 31, 2010.

7 Rosales filed the instant motion on April 10, 2015.

8 9 **III. DISCUSSION**

10 Defendant brings this motion to vacate his sentence on the ground of actual
11 innocence. As discussed below, the Court denies Defendant's motion as time-
12 barred.

13 A one-year statute of limitations applies to a § 2255 motion. The one-year
14 period runs from the latest of:

15 (1) the date on which the judgment of conviction becomes final;

16 (2) the date on which the impediment to making a motion created by
17 governmental action in violation of the Constitution or laws of the
18 United States is removed, if the movant was prevented from making a
19 motion by such governmental action;

20 (3) the date on which the right asserted was initially recognized by the
Supreme Court, if that right has been newly recognized by the
Supreme Court and made retroactively applicable to cases on

1 collateral review; or

2 (4) the date on which the facts supporting the claim or claims presented
3 could have been discovered through the exercise of due diligence.

4 28 U.S.C. § 2255(f).

5 Defendant does not claim to have brought his motion within the one-year
6 period. Instead, Defendant invokes the equitable exception for an actual
7 innocence claim. In McQuiggin v. Perkins, ___ U.S. ___, 133 S. Ct. 1924 (2013), the
8 Supreme Court held that a prisoner who makes a proper showing of actual
9 innocence may pursue his constitutional claims on the merits notwithstanding
10 AEDPA's one-year statute of limitations. To invoke the miscarriage of justice
11 exception to AEDPA's statute of limitations, a petitioner "must show that it is more
12 likely than not that no reasonable juror would have convicted him in the light of the
13 new evidence." Id. at 1935 (quoting Schlup v. Delo, 513 U.S. 298, 327 (1995)).

14 Defendant contends that after his conviction, there was a change in the law
15 that renders him legally innocent. A petitioner is actually innocent when he was
16 convicted for conduct not prohibited by law. Alaimalo v. United States, 645 F.3d
17 1042, 1047 (9th Cir. 2011). Thus, a change in the law that is retroactive and
18 applies to the merits of the petition to make it more likely than not that no
19 reasonable juror would have convicted the petitioner, may support an actual
20 innocence claim. Wooten v. Cauley, 677 F.3d 303, 307 (6th Cir. 2012).

Defendant cites to a "ground-breaking ruling" in United States v. Hudson, 3

1 F. Supp. 3d 772 (C.D. Cal. 2014). In Hudson, the Central District judge granted
2 the defendant's motion to dismiss the indictment due to outrageous government
3 conduct. The court held that the ATF's fake stash-house scheme transcended the
4 bounds of due process and rendered the government's actions outrageous.

5 However, the Ninth Circuit reversed the district court's ruling in United States
6 v. Dunlap, 593 Fed. Appx. 619 (9th Cir. 2014). The Ninth Circuit held that the
7 district court erred in concluding that the government's conduct met the "extremely
8 high standard" necessary to dismiss an indictment for outrageous government
9 conduct. Id. at 620 (quoting United States v. Black, 733 F.3d 294, 302 (9th Cir.
10 2013)). The Ninth Circuit reasoned that the government's conduct did not go
11 beyond the bounds of what the Ninth Circuit found acceptable in Black:

12 The ATF targeted individuals who had already demonstrated an
13 interest in committing robberies, and did little more than "set the 'bait'"
14 by inventing a fictitious cocaine stash house they could rob. Black, 733
15 F.3d at 310. Once the bait was set, Defendants "responded with
16 enthusiasm." Id. at 307. They planned nearly every detail of the
17 robbery without assistance, including how many men they would bring,
18 what weapons they would use, how they would dress, how they would
19 break into the stash house, how they would restrain any guards, where
they would hide after the robbery, and where they would sell the stolen
cocaine. Defendants themselves also provided the guns, disguises,
and zip ties necessary for them to carry out the robbery according to
the plans they made. The government's conduct here did not "violate
fundamental fairness or shock the universal sense of justice mandated
by the Due Process Clause of the Fifth Amendment." Williams, 547
F.3d at 1200 (internal quotation marks and alterations omitted).

20 Id. at 621.

1 In Black, which was decided after judgment was entered against Rosales,
2 the Ninth Circuit affirmed the denial of the defendants' motions to dismiss for
3 outrageous government conduct. Although the court found that the reverse sting
4 operation at issue raised questions about possible overreaching, the defendants
5 had not met the "extremely high standard" to establish a violation of fundamental
6 fairness. Black, 733 F.3d at 298.

7 The Ninth Circuit identified the following factors as relevant to whether the
8 government's conduct was outrageous: (1) known criminal characteristics of the
9 defendants; (2) individualized suspicion of the defendants; (3) the government's
10 role in creating the crime of conviction; (4) the government's encouragement of the
11 defendants to commit the offense conduct; (5) the nature of the government's
12 participation in the offense conduct; and (6) the nature of the crime being pursued
13 and necessity for the actions taken in light of the nature of the criminal enterprise
14 at issue. Id. at 303.

15 In Black, the Ninth Circuit found that the government did not have any
16 individualized suspicion of any of the defendants as being involved in stash house
17 robberies when it dispatched the CI into the field, and that the stash house robbery
18 was entirely the ATF's creation. However, the Ninth Circuit's concerns were
19 mitigated because the defendants later told the undercover ATF agent that they
20 had engaged in similar criminal activity in the past, and once the bait was set, the

1 defendants responded with enthusiasm and without further inducement by the
2 government. Id. at 307. Indeed, the defendants on appeal were recruited by other
3 defendants, not the ATF agent. Id. Furthermore, there was no evidence that the
4 government engaged in inappropriate threats or coercion to encourage defendants
5 to engage in the robbery. Id. at 308. Although the government took the initiative
6 of approaching the defendants and proposing the fictitious stash house robbery, it
7 played a minimal role thereafter. Id. at 309. The agent did not provide weapons,
8 plans, manpower, or direction about how to perform the robbery. Id. In addition,
9 the Ninth Circuit noted that stash house robberies pose a great risk of violence in
10 residential communities, and the reverse sting tactic was designed to avoid these
11 risks to the public and law enforcement officers by creating a controlled scenario
12 that results in the capture of individuals willing to commit such an armed robbery
13 without taking the final step of an actual home invasion. Id.

14 Neither Hudson nor Black constitutes an intervening change in law that
15 establishes that Defendant was convicted for conduct not prohibited by the law.
16 According to the government, the CI had information that Guzman had already
17 engaged in stash-house robberies with others *before* Delgadillo brought up his
18 plan to rob a stash house. On May 5, 2009, Guzman even informed the CI that
19 he, Rosales, and Cabrera were en route to conduct a home invasion robbery of a
20 stash house. Even though the government made up the fiction of Delgadillo

1 receiving orders to rob the stash house and to kidnap the “boss” of the stash house,
2 it does not appear that the government coerced or threatened Rosales or the other
3 Defendants into participating in the plan. Based on the facts presented by the
4 government, Rosales and the others were more than willing to carry out the
5 robbery and kidnaping. The government did not provide direction regarding how
6 the robbery and kidnaping would occur and did not provide any manpower or
7 weapons. The facts of this case are similar to Black and do not meet the
8 “extremely high standard” for establishing outrageous government conduct.

9 Accordingly, Defendant does not qualify for the actual innocence exception
10 to the one-year statute of limitations set forth 28 U.S.C. § 2255(f). Defendant’s §
11 2255 motion was filed more than four-and-a-half years after judgment was entered
12 in his case. Therefore, his motion is time-barred.

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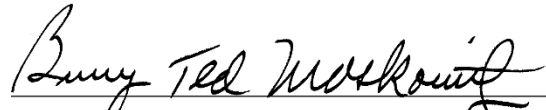
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1 **IV. CONCLUSION**

2 For the reasons discussed above, Defendant Juan Rosales's motion to
3 vacate, set aside, or correct sentence under § 2255 is **DENIED**. The Court
4 **DENIES** a Certificate of Appealability. The Clerk shall enter judgment accordingly.

5 **IT IS SO ORDERED.**

6 Dated: January 4, 2016

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8 Barry Ted Moskowitz, Chief Judge
9 United States District Court
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