HANDOUTS: WINNING STRATEGIES

Attacking Bias Through Motions Practice: Revealing and Litigating Unfair Targeting of People of Color in Federal Court (Alison Siegler)

- Motions to Dismiss for Racially Selective Law Enforcement in Chicago
  - *Was Racial Bias Behind ATF Stash House Stings? Chicago Judges Take Up Landmark Case Today*, Chicago Tribune (Dec. 13, 2017), http://www.chicagotribune.com/news/local/breaking/ct-met-atf-stash-house-hearing-20171211-story.html
  - *ATF Sting Operation Accused of Using Racial Bias in Finding Targets—the Majority of Them Being Minorities*, Chicago Tribune (Mar. 3, 2017), http://www.chicagotribune.com/news/local/breaking/ct-atf-stash-house-sting-racial-discrimination-met-20170303-story.html
  - Motion to Dismiss for Racially Selective Law Enforcement in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 265, filed 10/11/16) (Expert Report of Professor Jeffrey Fagan attached as Exhibit A)
  - Link to 12 pending Motions to Dismiss: http://www.law.uchicago.edu/news/federal-criminal-justice-clinic-moves-dismiss-cases-because-atf-discriminated-basis-race
  - Not attached but available on Pacer: Government's Response to MTD in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 294, filed 2/17/17) (Expert Report of Professor Max Schanzenbach attached as Exhibit 1)
  - Not attached but available on Pacer: Defendants' Reply in Support of Motion to Dismiss for Racially Selective Law Enforcement in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 329, filed 9/11/17) (Reply Report of Professor Jeffrey Fagan attached as Exhibit F)

- Discovery Motions & Briefing (San Francisco, New York, Chicago)
  - Amended Motion to Compel Discovery on Selective Prosecution and Enforcement and Memorandum of Points and Authorities in Support of Motion in *United States v. Mumphrey et al.*, 3:14-CR-00643 (EMC) (N.D. Cal.) (DE 119, filed 12/2/15)
  - Defendant's Motion to Compel Discovery re Selective Enforcement in *United States v. Lonnie Jackson*, 16-CR-2362-MCA (D.N.M.) (DE 29, filed 4/19/17)
  - Discovery Motion with exhibits A, B, F in *United States v. Lamar et al*., 14-CR-726 (PGG) (SDNY) (DE 28-30, filed 3/16/15)
  - Reply Brief with expert declaration in *Lamar* (DE 34, filed 4/20/15)
  - Supplemental Discovery Motion in *United States v. Hummons & Williams*, 12-CR-887 (N.D. Ill.) (DE 178, filed 2/16/15) (redacted per protective order)

- Discovery Opinions & Orders
  - Order Granting Selective Enforcement Discovery in San Francisco: *United States v. Mumphrey*, 2016 WL 3548365 (N.D. Cal. June 30, 2016)
  - Order Granting Selective Enforcement Discovery re ATF operation in New Mexico: *United States v. Casanova*, 16-CR-02917-JAP (D.N.M. 6/12/17)
  - Seventh Circuit's en banc opinion in *United States v. Davis*, 766 F.3d 722 (7th Cir. 2015)—see Part III
  - *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill. April 17, 2014)
  - *United States v. Brown et al.*, 12-CR-632 (N.D. Ill.): DE 153 (7/31/13); DE171 (11/8/13); DE 261 (10/3/14)
  - *United States v. Alexander, et al.*, 11-CR-148 (N.D. Ill.): *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013); DE 171 (12/10/13); DE 243 (2/10/15)

- Additional press related to selective enforcement and selective prosecution litigation
  - Chicago
    - *Court Decision Could Force Changes to ATF's Undercover Operations, NPR's Morning Edition* (12/15/17), https://www.npr.org/2017/12/15/571027767/court-decision-could-force-changes-to-atfs-undercover-operations
    - *ATF Drug Stings Targeted Minorities, Report Finds* (9/23/16), https://www.usatoday.com/story/news/2016/09/23/atf-stash-house-stings-minorities/90950474/
    - *Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings*, Chicago Tribune (1/29/15), at this link.
    - *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times (1/30/15), at this link.
  - San Francisco
    - *Federal Judge Finds Evidence of Racial Bias by S.F. Police*, San Francisco Chronicle (June 30, 2016), http://www.sfchronicle.com/news/article/Federal-judge-finds-evidence-of-racial-bias-by-8335739.php?t=21608d1409baa6eec6&cmpid=twitter-premium
  - Albuquerque
    - *Feds' Sting Ensnared Many ABQ Blacks, not "Worst of the Worst,"* http://nmindepth.com/2017/05/07/feds-sting-ensnared-many-abq-blacks-not-worst-of-the-worst/

Motions to Dismiss for Racially Selective Law Enforcement

Alison Siegler, Univ. of Chicago Law School

Was racial profiling behind ATF stash house stings? Chicago judges to take up landmark case today

Jason Meisner and Annie Sweeney

Chicago Tribune

December 13, 2017

The drug stash house sting has been a bread-and-butter part of the federal law enforcement playbook for years.

By dangling the promise of a big score, the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives convinced hundreds of would-be robbers across the country that they were stealing large quantities of narcotics, only to find out the drugs were a figment of the government's imagination.

also has been controversial, sweeping up mostly African-American targets — some with only minor criminal backgrounds — and sparking allegations across the country of entrapment and racial profiling. With the way mandatory federal sentencing laws work, the stings have landed many defendants behind bars for decades or even life, even though the drugs never existed.

Now the legal battle is coming to a head in an unprecedented hearing at the Dirksen U.S. Courthouse in Chicago before a panel of nine district judges overseeing a dozen separate cases involving more than 40 defendants.

The hearing, which has been four years in the making, will take place over two days in the courthouse's large ceremonial courtroom. As many as 30 defendants, their relatives and individual attorneys are expected to attend, and an overflow courtroom has been set up to handle the anticipated crowd.

"In my 46 years of practicing law, I've never seen anything like this before," attorney Richard Kling, who represents one of the defendants, told the Chicago Tribune this week.

The testimony will focus on dueling experts who reached starkly different conclusions about the racial breakdown of targets in the stash house cases.

A nationally renowned expert hired by the Federal Criminal Justice Clinic at the University of Chicago Law School — which is spearheading the effort to have the cases dismissed — concluded that disparity between minority and white defendants in the stings was so large that there was "a zero percent likelihood" it happened by chance.

An expert testifying for federal prosecutors, though, will contend that conclusion used an "absurdly overbroad" sample that was designed to show a racial disparity where none exists.

The Tribune first reported the experts' findings in a front-page story in March that highlighted the case of Leslie Mayfield, who has been in jail awaiting a new trial since his conviction and 22-year sentence were overturned on appeal three years ago.

"I'm not nervous about this hearing," Mayfield, 49, wrote in an email to the Tribune from the Metropolitan Correctional Center. "I'm excited. I'm tired of being in jail and I'm ready to get this over."

The groundbreaking hearing is being closely watched in federal districts across the country. How it plays out could have ramifications far beyond the 43 Chicago defendants who are seeking to have their charges thrown out. The judges are expected to issue separate rulings at a later date, although some lawyers think there could be joint opinions issued by several judges if any are in agreement.

"It's impossible to predict," said University of California at Irvine law professor Katharine Tinto, a criminal law expert who has written extensively about the stash house stings. "This is very unusual in the criminal court because every individual defendant typically has a very unique case."

Tinto said the central argument of racial profiling unites the cases in a sort of criminal class action — a legal tool used in civil lawsuits. Aside from the fates of the individuals who were charged, the outcome could also force some soul-searching on behalf of law enforcement, she said.

"It could have an impact on having law enforcement agencies think critically about how they target suspects and how they structure undercover stings," Tinto said. "And that sort of critical self-examination is a good thing."

A spokesmen for the U.S. attorney's office in Chicago declined to comment for this story, citing the ongoing litigation. An ATF spokeswoman was not available for comment Wednesday.

Prosecuting a 'desperate' target

Launched in Miami during the cocaine-war days of the early 1990s, stash house stings have been honed over the years and are run by experienced agents who use a tightly controlled playbook.

They typically begin when an informant provides information to the ATF about a potential target who has expressed interest in taking part in a robbery. The informant then introduces the target to an undercover agent who poses as a disgruntled courier for

a drug cartel and offers an opportunity to steal large quantities of drugs from a stash house guarded by men with guns.

In a series of conversations captured in undercover recordings, the target is told if he is interested he must assemble an armed team to commit the robbery. The target and his crew are arrested after they show up on the day of the supposed crime.

In order to avoid a defendant raising an entrapment defense, the stings are supposed to target only suspects who are already experienced robbers. ATF criteria also require that at least two of the participants have violent backgrounds and that all must be criminally active at the time the investigation is launched.

The issue of racial profiling started to simmer four years ago after U.S. District Chief Judge Ruben Castillo ordered prosecutors to turn over to defense attorneys in a stash house case detailed information on how the stings are run and the race of the defendants who had been charged so far.

After the University of Chicago team got involved, another ruling in July 2015 by the appellate court in Chicago resulted in the government turning over more data on the stings.

The data showed that the vast majority of those swept up in the stings were minorities, according to defense lawyers. A close examination of the criminal backgrounds of some of those targeted also raised questions about whether they were truly the most dangerous gun offenders ATF was aiming to remove from the street, they said.

Some had trouble even coming up with guns to do the job — including one crew that after months of preparation managed to find only one World War I-era pistol with a broken handle that could barely fire a round, court records show. Others had no history of carrying out high-risk armed robberies — a key provision in the ATF playbook designed to make sure targets were legitimate, defense lawyers have argued.

Mayfield, for one, talked on undercover recordings about his experience robbing stash houses, but in reality he had no arrests for robbing drug dealers. The fact that he was lured into the sting while working a full-time job and apparently trying to better his life has also been heavily criticized by the appellate court.

Another case prosecuted in Chicago involved Tracy Conley, who was ensnared after two acquaintances approached him with a plan to rob a stash house supposedly filled with 50 kilos of cocaine. At the time, Conley was working a full-time job but was struggling to make ends meet. In fact, he was stuck at a gas station with no money for fuel to get home on the day he was approached, court records show.

Conley was convicted by a jury and faced a mandatory minimum 15-year sentence. At his sentencing hearing, U.S. District Judge Sharon Johnson Coleman expressed disgust with the government's conduct, saying that putting Conley in prison for such a long stretch was not only unfair but it also served "no real purpose other than to destroy any

vestiges of respect in our legal system and law enforcement that (Conley) and his community may have had."

Last month, the 7th Circuit upheld Conley's 15-year sentence but echoed Coleman's statements, questioning the wisdom of expending so many resources to prosecute an "unsophisticated and desperate" target.

Because Conley lost his appeal, he is not among the 43 defendants whose cases will be heard Thursday. But Coleman, the judge who came down hard on the government for his prosecution, will be on the panel.

'Overwhelmingly men of color'

The hearing will focus almost entirely on the likely dry testimony of two experts who analyzed the same data.

For the University of Chicago team, Jeffrey Fagan, a nationally known specialist in police practices who also examined the New York Police Department's stop-and-frisk policy, examined 94 defendants in 24 separate stings conducted between 2006 and 2013 and found that 74 of the defendants were black.

When he compared those numbers to general population statistics, Fagan concluded that minorities were "substantially more likely" than similarly situated whites to be targeted by ATF in the stash house stings, court filings show.

"Each test showed the same pattern: Being black significantly increased a person's chance of being targeted by the ATF," lawyers for the defendants wrote in their motion to dismiss the cases.

But the expert hired by the U.S. attorney's office, Northwestern University law professor Max Schanzenbach, concluded that Fagan had used an "absurdly overbroad" group to compare to stash house defendants, including people with only minor criminal convictions such as simple drug possession and misdemeanor assault, a court filing by prosecutors show.

In all, Fagan's "eligible list" included nearly 300,000 people — a number that equals 10 percent of all males ages 14-49 in the Chicago area, their filing said. Using such a broad swath of the public in a statistical analysis ignores the realities of how the stash house stings work, prosecutors have said.

"ATF agents do not compile a list of citizens with criminal records throughout the district, select people from the list at random, and then cold-call those people and offer them a chance to rob a stash house," prosecutors wrote. "There is no reason the home invasion defendants should resemble Professor Fagan's fantasy home invasion lottery."

Tinto, the University of California law professor, said the key question for the judges will come down to whether there is any logical explanation that so many of the stash house targets were black.

“This is a debate among experts about the fact that the defendants in these cases are overwhelmingly men of color,” Tinto said. “How did that come to be? Is that because of their criminal histories? Is it chance? Or is it because of racially biased policing?”

The discrimination does not have to be explicitly stated as a purpose of the stings, according to previous court rulings. It can be inferred from all the evidence, including expert testimony that there’s no explanation other than race for why so many targets were black men.

Whatever the outcome, the hearing could put prosecutors in an interesting position, defending their own law enforcement agencies from allegations of racism even as the federal government has slapped city after city — Chicago included — with troubling civil rights findings on policing.

Mayfield, for one, said it’s a complex problem, and he doesn’t expect it to change anytime soon.

“There is no one thing that will solve the issue of treating everyone equally,” he said.

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***ATF Sting Operation Accused of Using Racial Bias in Finding Targets—the Majority of Them Being Minorities*, Chicago Tribune (Mar. 3, 2017)**

Alison Siegler, Univ. of Chicago Law School

ATF sting operation accused of using racial bias in finding targets — the majority of them being minorities

University of Chicago law students are working on a legal effort to have a dozen Chicago “Stash House Sting” cases dismissed that involve more than 40 defendants. In support of that effort, a recently unsealed study concluded the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives showed a clear pattern of racial bias. (Abel Uribe / Chicago Tribune)

By **Jason Meisner and Annie Sweeney**
Chicago Tribune

MARCH 3, 2017, 7:22 AM

Leslie Mayfield was handcuffed in the back of a police wagon when he realized the plan to rob a drug stash house was a setup.

For four years, Mayfield had been struggling to turn his life around after more than a decade in prison. To escape the street life, he moved to Naperville with his fiancee's family and managed to find a full-time job at a suburban electronics facility that paid 12 bucks an hour. It was there that a co-worker lured him into the robbery after weeks of effort, promising a big score.

Now, inside the police vehicle, the sounds of flash-bang grenades still ringing in his ears, Mayfield started to piece it all together. There was no stash house, no cartel drugs or associates to rob. It was a crime dreamed up by federal authorities and carried out with the help of Mayfield's co-worker to reel him in when he was at his most vulnerable.

Eight years later, Mayfield, 48, and dozens of others are at the center of a brewing legal battle in Chicago's federal court over whether the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives' signature sting operation used racial bias in finding its many targets.

A team of lawyers led by the University of Chicago Law School is seeking to dismiss charges against more than 40 defendants in Chicago. The undercover probes, a staple of the ATF since the mid-1990s, have ensnared hundreds of defendants across the country.

A recently unsealed study by a nationally renowned expert concluded that ATF showed a clear pattern of racial bias in picking its targets for the drug stings. The disparity between minority and white defendants was so large that there was "a zero percent likelihood" it happened by chance, the study found.

The vast majority of those swept up in the stings in Chicago were minorities, and a close examination of the criminal backgrounds of some of those targeted raises questions about whether they were truly the most dangerous gun offenders that ATF was aiming to remove from the street.

Some had trouble even coming up with guns to do the job — including one crew that after months of preparation managed to find only one World War I-era pistol with a broken handle that could barely fire a round. Others had no history of carrying out high-risk armed robberies — a key provision in the ATF playbook designed to make sure targets were legitimate, defense lawyers argued in recent court filings.

Mayfield, for one, talked on undercover recordings about his experience robbing stash houses, but in reality he had no arrests for robbing drug dealers. The fact that he was lured into the sting while working a full-time job has also been heavily criticized by the appellate courts.

"Criminals do sometimes change and get their lives back on track, and we don't want the government pushing them back into a life of crime," Judge Richard Posner of the 7th Circuit U.S. Court of Appeals in Chicago wrote in an opinion supporting Mayfield's argument that he had been entrapped by authorities.

The controversy comes amid a national debate over the treatment of minorities by law enforcement and a scathing report by the U.S. Department of Justice just weeks ago that found that Chicago police

routinely violate the civil rights of citizens, particularly African-Americans and Hispanics living on the city's impoverished South and West sides.

It could put the Justice Department in the uncomfortable position of defending its own stash house prosecutions against allegations of racist practices while at the same time pushing Chicago police for reforms of similar accusations.

Earlier this month, federal prosecutors filed a lengthy motion vehemently disputing that minorities were unfairly targeted in the stash house cases, saying the expert report filed by the defense was "riddled with false assumptions that were designed to manufacture a racial disparity where none exists."

The dispute sets up what could be an unprecedented hearing at the Dirksen U.S. Courthouse in the coming months involving a panel of district judges hearing the multiple criminal cases at once.

"It's almost like a criminal class action," said Alison Siegler, director of the Federal Criminal Justice Clinic at the University of Chicago Law School, which represents most of the defendants in the dozen cases they are seeking to be dismissed. "Judges are seeing this as a coordinated litigation. It's a very unusual situation."

Out of answers

When Mayfield landed a job in May 2009 at LG Electronics, a sprawling, warehouse-like facility just off 115th Street in Bolingbrook, it seemed to be a stroke of luck. Still on parole for an attempted murder conviction, he checked for defects in cellphones imported from Asia.

Several weeks into his employment, Mayfield was approached by a woman who was one of the only other African-Americans who worked in his group, he said. She flirted with him, he said, on lunch breaks, confiding in him that she wasn't happy in her marriage.

It wasn't long before she introduced him to her husband, Jeffrey Potts, a burly ex-con who worked in another group at LG. Mayfield said he tried to keep his distance, uneasy that Potts' wife was so flirtatious around him, especially since Potts was white. But Potts persisted, and soon they were talking regularly, he said.

"Obviously, he had an objective," Mayfield, who is serving a 27-year sentence, said in an interview at the Metropolitan Correctional Center in the Loop. "When I think back about it now, he immediately started trying to find out about me, about my background."

Potts, who had done prison time for drug distribution and robbery, was secretly working as a federal informant, helping an ATF agent search for possible targets for sting operations, court records show. He was paid for the effort, but not much. Potts later told a private investigator working for Mayfield's defense team that he earned just $200 from ATF for bringing them Mayfield's case, according to court records.

A man who claimed to be Potts returned a recent call from a Tribune reporter but said he was too busy to talk and never called back.

Mayfield said that as the weeks wore on, Potts began dropping references to drugs into their conversations. He told Mayfield he had a new drug connection and was making a lot of money and would often ask him if he was looking to get out of the day-to-day drudgery of working at LG, Mayfield said.

"Every day at work he began to make comments such as, 'Cuz, I know you tired of working for this chump change,'" Mayfield wrote in a letter filed in federal court. "'I know you need this money.'"

Mayfield said he told Potts he didn't sell drugs, but Potts "kept on me on a daily basis, saying, 'You're missing out.'"

After awhile, Potts' talk turned to robberies. One day, the two were having a smoke by the parking lot when Potts pointed to his new pickup truck — a red Dodge Ram 1500 with fancy rims, Mayfield said. He told Mayfield he'd made tens of thousands of dollars robbing drug dealers and could bring Mayfield in on an upcoming score.

"He said, 'Man, I hit this lick — 40K and two kilos of cocaine. That's how I got this truck,'" Mayfield said. "I kept saying I wasn't interested. Believe me, there was nothing I wanted less than to go back to jail."

In mid-June 2009, Mayfield suffered a setback that left him desperate. The van he depended on to get to work died on a Chicago-area expressway, leaving him with a huge bill for towing and repairs that he couldn't afford. He missed several days of work before he was able to arrange a ride. When Potts asked him where he had been, Mayfield told him about his car troubles. The next day, Potts walked up to him in the bathroom at LG and slipped him $180 in cash.

"I tried not to take it, but I did need it," Mayfield said. "I felt at the time like he was genuine."

Later, Mayfield said, Potts offered to forgive the debt if he went along with the robbery plan. Flat broke and out of answers, Mayfield finally caved. He told Potts to set up the meeting with his contact, records show.

Potts called his ATF handler, who approved Mayfield as a target, according to court records.

Race and law enforcement

According to the ATF, stash house stings are a key part of the agency's national effort to target people who "show a propensity of doing harm to the public through violent behavior."

Launched in Miami during the cocaine-war days of the early 1990s, the stings have been honed over the years and are run by experienced agents who use a tightly controlled playbook.

They typically begin when an informant provides the ATF information about a potential target who has expressed interest in taking part in a robbery. The informant then introduces the target to an undercover agent who poses as a disgruntled courier for a drug cartel and offers an opportunity to steal large quantities of drugs from a stash house guarded by men with guns.

In a series of conversations captured on undercover wire, the target is told if he is interested he must assemble an armed team to commit the robbery. The target and his crew are arrested after they show up on the day of the supposed crime.

"At the time of arrest, the home invasion defendants are poised, at any moment, to invade a stash house, steal kilograms of cocaine guarded by armed cartel members, and in the process, kill or be killed," prosecutors wrote in their recent court filing.

In order to avoid arguments of entrapment in court, the stings are supposed to target only established robbery groups. ATF criteria also require that at least two of the participants have violent backgrounds and that all must be criminally active at the time the investigation is launched.

Not only were the operations a boon for the ATF but the resulting prosecutions also netted eye-popping sentences — sometimes up to life in prison — in part because defendants were criminally liable for the amount of imaginary drugs they believed they were stealing. It didn't matter that the robbery was fake or that no drugs actually existed.

"The reason this scenario exists is because it's realistic," Assistant U.S. Attorney Jeffrey Perconte argued at Mayfield's sentencing in 2011 while seeking up to 37 years in prison. "It certainly was real to Mr. Mayfield."

Spokesmen for both the ATF and the U.S. Attorney's Office declined to comment for this story, citing the ongoing litigation.

The lengthy sentences were just one pattern that raised red flags for the criminal defense bar. In case after case, the ATF stings seemed to be targeting only minorities.

In early 2013, a handful of private attorneys and assistant federal defenders, all veterans at the Dirksen U.S. Courthouse, were so troubled by a stash house case they were defending that they asked the U.S. Attorney's Office for a complete list of all the defendants in similar cases sorted by race. Prosecutors rebuffed this admittedly unorthodox request.

"ATF does not maintain statistics on the nature in question at either the local or national level," Assistant U.S. Attorney Philip Fluhr wrote in response, court records show.

The defense lawyers then asked the judge overseeing the case to order prosecutors to turn over detailed information on how the stash house stings are run and the race of the defendants who had been charged so far. They included their own research showing more minorities were targeted.

Prosecutors strenuously objected. But a few months later, U.S. District Chief Judge Ruben Castillo allowed the discovery to go forward.

"History has shown a continuing difficult intersection between the issue of race and the enforcement of our nation's criminal laws," wrote Castillo, concluding that the defense team had "made a strong showing of potential bias."

Similar motions in other stash house cases soon followed, but the effort to prove racial bias was being made case-by-case with no coordination. Then in 2014, the University of Chicago's Federal Criminal Justice Clinic agreed to focus all its efforts on the 12 stash house cases and their 43 defendants.

This allowed the defense attorneys to address the alleged racial bias in a coordinated effort, a critical undertaking given the government's massive resources, the attorneys said.

"It's a giant power imbalance if one person decides to go against the government," said Adam Davidson, one of seven U. of C. law students who helped the clinic's three law professors coordinate the cases.

'The real Leslie Mayfield'

On July 23, 2009, Mayfield climbed into a black Cadillac Escalade parked in a Naperville lot to meet with Potts and a purportedly disgruntled cartel drug courier. In a conversation captured on undercover recording, the courier, an undercover ATF agent, laid out the robbery plot, warning that up to 30 kilograms of cocaine would be protected by as many as four armed guards.

When the undercover agent asked if he had ever done a stash house robbery before, Mayfield replied, "Yes, sir," according to a transcript of the recording in court records. Later in the conversation, Mayfield talked about other home invasions he had committed, noting his preference to scout out locations in advance and hit them under the cover of darkness.

Mayfield also told the agent the people he would recruit were experienced and would be excited about the plan once they knew the quantity of drugs involved. It would be enough for everyone to make "a nice li'l piece o' change," Mayfield said, according to the transcript.

Two weeks later, Mayfield brought the crew he'd assembled to meet with the undercover agent and go over the plan. The crew assured the agent that they were up for the danger of the operation and talked about what to do with the armed guards, including killing everyone inside if necessary, according to transcripts of the conversation. Mayfield stressed that their biggest advantage was "the element of surprise."

The next night, Mayfield got the call that the robbery was on. He and his crew drove to Aurora in a brown van to meet with the undercover agent, who took them to a nearby storage facility where they would supposedly hide the drugs after the heist, court records show. In a conversation outside the storage facility that was caught on undercover video, the agent gave the crew one more chance to back out, asking them if they felt they were up for the job.

"Yeah, bro!" exclaimed Montreece Kindle, Mayfield's cousin, who stuck out an arm to shake the agent's hand.

As the crew got ready, the video showed Mayfield throw a loaded .357 Magnum handgun into a rear cargo area of the vehicle. Seconds later, the boom of flash-bang grenades and shouting could be heard as a special operations team of agents stormed out of the storage facility to make the arrest.

Records show Mayfield's crew had brought an arsenal to the scene. In addition to the .357, agents found a loaded sawed-off shotgun, a .44-caliber revolver, a semi-automatic pistol, ski masks, bulletproof vests and latex gloves.

Mayfield and all three of his accomplices were convicted at trial. At Mayfield's sentencing hearing in 2011, prosecutors highlighted his previous convictions for burglary and unlawful restraint and incorrectly told the judge that he had been the shooter in the 1994 attempted murder that had landed him in prison for 11 years.

After his release in 2005, Mayfield had picked up a new charge in Lake County after state police stopped a car he was riding in and found him with a loaded gun, prosecutors said.

"That's the real Leslie Mayfield," Perconte told U.S. District Judge Harry Leinenweber, who imposed a 27-year prison sentence. "From the time he was 18 ... he has added nothing to society but danger."

Exaggerated capabilities

Born and raised in Zion, Mayfield had an unstable childhood. He never knew his father, and his mother struggled to make ends meet. In court statements, Mayfield recalled being homeless for long stretches. He spoke of memories of his mother making them bologna sandwiches in the front seat of their car and washing him up in gas station bathrooms because they had nowhere else to go.

Mayfield graduated from eighth grade but never attended high school. In 1994, when he was 26, Mayfield and several others were arrested after the carjacking and shooting of a motorist in Waukegan.

Lake County prosecutors conceded that Mayfield wasn't the gunman, but under the state's "accountability" law, a jury convicted him at trial of attempted murder, armed robbery, armed violence and aggravated battery with a firearm. He was sentenced to 40 years in prison.

An appeals court later reversed the attempted murder conviction, ruling in 1997 that the jury was improperly barred from hearing Mayfield's statement to police that he was angry that his co-defendant had opened fire because he had "no good reason to shoot" the victim.

After his case was sent back to Lake County Circuit Court, Mayfield pleaded guilty to attempted murder in exchange for a seven-year sentence to run consecutive to a 15-year term for the armed violence count, records show. With good behavior, he wound up serving 11 years.

In his interview with the Tribune, Mayfield said he decided to use his time in prison to turn his life around. He earned his high school equivalency certificate and later an associate degree in general college studies. He got a cosmetology license and became a certified tutor. Although he said he never affiliated with a gang on the street, he joined the Gangster Disciples to avoid conflicts in prison. "I did everything I could to remain positive," he said.

After he was released on parole in 2005, Mayfield went back home to Waukegan, but staying away from the violence of the streets proved difficult. A couple years after his release, Mayfield was in a home when a shooting occurred and a family member was wounded in the head, he said.

To protect himself, he started carrying a gun, but that, he acknowledged, turned out to be a huge mistake. That August, state police stopped the car Mayfield was riding in, and he took off running before they could pat him down. After a foot chase, he was ordered to the ground at gunpoint. Police found a loaded .40-caliber pistol in his waistband.

Despite that setback, Mayfield said he was determined to stay on course. He moved with his girlfriend to Naperville, where they lived in a tiny, two-bedroom house with her four teenage children and one grandchild.

Struggling at LG Electronics on $12 an hour, Mayfield described in court records how the family relied on one car and had no money for cellphones or other luxuries. Every Tuesday, Mayfield would stand in line at a local food pantry to make sure the kids had enough to eat.

In his interview with the Tribune, Mayfield said he was coached by Potts to boast to the purported drug courier about past stickups and robberies. At his sentencing six years ago, he denied ever selling or stealing drugs and said he had never shot anyone in his life. Mayfield owned up to his role in the stash house robbery but insisted in a long and emotional plea to the court that the government had exaggerated his capabilities.

"They say I had a drug crew? We couldn't even afford a cellphone," Mayfield told the judge, according to a transcript. "We didn't even have a car when the agent came across me. I tried everything I could to be a better person."

'Absurdly overbroad'

As the movement to fight the stash house cases gathered steam among defense attorneys, the judiciary also weighed in with some key decisions.

In November 2014, the full 7th Circuit U.S. Court of Appeals granted Mayfield a new trial in a rare decision that concluded Potts had "targeted Mayfield at a moment of acute financial need and against a backdrop of prolonged difficulty finding permanent, family-supporting work."

In a 2012 dissenting opinion as the case was winding through the court, appellate Judge Richard Posner had put an even finer point on it, referring to the stings as a "disreputable tactic" that used government informants to target people at a vulnerable time in their lives.

Meanwhile, another ruling in July 2015 by the appellate court in Chicago resulted in the government turning over more data on the stash house stings sought by the defense. The ruling allowed the defendants to move ahead with what is believed to be the most thorough analysis of the stings anywhere in the country.

To examine the data, the University of Chicago team hired Jeffrey Fagan, a nationally known specialist in police practices who also examined the New York Police Department's stop-and-frisk program.

Fagan examined 94 defendants in 24 separate stings conducted between 2006 and 2013 and found that 74 of the defendants were black. Fagan also ran three statistical analyses to figure out the likelihood that the proportion of stash house defendants would, by chance, be African-American.

To do that, Fagan created a control group by using ATF criteria for their defendants — having one or more convictions for specific violent offenses identified by the ATF or for narcotics or firearms offenses. The offenses also had to occur in the same geographic area and around the same time the stash house plan arose.

When Fagan compared the two groups, he concluded that minorities were "substantially more likely" than similarly situated whites to be targeted by ATF in the stash house stings, according court filings.

"Each test showed the same pattern: Being black significantly increased a person's chance of being targeted by the ATF," lawyers for the defendants wrote in their filing.

But an expert hired by the U.S. attorney's office concluded that Fagan had used an "absurdly overbroad" group to compare to stash house defendants, including people with only minor criminal convictions such as simple drug possession and misdemeanor assault, according to the recent court filing by prosecutors. In all, Fagan's "eligible list" included nearly 300,000 people — a number that equals 10 percent of all males ages 14-49 in the Chicago area, their filing said.

Using such a broad swath of the public in a statistical analysis ignores the realities of how the stash house stings work, prosecutors said.

"ATF agents do not compile a list of citizens with criminal records throughout the district, select people from the list at random, and then cold-call those people and offer them a chance to rob a stash house," prosecutors wrote. "There is no reason the home invasion defendants should resemble Professor Fagan's fantasy home invasion lottery."

Echoing an argument sometimes made by Chicago police, federal prosecutors also said Fagan's report failed to account for the fact that many of the stash house investigations took place in neighborhoods that are more than 90 percent black, naturally leading to targets who are black as well.

The debate is now potentially headed for a court hearing involving all defendants. The outcome could set precedent for judges in other states.

"Courts tend to give law enforcement a lot of leeway," said University of California-Irvine law professor Katharine Tinto, a criminal law expert who has written extensively about the stash house stings. "... The fact that an expert is saying a federal law enforcement agency is discriminating on the basis of race is something everybody should be watching."

'Sentenced with him'

Sharonnette Sholaja first met Mayfield in 2006 when he was doing odd jobs for his cousin after his release from prison. Despite Mayfield's background, she fell for him in part because of his efforts to put his past behind him.

"He was really trying to get himself together," Sholaja said in a recent interview. "I was getting up at 4 or 5 a.m. driving him for all kinds of job interviews because he was determined. He didn't let anything stop him."

Within two years they had moved to Naperville, crammed into a small apartment with her kids and a grandchild, so Sholoja could be close to her work in Woodridge. Mayfield found the job at LG, but money was still tight, she said. For their first holiday in Naperville, they couldn't afford a Christmas tree. With their money going to rent and food, they relied on a food pantry to get by, she said.

When the family car broke down — the event that ultimately drew Mayfield into the stash house sting — they had to borrow $300 from her mom to cover the tow, Sholaja said.

Despite the financial hardships, Mayfield never spoke of violence, carried guns or kept one in the house, Sholaja said. The news that he had agreed to rob a drug stash house shocked and angered her. She lost the apartment after he was locked up, and eventually the stress ripped them apart.

Sholoja, 44, said they still consider each other friends and remain in touch. But she's moved to Arizona to start over.

"I told him I felt like l was sentenced with him," she said. "You know, we would be married had this not happened."

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This article is related to: Crime, Theft, Drug Trafficking, Homicide, University of Chicago, U.S. Department of Justice

Motion to Dismiss for Racially Selective Law Enforcement in *United States v. Cousins*, 12-CR-865 (N.D. Ill.) (DE 265, filed 10/11/16)
(Expert Report of Professor Jeffrey Fagan attached as Exhibit A)

Alison Siegler, Univ. of Chicago Law School

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**No. 12-CR-865**
v.	)	**Hon. Gary Feinerman**
	)	
	)	
DAVID COUSINS, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS
FOR RACIALLY SELECTIVE LAW ENFORCEMENT

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Defendant DAVID COUSINS, by the University of Chicago Law School's Federal Criminal Justice Clinic and its attorneys, JUDITH P. MILLER and ALISON SIEGLER, and his attorney, JOHN L. SULLIVAN, respectfully submits this MOTION TO DISMISS FOR RACIALLY SELECTIVE LAW ENFORCEMENT. If the Court requires additional information, defendant requests an evidentiary hearing. Defendant submits this motion on behalf of himself and his co-defendants, Michael Cousins and Dunwon Lloyd ("defendants"). In support, defendants state:

INTRODUCTION

Defendants move to dismiss the indictment in this case because the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) engaged in racially discriminatory selective law enforcement in violation of the Fifth Amendment's equal protection principles. The ATF intentionally and disproportionately targeted Black people and other people of color in its Stash House Operations in the Northern District of Illinois. If the ATF "offer[s] lucrative-seeming opportunities to black and Hispanic suspects, yet not to those similarly situated in criminal background and interests but of other ethnicity," then "they have violated the Constitution." *United States v. Davis*, 793 F.3d 712, 720 (7th Cir. 2015) (en banc). Defendants' evidence demonstrates that the ATF has done just that. Accordingly, dismissal is warranted.

"[T]he equal protection component of the Due Process Clause of the Fifth Amendment" constrains the exercise of both law enforcement discretion and prosecutorial discretion. *United States v. Armstrong*, 517 U.S. 456, 464–65 (1996). Selective enforcement and prosecution claims "draw on ordinary equal protection standards." *Id.* at 465 (internal quotation marks omitted). To prevail on a selective enforcement claim, a defendant must show that law enforcement's conduct (1) had a discriminatory effect, and (2) was motivated by a discriminatory purpose or intent. *Id.*;

Chavez v. Illinois State Police, 251 F.3d 612, 635–36 (7th Cir. 2001). The ATF's Stash House Operations produced a discriminatory effect, and were motivated by a discriminatory purpose.

Defendants asked Professor Jeffrey Fagan "to conduct a comparative empirical analysis to determine whether the race disparities in the pool of stash house defendants result from a selection process that is influenced by race." Expert Disclosure, *United States v. Byrd*, 13-CR-63, Dkt. 386 (N.D. Ill. Jan. 20, 2016); *United States v. Williams*, 12-CR-887, Dkt. 238 (N.D. Ill. July 27, 2015). Professor Fagan's four statistical analyses are contained in an Expert Report attached as Exhibit A (Fagan Report or Report). Professor Fagan's tests show (1) discriminatory effect, in that there was a clear pattern of racial disparities in whom the ATF chose to target, and (2) discriminatory intent, in that those racial disparities are inexplicable on grounds other than race. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977). The Fagan Report finds clear evidence of race discrimination:

> [A]fter controlling for the ATF criteria as well as several indicia of criminal propensity, race remains a statistically significant predictor of selection as a Stash House defendant. These analyses show that the ATF is discriminating on the basis of race in selecting Stash House defendants.

Report at 3. Professor Fagan's statistical analyses are evidence not just of correlation but also of causation: They rule out race-neutral explanations, creating the inescapable conclusion that the ATF selected the stash house defendants on the basis of race.

Defendants present additional evidence that the ATF acted with a discriminatory purpose. The defendant group contains a higher percentage of Black people than three *real* stash house robbery crews not prosecuted by the ATF in this district, underscoring the conclusion that the ATF targeted the defendants because of their race. In addition, the ATF abandoned its governing procedural and substantive criteria for defendants of color, leaving agents to their own discretion. Agents misused that discretion, targeting defendants of color. Moreover, defendants provide

direct evidence that, in some cases agents went so far as to expressly recruit Black targets. Finally, discriminatory intent is also established by the Stash House Operation's susceptibility to abuse when considered in tandem with the racial disparities it produced.

The ATF violated the Constitution in executing its Stash House Operation in this case and this district. Accordingly, defendants respectfully request that this case be dismissed.

FACTUAL BACKGROUND

The ATF's Stash House Operation is a wholly fictitious crime that is created, managed, and orchestrated by the ATF for the ostensible purpose of "identifying persons and infiltrating groups that . . . focus their criminal activities on executing robberies, by means of force, for personal gain." ATF O 3250.1B.12.a(1); *see also* ATF O 3250.1A.52.[1] The set-up is virtually the same every time. *United States v. Kindle*, 698 F.3d 401, 404 (7th Cir. 2012), *rev'd sub nom. on other grounds*, *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014) (en banc) (observing that the ATF "has a standard playbook" for its Stash House Operations; "the facts between cases are frequently nearly identical"). An undercover ATF agent or confidential informant (CI) offers his targets an enticing jackpot: an opportunity to rob a stash house that contains large quantities of drugs, worth hundreds of thousands of dollars, guarded only by a few men with guns. *See* Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 Cardozo L. Rev. 1401, 1446–47 (2013). Of course, there is no stash house, no drugs, no guards, and no weapons—and when the targets gather to execute the law enforcement-led "robbery," the ATF arrests them all. *See id.*

The ATF tightly controls the entire Stash House Operation scenario, up through and

[1] The government produced four ATF documents, which defendants have reprinted in an Under Seal Supplemental Appendix as follows: The "ATF Manual" is Supp. Appx A; the "ATF O 3250.1B" is Supp. Appx B; the "Zayas Training" is Supp. Appx C; and the "ATF O 3250.1A" is Supp. Appx D. For the sake of brevity, this Motion cites directly to specific provisions and page numbers of the ATF documents. These documents are discussed in more detail in footnote 5, *infra*.

including the day of arrest. It uses that control to select each individual defendant. ATF agents are instructed to hand-pick or validate not only the initial target, but also the other members of the robbery crew.

In Chicago, the ATF has misused the tremendous control afforded by the Stash House Operation. In each of the 24 cases charged from 2006–2013, Report at 3, the ATF used the same playbook described above. These cases did not, however, comply with the ATF's internal safeguards for ensuring proper target identification. In this district, the program swept up not the "'worst of the worst,'" but enormous numbers of poor and vulnerable Black people and other people of color. *See* Brad Heath, *Investigation: ATF drug stings targeted minorities*, USA Today, July 20, 2014 (USA Today Investigation) (quoting Melvin King, ATF Deputy Assistant Director for Field Operations), http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/.

This is not the first time the ATF has come under fire for its handling of undercover operations. The ATF was recently taken to task for its so-called "storefront operations," in which the ATF "operates a fake business" that serves as a front for undercover illegal activity.[2] Along with Stash House Operations, storefronts are one of the ATF's "most commonly used undercover operations requiring significant oversight . . . ." ATF Manual at iv. The storefront operations "came under scrutiny after news reporting described numerous problems with [them], including the theft of firearms, improper handling of sensitive information, and the alleged targeting of persons with disabilities." Storefront Report at 35. In response to these concerns, the Department of Justice's Office of the Inspector General (OIG) investigated and found numerous

[2] Office of the Inspector General, United States Department of Justice, *A Review of ATF's Undercover Storefront Operations* at iv (2016) (Storefront Report), https://oig.justice.gov/reports/2016/o1606.pdf.

problems with the operations: "ATF failed to devote sufficient attention to how it was managing its undercover storefront operations. It lacked adequate policies and guidance for its agents, and in some cases supervision, necessary to appropriately address the risks associated with the use of this complex investigative technique." *Id.* at 87. The OIG observed that, given such flaws, "we were not surprised that ATF's storefronts did not lead to the arrest of leading gang figures or the dismantling of criminal organizations." *Id.* at 72; *see also id.* at 65 ("[T]he head of the FBI's undercover program told [the OIG] that storefronts were 'a crude tool to target a crime problem' . . . ."). In another instance, Congress harshly criticized the Arizona office of the ATF as having "failed spectacularly to consider resulting negative outcomes" of Operation Fast and Furious, including the foreseeable deaths of law enforcement officers and others.[3] The well-documented and wide-ranging failures in these other ATF undercover operations[4] lend support to defendants' concerns with the ATF's handling of its Stash House Operation in this district.

I. The ATF Orchestrates Every Aspect of the Fictitious Stash House Operation.

The Stash House Operation originated in the early 1990s in Miami, Florida, and was "aimed at combatting the increasing presence of crews dedicated to robbing drug trafficking organizations." Christopher Bayless Affidavit (Bayless Aff.), *United States v. Jackson*, 13-CR-636, Dkt. 96-3 at 2 (N.D. Ill. Nov. 14, 2014). Law enforcement described these "crews" in stark terms: "Heavily armed criminal gangs staged robberies of suspected narcotic trafficker's

[3] *See generally* Joint Staffs of H. Comm. on Oversight & Gov't Reform & S. Comm. on the Judiciary, 112th Cong., *The Department of Justice's Operation Fast and Furious: Accounts of ATF Agents* at 28 (2011) (Fast and Furious Report), https://oversight.house.gov/wp-content/uploads/2012/02/ATF_Report.pdf.

[4] *See*, *e.g.*, Storefront Report at 73 (noting that one store front operation was placed 1000 feet from a day care center, while another was placed 600 feet from a Boys and Girls Club); *id.* at 20–21 (suggesting that guns were bought specifically to sell to the ATF operation); Fast and Furious Report at 40–41 (detailing how some within ATF not only foresaw, but expected, their operation to lead to the commission of additional crimes, including the possible homicides of citizens or law enforcement).

residences in search of drugs and/or currency . . . . These robberies, described as 'home invasion' robberies, often resulted in violent physical assaults of victims." Zayas Training at 2.[5]

Starting in the late 1990s, South Florida AUSAs and the ATF developed a national stash house program that consolidated the ATF's control over every aspect of the Stash House Operation. ATF Manual at 3; Bayless Aff. at 3; ATF O 3250.1B.12.d(1). They began training agents and prosecutors around the country in the national program. *See* ATF Manual at 3. The ATF has used this national program in the Northern District of Illinois since at least 2006. *See, e.g.*, *United States v. Harris*, 06-CR-586.

The national program shared the same goal as the Miami version: targeting and eliminating what the ATF called "home invasion robbery crews." ATF Manual at 2–3. Unlike the Miami Operation, the national framework is a "dry conspiracy." *See* ATF O 3250.1B.12.d(1);

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[5] ATF Agent Richard Zayas helped originate the Stash House Operation in Miami and for decades led training on the Operation around the country. Zayas Testimony Tr. 456:6–8, *United States v. Simpson*, 09-CR-1040, Dkt. 453 (D. Ariz. Apr. 20, 2011) (testimony Apr. 29, 2010) ("In 1991, myself and other agents developed a technique for working home invasions in Miami. And since 1991 to 2010, I've been working those type of investigations."); *id.* at 460:9–11 ("I've participated as assisting other agents in how to utilize this technique in multiple states.").

The government produced the Zayas training materials and three additional ATF documents in response to Chief Judge Castillo's order that the government produce any documents prepared by the ATF that "summarize[] how to investigate and prosecute phony stash house rip off cases, including any guidelines for selecting appropriate targets for these cases . . . ." *Williams*, 12-CR-887, Dkt. 70 at 2 (July 31, 2013); *Brown*, 12-CR-632, Dkt. 153 at 2 (July 31, 2013). The four documents are: (A) an ATF Home Invasions Operations Manual dated 2013 (hereinafter "ATF Manual"); (B) a policy entitled ATF Order 3250.1B.12 dated November 17, 2011, and reprinted in the 2013 ATF Manual; (C) an "ATF Course" by Richard Zayas dated 2009 (hereinafter "Zayas Training"); and (D) an undated policy entitled ATF Order 3250.1A.52 from sometime before 2011. These documents are contained in Under Seal Supplemental Appendices A–D.

Defendants operate on the assumption that both the Zayas Training and the ATF Manual apply throughout the entire 2006–2013 time period. Defendants also provide parallel citations to ATF Orders 3250.1A and 1B where applicable. The Zayas Training appears to provide directions for implementing Order 3250.1B and Order 3250.1A, neither of which sets out key features of the Operation, such as the undercover story. The Zayas Training is the only document the government produced that supplies this kind of direction. The 2013 ATF Manual, in turn, appears to incorporate both the Zayas Training and 3250.1B. The Manual states that its goal is to provide "one-stop shopping for background, policy and direction" on the Stash House Operation. *See* ATF Manual at iv; *see also e.g.* ATF Manual at 12 (referencing ATF O 3250.1B).

ATF Manual at 2–3. The charges arise from a mere *plan* to rob the "stash house"—there are no drugs nor any "robbery" at all. *See* ATF Manual at 24; Zayas Training at 12–13. Because the crime is fake, the undercover agent must play a central role. ATF O 3250.1B.12.d(1).[6]

In the national version of the program, the ATF orchestrates the scheme to ensure that the undercover ATF agent maintains tight control of the Operation and obtains the damning evidence that will lead to an arrest and an indictment. The ATF trains its agents to first contact the intended targets via "[a]n informant who is a member and/or has access to the group." Zayas Training at 5; ATF Manual at 2. Under the agent's supervision, the informant steers the targets' conversation toward home invasion robberies, especially those involving the use of guns with multiple robbers. Zayas Training at 6. The informant then introduces the targets to the undercover agent, who poses as a disgruntled courier for an international drug cartel. ATF Manual at 2 ("In this new strategy, ATF used a CI to introduce an ATF undercover agent to the armed robbery crew so that the agent could ensure better control of the investigation . . . .").

After that, the agent makes himself indispensable to the targets. *Id.* He offers them a once-in-a-lifetime opportunity to make a huge amount of money by robbing a fictional drug cartel of kilograms of valuable cocaine. Zayas Training at 8. The agent holds the keys to robbing that "stash house": He claims the "cartel" will tell him the location of the cocaine right before the "courier" is to pick it up, leaving only a small window of time for the "robbery." *Id*. at 8–9.

The agent uses this fabricated role to orchestrate the entire robbery plan. Over multiple meetings, the agent emphasizes to the targets how much they stand to gain and pushes them to

[6] In testimony under oath, Richard Zayas confirmed that this framework is the one that he and other ATF agents took national. Zayas Tr. 458:4–459:24, *Simpson*, 09-CR-1040, Dkt. 453 (D. Ariz. Apr. 20, 2011) (testimony Apr. 29, 2010) (comparing Miami technique to the "technique which we use today"). This confirms that the Zayas Training provided important directions for implementing ATF Order 3250.1B and Order 3250.1A during the entire 2006–2013 period.

spell out a plan for executing the "robbery." Zayas Training at 10–11. He encourages the targets to bring along additional people and guns by stressing that the robbery plan will require enough manpower and guns to overcome the armed guards who supposedly stand sentry over the stash house. *Id.* And only once the targets' plan meets with the agent's approval does he move the Operation to the next stage by telling them that he expects a call from his cartel "boss" any time, so they should be ready. *Id*. at 11.

At that point, the agent puts the targets on a tight timeline. He tells them that the robbery window will open within the next day or two. *Id.* at 11. At the appointed time, the targets gather to wait for the agent to learn the stash house's location from his supposed cartel bosses. *Id.* at 11–12. In reality, the message from the cartel "boss" comes from the agent's ATF supervisor, who signs off on the Operation one last time. *Id.* at 8–9, 12. Once the supervisor approves, the ATF swoops in and arrests everyone present.[7]

II. The ATF Hand-Picks All of Its Targets for the Fictitious Stash House Operation.

The ATF's policies require its agents to carefully select the stash house targets from the Operation's initiation through the day of arrest. Each step of the Stash House Operation is supposed to ensure that the ATF targets and ensnares only viable robbery crews. ATF O 3250.1B.12.a(1); *see also* ATF O 3250.1A.52; Zayas Training at 4 (suggesting that stash house operations be initiated when "an agent developed information identifying an organization involved in home invasion robberies"). Just to get one of these operations off the ground, the ATF must "validate the suspects [as] a viable robbery crew or violent individuals." ATF Manual,

[7] ATF Agent Richard Zayas played a prominent role in creating, promoting, and training ATF agents around the country on the Stash House Operation. Disturbingly, he was found not credible under oath in a Stash House case when he claimed that a defendant pointed a handgun at him. *United States v. Ryan*, 2009 U.S. Dist. LEXIS 88204, at *7 (D. Ariz. Sept. 24, 2009) ("I do not find that Special Agent Zayas is credible on this issue."), *vacated on other grounds* (mootness), *Ryan*, 09-CR-1145, Dkt. 84 (D. Ariz. Nov. 19, 2009).

"Operational Checklist" at 26; ATF Manual at 11; *see also* Zayas Training at 4.

Moreover, the Operation's numerous procedural and substantive conditions require the agents to sign off on all of their targets before arrest, not just the initial target. The playbook even entitles agents to walk away on the day of arrest if the ATF cannot conclude that the targets are a viable robbery crew or otherwise have met the Operation's criteria. *See* Zayas Training at 12.

The ATF has strict procedural requirements for meeting, identifying, and ratifying the individual targets of a given Operation. *See generally* Zayas Training at 9–11; *see also* ATF O 3250.1B.12.g (requiring ATF to identify all known targets in a Takedown Memorandum); ATF O 3250.1A.52.c (same); ATF O 3250.1B.12.b(4) (requiring meeting with at least two members of the fictional robbery crew before the day of arrest); ATF O 3250.1B.12.f(1) (requiring ATF to attempt to identify all targets before arrest); *id.* (requiring three in-person meetings with targets before the day of arrest). It is during these meetings that agents identify the Operation's targets, shape the robbery plan, and encourage the early targets to recruit more people, with guns, as discussed above. ATF agents are trained to use the second meeting to meet "with as many members of the target group as possible." Zayas Training at 11. The ATF further trains its agents to hold additional meetings to "identify other members [of the conspiracy]." Zayas Training at 11. The ATF emphasizes that the final meeting should ensure the undercover agent's ability to speak with *all* targets even if some of them were missing from earlier meetings. ATF O 3250.1B.12.e(2).

These procedural requirements are also supposed to ensure that the ATF's targets meet the agency's substantive goal of incapacitating violent robbery crews. *See* ATF O 3250.1B.12.b; Zayas Training at 5. First and foremost, the ATF limits its targets to established robbery crews. ATF O 3250.1B.12.a(1); *id.* at 3250.1B.12.b; ATF O 3250.1A.52. The ATF also requires that the

targeted crew meet three minimum criminal history requirements: (1) at least two members must be "identified as violent offenders," ATF O 3250.1B.12.b(1); (2) all "[t]argets must be currently involved in criminal activity," ATF O 3250. 1B.12.b(3); and (3) "[a]t least one target must have a past violent crime arrest or conviction," ATF O 3250.1B.12.b(2). *See generally* Zayas Training at 5. Finally, the ATF trains agents to pursue investigations only against targets who can demonstrate their "ability to commit a home invasion by . . . having possession of, or access to, firearms." Zayas Training at 5.

The ATF further requires supervisors and/or AUSAs to approve the targets in a given Operation no fewer than three times before they can be arrested: (1) At the outset (Zayas Training at 4); (2) before proceeding to the arrest phase (*id*. at 11; ATF O 3250.1B.12.g; ATF 3250.1A.52.c); (3) and immediately before the takedown (*id*. at 9, 12). Any variations, such as allowing the CI a more prominent role or limiting the number of identification meetings, require yet more approvals from supervisors. ATF Manual at 12 (CIs); ATF O 3250.1B.12.d(2) (same); ATF Manual at 13 (meetings); ATF O 3250.1B.12.f(2) (same). In addition, the ATF is required "to establish an understanding," as well as "parameters for selecting investigative techniques," with the local United States Attorney's Office before proceeding with Stash House Operations. ATF O 3250.1B.12.h; *see also* ATF O 3250.1A.52.a.

In spite of these directives, the ATF disregarded its Operations' many substantive and procedural selection criteria for Black people and other defendants of color. *See infra* Argument III.C. The result is a group of defendants who are 92% people of color—enormously more targets of color than a non-race based selection process would capture. Report at 18.

In addition, in at least three cases in this district, the ATF expressly targeted Black defendants and encouraged them to recruit other Black people into the robbery crew. *See infra*

Argument Part III.D (discussing these tactics in *Williams*, *Brown*, and *Paxton*). Agents in those cases posed as disgruntled couriers for a Mexican cartel and made clear that they wanted the stash house crew to be Black. They tried to justify this race-based selection by reference to the fake cartel. *See, e.g.*, Ex. D-1 at 1 ("You know if they see m—if they see some other Mexicans doin' it, they're gonna know they're with me"). And the agents' recruitment aim succeeded; each case netted exclusively Black defendants.

III. The Fagan Report Shows that the ATF Selected a Disproportionate Percentage of People of Color, and the Selection is not Explained by Race-Neutral Factors.

The stash house defendants charged in this district are overwhelmingly and disproportionately non-White. From 2006–2013, the ATF charged 94 people, resulting in 24 federal criminal cases.[8] *See* Report at 12–15. The 94 targets comprised 8 White people, 12 Hispanic people, and 74 Black people, in two distinct time periods. *Id*. at 15.

The ATF's targeting of people of color for the Stash House Operation worsened over time. In the first phase of the Operation, from 2006–2009, seven of the 37 stash house targets (18.9%) were White. *Id*. In the second phase, from 2011–2013, the ATF picked up steam, charging a greater number of people (from 37 to 57 people). *Id*. However, only one of the people it charged (1.8%) was White. *Id.* During that later period the ATF's cases charged 1 White person, 11 Hispanic people, and 45 Black people. *Id.* The percentage of Black people charged in both time periods remained roughly constant at 78% to 79%. *Id.* The number of Hispanic people jumped enormously in the later period, from 1 to 11 people. *Id*.

Professor Fagan uses four different statistical tests to compare the stash house targets in this district to a similarly situated comparison group. All four tests support a finding that the ATF intentionally targeted Black people for the Stash House Operation. Report at 2–3, 36.

[8] There have been no ATF Stash House cases charged in this district since 2013.

First, Professor Fagan estimates the probability of drawing a defendant group composed almost exclusively of people of color from a larger group of potentially eligible offenders. Report at 16. This is known as a "binomial distribution" analysis. *Id.* He finds an approximately 0% likelihood of selecting by chance such a high proportion of Black people or people of color from a population comprising people with convictions for firearms, controlled substance, and/or violent offenses. *Id*. at 16–18.

Second, Professor Fagan uses a multivariate logistic regression (Test 1) to "isolate the role of race . . . in the selecting of Stash House defendants" in this district. Report at 22. The regression factored out major race-neutral explanations. *Id.* at 24–26. Professor Fagan finds a less than 1% or 5% likelihood that the pattern of racialized outcomes was the result of chance, across several alternative explanations he tested. *Id.* at 29–32. That is, the results were statistically significant.[9]

Professor Fagan's third and fourth tests confirm the results of the logistic regression using different regression methods. Those tests are an Augmented Inverse Probability Weighting test (Test 2) and a Propensity Score Matching test (Test 3). *See* Report at 26–29, 32–35. Again, these statistically significant results rule out alternative race-neutral explanations, *id.* at 32–35,

[9] In this motion, the word "significant" refers specifically to statistical significance unless otherwise noted. Statistical significance refers to the likelihood that the observed race disparity resulted from chance. The lower the "p-value" (probability), the less likely the observed numbers are the result of chance. *See* Report at 31 n.50. For example, when the p-value is less than .01 or 1%, that means there is a less than 1 in 100 chance that so many non-White or Black people would be targeted by chance, given the racial composition of the eligible population. *See id.*; D.H. Kaye & D.A. Freedman, *Reference Guide on Statistics*, *in* Reference Manual on Scientific Evidence 249–51 (2010) ("Reference Guide"). Likewise, when the p-value is less than .05 or 5%, that means there is a less than 1 in 20 chance that so many non-White or Black people would be selected; a p-value less than .1 or 10% creates a less than 1 in 10 chance. Professor Fagan specifies statistical significance at the 1% ($p<.01$), 5% ($p<.05$), and 10% ($p<.1$) levels in the Report. *See, e.g.*, Report at 33. This is consistent with Seventh Circuit precedent, which directs judges to make determinations about significance levels based on "the evidence of a trained statistician . . . in the context of a particular study in a particular case." *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362–63 (7th Cir. 2001).

and thus show that the ATF selected the stash house targets on the basis of race.

In sum, all variations of all tests show a less than 5% likelihood of the ATF selecting so many Black defendants by chance. *See* Report at 30, 31, 33, 35. Accordingly, all of Professor Fagan's results are statistically significant for Black defendants at the 5% level or less. *Id.*

IV. ATF Targeting in *United States v. Cousins*

In this stash house case, the ATF targeted three Black men. It is undisputed that the ATF initiated contact with David Cousins, directing a CI to call David and connect him with an ATF agent. *See* Complaint at 4.[10] When David reached out, the agent set the wheels of the crime in motion and ratcheted up the seriousness of the offense at every turn. The agent promised a payday of "at least eight kilograms of cocaine," *id.* at 7, encouraged David to arm himself by pretending that two to three armed men would be standing guard, *id.* at 8, and even promised to provide David with a trap car to facilitate the offense, *id.* at 19.

Moreover, in bringing this case, the ATF repeatedly departed from its own substantive and procedural targeting requirements, in contrast to its adherence to those requirements in cases involving White defendants. *See generally infra* Argument Part III.C.

The ATF disregarded several of its substantive requirements. First, the ATF's targeting of David Cousins violated its primary mission of targeting viable robbery crews. *Contra* ATF O 3250.1B.12.a(1); ATF O 3250.1A.52; Zayas Training at 4. According to the government, this case arose when a CI stated that David claimed to have conducted a recent armed robbery. Complaint at 3–4. Notably, at the time he was targeted, David had never been convicted of anything remotely violent, and had never before been sentenced to prison.

In addition, the Complaint's contention that "the description of the robbery provided by

[10] The ATF ultimately arrested both David Cousins and Michael Cousins. For clarity's sake, this section will refer to them by first name.

the CS was consistent with a robbery that occurred on or about December 7, 2011," Complaint at 3–4, is belied by the evidence—as the ATF would have discovered had they done even the most minimal of investigations. The CI said that David claimed responsibility for a robbery that turns out to have been covered extensively by the local news.[11] Specifically, a man had visited a local casino and was robbed of his winnings as he returned home. The arrest report of this December 7, 2011, robbery describes two perpetrators who were "black males" "age 22-27." Yet in 2011, David was nearly twice that age—41 years old. The well-publicized robbery also occurred at an address in Chinatown that is fully 10 miles away from where David resided on the South Side. By the time of David's supplemental bond hearing on February 24, 2015—over three years after the robbery—it was clear that no governmental agency considered him a genuine suspect in the robbery. Had he ever truly been under suspicion, the police would surely have shown his photo to the complainant by then.

Despite its concerns about David Cousins, the ATF appears to have done no investigation into his supposed "crew." The ATF's CI identified only David as having claimed to have committed a past robbery, and made no mention of a robbery "crew." *See id.*; Supp. Appx E-17 at 2. The ATF also reports no attempts to explore "all traditional investigative avenues and arrest options" at the start of the operation. *Contra* Zayas Training at 4. Instead, the ATF opted to begin the phony stash house operation only five days after its CI first identified David. *See* Supp. Appx

[11] *See* William Lee, *Gambler Says He was Robbed of $10,000 Won at Casino*, Chicago Tribune (Dec. 7, 2011), http://articles.chicagotribune.com/2011-12-07/news/chi-gambler-says-he-was-robbed-of-10000-won-at-casino-20111207_1_hammond-casino-chinatown-man-victim; Naomi Nix & William Lee, *After Winning $10K at Indiana Casino, Man Robbed Steps from Chicago Home*, Chicago Tribune (Dec. 7, 2011), http://articles.chicagotribune.com/2011-12-07/news/chi-after-winning-10k-at-indiana-casino-man-robbed-steps-from-chicago-home-20111207_1_indiana-casino-cash-and-casino-chips-apartment-building; Elizabeth Chuck, *Unlucky: Man Robbed of $10,000 Won at Casino*, NBC News (Dec. 8, 2011), http://usnews.nbcnews.com/_news/2011/12/08/9301146-unlucky-man-robbed-of-10000-won-at-casino?lite.

E-17 at 2.

Second, the ATF flouted its substantive requirement that all of the "[t]argets must be currently involved in criminal activity." ATF O 3250.1B.12.b(2). As an initial matter, the ATF failed to identify either Michael Cousins or Dunwon Lloyd by name prior to the date of arrest. *See* Complaint at 9 n. 4 (noting that Michael Cousins was not identified until after arrest), *id*. at 11 n. 5 (noting that Dunwon Lloyd was not identified until after arrest). *Id.* Accordingly, the ATF was unable to assess the criminal history of either of these men. The only person the ATF did positively identify, David Cousins, had no prior arrests or convictions within the two years before he was targeted. In fact, David had only a single conviction based on conduct that occurred in the previous decade, and he received probation in that case and completed it successfully. Indeed, of the three men ultimately targeted by the ATF in this case, only one, Dunwon Lloyd, had even been arrested within two years of the ATF's operation, and that arrest was for misdemeanor assault and did not result in a conviction. Any other criminal history for the three targets was far too dated to constitute "current" involvement.

Additionally, the ATF only nominally met its substantive requirement that two of the suspects be violent offenders. *See* ATF O 3250.1B.12.b(1) (requiring that two members must be "identified as violent offenders"). Because of counsels' generous interpretation of the ATF's criteria, David Cousins and Michael Cousins are counted as fulfilling this violent offender requirement. However, the ATF did not identify Michael Cousins until after the arrest, and so they had no way to know that he had a nearly twenty-year-old battery conviction. *See* Complaint at 9 n.4. Moreover, had the ATF even cursorily investigated David Cousins' claim that he had committed the casino-winnings robbery, they would have learned that he did not fit the description of the actual perpetrators. Beyond the simple age and distance issues, if David had

truly been a suspect in that robbery, the ATF would have shown his photo to the complainant as part of its requirement to utilize "all traditional investigative avenues and arrest options," instead of creating a phony Stash House Operation. *See* Zayas Training at 4.

Furthermore, the ATF violated two important procedural requirements in this case. First, in the Takedown Memorandum, the ATF failed to identify two of the targets—Michael Cousins and Dunwon Lloyd—and those targets' criminal histories. *Contra* ATF O 3250.1B.12.g; ATF O3250.1A.52.c. The ATF departed from this criterion in fully ten cases involving defendants of color, as discussed in Argument Part III.C.2(a).

Second, although the ATF met with all three targets, it failed to identify either Michael Cousins or Dunwon Lloyd until after the arrest. *Contra* 3250.1B.12.f.(1); Zayas Training at 11 ("[A]dditional meetings will be conducted in an attempt to identify other members."). This is in spite of the fact that Michael Cousins identified himself to the ATF undercover agent by his first name, "Mike," and was introduced to the ATF undercover agent as David Cousins' cousin. *See id.* at 9. Contrary to its rules, the ATF made little or no effort to attempt to identify either of these individuals. *Contra* ATF O 3250.1B.12.f(1) ("All available investigative measures should be applied in an effort to identify all subjects involved in the investigation.").

The ATF's marked failure to identify two of the three participants in this case, in spite of clear signals pointing to their identities, stands in sharp contrast to the cases involving mostly White defendants, in which the ATF knew of every defendant before the day of the arrest. *See infra* Argument Part III.C.2(b). This case illustrates the ATF's substantial deviations from its own guidelines and procedures in cases involving people of color.

ARGUMENT

I. Selective Enforcement Legal Standard

As the Seventh Circuit recently reaffirmed, the Constitution prohibits law enforcement agents from engaging in selective enforcement on the basis of race. *See Davis*, 793 F.3d at 720. Selective enforcement claims "draw on ordinary equal protection standards." *See Armstrong*, 517 U.S. at 465 (internal quotation marks omitted). Defendants must meet a two-prong legal standard: We must show that the ATF's Stash House Operation had a discriminatory effect and was motivated by a discriminatory purpose (also called discriminatory intent). *Id*. at 465; *Chavez*, 251 F.3d at 635–36.

Defendants here allege selective enforcement by a law enforcement agency—the ATF—rather than selective prosecution by the U.S. Attorney's Office. In the selective prosecution context, the Court established a "clear evidence" standard for selective prosecution challenges because there is a "presumption that a prosecutor has not violated equal protection[.]" *Armstrong*, 517 U.S. at 464–65.

A lower standard applies for selective enforcement challenges such as this one because law enforcement agencies do not enjoy the same presumptions and privileges as prosecutors: "Unlike prosecutors[,] . . . [a]gents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior." *Davis*, 793 F.3d at 720; *see also Chavez*, 251 F.3d at 640 (distinguishing *Armstrong* because "*Armstrong* emphasized . . . the discretion accorded to prosecutors" and "the instant case involves police conduct, not prosecutorial discretion"). This distinction, in turn, lowers the legal standard that applies in the selective enforcement context: "[T]he sort of considerations that led to the outcome in *Armstrong* *do not apply* to a contention that agents of the FBI or ATF engaged in racial discrimination when

selecting targets for sting operations, or when deciding which suspects to refer for prosecution." *Davis*, 793 F.3d at 721 (emphasis added).

II. Defendants Have Demonstrated Discriminatory Effect.

The Fagan Report provides overwhelming statistical evidence that the ATF's Stash House Operations produced a racially discriminatory effect, thus meeting the first prong of the selective enforcement test. *See, e.g.*, *Floyd v. City of New York*, 959 F. Supp. 2d 540, 661–62 (S.D.N.Y. 2013) (analyzing an expert report by Professor Fagan about New York City's stop-and-frisk practices and concluding, "[P]laintiffs' statistical evidence of racial disparities in stops is sufficient to show a discriminatory effect."). The Fagan Report compares the racial composition of the defendants in stash house stings with the racial composition of a similarly situated comparison group composed of individuals who met the ATF's purported selection criteria but were *not* targeted. The Report proves discriminatory effect by finding that non-Whites were substantially more likely than similarly situated Whites to be targeted by the ATF for participation in stash house stings. The Report concludes that there is a less than .1% probability of the ATF randomly selecting such a high proportion of people of color. Report at 2.

A. The Supreme Court and Seventh Circuit's Comparative Standard

Armstrong instituted a *comparative* standard for proving discriminatory effect: "To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." 517 U.S. at 465. To prove discriminatory effect, the defense must provide evidence of the racial composition of two groups: (1) the defendant group, and (2) a similarly situated comparison group composed of people who met the relevant targeting criteria and yet were treated differently. *See id.* at 469 (requiring evidence that "similarly situated defendants of other races could have been prosecuted, but were not.").

The Seventh Circuit has extended this comparative standard to the selective enforcement context. *See Chavez*, 251 F.3d at 638. The court made clear in *Chavez* that statistics can meet the similarly situated standard. *Id*. at 640 (holding that a party seeking to demonstrate selective enforcement need not identify a specific White individual who met criteria and was not targeted, because that would be impossible). The Department of Justice agrees. *See* United States Department of Justice Civil Rights Division, *Investigation of the Baltimore City Police Department* at 48 (Aug. 10, 2016) ("DOJ Baltimore Report") (citing cases), https://www.justice.gov/opa/file/883366/download (statistical evidence is appropriately used to demonstrate that law enforcement has created a racially discriminatory effect).

In the specific context of the ATF's phony Stash House Operations, the Seventh Circuit has held that a defendant can meet the comparative standard and prove discriminatory effect by showing that "suspects of another race, and otherwise similarly situated, w[ere] not . . . offered the opportunity for a stash-house robbery . . . ." *Davis*, 793 F.3d at 723; *see also Chavez*, 251 F.3d at 639 ("[S]tatistics demonstrating that whites stopped for traffic violations" were treated differently than "similarly situated African-American or Hispanic[] drivers . . . would be sufficient to show discriminatory effect.").

Here, the similarly situated comparison group is defined by the ATF's purported targeting criteria. *See Davis*, 793 F.3d at 723 (explaining that analysis of the ATF's "targeting criteria . . . could shed light on whether an initial suspicion of race discrimination in this case is justified"). The similarly situated group includes all people who met the ATF's purported targeting criteria yet were *not* targeted by the ATF for participation in a phony stash house sting. *See Chavez*, 251 F.3d at 640–45 (defining the comparison group as White individuals who met the requirements of "Operation Valkyrie" by driving on Illinois highways); *United States v. Hayes*,

236 F.3d 891, 895 (7th Cir. 2001) (defining the comparison group as "persons of another race who fell within the Operation Triggerlock guidelines [but] were not federally prosecuted"). Of course, because the ATF fabricates the offense of stash house robbery and selects people to commit the fake crime, there does not exist a group of people committing the offense who are *not* being targeted by the ATF. *United States v. Paxton*, 2014 U.S. Dist. LEXIS 56857, at *15 (N.D. Ill. Apr. 17, 2014) ("[T]here is no defined pool of individuals who are charged and subsequently prosecuted differently to whom defendants may compare themselves."), *quoted in Brown*, 12-CR-632, Dkt. 261 at 5–6 (Oct. 3, 2014); *Williams*, 12-CR-887, Dkt. 141 at 5–6 (Oct. 3, 2014).[12]

The similarly situated requirement is met, and discriminatory effect is proved, if a comparison between the *defendant group* and the *similarly situated group* demonstrates that Black people or other people of color were more likely than White people to be targeted for Stash House Operations. For example, the Supreme Court has held that "the similarly situated requirement was met by [evidence] . . . that Blacks were 1.7 times as likely as whites to suffer disenfranchisement under the law in question." *Chavez*, 251 F.3d at 636 (discussing *Hunter v. Underwood*, 471 U.S. 222, 227 (1985)); *see also Armstrong*, 517 U.S. at 467 (describing showing in *Hunter* as "indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites"); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (similarly situated standard met by evidence that all 200 exemption applications by Chinese launderers were denied, while 79 of 80 such applications by White launderers were approved).

[12] The similarly situated comparison group in a selective enforcement case is akin to the relevant labor pool in a failure-to-hire employment discrimination case. In the Title VII context, the statistical question is "how many African-Americans should have been hired based on the relevant labor market . . . ." *E.E.O.C. v. O&G Spring & Wire Forms Specialty Co.*, 38 F.3d 872, 875 (7th Cir. 1994). In the selective enforcement context, the question is how many African-Americans and non-Whites should have been selected by the ATF (a.k.a. "hired") based on the pool of people who met the relevant criteria.

B. Defendants' Evidence Meets the Comparative Standard and Demonstrates Discriminatory Effect.

The Fagan Report demonstrates that the ATF disproportionately targeted non-White individuals for the Stash House Operation. To distill a proper similarly situated comparison group, defendants obtained data about all individuals who met the ATF's purported targeting criteria. Professor Fagan analyzed that data, and found statistically significant evidence that the ATF targeted people of color at a higher rate than similarly situated White people. Defendants have therefore met the comparative standard articulated in *Armstrong* and the Seventh Circuit's case law.

The Defendant Group: In the stash house context, the defendant group includes all 94 people whom the ATF targeted to participate in phony stash house robberies and who were charged as defendants in such cases between 2006 and 2013. Report at 3.[13]

The Similarly Situated Comparison Group: To determine the contours of the comparison group, defense counsel subpoenaed data regarding all individuals who (1) met the ATF's purported targeting criteria, in that they had one or more convictions for the "violent" target offenses listed in the Manual, narcotics offenses, or firearms offenses;[14] and (2) were convicted of those offenses in the same geographic area and during the same time period in which the stash

[13] Defendants also requested discovery about individuals who the government approached or in some way targeted for a Stash House Operation but who did not participate or were not arrested. *Williams*, 12-CR-887, Dkt. 178 at 13–14 (Feb. 16, 2015); *Brown*, 12-CR-632, Dkt. 306 at 13–14 (Feb. 16, 2015). The government persuaded Chief Judge Castillo to deny that request. Mar. 25, 2015 Hearing Tr. 7:7–10, *Williams*, 12-CR-887, Dkt. 212 (May 15, 2015).

[14] For a full description and discussion of the target offenses, *see* Report at 5 & n.8; *see also id.* at Appendix C.

house cases arose.[15] The similarly situated comparison group here is drawn from the 292,442 "potential eligibles" who fit those parameters. Report at 16; *see also id.* at 5–6.

Defendants' comparative evidence meets the Supreme Court's and the Seventh Circuit's discriminatory effect standard. Defendants illustrate the comparative evidence visually:[16]

FIGURE 1:
Stash House Cases—
Comparative Evidence

Defendant Group	Comparison Group
94 Stash House defendants	**292,442 people who met ATF's targeting criteria**
Geographic Area → 8 counties in IL	**Geographic Area →** 8 counties in IL
Time period → 2006-2013	**Time period →** 2000-2013
Racial Composition → 78.7% Black	**Racial Composition →** 55.4% Black
Likelihood Racial Composition Result of Chance → 0%	

FIGURE 2:
***Armstrong*—**
NO Comparative Evidence

Defendant Group	Comparison Group
Defendants in federal crack cocaine cases	
Geographic Area → Los Angeles	**NONE PRESENTED**
Time period → 1991	
Racial Composit'n → 100% Black	
Likelihood Racial Composition Result of Chance → ?	

Defendants' evidence provides the proof that was missing in *Armstrong*. The defendants in *Armstrong* lost because they only presented evidence about the defendant group, and did not present evidence of a similarly situated comparison group. The *Armstrong* defendants

[15] As Professor Fagan explains: "Records were requested for the entire Metropolitan Statistical Area of Chicago, but the Court ordered records produced only for the counties where the Stash House cases arose: Cook, Lake, Will, DuPage, Kane, Kendall, LaSalle and Winnebago Counties." Report at 6. Defendants requested records for the entire Metropolitan Statistical Area because the government's expert contends that it is the relevant geographic area. *See* Gov't Response to Defendants' Joint Revised Motion for Discovery, *Jackson*, 13-CR-636, Dkt. 96 at 14 (Nov. 14, 2014); Expert Report of Max M. Schanzenbach ("Schanzenbach Report"), *Jackson*, 13-CR-636, Dkt. 96-1 at 3–4 (Nov. 14, 2014).

[16] The facts in Figure 1 are drawn from the Expert Report. *See* Report at 3–7, 16, 17 (Table 3.1).

demonstrated the racial composition of the defendant group (people prosecuted for dealing crack cocaine), 517 U.S. at 459, but entirely "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted," *id.* at 470. To prove discriminatory effect, the *Armstrong* defendants would have had to "investigat[e] whether similarly situated persons of other races were prosecuted by the State of California . . . , but were not prosecuted in federal court." *Id*.

Contrasting Figure 1 with Figure 2 makes clear that defendants in this case have provided the comparative evidence that *Armstrong* requires. That showing also sets this case apart from post-*Armstrong* selective prosecution and selective enforcement cases in the Seventh Circuit where the defendants failed to provide evidence that government actors were treating similarly situated people of another race differently. *See Hayes*, 236 F.3d at 895 (defendant failed to provide evidence "that persons of another race . . . fell within the Operation Triggerlock guidelines [but] were not federally prosecuted."); *United States v. Westmoreland*, 122 F.3d 431, 434 (7th Cir. 1997) (defendant's evidence was "not probative of selective prosecution in the absence of any showing of different treatment of similarly situated persons of other races"). Cases in which defendants defined the *wrong* similarly situated comparison group are likewise distinguishable. *See United States v. Barlow*, 310 F.3d 1007, 1011–12 (7th Cir. 2002) (rejecting defendants' field study because White people who were not stopped were not similarly situated, as they had not engaged in the same behavior as defendants); *Chavez*, 251 F.3d at 621, 645 (rejecting plaintiffs' discriminatory effect claim because they had failed to provide "reliable data" about both the targeted group and the similarly situated comparison group). Defendants' comparison group does not suffer from these problems.[17]

[17] Defendants also have undertaken a national review of selective prosecution and enforcement

C. The Fagan Report's Initial Analysis Demonstrates Discriminatory Effect.

Using a statistical method called "binomial distribution" analysis, Professor Fagan finds that the likelihood of the ATF randomly picking Stash House defendants with the existing racial composition is nearly 0%. Report at 16–17; *id.* at 17 (throughout: "less than .1% likelihood, which is rounded to 0%"). He reaches this conclusion by comparing the racial composition of the stash house defendant group to the racial composition of a similarly situated comparison group. Report at 3–7; *see* Schanzenbach Report at 4 (government's expert stating: "The appropriate analysis of probabilities in this case is through the binomial formula").

The binomial distribution establishes that the ATF's actions created a discriminatory effect. It does so by showing that there are significantly more non-White defendants and Black defendants than one would expect, given the racial composition of the similarly situated group of people who could have been targeted by the ATF. The test finds that there is a 0% chance that the defendant pool would be made up of 91.5% or more non-White people, given the racial composition of the comparison group. Report at 18. Similarly, there is a 0% chance that the defendant pool would comprise 78.7% Black people. *Id*. at 17. Moreover, looking at the period of 2011–2013, there is also a 0% chance that the defendant group would be made up of 98.2% non-White individuals. *Id*. at 17.

These extraordinary "results suggest that it is extremely unlikely that a Stash House defendant pool would be selected with the racial and ethnic composition we observe, given the racial and ethnic composition of the pool of potential eligibles." Report at 18. Accordingly, the binomial distribution test demonstrates that the ATF's Stash House Operation created a *discriminatory effect* for targeted Black and other non-White individuals, and that this

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cases. In the overwhelming majority of those cases defendants did not present any comparative evidence at all, much less comparative evidence that complies with the similarly situated requirement.

discriminatory targeting increased from 2011–2013.

In fact, defendants' comparison group likely underestimates the extent of the discriminatory effect. Defendants created a comparison group consisting entirely of *people with convictions*. However, the ATF actually targeted at least 19 people with no convictions at all. Report at 19. If the "relevant labor market" for "stash house robbery crews" includes people with no convictions at all, then the proper comparison group would be *all* adults in the relevant geographic area during the applicable time period—not just adults with specified convictions. *See, e.g.*, *O&G Spring*, 38 F.3d at 875 (statistics about the relevant labor market "probably underestimated the African-American availability"). From 2006–2013, the adult population of the counties where the stash house cases arose was 17% Black. Ex. B. By comparison, the potential eligibles group was 55% Black. Report at 21. Had defendants used a comparison group that accounted for the fact that the ATF targeted people with no convictions, the magnitude of the discriminatory effect, as well as its statistical significance, likely would have increased dramatically.[18]

D. The Report's Three Additional Statistical Tests Further Demonstrate Discriminatory Effect.

The next three increasingly rigorous statistical analyses conducted by Professor Fagan provide additional evidence that the ATF's Stash House Operation created a discriminatory effect. Professor Fagan again directly compares the Stash House defendants to the similarly situated group of individuals who were not targeted by the ATF, and finds a clear racial

[18] In addition, to the degree that racial disparities in the criminal justice system are a consequence of a legacy of race-based decision-making, the comparison group incorporates the consequences of discrimination from the outset, thereby biasing it against Blacks and other people of color. *See, e.g.*, M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. of Poli. Econ. 1320, 1323 (2014) (finding that black men are 1.75 times more likely than white men to be charged with mandatory minimum offenses, all else being equal). Again, this would mean that Professor Fagan's statistical analyses *understate* the discriminatory effect and intent of the ATF's policies.

disparity: "[U]sing three distinct statistical tests for disparate racial treatment, there is strong, consistent, and statistically significant evidence that non-White suspects were more likely than White suspects to be targeted for recruitment into the Stash House Program . . . ." Report at 36.

The tests further support discriminatory effect because they establish that the stark racial disparity cannot be explained on grounds other than race. The disparity is not attributable to differing criminal propensities among non-White and White individuals in the pool of eligibles. *Id*. at 36. These alternative explanations were statistically ruled out in different ways across the three tests. Yet each test showed the same pattern: Being Black significantly increased a person's chance of being targeted by the ATF above and beyond any influence of race-neutral alternative explanations. *Id*. After conducting these tests, Professor Fagan concluded:

> [T]he results of these three tests, as well as the unadjusted tests of simple selection probabilities, show a pattern of selective enforcement in the recruitment of Stash House defendants. The results show that after controlling for several indicia of criminal propensity, race remains a statistically significant predictor of selection as a Stash House defendant.

Id. Together, "[t]he tests use a variety of analytic methods to examine the patterns of racial and ethnic differences, and each shows evidence of discrimination." *Id*. at 36. These three tests thus also provide strong evidence of discriminatory intent, as discussed in the next Section.

In conclusion, defendants have definitively proven that the ATF's Stash House Operation created a racially discriminatory effect.

III. Defendants Have Demonstrated Discriminatory Intent.

The ATF intentionally discriminated on the basis of race in executing its Stash House Operation in this district. Defendants have abundant evidence of discriminatory intent:

- First, the statistical analyses in the Fagan Report establish that the stark racial disparity outlined in the Discriminatory Effect section cannot be explained on grounds other than race.

- Second, comparing defendants to actual stash house robbers in this district further negates the possibility that the stark racial disparity can be explained on grounds other than race.

- Third, the ATF's repeated departures from its substantive and procedural criteria when targeting people of color, but not White people, establish discriminatory intent.

- Fourth, defendants' evidence that ATF agents expressly recruited Black people show that the agents acted with an invidious and racially biased purpose in the course of their Operations.

- Fifth, when the Stash House Operation's susceptibility to abuse is combined with the discriminatory effect it created, discriminatory intent is established.

Under the ordinary Equal Protection standards that apply in this case, the stash house defendants must demonstrate that the ATF's conduct "was motivated by a discriminatory purpose" or intent. *Armstrong*, 517 U.S. at 465. The Supreme Court and the Seventh Circuit emphasize that a wide variety of "circumstantial" evidence can be used to prove discriminatory purpose. *See Arlington Heights*, 429 U.S. at 266–68. This is a totality of the circumstances test: "Discriminatory purpose is inferred from considering the totality of the available circumstantial evidence, . . . even if no individual act carries unmistakable signs of racial purpose . . . ." *United States v. Bd. of Sch. Comm'rs of Indianapolis*, 573 F.2d 400, 412 (7th Cir. 1978). Defendants need not prove that the ATF's actions "rested *solely* on racially discriminatory purposes." *Arlington Heights*, 429 U.S. at 265 (emphasis added). It is sufficient to show only that "discriminatory purpose was *a* motivating factor." *Id.* at 266 (emphasis added).

The Fagan Report creates an inference of discriminatory intent by establishing that the ATF's targeting practices created a stark discriminatory effect that cannot be explained on grounds other than race. Discriminatory intent can be shown when "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action[.]" *Id.* (citations omitted). The Supreme Court and Seventh Circuit hold that extreme evidence of

discriminatory effect alone can support a finding of discriminatory intent: "The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point." *Id.* (internal quotation marks and citation omitted); *see also Gomillion v. Lightfoot*, 364 U.S. 339, 340–41 (1960); *Bd. of Sch. Comm'rs of Indianapolis*, 573 F.2d at 411 ("The first and often the most probative indicia of discriminatory purpose is the disproportionate impact or effect a[n] . . . official act may have. In some circumstances impact alone may be sufficient."). Defendants' evidence goes far beyond this threshold, as it rules out major race-neutral explanations for the stark discriminatory effect of the ATF's actions.

Discriminatory intent also can be established by procedural and substantive departures on the part of a decisionmaker: "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights*, 429 U.S. at 267. As demonstrated below, the ATF repeatedly deviated from its procedures and from its substantive guidelines, further demonstrating discriminatory intent.

In addition, the Supreme Court has held that when statistical evidence of race disparities is combined with "a selection procedure that is susceptible of abuse," that combination alone is sufficient to make out a prima facie equal protection violation. *See Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *see also Yick Wo*, 118 U.S. 356. The Stash House Operation's agent-led structure, overly broad criteria, and abandonment of the criteria for targets of color make the Operation highly susceptible to abuse.

Notably, under *Arlington Heights*' totality of the circumstances inquiry, defendants need not present a "smoking gun," such as racial epithets or explicit plans to target people of color, to

prove discriminatory intent. *See Arlington Heights*, 429 U.S. at 266–68. Rather, "circumstantial . . . evidence of intent" is sufficient. *Id.* at 266. Defendants nonetheless present evidence below that several agents expressly recruited defendants of color based on race.

A. The Expert Report Provides Statistical Evidence of Discriminatory Intent.

The Fagan Report's statistical analyses create a strong inference that the ATF intentionally targeted racial minorities. The binomial distribution and the three disparate treatment tests Professor Fagan employs show not only discriminatory effect, but also discriminatory intent, in that the clear pattern of racial disparities is inexplicable on grounds other than race. *See Arlington Heights,* 429 U.S. at 266. All four tests compare the defendant pool to the similarly situated comparison group in different ways, and all converge on the same result: There is a statistically significant racial disparity between the Black people targeted for the Stash House Operation and the people who could have been selected for the Operation. Report at 2–3, 16–17, 29–36. This clear and consistent pattern of the ATF disproportionately targeting Black people remains statistically significant, even after taking into account race-neutral explanations for the ATF's conduct. *Id*. at 2–3, 29–36. Accordingly, this robust result is strong evidence that the ATF intentionally targeted Black people for its Stash House Operation.

This section sets out the different kinds of statistical evidence courts have endorsed for showing intentional discrimination, explains how the Fagan Report fits within those categories, and then discusses Professor Fagan's statistical analyses in detail.

1. Courts Endorse the Use of Statistical Evidence to Prove Discriminatory Intent.

It is well-established that a Court can infer discriminatory intent from the statistical evidence of discriminatory effect presented in the Fagan Report. As the Supreme Court explained in *Hazelwood School District v. United States*, "gross statistical disparities" may "alone" prove a

prima facie case of intentional discrimination. 433 U.S. 299, 307–08 (1977); *see also, e.g., Gomillion*, 364 U.S. at 340–41 (finding intentional discrimination, in violation of Equal Protection clause, when gerrymandering removed all but four or five of 400 Black voters from the city, but no white voters); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." (citing *Arlington Heights*, 429 U.S. at 265–66)). The Seventh Circuit likewise has held that statistics alone can establish intentional discrimination. *See O&G Spring*, 38 F.3d at 876 ("Reliance on statistical evidence by no means diminishes the plaintiff's obligation to prove discriminatory intent—but in some cases, statistical disparities alone may prove intent."). Indeed, the Department of Justice itself uses statistics—specifically, regression analyses—to show unconstitutional discriminatory intent by law enforcement. *See, e.g.*, DOJ Baltimore Report at 63 (using regression analyses that show "consistent racial disparities . . . that are not attributable to . . . race-neutral factors" to support a selective enforcement claim and demonstrate discriminatory intent under *Arlington Heights*).

Statistical analyses create an inference of discriminatory intent when there is a discrepancy between the racial composition of the people who *could have been* selected and the people who *were* selected. So, for example, in a Title VII failure-to-promote case, the Seventh Circuit finds that a prima facie case of intentional discrimination can be established "[w]here statistical evidence demonstrates a discrepancy between the racial composition of those promoted to a given job and the pool of eligible applicants which is too great to reasonably be the product of random distribution . . . ." *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 449 (7th

Cir. 1976).[19] Similarly, in *Castaneda*, an Equal Protection challenge to the racial composition of a grand jury venire, the Court compared the percentage of Mexicans in Hidalgo County, Texas to the percentage of Mexicans summoned for grand jury service. The Court concluded that the resulting disparity was "enough to establish a prima facie case of discrimination." 430 U.S. at 495–96, 496 n.17.

Statistical analyses create a more powerful inference of discrimination when they also rule out race-neutral explanations for a discriminatory effect. Indeed, the Supreme Court recognizes that when a discriminatory effect cannot "be plausibly explained on a neutral ground," then the discriminatory "impact itself" is strong evidence of discriminatory intent. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 275 (1979) (citing *Washington v. Davis,* 426 U.S. 229, 242 (1976); *Arlington Heights*, 429 U.S. at 266).

Regression analyses such as those Professor Fagan presents meet this challenge head-on. The Supreme Court recognizes that a regression supports an inference of discriminatory intent when it "accounts for the major factors" in the allegedly discriminatory decision-making. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986). "*Major* factors" does not mean all *possible* or even all *relevant* factors; both the Seventh Circuit and the Supreme Court hold that a regression analysis that omits "some arguably relevant variables" can nevertheless prove discriminatory intent. *E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292, 300 (7th Cir. 1991) (emphasis added); *see also Bazemore*, 478 U.S. at 400 (which covariates are important in using a regression to show intentional disparate treatment "will depend in a given case on the factual context . . . in

[19] A plaintiff must provide proof of "discriminatory intent or motive" to establish a "disparate treatment" claim in the Title VII context, just as proof of intent or motive is required in the selective enforcement context. *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009). The Seventh Circuit has emphasized that, for the plaintiff's showing, "[i]t is well-established that an intentional-discrimination claim under Title VII is evaluated the same way as an intentional-discrimination claim arising under the Equal Protection Clause." *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 885 (7th Cir. 2012).

light of all the evidence presented by both the plaintiff and the defendant").

Professor Fagan's three regression analyses more than meet this legal standard because he rules out major non-discriminatory explanations for the racial disparity, including explanations advanced by the ATF and the government. Indeed, the three regression analyses Professor Fagan uses are akin to—and even more rigorous than—statistical analyses the Seventh Circuit and the Supreme Court have concluded prove discriminatory intent in the Title VII and Equal Protection contexts. For example, in *O&G Spring*, a Title VII failure-to-hire case, the plaintiffs' expert presented "statistical evidence . . . to calculate how many African-Americans should have been hired based on the relevant labor market . . . ." 38 F.3d at 875. As with Professor Fagan's latter three tests, the *O&G Spring* analysis accounted for alternative explanations. *Id*. at 877. The appellate court rejected the defendant's claim that the expert should have accounted for additional variables, and found intentional discrimination based on the statistics. *See id*. at 878 ("But even the use of the most forgiving variables could not reduce the calculation of African-Americans in the relevant labor market to a level that would account statistically for O&G's failure to hire any African-Americans.").

In fact, Professor Fagan's latter three analyses are substantially more rigorous than some of the statistical analyses the Seventh Circuit and the Supreme Court have deemed sufficient to prove discriminatory intent in the Title VII and Equal Protection contexts. The difference is that Professor Fagan's regression analyses eliminate relevant, non-discriminatory reasons for the disparity. For example, in *Mister v. Illinois C.G.R. Co.*, 832 F.2d 1427 (7th Cir. 1987), a Title VII case, the plaintiff's expert conducted what appears to be a binomial analysis and testified "that there was less than one chance in a million that this disparity was consistent with race-neutral hiring." *Id*. at 1429. The court critiqued the expert's statistical analysis for failing to rule

out race-neutral explanations the way a regression would. *Id*. at 1431. The Seventh Circuit nonetheless concluded that the plaintiffs' statistical analysis "made out a presumptive case of disparate treatment." *Id*.; *see also, e.g.*, *Castaneda*, 430 U.S. at 495–96, 496 n.17 (finding prima facie case of discriminatory purpose based on a statistical analysis that did not rule out alternative explanations); *Hazelwood*, 433 U.S. at 308 & n.14 (applying binomial formula to compare racial composition of school district's teachers and racial composition of qualified teachers in relevant labor market); *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 867 & n.7 (7th Cir. 1985) (finding prima facie case of intentional discrimination from disparity that did not rule out alternative explanations).

Professor Fagan's initial binomial analysis is sufficient to meet the lower standard. Professor Fagan's three subsequent regression tests go further, meeting the highest standard for statistical evidence of discriminatory intent. They rule out major alternative explanations, leaving only race. Taken together, the four statistical analyses more than meet the first *Arlington Heights* factor for discriminatory intent.

2. Professor Fagan's Binomial Distribution Test is Evidence of Discriminatory Intent.

The statistically significant results of Professor Fagan's binomial distribution analysis offer evidence of discriminatory intent. He finds that there is nearly a 0% chance that the ATF would have targeted such high numbers of Black or non-White individuals by chance, given the racial composition of the pool of eligible people. Report at 16–18. This is analogous to comparing the actual stash house defendants to the "relevant labor market" for people who could be "hired" for stash house robbery crews. This is the same type of comparison that sufficed to show discriminatory intent in *Castaneda*, *Mister*, and *Babrocky*.

3. Professor Fagan's Three Regression Tests Provide Strong Evidence of Discriminatory Intent.

Professor Fagan next uses three more detailed statistical methods that provide additional evidence of discriminatory intent, and further support a finding of discriminatory effect. Those methods are logistic regression analysis (Test 1), Augmented Inverse Probability Weighting regression analysis (AIPW) (Test 2), and Propensity Score Matching regression analysis (PSM) (Test 3). Report at 22–29. These three tests add to the earlier analysis by factoring out "major factors" that might provide a race-neutral explanation for the racially disparate result. *Bazemore*, 478 U.S. at 400. These race-neutral explanations are often referred to as "confounding variables" or "covariates." Report at 27–28. As Professor Fagan explains, factoring out these confounding variables allows him to "identify the unique effects of race that are present once the influence of proxies for race are removed." *Id*. at 22. Once the confounding variables are adjusted for, the only explanation left is race.

All variations of all three regression analyses show that Black individuals were significantly more likely to be targeted by the ATF, even when adjusting for a number of confounding variables unaccounted for in the initial binomial distribution analysis. Professor Fagan groups these variables into four different "models" across the tests. *Id.* at 23–26.[20] The models build on each other and adjust for, in order: demographic characteristics (Model 3), ATF Manual criteria (Model 4), additional criminal history variables (Model 5), and post-hoc statements by the government about eligibility criteria (Model 6). *Id*. at 24, 26, 30–32:[21]

[20] Professor Fagan refers to his statistical methods as "tests" and the groupings of confounding variables as "models." This motion follows the same convention.

[21] Models 1 and 2 parallel the initial binomial distribution analysis. They show that being Black (vs. White) increases a person's odds of being targeted by the ATF; they do not examine any alternative explanations. Report at 29–30.

- In Model 3, Professor Fagan includes a series of demographic variables designed to factor out any possibility that Blacks or Hispanics in the defendant pool were more likely to be current, serious criminals than White people in the similarly-situated pool. For example, Professor Fagan explains, "*age at first arrest* is a robust predictor of the length and seriousness of criminal careers." Report at 24. These variables are included because the ATF emphasizes that its goal is to target established, current, violent offenders. The ATF says in its written materials and public statements that it targets the "people that are most violent in a community." Erik Eckholm, *More Judges Question Use of Fake Drugs in Sting Cases*, N.Y. Times, Nov. 20, 2014, at A16 (quoting Ginger L. Colbrun, ATF Spokeswoman), http://www.nytimes.com/2014/11/21/us/lured-to-stings-by-fake-drugs-and-facing-jail-time-thats-all-too-real.html.[22]

- In Model 4, Professor Fagan incorporates a series of ATF Manual criminal history variables to account for the fact that the ATF's internal policies expressly state that the agency targets people with violent convictions. *See, e.g.*, ATF O 3250.1B.12.b. Incorporating these variables rules out the possibility that the reason there are more non-White individuals in the defendant pool is because non-Whites have more violent criminal histories. These variables will be referred to as the ATF Manual criteria.

- In Model 5, Professor Fagan brings in additional criminal history variables that provide another angle for negating the possibility that Black or Hispanic individuals are more likely to be current, serious criminals than White people. He explains, "The number of prison and jail sentences is included as a measure of the person's criminal propensity and crime seriousness spanning his or her criminal career." Report at 25. These variables will be referred to as additional criminal history variables. (Model 3 and Model 5 thus control for criminal propensity in different ways.)

- In Model 6, Professor Fagan includes a set of post-hoc variables that the government proposed during the course of this litigation. Prosecutors have defended the ATF by claiming that the agency is targeting people with convictions for *controlled substance* or *firearms* offenses, even though these are not among the ATF Manual criteria. For example, the government publicly stated before the Seventh Circuit: "The comparison group should be individuals who have sustained prior state or federal convictions for offenses involving robbery, narcotics, or firearms." *United States v. Davis*, Oral

[22] *See also, e.g.*, Government's Response to Defendants' Joint Revised Motion for Discovery, *Jackson*, 13-CR-636, Dkt. 96 at 15 (proper comparison involves "individuals with criminal history levels of II or greater"); Schanzenbach Report, *Jackson*, Dkt. 96-1 at 1 ("I was also advised by the government that, for the purposes of my analysis, I should assume that the criminal histories of the targets in these cases were above a Criminal History Category I under the United States Sentencing Guidelines."); Erik Eckholm, *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times, Jan. 30, 2015, at A14, http://www.nytimes.com/2015/01/31/us/toughest-charges-dropped-in-chicago-drug-stings.html ("The A.T.F. said the sting operations had put more than 1,000 'violent, hardened criminals' in prison over the past decade.").

Argument, 14-1124, Dkt. 39, 40 at 11:49 (7th Cir. 2014).[23] Although the government produced no evidence to show that the ATF was, in fact, targeting people with such convictions, Professor Fagan nevertheless controls for the possibility that the ATF was targeting firearms or controlled substance offenders who just happen to be disproportionately Black. *See* Report at 24–26. These will be referred to as post-hoc variables.

The three statistical tests in the Fagan Report support a strong inference of discriminatory effect and intent by providing evidence that the ATF selected its targets on the basis of race, over and above these major alternative explanations. When the major race-neutral factors are eliminated, the only explanation left is race.

a) Test 1: Logistic Regression

Professor Fagan's Test 1 uses "logistic regression" to examine whether being Black or Hispanic increased a person's chances of being targeted by the ATF for the Stash House Operation, even after accounting for the race-neutral variables laid out above: demographics, ATF Manual criteria, additional criminal history variables, and the government's post-hoc variables. Report at 22–26. Because these variables stand in for major alternative explanations that could potentially account for the higher proportion of racial minorities among the defendants, the logistic regression controls for them. The test shows that being Black significantly increased a person's odds of being selected, over and above any effect of the

[23] The oral argument is publicly available via the Seventh Circuit's website at http://media.ca7.uscourts.gov/sound/2014/nr.14-1124.14-1124_05_21_2014.mp3 (last accessed Sept. 8, 2016); *see also, e.g.*, *Davis*, Reply Br. at 6; Government Motion for Reconsideration Regarding Discovery Order, *Williams*, 12-CR-887, Dkt. 74 at 6 (Aug. 21, 2013) ("Defendants have failed to identify any individuals remotely similar to themselves—people with criminal histories including narcotics and weapons offenses who sought to commit potentially violent robberies—who were not further investigated or prosecuted because of their race."); Government Response to Defendant Williams's Motion for Discovery on Racial Profiling, *Jackson*, 13-CR-636, Dkt. 52 at 10 (Dec. 18, 2013) (same); Government's Response to Defendants' Motion for Discovery on the Issue of Racial Profiling/Selective Prosecution, *Payne*, 12-CR-854, Dkt. 80 at 6 (N.D. Ill. Oct. 25, 2013) (same); Government's Response to Defendant William Alexander's Motion for Discovery on Racial Profiling, *Alexander*, 11-CR-148, Dkt. 130 at 6 (N.D. Ill. Sept. 9, 2013) (identifying those "with criminal histories including narcotics and robbery offenses who discuss potentially violent robberies" as "similar to" stash house defendants).

potential confounding variables. *Id*. at 29–32. By ruling out race-neutral explanations, the regression analysis provides evidence that race was a motivating factor behind the ATF's selection of the Stash House targets. *See Arlington Heights*, 429 U.S. at 266.

Because the ATF puts so much emphasis on its claims to be "'targeting the worst of the worst,'" any regression analysis of the Operation must account for the possibility that the ATF ultimately is selecting for serious criminals, rather than selecting on the basis of race. *See* Heath, USA Today Investigation, *supra*. To test for that possibility, Professor Fagan includes the series of variables discussed above that predict criminal propensity. These variables enable the regression to examine whether being Black increases a person's chances of being targeted, *above and beyond* any relationship between race and criminal history or criminal propensity. If serious, violent criminals were disproportionately Black, then any disproportionate effect on Black people would disappear once the model "factored out" that possibility. *See* Report at 23–25. But this is not what happens. Instead, there is still a racially discriminatory effect even once alternative explanations are factored out. *Id*. at 29–31.

The Report concludes that even "after controlling for criminal propensity, race remains statistically significant, meaning that the ATF is selecting defendants on the basis of race." *Id*. at 29. That is, even when accounting for demographics, ATF Manual criteria, additional criminal history variables, and the government's post-hoc explanations of the ATF's conduct, being Black significantly increased the odds of a person becoming a target in the Stash House Operation. *Id*. at 30–31. Test 1 thus shows that the significant racial disparities of the defendant population cannot be explained away by race-neutral factors. *Id.* at 29–31. That is, the ATF took race into account. Under *Feeney* and *Arlington Heights*, this is strong evidence of discriminatory intent.

b) Test 2: Augmented Inverse Probability Weighting Regression Test

Professor Fagan's second statistical test further supports a finding of discriminatory intent (and discriminatory effect) by demonstrating a pattern of racial discrimination and ruling out ostensibly race-neutral explanations for the disparity. Report at 32–33. Using an Augmented Inverse Probability Weighting test (AIPW), Professor Fagan finds strong and consistent evidence that the ATF was discriminating against Black and non-White individuals when selecting targets for their Stash House Operations, even once the major confounding variables are taken into account. *Id*. at 33.

The AIPW test uses a different method to isolate the effect of race on the likelihood of being targeted. This test accounts for confounding variables by conducting two separate regressions. This makes the test "doubly robust." *Id*. at 27. The AIPW test first analyzes the relationship between the confounding variables and race. The procedure then uses the results of the first step to test for selection as a Stash House defendant.

The Fagan Report finds that the AIPW test "shows consistent evidence across 8 models of racial and ethnic discrimination in the selection of Stash House defendants from a large pool of potential eligibles." *Id*. at 33. Four of the models compare White to non-White people, and four compare White to Black people. *Id*. In both instances, race is a significant predictor of being targeted by the ATF. *Id*. Importantly, the AIPW test is able to balance the confounding variables across racial groups, such that Whites and Blacks/non-Whites had relatively equal distributions of demographics, ATF Manual criminal history criteria, etc. *Id*. at 27. The fact that there is still a racial disparity even after the two groups are balanced means that selection as a stash house defendant is not a byproduct of race-neutral selection criteria. *See id*. at 33. Once again, the only remaining explanation for selection as a stash house defendant is intentional racial discrimination

by the ATF.

c) Test 3: Propensity Score Matching Test

Professor Fagan's final test, Propensity Score Matching (PSM), adds to the evidence of discriminatory intent (and effect), further demonstrating that the ATF selected stash house targets on the basis of race, rather than on the basis of race-neutral factors. The test finds that Black individuals had a statistically significant higher chance of being targeted by the ATF. Report at 35. After conducting this test, Professor Fagan concluded:

> Blacks are more likely than similarly situated Whites to be selected as a Stash House defendant using the pool of potential eligibles as a benchmark, after controlling for an increasingly rich set of covariates. . . . [T]he increasing role of race as additional legally relevant and programmatically relevant confounding variables are added reveals a pattern of discrimination in the selection of defendants. *Id.*

Propensity Score Matching is unique among the three regression analyses in that it comes closest to a direct showing of causality. It does so by using statistical methods to mirror a randomized controlled experiment. A randomized experiment is the gold standard for demonstrating that discriminatory intent *caused* a racially disparate outcome.[24] In an experiment, individuals are randomly assigned to one of two groups, the treatment group or the control group. Reference Guide at 218–19. Because of the random assignment, any differences in background characteristics wash out—the background characteristics are equally distributed between the two groups. *Id*. at 220, 285. Thus, any observed differences between the two groups must be due to the treatment, and not to differences in other characteristics. Stuart at 3; Reference Guide at 285.

Two familiar examples show how an experiment can demonstrate causation. In a medical study, participants could be randomly assigned to receive the medication (treatment) or to

[24] *See* E.A. Stuart, *Matching Methods for Causal Inference: A Review and a Look Forward*, Statistical Science 25, 1–21 (2010); "Reference Guide," *supra* n. 6.

receive a placebo (control). In such a study, because individuals are randomly assigned to receive the treatment or not, the two groups are comparable in terms of background characteristics. Therefore any difference in outcome must be due to the treatment. Reference Guide at 220. Similarly, in fair housing discrimination audits that utilize matching methods, rental agents meet with both Black and White potential renters who are matched in terms of background characteristics (e.g. credit score, rental history). *See, e.g.*, John Yinger, *Measuring Racial Discrimination with Fair Housing Audits: Caught in the Act*, 76 Am. Econ. Rev. 881, 881 (1986). If the rental agents accept more applications from White potential renters, this can be attributed to the agents' racial bias because the White and Black renters were identical in all relevant regards. *Id.* Both the randomized medical experiment and the housing tester matching method show how an experiment can isolate the true cause of a particular outcome.

In Professor Fagan's Propensity Score Matching test, "race" is the treatment; selection as a stash house defendant is the "outcome." Report at 28. However, to test for racial discrimination, it is obviously not possible to randomly assign people to a particular race (as in the medical trial example) nor to match truly identical individuals (as in the housing testers example). This means that background characteristics such as criminal history might not be equal across groups. *See Armstrong*, 517 U.S. at 469 (disagreeing with the Ninth Circuit's "presumption that people of *all* races commit *all* types of crimes") (citation and internal quotation marks omitted).

The Propensity Score Matching test adjusts for such confounding variables, and does so in a way more analogous to an experiment than Tests 1 or 2.[25] Report at 27–29. The Propensity

[25] Logistic regression (Test 1) and the AIPW test (Test 2) account for these "confounding variables" by statistically removing their effects and isolating the effect of race on being selected as a Stash House target.

Score Matching test creates two groups of individuals (Black/non-White and White) that are comparable across the relevant characteristics other than race, and then compares the rate at which members of these groups were targeted by the ATF. *Id*. at 28. Specifically, the test matches each non-White or Black individual in the sample with a White individual who is similar in the aggregate of their demographics, ATF Manual criteria, additional criminal history variables, and the post-hoc variables. The two people thus have very similar "propensity scores." *Id*. at 27–29. After being matched, the Black/non-White and the White groups have similar characteristics on average, mirroring a randomized experiment. *Id*. Thus, as in the two examples above, any difference in the probability of the two groups being selected as a target can be attributed to race, because the two groups are otherwise directly comparable. *Id*. at 33–35.

The Propensity Score Matching test confirms the results of the first two tests. Once individuals are matched, people who are Black are significantly more likely to be targeted by the ATF compared to the "matched" White individuals. *Id*. at 35. In this way, Test 3 examines racial discrimination on a more individual level than Test 2: Even when Black individuals are matched with similarly situated White individuals who have similar propensity scores, and are thus similar in terms of background characteristics, race remains predictive of being targeted by the ATF.

The results of the Propensity Score Matching test thus provide even stronger evidence that race *caused* selection as a Stash House target. Like a racist rental agent picking a White prospective tenant over an identical Black prospective tenant, the ATF repeatedly picked Black targets over similarly situated White people. The ATF discriminated on the basis of race.

d) All Three Regression Tests Converge on Discriminatory Intent

Across the three tests, the Fagan Report provides clear statistical evidence of both

discriminatory effect and discriminatory intent. Report at 2–3, 36. It finds that "after controlling for several indicia of criminal propensity, race remains a statistically significant predictor of selection as a Stash House defendant." *Id*. at 36. The Fagan Report satisfies *Arlington Heights* because it shows that race was a factor in selection, above and beyond any ostensibly race-neutral explanations that could account for a higher number of minorities among the defendant group. Because the racial disparity in the defendant group cannot be explained away by seemingly race-neutral factors, race is the only explanation for why the ATF targeted these individuals. This provides strong support for an inference of discriminatory intent on the part of the ATF. Accordingly, Professor Fagan concludes that the "analyses show that the ATF is discriminating on the basis of race in selecting Stash House defendants." *Id.*

B. Comparing the Stash House Defendants to Real Stash House Robbers Provides Additional Evidence of Discriminatory Intent.

A comparison to real stash house robbers further supports defendants' showing of discriminatory intent because the only *real* stash house robbers arrested in this district during the same time frame are overwhelmingly *not* Black. Unlike Miami in the heyday of the cartel years, Chicago today does not appear to have a serious problem with violent stash house robberies. Defendants have discovered only three non-ATF cases of real stash house robbery groups in this district, and all have a racial composition that is strikingly different from the racial composition of the ATF's targets. *See United States v. Vaughan*, 14-CR-639 & *United States v. Rodgers*, 13-CR-770; *United States v. Rodriguez*, 09-CR-332 (N.D. Ill.); *People v. Panozzo*, *et al.*, 14CR-14577 (Cir. Ct. of Cook County).

In the first of these cases, a crew of three white police officers was arrested on federal Hobbs Act robbery charges for robbing drug dealers. *See Vaughan*, 14-CR-639 & *Rodgers*, 13-CR-770. Officers Stan Kogut, Robert Vaughan, and Jimmy Rodgers spent four years "robb[ing]

individuals or homes of marijuana based on information they learned from confidential informants they used in their roles as police officers" and selling the proceeds of their crimes "to narcotics traffickers in Chicago in exchange for cash, which they retained for their personal benefit." Complaint, *United States v. Vaughan*, 14-CR-639, Dkt. 1 at 3 (N.D. Ill. Nov. 4, 2014); *see also* Government's Sentencing Memorandum, *Rodgers*, 13-CR-770, Dkt. 41 at 1 (July 29, 2014) ("[D]efendant Rodgers engaged in conduct that we often only see on television – he set up fake transactions with criminals, detained them, cuffed them, ripped their goods and their funds, threatened them, kept their money for his own benefit, and then lied and concealed the scam."). Ironically, Officer Kogut was one of the undercover agents in the ATF's *Jackson* stash house case, and was robbing drug dealers during the same time period that he was setting up the *Jackson* defendants for a Stash House Operation. *Id.* at 2–3, 6–7; *see also* Jason Meisner, *Deputy arrested in drug sting dies in federal jail of apparent suicide*, Chicago Tribune, Nov. 4, 2014, http://www.chicagotribune.com/news/ct-deputy-hanging-federal-jail-met-20141104-story.html.

In the *Rodriguez* case, the DEA knew that Saul Rodriguez operated an organized crew with members who sold illegal narcotics, ripped off stash houses, kidnapped people for ransom and murdered people for hire. *Rodriguez*, 09-CR-332, Dkt. 1 at ¶¶ 6, 8–12, 28–32; *id.*, Dkt. 126-2, Count 1, ¶¶ 1-10; *id.* Dkt. 1524 at 1–4. The members of the crew who were charged were seven Hispanic people, two White people, and two Black people.

And in the Panozzo-Koroluk case, the State charged six defendants: one Hispanic person and five White people. Even before the indictment there was substantial evidence that the Panozzo-Koroluk crew was an established, close-knit, and well organized crew involved in many stash house robberies, residential burglaries, and murder plots. *See* Ex. F, Excerpts from Complaint for Search Warrants (Panozzo Koroluk Crew) (July 17, 2014). This crew was

connected to the Chicago Outfit and a white street gang, the C-Notes. *See* Frank Main, *Mob crook gets 18 years*, Chicago Sun Times, June 23, 2016.

Taken together, the three real stash house cases were 10% Black and 50% non-White. By comparison, the ATF's phony stash house cases were 79% Black and 92% non-White. *See* Report at 17. In addition, unlike many of the Black people charged in the federal stash house cases, the crews in these three cases (none of which had Black leaders) were involved in exactly the kinds of crimes the ATF designed the Stash House Operation to target.

This comparison shows that even if different types of crime may be unevenly distributed by race, *see Armstrong*, 517 U.S. at 469, it appears that Black people do not commit *this* crime—or, at least, not approaching a rate that would justify the racial composition of the ATF's cases. The comparison thus further reinforces Professor Fagan's conclusion that race-neutral factors do not explain the disproportionate percentage of people of color the ATF chose as stash house targets. The only remaining explanation for this "clear pattern" is that the ATF purposefully selected targets based on race. *Arlington Heights*, 429 U.S. at 266.

C. The ATF Demonstrated Discriminatory Intent by Departing from its Targeting Criteria for Defendants of Color.

In the stash house cases in this district, the ATF repeatedly and systematically deviated from its substantive and procedural targeting criteria for defendants of color while adhering to them for White defendants. These deviations provide strong evidence of discriminatory intent.

The Supreme Court recognizes that the failure to follow substantive selection criteria or stated procedures constitutes evidence of discriminatory intent. *Arlington Heights*, 429 U.S. at 267; *see also, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999). The Seventh Circuit agrees: "It is well settled law that departures from established practices may evince discriminatory intent." *Nabozny v. Podlesny*, 92 F.3d 446, 454–55 (7th Cir. 1996) (reversing dismissal of Equal

Protection gender discrimination claim where school administrators departed from a purportedly gender-neutral "policy and practice" when faced with a male victim). Other circuits likewise rely on such departures to establish discriminatory purpose. *See, e.g.*, *N.C. State Conf. of the NAACP v. McCrory*, Nos. 16-1468, 16-1469, 16-474, 16-1529, 2016 U.S. App. LEXIS 13797, at *40–41 (4th Cir. July 29, 2016) (reversing district court for "refusing to draw the obvious inference" that departures from normal legislative process provided "devastating" proof of discriminatory intent).[26] As Chief Judge Castillo has explained in the stash house context: "A significant failure by the agents to follow protocols in connection with the stings could suggest an improper purpose in targeting Defendants." *Williams*, 12-CR-887, Dkt. 141 at 11 (Oct. 3, 2014) (citing *Arlington Heights*, 429 U.S. at 267); *Brown*, 12-CR-632, Dkt. 261 at 11 (Oct. 3, 2014) (same).

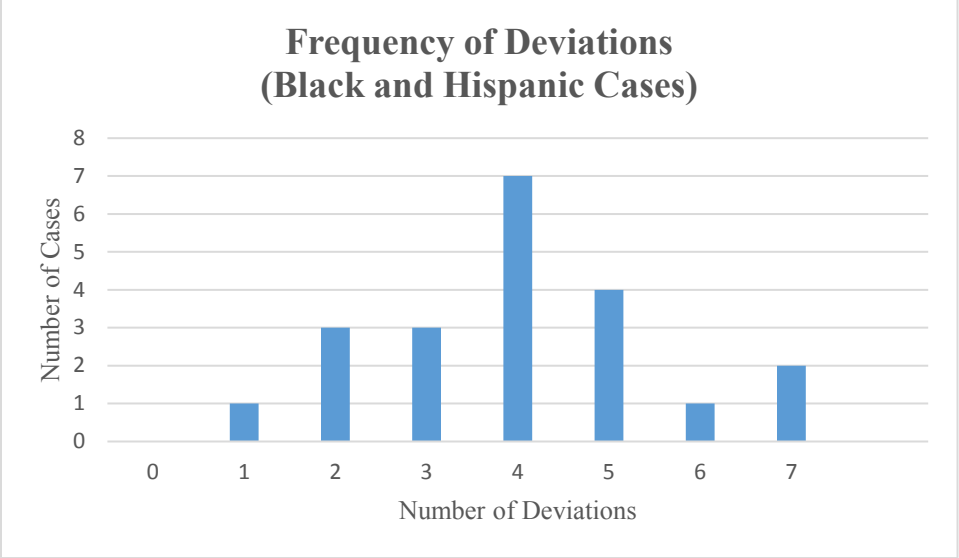
The ATF has extensive substantive aims and procedural meeting and identification requirements for the Stash House Operation. The Operation relies on an "investigative structure" with "specific measures and benchmarks [that] must be met." ATF Manual at 11; ATF O 3250.1B.12.a.3; ATF O 3250.1B.12.e(1) ("The undercover scenario has specific details that must be followed.").

In this district, the ATF abandoned its substantive and procedural safeguards for non-White targets while adhering closely to them for White targets. Defendants compared the 24

[26] *See also Navajo Nation v. New Mexico*, 975 F.2d 741, 744 (10th Cir. 1992) (recognizing evidence of discriminatory intent where "[t]he funding reduction occurred outside the normal procedural process and without considering the normal substantive criteria . . . .") (citation omitted); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1221 (2d Cir. 1987) (imposing liability for race discrimination where "[t]he record also reflects numerous instances in which the City deviated from its normal procedural sequences or ignored the usual substantive standards in order to place low-income housing in Southwest Yonkers or to prevent its construction in East Yonkers"); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 144 (3d Cir. 1977) (finding discriminatory intent based on "numerous instances of departures from normal procedural sequences (the fourth *Arlington Heights* factor)" and evidence that the city had also engaged in "a glaring 'substantive' departure from normal decision-making (the fifth *Arlington Heights* factor)").

ATF stash house cases in this district to the ATF's requirements. As detailed below, defendants found that, for the three mostly White cases, the ATF rarely deviated from its internal requirements, deviating a median of once per case. *See* Ex. C-1. By contrast, the ATF deviated in *all* of the non-White cases, a median of four times per case. *See id.*[27]

This Table provides a visual depiction of those deviations:



The pattern of deviations for people of color (but not for White people) holds for both time periods. From 2006 to 2009, the ATF charged cases involving Black defendants and cases involving mostly White defendants. (There were no mostly Hispanic cases during that time period.) The White cases closely followed the ATF's substantive and procedural criteria—only zero or one deviation per case. By contrast, the Black cases charged during that time departed a median of four times per case, with as many as seven deviations overall. From 2011 to 2013, the ATF did not charge *any* mostly White cases. Instead, it charged Black and Hispanic cases, and

[27] Exhibit C-1 summarizes all of the departures in a table. In Exhibit C-2, defense counsel explain how they interpreted the ATF's substantive and procedural criteria in reaching the conclusions in this Section. The defense's analysis understates the true number of deviations, because we interpreted the criteria favorably to the government at each step. *Even making every assumption in favor of the government* yields an enormous number of deviations. In addition, the defense counts all of the marginal cases in favor of the government.

deviated from them a median of four times per case.

Although each individual deviation may seem minor in isolation, a disturbing pattern emerges when examining the ATF's substantive and procedural deviations in the aggregate. It is as if the ATF is running two very different types of Stash House Operations. When the ATF adheres to its primary substantive goal of targeting violent home invasion robbery crews, the ATF pursues established criminal organizations that are not Black, runs a tight operation, and generally meets its criteria, deviating only occasionally. But when the ATF abandons its primary goal, it targets Black people who are not part of an established robbery crew. The initial departure thus has a snowball effect: The ATF makes little effort over the course of the operation to ensure that it is targeting the right people, and deviates from its criteria far more than it adheres. This is evidence of discriminatory intent.[28]

1. Substantive Criteria

The ATF selectively targeted defendants of color who did not fit its substantive targeting criteria, but generally adhered to its criteria for White defendants. Under *Arlington Heights*, the ATF's one-way departures provide strong evidence that the ATF intentionally targeted people of color, especially Black people. *See* 429 U.S. at 267. In at least five distinct ways, the ATF failed to live up to its promise of targeting only "the worst of the worst"—and it did so for Hispanic and Black defendants, but not for White defendants. On the whole, the ATF's White targets were

[28] To evaluate each of the ATF's substantive and procedural criteria, defense counsel relied on information available in the following: the ATF's Takedown Memoranda, certain initial reports of investigation, the defendants' rap sheets, and the Complaints from the cases. The Takedown Memoranda are especially important to this analysis. Before an agent can move a Stash House Operation from the "meetings" phase to the "takedown" phase, the agent must file a Takedown Memo justifying why this particular Operation meets the ATF's overall goals and internal criteria for these cases. *See generally* ATF O 3250.1B.12.g; ATF O 3250.1A.52.c. The Memoranda thus provide especially strong evidence of discriminatory intent because they set out what the agents and agency knew, when they knew it, and why they decided the targets were "proper suspect[s]" for the Operation. The Takedown Memoranda are contained in Under Seal Supplemental Appendix E.

hardened criminals who matched the ATF's goal of targeting stash house robbers. By contrast, the ATF repeatedly arrested defendants of color who did not meet its criteria.

The ATF's departures from its substantive criteria break down along clear racial lines. In summary, the requirements and departures are:

- Requirement to target established robbery groups:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 14 (78% of Black cases) [29]
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 2 (67% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement that two suspects be violent offenders:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 9 (50% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 0 (0% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement that all suspects be currently criminally active:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 11 (61% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 2 (67% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 1 (33% of White cases)

- Requirement that one target have a past violent conviction:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 3 (17% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 0 (0% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement that the group have access to weapons:
  - Cases involving exclusively Black defendants in which the ATF departed from

[29] There were 18 cases with exclusively Black defendants, three cases with mostly Hispanic defendants, and three cases with mostly White defendants. *See* Ex. C-1.

this requirement: 5 (28% of Black cases)
- Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 1 (33% of Hispanic cases)
- Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

a) Departures from requirement to target established robbery groups

First and foremost, the ATF departed from its mission to target only viable robbery crews. This criterion requires thorough investigation of the targets and "proper suspect identification" to meet the ATF's stated goal of "identifying persons and infiltrating groups that collectively and/or as a community focus their criminal activities on executing robberies, by means of force, for personal gain." ATF O 3250.1B.12.a(1); *see also* ATF O 3250.1A.52; Zayas Training at 4 (suggesting that stash house operations be initiated when "an agent developed information identifying an organization involved in home invasion robberies").[30]

The ATF failed to identify and target established, violent robbery groups in at least fourteen cases involving exclusively Black defendants, two cases involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[31] In cases involving mostly

[30] This criterion measures whether, in the eyes of the ATF, there was some verified reason to believe that the defendants in a given case were a viable robbery crew. Accordingly, this criterion says nothing about whether any group of defendants was, in fact, a viable robbery crew. *See* Ex. C-1.

[31] The cases with exclusively Black defendants in which the ATF's pre-arrest information does not indicate that it was targeting an established robbery crew are *United States v. Alexander*, 11-CR-148 (St. Eve, J.) (three Black defendants); *United States v. Brown*, 12-CR-632 (Castillo, C.J.) (five Black defendants); *United States v. Cousins*, 12-CR-865 (Feinerman, J.) (three Black defendants); *United States v. Davis*, 13-CR-63 (Darrah, J.) (seven Black defendants); *United States v. Hall*, 08-CR-386 (Coar, J.) (three Black defendants); *United States v. Harris*, 06-CR-586 (Leinenweber, J.) (four Black defendants); *United States v. Jackson*, 13-CR-636 (Durkin, J.) (four Black defendants); *United States v. Lewis*, 07-CR-007 (Kendall, J.) (three Black defendants); *United States v. Mahan*, 08-CR-720 (Kendall, J.) (four Black defendants); *United States v. Mayfield*, 15-CR-497 (Chang, J.) (four Black defendants); *United States v. Payne*, 12-CR-854 (Norgle, J.) (four Black defendants); *United States v. Tanner*, 07-CR-707 (Guzman, J.) (three Black defendants); *United States v. Walker*, 07-CR-270 (Norgle, J.) (two Black defendants); and *United States v. Williams*, 12-CR-887 (Castillo, C.J.) (three Black defendants). The two Hispanic cases were *United States v. DeJesus*, 12-CR-511 (Zagel, J.) (four Hispanic defendants); and *United States v. Elias*, 13-CR-476 (Leinenweber, J.) (five Hispanic defendants; three Black defendants; one White defendant).

White defendants the ATF provided extensive documentation that each group was an established, violent robbery crew. In *United States v. Farella*, for example, the Takedown Memo included a thorough description of the Farella organization's ties to violent crime, and the ATF's intelligence gathering confirmed those ties:

> ATF Chicago Group I has initiated an investigation into the criminal activities of Frank FARELLA and co-conspirators, yet to be identified . . . It is believed FARELLA and his associates are trafficking NFA firearms and narcotics in the Lake County and Cook County arears of Illinois. It is believed FARELLA and his associates finance their existence through residential burglaries, armed robberies, and through the sale of cocaine, heroin, and prescription medications. . . . FARELLA and his associates protect their narcotics trafficking activities by the threat and use of violence and the illegal use and possession of firearms that they obtain through thefts, straw purchases, and residential burglaries. FARELLA has been involved in recent violent crimes including shootings, drug and firearm trafficking, and robberies in and around the northern and western suburbs of Chicago. In addition, during these investigations law enforcement officers have learned that FARELLA and his associates has a propensity for violence and crimes including murders, attempted murders, aggravated batteries with and without firearms, aggravated discharge of firearms, strong armed robberies, and home invasions. This information is a result of interviews, police reports, and confidential informant debriefings.

Farella Takedown Memo, Supp. Appx E-9. The ATF provided similarly thorough descriptions in the Takedown Memoranda for both *United States v. Corson* and *United States v. George*, both cases involving mostly White defendants. *Corson* Takedown Memo, Supp. Appx E-2; *George* Takedown Memo, Supp. Appx E-6.

There is nothing approaching this kind of evidence in any of the fourteen exclusively Black cases or the two mostly Hispanic cases. To the extent a pattern can be found, the ATF appears to have relied almost entirely on the uninvestigated and unverified word of a paid CI. The contrast with the White cases could not be more striking.

b) Departures from criminal history requirements

The ATF's "minimum" targeting criteria include at least three factors focused on a target's criminal history: For any targeted robbery crew: (1) at least two members must be

"identified as violent offenders," ATF O 3250.1B.12.b(1); (2) "[t]argets must be currently involved in criminal activity," ATF O 3250.1B.12.b(3); and (3) "[a]t least one target must have a past violent crime arrest or conviction." ATF O 3250.1B.12.b(2).[32] Again, the ATF's departures from each of these standards demonstrate that the Stash House Operation was not fulfilling its purpose when applied to defendants of color, and are evidence of racially discriminatory intent by the ATF and its agents.

i) Requirement that two suspects are "violent offenders"

First, the ATF departed from its targeting criterion that required at least two members of the group to be "identified as violent offenders." ATF O 3250.1B.12.b(1).

The ATF targeted groups with one or zero identified violent offenders in at least nine cases involving exclusively Black defendants, zero cases involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[33] For example, in *United States v. Alexander*, a case involving three Black defendants, only one of the suspects the ATF knew about before the arrest day had any confirmed history of past violence, and that was as a juvenile: Hugh Midderhoff had been adjudicated delinquent for battery in 2010.

By contrast, in cases involving mostly White defendants, the ATF complied with this criterion, only targeting groups of which at least two members were violent offenders. In fact, in *United States v. George*, the two defendants (both White) had seven convictions for violent

[32] The target identification requirements in the Zayas Training largely parallel the criminal history requirements in Order 3250.1B, which is dated 2011. *Compare* Zayas Training at 5 *with* ATF 3250.1B.12.b(1), (2). Any difference is a wash; even in the cases that arose before 2011, the ATF appears to have followed the criteria in Order 3250.1B for all of the cases involving mostly White defendants.

[33] The cases with exclusively Black defendants in which only one or zero defendants were identified before the day of arrest to be violent offenders are *Davis*, 13-CR-063; *United States v. Flowers*, 11-CR-779 (Coleman, J.) (seven Black defendants); *Mayfield*, 15-CR-497; *United States v. Paxton*, 13-CR-103 (Gettleman, J.) (five Black defendants); *Payne*, 12-CR-854; *United States v. Sidney*, 07-CR-652 (Bucklo, J.) (three Black defendants); *Alexander*, 11-CR-148; *Tanner*, 07-CR-707; and *Walker*, 07-CR-270.

crimes between them, including four burglary convictions, one assault conviction, one battery conviction, and one murder conviction. In *United States v. Farella*, defendant Frank Farella had three previous battery or aggravated battery convictions and Michael Blais had one. In *United States v. Corson*, defendant Aaron Corson had an armed robbery conviction, and defendant Oscar Alvarez had a burglary conviction.

ii) Requirement that all suspects are currently criminally active

Second, the ATF departed from its targeting requirement that all members of the alleged robbery group "must be currently involved in criminal activity." ATF O 3250.1B.12.b(3); Zayas Training at 5.

The ATF failed to ensure that all of the defendants it knew prior to the day of arrest were currently involved in criminal activity in eleven cases involving exclusively Black defendants, two cases involving mostly Hispanic defendants, and one case involving mostly White defendants.[34] In this case, for example, the only defendant identified by the ATF before the arrest did not meet this requirement. Of the three Black defendants the ATF ultimately targeted, only one had even been arrested in the previous two years—for a misdemeanor that did not result in conviction. Likewise, in *United States v. DeJesus*, a case involving exclusively Hispanic defendants, at the time of the arrest there was no evidence of current criminal activity for any of the defendants. One defendant was unknown to the ATF until after the arrest, and the criminal

[34] The cases with exclusively Black defendants in which there was no evidence of current criminal activity for at least one charged target who was known before the arrest day are *Brown*, 12-CR-632; *Cousins*, 12-CR-865; *Davis*, 13-CR-063; *Harris*, 06-CR-586; *Jackson*, 13-CR-636; *Lewis*, 07-CR-007; *Mayfield*, 15-CR-497; *Paxton*, 13-CR-103; *Tanner*, 07-CR-707; *Walker*, 07-CR-270; and *Williams*, 12-CR-887. The cases with mostly Hispanic defendants in which there was no evidence of current criminal activity for at least one defendant known before the arrest day are *DeJesus*, 12-CR-511; and *Elias*, 13-CR-476. The case with mostly White defendants in which there was no evidence of current criminal activity for at least one defendant known before the arrest day is *United States v. Farella*, 09-CR-087 (Lefkow, J.) (three White defendants).

histories of the three defendants known to the ATF before the day of the arrest were far from recent. The most recent convictions for Benjamin DeJesus and Jesus Corona were based on conduct dating all the way back to 1999, while the offense conduct underlying Ceferino Malave's most recent conviction dated back to 2008, approximately four years before his stash house arrest.

In contrast, the ATF departed from its requirement that all members of the alleged robbery group be currently criminally active in only one case involving mostly White defendants. In *United States v. Farella*, there is no evidence of current criminal activity for Michael Blais or Donald Catanzaro. In the other two cases involving mostly White defendants, *United States v. George* and *United States v. Corson*, all of the defendants had arrests or convictions within two years of the stash house arrest.

iii) Requirement that one target have a past violent conviction

Third, the ATF departed from its requirement that at least one target must have a past violent crime conviction. ATF O 3250.1B.12.b(2). The ATF defines violent crime "as offenses that involve force or threat of force and includes murder, forcible rape, robbery, aggravated assault, and arson." ATF O 3250.1B.12.b.

In three cases involving exclusively Black defendants, the ATF could not meet even this minimal requirement.[35] In *United States v. Davis,* for example, the ATF met only one of the seven defendants before the day of the arrest (Paul Davis), and he did not meet this criterion: he had no violent convictions in his record. In *United States v. Flowers*—another case involving exclusively Black defendants—the only known suspect, Myreon Flowers, had no prior convictions at all. Even when the ATF technically met this criterion, it often did so by the

[35] The cases with exclusively Black defendants in which no defendant had a prior violent conviction were *Davis*, 13-CR-063; *Flowers*, 11-CR-779; and *Alexander*, 11-CR-148.

slimmest of margins. For example, in *United States v. Tanner*, which involved exclusively Black defendants, the only prior violent conviction for the only known suspect, Rodney Tanner, was a sexual assault conviction from 1990—a full seventeen years before his stash house arrest.

By comparison, in cases involving primarily White defendants, the ATF met this requirement every time. In each case, there were violent convictions for at least two of the defendants. *See supra* Subsection III.C.1(b)(i).

c) Deviations from access to weapons requirement

The ATF also departed from the criterion that all targeted groups have access to weapons. *See* Zayas Training at 5 ("The target(s) must . . . have the ability to commit a home invasion by: 1) having possession of, or access to, firearms."). This requirement reflects the ATF's goal of targeting viable, existing robbery groups, since suspects who are regularly engaged in this type of activity are almost certain to have easy access to weapons. ATF Manual at 11.

The ATF targeted defendants who did not have ready access to firearms in five cases involving exclusively Black defendants, one case involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[36] *Alexander* is perhaps the most egregious departure: After over a month of searching, the three Black defendants were able to come up with just one barely functional firearm among them—a vintage firearm manufactured sometime between 1904 and 1918, the left grip of which was broken and secured by duct tape. The

[36] The cases with exclusively Black defendants in which the defendants faced serious difficulty accessing firearms or only brought one firearm on the day of the proposed robbery are: Complaint, *Alexander*, 11-CR-148, Dkt. 1 at 7–8 (Feb. 24, 2011); *Lewis* Takedown Memo, Supp. Appx E-4; Complaint, *Lewis*, 07-CR-007, Dkt. 1 at 14 (Jan. 5, 2007); *Sidney* Takedown Memo, Supp. Appx E-7; Complaint, *Sidney*, 07-CR-652, Dkt. 1 at 16–19 (Oct. 4, 2007); Complaint, *Tanner*, 07-CR-707, Dkt. 1 at 18–19 (Oct. 26, 2007); *Williams* Takedown Memo, Supp. Appx E-18; Complaint, *Williams*, 12-CR-887, Dkt. 1 at 17–18 (Nov. 15, 2012). The case with mostly Hispanic defendants in which the defendants faced serious difficult accessing firearms is *DeJesus* Takedown Memo, Supp. Appx E-13; Complaint, *DeJesus,* 12-CR-511, Dkt. 1 at 7, 10, 14–15, 17 (July 11, 2012).

morning of the robbery, they called the ATF agent about their fruitless search three times before he suggested that another contact, also an undercover officer, could provide a second firearm. *Alexander* Complaint at 7–8. Similarly, in *United States v. Lewis*, the defendants asked the ATF agent for help finding firearms, and only ultimately mustered up one. *See Lewis* Takedown Memo, Supp. Appx E-4. In *United States v. DeJesus*, a case in which all defendants were Hispanic, the Takedown Memo reports numerous conversations over the course of three months in which the targets repeatedly complained that they were unable to find firearms. *DeJesus* Takedown Memo, Supp. Appx E-13. At one point, Mr. DeJesus expressly told the undercover agent, "It's the tools [guns] that's my problem." *DeJesus* Complaint at 7. In contrast, defendants in cases involving mostly White defendants appear to have had little difficulty locating firearms. In *United States v. Farella*, for example, the three defendants brought four firearms among them.[37] Complaint, *Farella*, 09-CR-087, Dkt. 1 at 15 (Jan. 30, 2009); *see also* Complaint, *George*, 07-CR-441, Dkt. 1 at 7 (July 13, 2007) (three firearms; two defendants).

2. Procedural Criteria

The ATF also selectively disregarded its target-identification *procedures* when targeting defendants of color, which constitutes further evidence of discriminatory intent by the ATF. *See Arlington Heights*, 429 U.S. at 267. To ensure that the ATF targets only the appropriate individuals, ATF policy outlines several mandatory meeting and "proper suspect identification" procedures. ATF Manual at 11. In the cases involving mostly White defendants, the ATF closely

[37] "Recovered during the post arrest search in FARELLA's waistband was a Ruger, Model P85, 9 mm pistol, serial number 302-07947 loaded with on 9mm magazine – 15 round capacity. . . . Recovered in the trunk of the Cougar was a Smith and Wesson, Model 37 Chief's Special Airweight, .38 Special revolver, serial number BRM7538 (5 shot – found unloaded). Also recovered in the trunk of the Cougar was a Rock Island Armory, .45 ACP pistol, serial number RIA982067, loaded, with one 8 round magazine, found in a small gun pouch with one spare, unloaded 45 caliber magazine. . . . Also found in the trunk of the Cougar was a Mossberg, Model 500 ATP, 12 gauge shotgun, with an aftermarket pistol grip and folding stock and no visible serial number." *Farella* Complaint at 15.

followed the rule book, and the people arrested did indeed fit the ATF's profile. By contrast, the ATF regularly departed from its meeting and identification requirements for defendants of color, showing little regard for ensuring that targets were "proper suspect[s]." ATF Manual at 11.

The ATF departed from its procedural requirements for each racial group as follows:

- Requirement to document all known suspects in a Takedown Memorandum:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 11 (61% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 2 (67% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement to identify all suspects before the arrest day:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 14 (78% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 2 (67% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement to meet with at least two members of the alleged robbery crew before the arrest day:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 3 (17% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 0 (0% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 0 (0% of White cases)

- Requirement to meet in person with the targets three times before the arrest:
  - Cases involving exclusively Black defendants in which the ATF departed from this requirement: 5 (28% of Black cases)
  - Cases involving mostly Hispanic defendants in which the ATF departed from this requirement: 0 (0% of Hispanic cases)
  - Cases involving mostly White defendants in which the ATF departed from this requirement: 1 (33% of White cases)[38]

[38] The defense did not have enough information to evaluate all of the ATF's procedural requirements. For example, the ATF prohibits agents from starting a Stash House Operation until "all traditional investigative avenues and arrest options [have been] explored" and they determine that "traditional investigative methods will not suffice" to take down the targets. Zayas Training at 4; *see also* ATF O 3250.1A.52.b. Although the defense lacked sufficient information to evaluate this criterion, cases

a) Requirement to document all known suspects in a Takedown Memorandum

First, in many cases involving defendants of color, the ATF failed to comply with its critical requirement that it identify and document all known suspects in a Takedown Memo, while abiding by this requirement in all cases involving White defendants. ATF policies require that the following "investigative information" be documented in a Takedown Memo: "(a) Background and/or synopsis of the investigation. (b) Complete identification and criminal history of all known suspect(s)." ATF O 3250.1B.12.g; ATF O 3250.1A.52.c(2)(b), (c).

The ATF departed from its identification and documentation requirement in eleven cases involving exclusively Black defendants, two cases involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[39] In the cases involving mostly White defendants, the ATF stringently adhered to this criterion and identified all known suspects in its Takedown Memoranda. In *United States v. Corson*, for example, the ATF positively identified not only the two defendants the ATF met, but also Aaron Corson, whom the agent had not yet met in person. *Corson* Takedown Memo, Supp. Appx E-2.

This stands in stark contrast to the cases involving defendants of color. For example, in *United States v. Mahan*, a case involving four Black defendants, fully one month after the ATF

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such as *Brown*, 12-CR-632, suggest that the government abandoned this criterion for defendants of color. In *Brown*, the government had recordings implicating the initial target in gun trafficking; the traditional investigative avenue of arresting him for that offense would have more than sufficed. Complaint, *Brown*, 12-CR-632, Dkt. 1 at 2–3 (Aug. 15, 2012).

[39] The cases with exclusively Black defendants in which a Takedown Memo was filed but did not include identifying information for all suspects known to the ATF at the time are *Brown*, 12-CR-632; *Cousins*, 12-CR-865; *Flowers*, 11-CR-779; *Lewis*, 07-CR-007; *Mahan*, 08-CR-720; *Paxton*, 13-CR-103; *Williams*, 12-CR-887; and *United States v. Tankey*, 06-CR-50074 (Reinhard, J.) (three Black defendants). Further, there are three cases with exclusively Black defendants in which defendants have no Takedown Memo. Those cases are *Davis*, 13-CR-063; *Hall*, 08-CR-386; and *Tanner*, 07-CR-707. The two cases with mostly Hispanic defendants in which a Takedown Memo was completed but did not identify all known suspects were *Elias*, 13-CR-476 and *United States v. Davila*, 12-CR-713 (Feinerman, J.) (two Hispanic defendants, one Black defendant).

agent initially met with Mr. Mahan and "two unidentified individuals," the ATF still had not identified either of those two individuals by name. *Mahan* Takedown Memo, Supp. Appx E-8. Similarly, in the Takedown Memo for *United States v. Elias*, a case involving mostly Hispanic defendants, the ATF identified by name only two of the four suspects it had met. *Elias* Takedown Memo, Supp. Appx E-20.

b) Requirement to identify all suspects before the arrest day

Second, the ATF departed from its requirement to attempt to identify *all* subjects before the arrest day. The ATF Manual requires that, "All available investigative measures should be applied in an effort to identify all subjects involved in the investigation." ATF O 3250.1B.12.f(1). This includes conducting follow-up meetings, if necessary. *See* Zayas Training at 11.[40]

The ATF departed from this requirement in fourteen cases involving exclusively Black defendants, two cases involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[41] Perhaps the most egregious example is *United States v. Elias*, a case involving mostly Hispanic defendants. There, the ATF agent failed to meet or identify seven defendants before the arrest day, even though the agent met two suspects in person, and Salvador Elias told the agent that he would probably bring additional crew members, including two

[40] This criterion is different from the previous requirement that the ATF document in the Takedown Memo all suspects it knows of at the time the memo is written. This criterion, in contrast, requires that the ATF endeavor to identify, at some point before arrest, all of the people who are ultimately arrested.

[41] The cases with exclusively Black defendants in which the ATF failed to identify every member of the alleged robbery crew before the day of arrest are *Jackson*, 13-CR-636; *Paxton*, 13-CR-103; *Davis*, 13-CR-063; *Williams*, 12-CR-887; *Cousins*, 12-CR-865; *Payne*, 12-CR-854; *Brown*, 12-CR-632; *Flowers*, 11-CR-779; *Alexander*, 11-CR-148; *Mayfield*, 15-CR-497; *Hall*, 08-CR-386; *Tanner*, 07-CR-707; *Lewis*, 07-CR-007; and *Tankey*, 06-CR-50074. The two cases with mostly Hispanic defendants in which the ATF failed to identify every member of the alleged robbery crew were *Elias*, 13-CR-476; and *DeJesus*, 12-CR-511.

drivers. Complaint, *Elias*, 13-CR-476, Dkt. 1 at 12 (June 5, 2013). According to the Complaint, the agent did not ask who the drivers were or ask to meet with any crew members. *Elias* Complaint at 12. By contrast, in cases involving mostly White defendants, the ATF met in person with every defendant prior to the day of the arrest.

c) Requirement to meet with at least two members of the alleged robbery crew

Third, the ATF departed from its requirement that the agent meet before the day of the arrest with "at least two members of the robbery crew" for named Black defendants, but not for named White defendants. ATF O 3250.1B.12.b(4). This requirement is part of the ATF's "minimum criteria" to ensure that the process of target selection includes only "persons who show a propensity of doing harm to the public through violent behavior/armed robberies." ATF O 3250.1B.12.b.

The ATF failed to comply with this requirement in three cases involving exclusively Black defendants, zero cases involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[42] In *United States v. Davis* and *United States v. Flowers*, both cases involving exclusively Black defendants, the ATF's lack of effort to meet other members of the alleged robbery crew was especially striking. In both cases, the ATF met with *only one* of the named defendants before the day of arrest, yet seven defendants were ultimately arrested and charged in each case. In *Davis*, Mr. Davis told the agent he would recruit additional participants, but no meeting with the agent ever took place. *Davis* Complaint at 8.

By contrast, in the cases involving mostly White defendants, the ATF complied with the

[42] The cases with exclusively Black defendants in which the ATF failed to meet with at least two members of the alleged robbery crew were: Complaint, *Davis*, 13-CR-063, Dkt. 1 at 4, 8, 14, 17 (Jan. 18, 2013); Complaint, *Flowers*, 11-CR-779, Dkt. 1 at 8, 14, 24–25 (Nov. 2, 2011); *Tanner* Complaint at 6, 8, 13.

two-member meeting requirement perfectly. In fact, the ATF met at least once with *all* of the defendants in each case involving White defendants, rather than just the minimum of two. *See Farella* Complaint at 12; Complaint, *Corson*, 06-CR-930, Dkt. 1 at 6–7 (Dec. 12, 2006). Indeed, in *United States v. George*, the agent met personally with both defendants, even though he knew they were plotting to kill him. *George* Complaint at 3–6.

d) Requirement to meet in person with the targets three times before the arrest

Fourth, the ATF regularly departed for defendants of color, but not for White defendants, from its requirement to meet with the targets in person three times before the arrest. ATF O 3250.1B.12.f(1); Zayas Training at 9–11. Specifically, the ATF failed to conduct three meetings with the targets in five cases involving exclusively Black defendants and one case involving mostly White defendants.[43]

***

In case after case involving defendants of color, the ATF's early decisions to disregard its internal requirements had a cumulative effect, resulting in more total departures. In this case, for example, the ATF initially targeted someone with no violent convictions who had never been to prison and had no current criminal involvement, then failed to identify by name either of the two other participants until after the arrest. In the *Davis* case, the ATF's initial unverified targeting decision resulted in arrests of one Black individual who met none of the ATF's criminal history

[43] The cases with exclusively Black defendants in which the ATF agent failed to hold three meetings are: Complaint, *Hall*, 08-CR-386, Dkt. 1 at 5, 7 (May 14, 2008); *Lewis* Complaint at 6, 9; Complaint, *Mayfield*, 15-CR-497, Dkt. 1 at 3, 4 (Aug. 18, 2015); Complaint, *Tankey*, 06-CR-50074, Dkt. 1 at 4, 6–7 (Dec. 1, 2006); and Complaint, *Walker*, 07-CR-270, Dkt. 1 at 4–5, 9–10 (May 2, 2007) (note, however, that there is confusion on whether there was an additional meeting on March 27, 2007). The case with mostly White defendants in which the ATF agent failed to conduct three meetings is *United States v. Corson*, 06-CR-930 (Pallmeyer, J.) (two White defendants, one Hispanic defendant) (*Corson* Complaint at 5, 11).

criteria, and an additional six Black individuals whom the ATF had never before met or investigated. Likewise, in the *Elias* case, the ATF's failure both to verify that it was targeting a genuine robbery crew and to identify its targets in advance resulted in the ATF sweeping up seven people who were completely unknown to the agency until the day of the arrest. In the *DeJesus* case, the ATF targeted a Hispanic individual who was not currently criminally active and had no preexisting robbery crew; consequently, it took him fully three months of effort to cobble together participants and find a gun. The *Alexander* case is similar in that the ATF's early decisions to ignore its criminal history requirements led to them arresting three inept offenders (at least one of whom was a total stranger) who never even managed to track down a modern, fully functioning firearm for the supposed robbery.

These cases stand in stark contrast to the three cases involving mostly White defendants, where the ATF guaranteed that its targets fit the substantive and procedural criteria almost perfectly.

D. ATF Agents Expressly Recruited Defendants of Color Because of Their Race.

Defendants need not present any "smoking gun" evidence, such as racial epithets, in order to succeed on their equal protection challenge. *See, e.g*, *Hunt*, 526 U.S. at 553 ("Outright admissions of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence."); *Bd. of Sch. Comm'rs of Indianapolis*, 573 F.2d at 412.

However, in at least three cases, undercover agents expressly targeted defendants "'because of,' not merely 'in spite of,'" their race, which is clear evidence of discriminatory intent. *Feeney*, 442 U.S. at 279. The three cases are: *Williams* (Agent Valles), *Brown* (Agent Gomez), and *Paxton* (Agent Karceski). In all three cases, the undercover agent pressured targets to recruit additional defendants who did not look like the agent—meaning targets who were

Black. The justification the agents gave for this request was patently discriminatory: The agent (posing as a disgruntled courier for a Mexican cartel) claimed the "cartel" would connect the "robbers" to him if they were his same race. Of course, because it was *the ATF* who ran the operation and there was no cartel, the race-based request came from the ATF and the ATF alone.

The ATF's effort to nab Black targets worked: The three agents successfully recruited *only* Black targets in the cases where they made such statements. In *Williams*, all three defendants were African-American, as were all five defendants in *Paxton*, and all five in *Brown*. *See* Report at 12–13. (Karceski was also the agent in *Alexander*, which also targeted only Black people.) Given the striking similarity between the agents' statements in the three cases, it appears the ATF may actually have trained its agents to direct Black targets to recruit additional Black targets.[44] The agents used similar racially coded language, and cited the same ostensible purpose. The ultimate result also was the same: They recruited exclusively Black defendants.

1. *United States v. Williams*

In *Williams*, ATF Agent Carlos Valles (who is Hispanic) said in no uncertain terms that he was coming to defendants Antonio Williams and Mario Brown with the stash house robbery proposition *because* Mr. Williams was Black. Agent Valles was posing as a disgruntled courier for a Mexican drug cartel. During a recruitment meeting, Agent Valles directly tied the success of the stash house operation to the race of Mr. Williams and his supposed crew.

Agent Valles emphasized that he needed Black people like Mr. Williams and Mr. Brown

[44] The ATF requires an agent to undergo extensive training before he can lead a Stash House Operation. *See* Operational Checklist, ATF Manual at 26 ("Only special agents who have attended the ATF Home Invasion Course are authorized to act as the primary undercover in the home invasion scenario. Special agents with less than three home invasion undercover roles will be required to be mentored throughout the scenario under investigation."); ATF Manual at 12 ("Use of an experienced undercover agent is imperative. . . ."); ATF O 3250.1B.12.d(1) ("It is . . . mandatory that an undercover agent who has attended the ATF home invasion training course be used throughout the investigation, up to and including during [sic] the arrest of the subjects.").

for the stash house operation so that the cartel would not associate the robbers with him. He explained that the other members of the cartel were "Mexican just like me." Ex. D-1 at 1. The agent made clear that the race of the robbers was important, and they couldn't be Mexican: "[T]hat's why I'm coming to *you*. You know, I roll with my cuz, but this shit can't come back on me. **You know if they see m—if they see some other Mexicans doin' it, they're gonna know they're with me**. . . . You know what I'm saying?" *Id.* (emphasis added).

2. *United States v. Brown*

As in *Williams*, the ATF agent in *Brown* expressly recruited targets on the basis of race. Over the course of three meetings, Agent Dave Gomez (who is Hispanic), posed as "Blanco" and repeatedly directed the Black CI and each of the Black targets to recruit people who were not Mexican. The clear implication was that the agent wanted the recruits to be Black.[45]

On July 23, 2012, Agent Gomez met with Dwaine Jones to discuss the scheme and who Jones should recruit. As in *Williams*, Gomez emphasized that it was critical that the "cartel" not be able to connect Gomez with the robbery crew. Ex. D-2, 7/23/12, at 4:19–21 ("What I need to make it look like is that I had not'in' to do with it—"). To that end, Gomez asked Mr. Jones to bring along others, and explained that the reason he "need[ed] these other guys" was because the men in the fake stash house were "Mexicans like me . . . ." Ex. D-2, 7/23/12, at 7:18–21. The import was plain: the targets were Black, and, of course, no one would think that a group of Black robbers would be associated with a Mexican courier. Moreover, Gomez made clear that he had selected Mr. Jones himself *because* Jones was not Mexican: "[W]hat I like about you is that nobody can put me and you together." Ex. D-2, 7/23/12, at 3:7–8. In other words, Gomez targeted Mr. Jones *because* he was Black.

[45] The nickname Agent Gomez chose, "Blanco," is Spanish for "White." He could have chosen to go by any nickname. It is striking that he chose a racialized one.

The subsequent conversations confirm this understanding. On July 24, 2012, Gomez met with defendant Jones as well as defendants Abraham Brown and Kenneth Taylor and repeated his description of the stash house scenario. Again using Hispanic names, Gomez identified one of his fictitious cartel associates as "Carlos," Ex. D-2, 7/24/12, at 6:2, and stressed that the cartel must not think that the robbers were associated with Gomez. Gomez underscored the point, stating "I gotta make it—my whole thing is that I gotta make it look like I had not'in' to do with it." Ex. D-2, 7/24/12, at 6:6–9. In case the targets misunderstood what he meant, the agent confirmed that the other two cartel associates guarding the house would be "Mexican, like me." Ex. D-2, 7/24/12, at 18:21–22. The obvious implication is that Gomez wanted Jones to recruit Black people.

Finally, in the third meeting on August 1, 2012, the agent met with all four of the defendants—Brown, Taylor, Jones, and Alfred Washington—all of whom were Black. The agent again directed the CI and each of the targets to make sure any recruits couldn't be identified with him, using nearly the exact same language he used in the prior meetings. Ex. D-2, 8/1/12, at 7:8–10 ("[M]y only main concern is that I want to make it look like I had no'in' to do with it."); Ex. D-2, 8/1/12, at 30:5–6 ("[W]hat I like about you is nobody could put me and you together."). However, the only trait that the agent ever expressed that would cause that non-identification was racial: a person not "like me"—that is, not Mexican.

3. *United States v. Paxton*

In *Paxton*, ATF Agent Andrew Karceski (who is White) engaged in the same race-based targeting as the agents in *Williams* and *Brown*. On December 5, 2012, Agent Karceski made clear to Cornelius Paxton—a Black man—that he needed a non-White crew for the robbery. Karceski said: "But man, (Paxton: Yea…) they're gonna know it's me if I got guys *looking like*

me coming in, they're gonna—it's automatically gonna come back on me . . . ." *See* Ex. D-3 (emphasis added).

***

The agents in the three cases discussed above—Agents Valles, Gomez, and Karceski—played major roles in the Stash House cases in this district, especially in the second wave 2011–2013 cases in which the ATF recruited a far greater percentage of people of color.[46] Gomez was the undercover agent in eight of the 24 cases in this district from 2006–2013. No other agent led as many cases as Gomez. Karceski and Valles participated exclusively in the second wave of Stash House cases, during which the ATF recruited only one white defendant out of 57, and Karceski initiated that wave with the *Alexander* case. See below for a Table matching each lead undercover agent with the case(s) the agent led:

[46] The stash house cases brought from 2011–2013 are especially important because they come close to presenting the "inexorable zero." The Supreme Court and Seventh Circuit recognize that a process that selects zero people of one race is strong evidence of intentional discrimination. *Int'l Bhd. of Teamsters*, 431 U.S. at 342 n.23; *O&G Spring*, 38 F.3d at 878. From 2011–2013, *none* of the stash house cases was mostly White. (Even going back to 2006, only three of the 24 cases were mostly White.) In addition, from 2011–2013, the ATF targeted only one White person out of 57, even as the number of overall targets *rose*. In a district as diverse as ours, no amount of "fine tuning" can overcome these numbers, nor the consequent inference of discriminatory intent.

Table of Cases, with Associated Undercover Agent(s)		
Case	**Year**	**Undercover Agent(s)**
Tankey	2006	Dave Gomez
Harris	2006	Dave Gomez
Corson	2006	Dave Gomez
Lewis	2007	Dave Gomez
Walker	2007	Christopher Bayless
George	2007	Christopher Bayless
Sidney	2007	Christopher Bayless
Mahan	2008	Dave Gomez
Farella	2009	Christopher Bayless
Mayfield	2009	Dave Gomez
Alexander	2011	Andrew Karceski
Flowers	2011	Christopher Bayless
DeJesus	2012	Dave Gomez
Brown	2012	Dave Gomez
Davila	2012	Sean Koren
Payne	2012	Michael Ramos; Richard Zayas
Cousins	2012	Leon Edmond
Williams	2012	Carlos Valles
Paxton	2013	Andrew Karceski
Elias	2013	Christopher Labno
Jackson	2013	Christopher Labno; Stan Kogut

See Supp. Appx E (containing the Takedown Memos from which this information was drawn).

E. The Stash House Operation's Selection Procedure is Highly Susceptible to Abuse, Further Demonstrating Discriminatory Intent.

The Supreme Court recognizes that discriminatory intent can be established by a selection procedure that (1) is susceptible to abuse and that (2) results in a statistical discriminatory effect. The Stash House Operation meets this standard.

In *Castaneda v. Partida*, the Court recognized that "a selection procedure that is susceptible of abuse . . . supports the presumption of discrimination raised by [a] statistical showing." 430 U.S. at 494. The Court applied the susceptibility to abuse standard to strike down Texas's grand jury venire selection process under the Equal Protection Clause. First, the Court concluded that Texas employed a highly discretionary selection procedure that was "susceptible of

abuse as applied." *Id.* at 497. The Texas process authorized local jury commissioners (known as "key men") to exercise their discretion in selecting a small grand jury venire from the huge pool of people living in each county. *Id.* at 484–85, 486. Second, Mr. Partida used a binomial distribution to show that this discretionary procedure resulted in a "substantial underrepresentation of his race or of the identifiable group to which he belongs." *Id*. at 494; 496 n.17. The Court concluded that the combination of a highly discretionary procedure that resulted in statistical evidence of race disparity supported a prima facie Equal Protection violation. *Id.* at 494.

In *Yick Wo v. Hopkins*, the Supreme Court also concluded that a discretionary procedure, when accompanied by evidence of discriminatory effect, denied the plaintiffs equal protection of law. 118 U.S. at 373–74. The San Francisco ordinance challenged in *Yick Wo* was highly discretionary, *id.* at 366, and the *Yick Wo* plaintiffs provided numerical evidence of discriminatory effect, *id.* at 373.

The Stash House Operation meets the first prong of the susceptibility to abuse standard because it employs a highly discretionary selection procedure. The second prong is met by defendants' statistical evidence showing that the subjective selection process results in a set of targets that is overwhelmingly and disproportionately Black and Hispanic.[47]

The government's active role in manufacturing prospective "crimes" places enormous and untrammeled discretion in the hands of ATF agents. The ATF creates a crime and chooses people to commit it. The ATF alone decides who will be targeted, dangles a carefully crafted, once-in-a-lifetime opportunity in front of those targets, and urges them to take the bait. The ATF also determines the amount of drugs and the financial reward it uses to entice its hapless targets.

[47] Professor Fagan's multiple statistical tests go beyond the binomial distribution that created the "statistical showing" in *Castaneda*, 430 U.S. at 496 n.17, in that they not only demonstrate discriminatory effect, but also provide evidence of discriminatory intent.

In addition, the disjunction between the purported aim of the Operation's selection criteria and the criteria as applied creates a procedure that is highly susceptible to abuse. The selection criteria purport to cabin agents' discretion. However, as in *Castaneda* and *Yick Wo*, the criteria in fact create a huge pool of permissible targets and provide little or no guidance for selecting among them, in at least three ways. First, the Fagan Report found that 292,442 individuals in the eight Illinois counties where stash house cases arose had at least one prior conviction that met the ATF's criminal history requirements. This is akin to *Castaneda*, where the Supreme Court recognized that authorizing "key men" to choose a jury venire from the 181,535 people of Hidalgo County left the process susceptible to abuse. 430 U.S. at 486 (county population of 181,535). Second, the true number of people eligible for the manufactured crime is even larger than the nearly 300,000 individuals enumerated in the Fagan Report. In practice, the ATF's criminal history requirements do not appear to require any prior convictions, much less for violent offenses. Professor Fagan notes that 19 of the 94 stash house defendants had no prior convictions for *any offense at all* before the first day of the year they were recruited into the stash house sting. Report at 19. Third, because the ATF abandoned its criteria when targeting Black and Hispanic defendants, the criteria as applied did not impose any meaningful or objective limitations on the agents. The repeated disregard for the agency's procedural and substantive criteria left the agents with truly unfettered discretion.

When combined with defendants' abundant evidence of discriminatory effect, the ATF Operation's susceptibility to abuse further demonstrates discriminatory intent.

CONCLUSION

For the foregoing reasons, defendants respectfully request that this Court DISMISS the indictment in this case. If the Court needs additional information, defendants request an evidentiary hearing on this motion. In the alternative, defendants respectfully request that this Court grant any other form of relief it deems appropriate.

Dated: October 11, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, ALISON SIEGLER, an attorney with the University of Chicago Law School's Federal Criminal Justice Clinic, hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

DEFENDANTS' MOTION TO DISMISS FOR RACIALLY SELECTIVE LAW ENFORCEMENT

was served pursuant to the district court's ECF system as to ECF filings, if any, and was sent by first-class mail/hand delivery on October 11, 2016, to counsel/parties that are non-ECF filers.

By: */s/ Alison Siegler*

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IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**No. 12-CR-865**
v.	)	**Hon. Gary Feinerman**
	)	
	)	
DAVID COUSINS, et al.,	)	
	)	
Defendants.	)	

EXHIBITS TO DEFENDANTS' MOTION TO DISMISS FOR RACIALLY SELECTIVE LAW ENFORCEMENT

Exhibit A: Report of Jeffrey Fagan, Ph.D.

Exhibit B: County-Level Racial Composition Data

Exhibit C: ATF Departures from Criteria

C-1: Chart Summarizing ATF Departures from Criteria

C-2: Defense Counsels' Interpretations of ATF Criteria

Exhibit D: Transcript Excerpts from Recorded Conversations

D-1: Transcript Excerpt from *United States v. Williams*, 12-CR-887

D-2: Transcript Excerpts from *United States v. Brown*, 12-CR-632

D-3: Transcript Excerpt from *United States v. Paxton*, 13-CR-103

Exhibit E: Excerpts from Complaint for Search Warrants (Panozzo-Koruluk Crew) (July 17, 2014)

Exhibit A:

Report of Jeffrey Fagan, Ph.D.

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 12-CR-632
v.	)	Chief Judge Rubén Castillo
	)	
ALFRED WASHINGTON,	)	
	)	
Defendant.	)	

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 12-CR-887
v.	)	Chief Judge Rubén Castillo
	)	
JOHN T. HUMMONS,	)	
	)	
Defendant.	)	

REPORT OF JEFFREY FAGAN, Ph.D.

I. OVERVIEW

A. Qualifications

I am the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School and Professor of Epidemiology at the Mailman School of Public Health at Columbia University. I also am a Senior Research Scholar at Yale Law School. I have been retained to serve as an expert witness for defendants' selective prosecution/enforcement claim in this case. A summary of my credentials and curriculum vitae is presented in Appendix G.

B. Issues Addressed

In this Report, I provide empirical evidence to address two principal claims by defendants in these cases.

- Defendants claim that the Bureau of Alcohol, Tobacco, Firearms and Explosives (hereafter, law enforcement or ATF) targeted Black and Hispanic people for recruitment into fictitious "Stash House stings," in violation of the equal protection principles of the Fifth Amendment.
- Defendants also claim that, in targeting Black and Hispanic people for recruitment into fictitious "Stash House stings," the ATF recruited persons based on criteria and characteristics that were not specified as selection criteria articulated in the ATF Manual for this program.

C. Summary of Findings

- From 2006-2013, the probability of selection of a cohort of Stash House Program defendants with their observed racial and ethnic composition from among a large pool of similarly situated potential eligibles is less than 0.1% for the 94 defendants in these cases.
- ATF engaged in nearly exclusive recruitment of non-White persons over a three-year period from 2011-2013. From 2011-2013, the selection of only one White defendant among the 57 Stash House defendants recruited in that period suggests that Black and Hispanic persons were targeted for selection by the ATF. The probability of selecting a cohort of 56 non-White defendants out of 57 from among potential eligibles is less than 0.1%. These extremely low probabilities provide evidence of race-based selection of Stash House defendants.
- Large numbers of Stash House defendants were recruited into the Stash House Program without having met the explicit criteria of violent crime set forth in ATF policy and guidelines.[1] Many defendants also appear to fail to meet expanded offense criteria articulated by the ATF and prosecutors during the course of this litigation.
- Using three distinct statistical tests for disparate racial treatment, there is strong, consistent and statistically significant evidence that non-White suspects were more likely than White suspects to be targeted for recruitment into the Stash House Program, compared to a large population of similarly situated and matched potentially eligible persons with one or more prior convictions for any of the ATF target offenses. Non-White persons were more likely to be recruited into the

[1] The ATF has stated the violent crime criteria as: "Violent crime is defined as offenses that involve force or threat of force and includes murder, forcible rape, robbery, aggravated assault, and arson." ATF Manual at A-31 (reprinting ATF O 3250.1B.b), *see infra* notes 7, 8.

Stash House Program after controlling for criminal histories relevant to the Stash House Program policies.

- The results of these tests show a pattern of selective enforcement in the recruitment of Stash House defendants. The results show that after controlling for the ATF criteria as well as several indicia of criminal propensity, race remains a statistically significant predictor of selection as a Stash House defendant. These analyses show that the ATF is discriminating on the basis of race in selecting Stash House defendants. In other words, Black status is a significant predictor of selection as a Stash House defendant after controlling for both formal and informal but articulated ATF criteria.

II. DATA AND MEASURES

This preliminary section describes the empirical foundations of the statistical analyses presented in this Report. This section describes the data sources and analytic methods that were used to compile evidence to address the claims in this case. There are two components to this section:

A. A description of the data sources that are used to characterize the defendants and potential eligibles in the Stash House cases.

B. A description of the measures that are used to assess the characteristics of the population that, after applying the ATF criteria, were potentially eligible for selection as Stash House defendants.

A. Data Sources – Defendants and Potential Eligibles

The sources of data used in the analyses are shown in Appendix A. These are described in the following sections.

1. Defendants

There were 24 cases with a total of 94 defendants charged between 2006 and 2013. Criminal history records were obtained and coded for each of the defendants across the cases analyzed for this Report. The criminal histories were in the form of "rap sheets" showing each arrest and conviction, with detailed information about the charges and dispositions in each case. Both the statute and generic description of each offense were listed for each offense. Since cases or arrest events often included multiple charges, all

charges were coded for analysis.[2] The type of sentence was coded, as was whether the defendant was sentenced to jail or prison.[3] Both the arrest charge(s) and final conviction charge(s), for those found or pleading guilty, were coded. Dispositions were reported, as were sentences for those convicted.[4]

Access also was granted to the Complaints filed in each case (which were used to determine the dates of the beginning and end of each Stash House investigation), Investigative Memoranda, and ATF "takedown memos" describing the details of each group of defendants who participated in a specific event.[5] These records together provide narrative descriptions of the criminal histories, recruitment, and other relevant information about the defendants in each case. These records also include the details of the recruitment of those recruited to carry out the fake Stash House robberies.

Race/ethnicity, gender, and year of birth also were coded from the rap sheets. Age at the beginning of each year 2006-2013 was computed from the year of birth. Arresting law enforcement agency was coded. Since most arrests took place in Chicago, the agency variable was limited to a binary measure of whether the arrest was made by the Chicago Police Department or another law enforcement agency. Specific location data (address), either for the location of the arrest or for the residence of the defendant at the time of arrest, was coded where available. However, the data were not available in most rap sheets. The extensive missing data on location made geographic analyses impossible at this point.

2. Eligible Population

To create a population of similarly situated persons (a comparison group), complete criminal history records of all persons with at least one prior conviction for certain offenses between 2000 and 2015 were obtained via subpoena from the Illinois State

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[2] Details are provided in Appendix D. The categorization by crime type followed the crime aggregation and reporting systems developed by the Federal Bureau of Investigation (FBI) in its Uniform Crime Reporting System (UCR). For a listing by the FBI of the full range of offense definitions *see* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/offense-definitions.

[3] The custodial data provided by ISP had extensive missing records and incomplete information on custodial stays, precluding any analysis utilizing custodial stay length.

[4] Sentences were coded in order of severity, with a prison sentence superseding a concurrent jail sentence (e.g., a sentence to 6 months with time served in jail and a one year prison sentence is recorded as one prison sentence).

[5] *See* ATF Manual at A-35 – A-37 (reprinting ATF O 3250.1B.g) describing the purpose and content of these memos and the importance they play in the stash house investigation process. *See infra* notes 7, 8.

Police (ISP).[6] The parameters for the requested convictions were derived initially from the target offenses listed in the ATF Home Invasions Operations Manual.[7] According to the ATF Manual, these target offenses were "offenses that involve force or threat of force and includes (sic) murder, forcible rape, robbery, aggravated assault, and arson."[8] The sample parameters for the requested data were derived initially from the target offenses listed in the ATF Manual for the Stash House Case Program.[9] Appendix C shows the definitions of eligibility as stated in the ATF Manual.

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[6] Details of the records produced are listed in Appendix B.

[7] It is my understanding from review of discovery that the ATF states its formal selection criteria in a series of regulations, manuals, and training materials. The government produced four sets of ATF documents in discovery: (1) an ATF Home Invasions Operations Manual dated 2013 (hereinafter "ATF Manual"); (2) a policy entitled ATF O 3250.1B dated November 17, 2011; (3) an "*ATF Course*" dated 2009; and (4) an undated policy entitled ATF O 3250.1A from sometime before 2011. This Report relies on the 2013 ATF Manual, which reprints ATF O 3250.1B (the November 17, 2011 policy, which is currently in operation until November 17, 2016), and on the "target identification" criteria set out therein. *See* ATF Manual at A-31 – A-32 and Bates # ATF-Docs(12CR632; 12CR887/00045). The "target identification" portion of the ATF Manual is shown in Appendix C.

The government produced these materials to lawyers for defendants in discovery as follows (Government's in camera submission of December 16, 2013): (1) The 2013 Home Invasions Operations Manual (1st ed. 2013), Bates # ATF-Docs(12CR632; 12CR887/00011–54), includes an appendix that reproduces (2) the 2011 policy, ATF O 3250.1B (Nov. 17, 2011), Bates # ATF-Docs(12CR632; 12CR887/00045–52); (3) the 2009 ATF Course is Richard Zayas, *ATF Course: Advanced Undercover Investigations; Lesson: Home Investigations* (Feb. 27, 2009), Bates # ATF-Docs(12CR632; 12CR887/00069–82), and (4) the undated policy is ATF O 3250.1A, Bates # ATF-Docs(12CR632; 12CR887/00064–67), and was reproduced in the appendix to Lawyers for defendants shared these documents with me under the confidentiality stipulations in effect in this case.

[8] ATF Manual at A-31. This Report relies on the 2011 targeting criteria, even though some of the cases analyzed arose before the date of the policy. All of the ATF Manuals reflect a focus on violent offenders, a focus elaborated most clearly in the 2011 policy. For example, the ATF used very similar targeting criteria in its earlier 2009 "ATF Course" materials. Specifically, the materials focused on "violent offender[s]" with "past convictions for violent crimes." Zayas, *ATF Course* at 5. *See also* ATF O 3250.1A ("'Home Invasion' investigations are defined as those investigations that focus upon members of the criminal element who break into or forcibly enter residences or other facilities generally for the purpose of committing armed robbery or burglary."); ATF Manual at 2 (discussing Stash House Program's origins in the 1990s as "viable means of continuing to arrest violent armed home invasion robbery crews" in South Florida), Bates # ATF-Docs(12CR632; 12CR887/00018).

[9] ATF Manual at A-31.

After this selective enforcement litigation began, the Government also publicly asserted that narcotics and firearms offenses are relevant to target identification.[10] These two categories of offenses are not mentioned by name in the ATF Manual that guides supervisors and undercover agents in the selection and recruitment of individuals for the Stash House Program. They also are not offenses that "involve force or threat of force." This appears on its face to be a post-hoc expansion of the authorized guidelines for the Stash House Program.[11]

To account for the Government's expanded criteria, the pool of potential eligibles was expanded beyond persons with one or more convictions for the target offenses listed in the ATF Manual, to include individuals with one or more state convictions for narcotics and firearms offenses.[12] Expanding the eligible population to include these additional individuals ensures the most "similar" comparison group, according to the government's claims.

Records were requested for the entire Metropolitan Statistical Area of Chicago, but the Court ordered records produced only for the counties where the Stash House cases arose: Cook, Lake, Will, DuPage, Kane, Kendall, LaSalle and Winnebago Counties. This analysis does not consider any potential eligibles after 2013 because no Stash House cases were brought after 2013.

Once the potential eligibles for the Stash House Program were identified using these criteria, their complete criminal history was created through a search of the ISP databases. In addition to the arrest information, other information included data on prosecution outcomes, case outcomes and sentences, and correctional or custodial confinement.[13] Each of these components of criminal history were generated as separate files, and records of individuals were constructed by concatenating information for each person using the State Identification number (SID). The subpoenaed records included thousands of specific arrest charges based on chapters and subsections of the Illinois

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[10] *See, e.g.*, Oral Argument, *United States v. Davis*, 14-1124, Dkt. 40 at 11:49 (7th Cir. May 21, 2014) ("The comparison group should be individuals who have sustained prior state or federal convictions for offenses involving robbery, narcotics, or firearms . . . ."), *available at* http://media.ca7.uscourts.gov/sound/2014/nr.14-1124.14-1124_05_21_2014.mp3; Government Motion for Reconsideration Regarding Discovery Order, *United States v. Williams*, 12-CR-887, Dkt. 74 (N.D. Ill. Aug. 21, 2013) ("Defendants have failed to identify any individuals remotely similar to themselves – people with criminal histories including narcotics and weapons offenses who sought to commit potentially violent robberies – who were not further investigated or prosecuted because of their race.").

[11] ATF Manual at A-31 – A-32.

[12] The offenses and variables are further explained *infra* in Table 1 at 26 and notes 43, 44 and the accompanying text.

[13] However, extensive missing records and incomplete information precluded use of the custodial data to determine lengths and locations of correctional confinement.

criminal statutes. Appendix E provides examples of the coding of a subset of frequently cited specific statutes – among the thousands in the ISP dataset – into the crime categories shown in Appendix D.

3. Coding Race: Hispanic Surname Analysis

Both sources of criminal history information provided for this litigation have limited or no information on the Hispanic ethnicity either of the defendants or the potentially eligible population. The ISP data identified less than .1% of the 292,442 potential eligibles as Hispanic. For the defendants, criminal history records ("rap sheets") contained no information on Hispanic ethnicity. For that group, information on race was supplemented and verified using individual-level inquiries by defense counsel in consultation with defendants ("Hispanic Verified").

I also used a second method to determine Hispanic ethnicity in these two populations. I applied a commonly-utilized method that assigns Hispanic ethnicity based on self-reported ethnicity data from the 2000 United States Census.[14] This method has been applied and accepted by the Court in a recent case in the U.S. District Court for the District of Arizona.[15] The method was applied in that case to determine the size and proportion of the Hispanic population in class action litigation alleging racial discrimination under the Equal Protection Clause of the Fourteenth Amendment. Details of the procedure are discussed in Appendix F and are summarized here.

The Census Bureau has created a list of all surnames occurring 100 or more times in the 2000 Census data and the corresponding likelihood of an American with that name being Hispanic.[16] Using this list, I treat defendants and potential eligibles as Hispanic if the probability of a person being Hispanic based on their last name exceeds certain thresholds. "Hispanic (60%)" means that, based on their last name, a person is more than

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[14] Ralph B. Taylor, Initial Expert Report (Dec. 2, 2010), *Melendres v. Arpaio*, 07-CV-2513, Dkt. No. 424-2, Ex. B (D. Ariz. Apr. 29, 2011); Ralph B. Taylor, Rebuttal Expert Report (Feb. 4, 2011), *id.*, Dkt. 424-3, Ex. C (D. Ariz. Apr. 29, 2011).

[15] "Dr. Taylor relied on independent U.S. Census data correlating the likelihood that a person with any given name self-identified as Hispanic. He did a differential analysis that focused particularly on names whose owners identified as Hispanic more than 90% of the time, more than 80% of the time, and more than 70% of the time. He also included names whose owners self-identified as Hispanic at a 60% threshold as 'a type of robustness analysis.'" Findings of Fact and Conclusions of Law, *Melendres*, 07-CV-2513, Dkt. 579 at 79 (May 24, 2013). "Dr. Taylor's statistics in this respect were, apparently, more sophisticated than those provided in the 1980 census list of Spanish surnames." *Id*. at 79 n.69.

[16] The current analysis used the 2000 Census Hispanic surname list B. *See* United States Census Bureau, "Frequently Occurring Surnames from the Census 2000, File B: Surnammes Occurring 100 or more times," *available at* http://www.census.gov/topics/population/genealogy/data/2000_surnames.html.

60% likely to be Hispanic. For each person, I calculate if they are Hispanic at the 60%, 70%, 80%, and 90% cutoffs.

For the potential eligible comparison group, I use the 60% Hispanic cutoff throughout the analysis, with a robustness check using the 90% Hispanic cutoff. I use this conservative measure in order to provide a consistent basis for statistical tests to determine disparate treatment. As shown in Table 4, *infra* at 21, the summary statistics for the Hispanic population at the 60%-80% thresholds are nearly identical, reducing potential error or bias that might be a function of the surname classification method and any differences between the thresholds.

For defendants, both the Hispanic 60% and the Hispanic Verified measures of Hispanic ethnicity are used in the analyses. I use the conservative Hispanic 60% measure to provide a consistent basis for statistical tests to determine disparate treatment. Table 4, *infra* at 21, shows that the summary statistics for the Hispanic population at the 60%-80% thresholds are identical, reducing potential error or bias that might be a function of the surname classification method and any differences between the thresholds. Appendix F presents a full discussion of the methods for the Hispanic Surname Analysis.

B. Measures

From the respective data sources, records of each arrest, conviction, sentence and custodial placement were aggregated to create a criminal history for each defendant and for each person in the pool of potential eligibles. The following variables were included in the aggregated criminal history data file:

Variables Created from Rap Sheets and Criminal Histories

Race - Black	Number of Arrests
Race - non-Hispanic White	Number of Convictions
Ethnicity - Hispanic (60%)	Number of Arrests – UCR Violent†
Ethnicity - Hispanic (70%)	Number of Arrests – UCR Expanded
Ethnicity - Hispanic (80%)	Number of Convictions – UCR Violent†
Ethnicity - Hispanic (90%)	Number of Convictions – UCR Expanded
Gender - Female	Number of Arrests and Convictions – Weapons Offenses
Age	Number of Arrests and Convictions – Drug Possession
Age at First Arrest	Number of Arrests and Convictions – Drug Sale
Number of Prison Sentences	Number of Arrests and Convictions – Marijuana Possession
Number of Jail Sentences	Number of Arrests and Convictions – Marijuana Sale
Percent of Arrests in Chicago	

Notes: †Based on ATF Manual.

The data are arrayed in the database for each individual as of January 1st of each year 2006-2013. This permits controls for criminal activity over time taking into account the specific temporal period when Stash House Program arrests took place and more precise specification of selection effects for those periods.

III. THE STASH HOUSE DEFENDANTS

A. Stash House Defendant Population

The population for analysis is a set of 94 defendants spanning 24 cases.[17] According to the ATF, the investigation should "target persons who show a propensity of doing harm to the public through violent behavior/armed robberies and whose activities have been documented either through criminal history, criminal reputation, or self-incrimination."[18] The ATF Manual setting standards for Stash House cases goes on to state "minimum criteria [that] must be followed."[19]

In addition to setting forth the criteria for recruitment, the ATF Manual states that "[t]he undercover agent must meet with at least two members of the robbery crew."[20] The ATF Manual also states that successful prosecutions "place a greater emphasis on the undercover conversations as opposed to … the physical evidence obtained at the time of arrest."[21] And, "[i]t is therefore mandatory that an undercover agent … be used throughout the investigation, up to and including the arrest of the *subjects*."[22] Throughout the section of the ATF Manual describing the procedures, there is repeated emphasis on directions given by the undercover ATF agent to the "violator(s)."[23] The ATF Manual goes on to describe the undercover agent's role in supervising the "robbery crew": "The undercover agent must meet at least two members of the robbery crew."[24] For example, in referring to meetings between the undercover ATF agent and the "violator(s)," the Manual states:

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[17] At the outset of research for these proceedings, 25 cases were identified, each including multiple defendants. However, one case, *U.S. v. Vidal*, was dropped from the analysis after attorneys for defendants notified me that this was not an ATF case.

[18] ATF Manual at A-31.

[19] *Id*. at A-31 – A-32.

[20] *Id*. at A-32.

[21] *Id*.

[22] *Id*. (emphasis added).

[23] *Id*. at A-33, § 3250.1B.e(2).

[24] *Id*. at A-32.

> "This also allows the undercover agent an opportunity to speak with all members of the organization in the event that all subjects were not present at prior meetings."[25]

Accordingly, the analyses in this Report examine the full set of defendants in each case together in each statistical test. Based on statements in the ATF Manual setting forth procedures that undercover agents will follow, these procedures place undercover agents in full control and active management of the activities of the entire "robbery crew," including the initial target(s) of the investigation and the other members of the "crew." The analyses of the full complement of defendants directly address the claims in this litigation, more so than an analysis focusing solely on the initial targets. According to the stated procedures, the undercover agents approve of the full membership of each "crew," meet on several occasions with the full "crew," are responsible to their supervisors at ATF for the training of all the conspirators, and prepare the full "crew" to take the substantial steps necessary for a successful prosecution.

B. Who are the Stash House Defendants?

1. Identifying Defendants

To identify the 94 defendants, I relied on three sources: (1) the "takedown memoranda," (2) criminal complaints, and (3) the initial reports of investigation (ROIs) for each case. I consider the ATF takedown memo to be the controlling document of the investigation because it provides the aggregated record of the facts of the investigation up to the arrest. In some instances, further investigations after the completion of the takedown memo but before the Stash House arrest took place revealed additional facts.[26] In the four cases where the takedown memo has not been produced to me, I rely on the complaint and the initial ROIs read in tandem.[27]

2. Defendants by Race

Table 2 (on the following pages) lists the Stash House cases. The table also shows the race of each defendant, with Hispanic defendants identified using the Hispanic Surname

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[25] *Id*. at A-34.

[26] For example, in *Williams*, 12-CR-887, the last meeting/contact listed in the takedown memorandum was on November 8, 2012 (Takedown Memo at 3, 5–6). The takedown memo also states that it anticipates future meetings on November 12 and 13 (Takedown Memo at 6). It was during a post-takedown memorandum meeting on November 12 that the ATF met Mr. Hummons (Complaint at 12–13). The defendants were arrested on November 14, 2012 (Complaint at 18).

[27] *United States v. Davis*, *United States v. Hall*, *United States v. Tanner*, and *United States v. Harris*.

Analysis method described earlier.[28] Hispanic ethnicity is assigned using the 60% threshold.[29] *See* Appendix F.

[28] *See supra* Subsection II.A.3 of this Report. As discussed in that section and in Appendix F, this method undercounts Hispanics when compared to self-identification of ethnicity and information from attorneys. However, to maintain methodological consistency in classifications between the defendant and potential eligible groups, the analyses proceed using the computed ethnicity.

[29] Three of the defendants in *United States v. Elias*, Adrian and Salvador Elias and Angel Olsen, have been classified as White using the Spanish surname methodology at the 60% cutoff. In reality all three are Hispanic. This conclusion is based on discovery and communications with defense counsel in consultation with the defendants. Specifically, Adrian and Salvador Elias self-identify as Hispanic and the ATF takedown memorandum in this case identifies them as Hispanic. Olson self-identifies as Hispanic, *see United States v. Elias*, 13 CR 0476, Dkt. 162 at ¶ 1 (N.D. Ill. Oct. 18, 2013), and, based on communications with defense counsel, Olson has one Hispanic parent and one Black parent. In addition, the U.S. Attorney's Office previously categorized Olson as Black in an earlier filing in which Hispanic categorizations were omitted. *Williams*, 12 CR 887, Dkt. 74-1 at 2 (Aug. 21, 2013).

Table 2. List of Defendants

Year of Investigation Initiation	Case Name	Defendant Name (Initial Targets Highlighted)	Race / Ethnicity[1][2]
2006	United States v. Corson, et al.	Alvarez, Oscar	Hispanic (60%)
.	.	Corson, Aaron	White
.	.	Corson, Marcus	White
.	United States v. Harris, et al.	Blitch, Christopher	Black
.	.	Carwell, Michael	Black
.	.	Harris, Michael	Black
.	.	Washington, Devarl	Black
.	United States v. Lewis, et al.	Billingsley, Lavoyce	Black
.	.	Lewis, Scott	Black
.	.	Williams, Vernon	Black
.	United States v. Tankey, et al.	King, James	Black
.	.	Lewis, Demarlon	Black
.	.	Tankey, Joaquin	Black
2007	United States v. George, et al.	George, Robert	White
.	.	Spagnola, Michael	White
.	United States v. Sidney, et al.	Lawrence, Charles	Black
.	.	Scott, Jerome	Black
.	.	Sidney, Ben	Black
.	United States v. Tanner, et al.	Calvert, Fred	Black
.	.	Calvert, Keith	Black
.	.	Tanner, Rodney	Black
.	United States v. Walker, et al.	Logan, Rashad	Black
.	.	Walker, Hurreon	Black
2008	United States v. Farella, et al.	Blais, Michael	White
.	.	Catanzaro, Donald	White
.	.	Farella, Frank	White
.	United States v. Hall, et al.	Gordon, Karinder	Black
.	.	Hall, Shamonte	Black
.	.	Ray, Rodney	Black
.	United States v. Mahan, et al.	Barber, Mario	Black
.	.	Mahan, Tony	Black
.	.	McKenzie, James	Black
.	.	Stewart, Steven	Black
2009	United States v. Mayfield, et al.	Kindle, Montreece	Black
.	.	Mayfield, Leslie	Black
.	.	Ward, Nathan	Black
.	.	White, Dwayne	Black
2011	United States v. Alexander, et al.	Alexander, William	Black
.	.	Midderhoff, Hugh	Black
.	.	Saunders, Devin	Black
.	United States v. Flowers, et al.	Adams, Anthony	Black
.	.	Conley, Tracy	Black
.	.	Flowers, David	Black
.	.	Flowers, Myreon	Black
.	.	Jones, Dwayne	Black
.	.	Space, Rudy	Black
.	.	Trapp, Anwar	Black
2012	United States v. Brown, et al.	Brown, Abraham	Black
.	.	Davis, Christopher	Black
.	.	Jones, Dwaine	Black
.	.	Taylor, Kenneth	Black
.	.	Washington, Alfred	Black

Year of Investigation Initiation	Case Name	Defendant Name (Initial Targets Highlighted)	Race / Ethnicity[1][2]
.	United States v. Cousins, et al.	Cousins, David	Black
.	.	Cousins, Michael	Black
.	.	Lloyd, Dunwon	Black
.	United States v. Davila, et al.	Davila, Jason	Hispanic (60%)
.	.	Davila, Justin	Hispanic (60%)
.	.	Hadley, Neiko	Black
.	United States v. Davis, et al.	Barbee, Corey	Black
.	.	Byrd, Jayvon	Black
.	.	Davis, Paul	Black
.	.	Jeffries, Dante	Black
.	.	Morris, Julius	Black
.	.	Smith, Vernon	Black
.	.	Withers, Alfred	Black
.	United States v. DeJesus, et al.	Borrero, Luis	Hispanic (60%)
.	.	Corona, Jesus	Hispanic (60%)
.	.	DeJesus, Benjamin	Hispanic (60%)
.	.	Malave, Ceferino	Hispanic (60%)
.	United States v. Paxton, et al.	Berry, Adonis	Black
.	.	Paxton, Cornelius	Black
.	.	Paxton, Randy	Black
.	.	Walker, Randy	Black
.	.	Webster, Matthew	Black
.	United States v. Payne, et al.	Bruce, Deandre	Black
.	.	Jackson, Brandon	Black
.	.	Jackson, Brian	Black
.	.	Payne, William	Black
.	United States v. Williams, et al.	Hummons, John	Black
.	.	Lee, Howard	Black
.	.	Williams, Antonio	Black
2013	United States v. Elias, et al.	Benitez, Demetrio	Hispanic (60%)
.	.	Elias, Adrian	White (Verified Hispanic)
.	.	Elias, Salvador	White (Verified Hispanic)
.	.	Ledesma, Miguel	Hispanic (60%)
.	.	Olson, Angel	White (Verified Hispanic)
.	.	Reding, Paul	White
.	.	Sistrunk, Cornelius	Black
.	.	Stevens, Deeric	Black
.	.	Washington, Mishon	Black
.	United States v. Jackson, et al.	Jackson, Thomas	Black
.	.	Swain, Nolan	Black
.	.	Williams, Calvin	Black
.	.	Wrotten, Demetrius	Black

Notes:
[1] Race and ethnicity is based on rap sheets and the Hispanic surname analysis. Neiko Hadley, whose rap sheet lists him as both Black and White, has been categorized as Black based on confirmation by defense counsel in consultation with Mr. Hadley.
[2] The defendants in United States v. Elias are classified as White using the Hispanic surname methodology at the 60% cutoff, but are categorized as Verified Hispanic based on confirmation by defense counsel in consultation with the defendants.

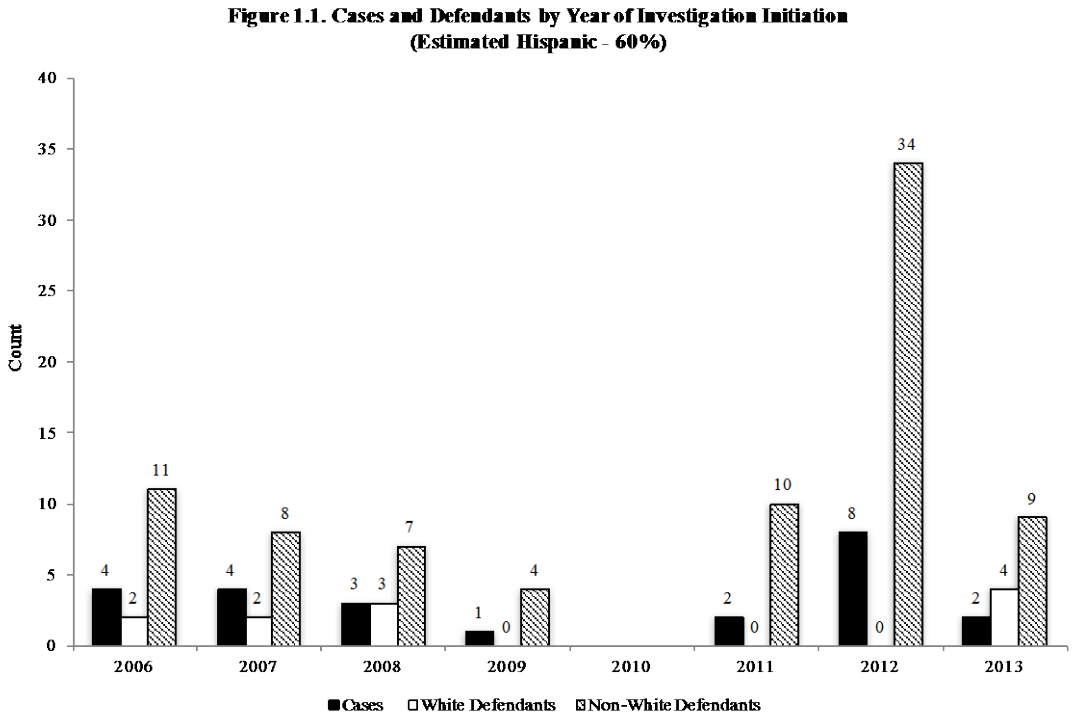
The table below summarizes the race and ethnicity (Hispanic 60%) for the full defendant sample from Table 2.

Race	All Defendants
Black	74 (78.7%)
Hispanic (60%)	9 (9.6%)
White	11 (11.7%)
Total	94 (100%)

The tables below and Figure 1.1 show that case origination took place in two distinct intervals.[30] The tables below collapse the years into the two periods. From 2006-2009, 12 cases were originated with 37 defendants. There were no cases originated in 2010, and another 12 cases were originated from 2011-2013, with 57 defendants. The pattern of recruitment by race changed noticeably from the first to the second period. Figure 1.1 and the first table below shows the number of cases originated by year, and the number of White and non-White (Black and Hispanic) defendants during each year. In the table below and in Figure 1.1, race and ethnicity are shown using the Hispanic 60% criterion.

Defendant Race	2006-2009	2011-2013
Black	29 (78.4%)	45 (78.9%)
Hispanic (60%)	1 (2.7%)	8 (14.0%)
White	7 (18.9%)	4 (7.0%)
Total	37 (100%)	57 (100%)

[30] Note that three of the defendants listed as White in Figure 1.1 and in the tables on this page under the Hispanic 60% threshold have been verified by defense counsel in consultation with defendants to be Hispanic. *See supra* note 29.

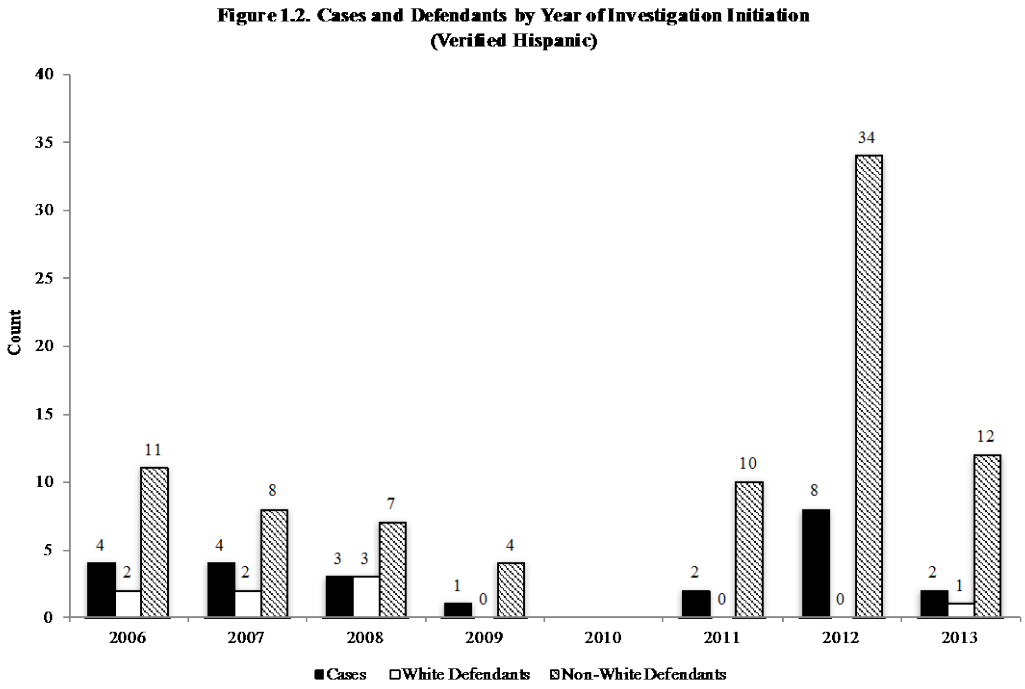


In the first interval, 30 of 37 defendants, or 81.1%, were either Black or Hispanic. The trend data show that over time, minority representation in the racial and ethnic composition of the defendant pool became more concentrated. Starting in 2011, 53 of 57 defendants, or 93.0%, were either Black or Hispanic. Among the 57 defendants in the latter period, 45 (78.9%) were Black, and 8 (14.0%) were Hispanic.

The next summary table and Figure 1.2 show the same trend, but this time with race and ethnicity data that were verified by defense counsel and self-reported by defendants. In the 12 cases originating between 2006 and 2009, 30 of 37 defendants (81.8%) were Black or Hispanic. From 2011-2013, 56 of 57 defendants (98.2%) were Black or Hispanic.

Together, the summary table and Figure 1.2 show that, using the verified race and ethnicity data, recruitment into the Stash House Program from 2011-2013 was nearly exclusively minority defendants. As shown in the next section, it is extremely unlikely that this selection took place by chance alone.

Defendant Race	2006-2009	2011-2013
Black	29 (78.4%)	45 (78.9%)
Hispanic (Verified)	1 (2.7%)	11 (19.3%)
White	7 (18.9%)	1 (1.8%)
Total	37 (100%)	57 (100%)



3. Unadjusted Probabilities of Defendant Selection by Race

Given the race and ethnicity distributions in the defendant and potential eligible populations, I next simply estimated the probability of drawing a sample with its racial distribution of 79% Black and 13% Hispanic from the very large pool of 292,442 potential eligibles. In that pool, 55% are Black and 17% are Hispanic (60%) (*See* Table 4 *infra* at 21). To do this, I estimated a binomial distribution, which takes the form:

$$P(x) = \frac{N!}{x!(N-x)!}\pi^{x}(1-\pi)^{N-x}$$

where P(x) is the probability of x successes out of N trials, N is the number of trials, and π is the probability of success on a given trial. From this, the probability of drawing a sample of defendants with the observed racial and ethnic distribution can be estimated. Tables 3.1 and 3.2 show the results. Separate estimates were developed for Black defendants only, and also for non-White defendants combined (Black and Hispanic 60%). Separate estimates were developed for the post-2010 period, when the number of White defendants was sharply reduced.

Table 3.1. Binomial Probability of Defendant Selection (Estimated Hispanic - 60%)

Panel I: All Years

Test	Defendants % Black	Total Eligible % Black	Probability
Probability of Selecting 74 Black Defendants from 94 Defendants	78.7%	55.4%	0.0%
	Defendants % Non-White	**Total Eligible % Non-White**	**Probability**
Using 60% Hispanic Surname Probability Cutoff			
Probability of Selecting 83 Non-White Defendants from 94 Defendants	88.3%	72.2%	0.0%

Panel II: Post-2010

Test	Defendants % Black	Total Eligible % Black	Probability
Probability of Selecting 45 Black Defendants from 57 Defendants	78.9%	55.4%	0.0%
	Defendants % Non-White	**Total Eligible % Non-White**	**Probability**
Using 60% Hispanic Surname Probability Cutoff			
Probability of Selecting 53 Non-White Defendants from 57 Defendants	93.0%	72.2%	0.0%

Notes:
[1] "Probability" is the percent chance that *n* number of Black/non-White defendants or more are selected.
[2] A defendant is classified as non-White if he is Black or Hispanic.

The upper portion of Table 3.1 shows that the probability of selecting a sample of 74 Black defendants in a pool of 94 from the population of potential eligibles is less than 0.1%, which is rounded to 0%. This is a very low probability estimate. In the post-2010 period, the probability is similarly low: 0% for Black defendants, and 0% for non-White defendants.

Table 3.2. Binomial Probability of Defendant Selection (Verified Hispanic)

Panel I: All Years

	Defendants % Non-White	Total Eligible % Non-White	Probability
Using 60% Hispanic Surname Probability Cutoff and Verified Hispanic			
Probability of Selecting 86 Non-White Defendants from 94 Defendants	91.5%	72.2%	0.0%

Panel II: Post-2010

	Defendants % Non-White	Total Eligible % Non-White	Probability
Using 60% Hispanic Surname Probability Cutoff and Verified Hispanic			
Probability of Selecting 56 Non-White Defendants from 57 Defendants	98.2%	72.2%	0.0%

Notes:
[1] "Probability" is the percent chance that *n* number of Black/non-White defendants or more are selected.
[2] A defendant is classified as non-White if he is Black or Hispanic.

Table 3.2 shows the same results using the verified Hispanic ethnicity classification. Recall that three defendants were classified as White using the Hispanic Surname Analysis method, but their actual ethnicity is Hispanic as verified by defense counsel in consultation with the defendant. The results here are similar to Table 3.1: the probabilities of randomly selecting a defendant pool that matches the actual defendant pool are 0%, and 0% for defendants after 2010.

The results suggest that it is extremely unlikely that a Stash House defendant pool would be selected with the racial and ethnic composition that we observe, given the racial and ethnic composition of the pool of potential eligibles. In the three tests that follow in Sections IV and V, the estimates are adjusted for the simultaneous effects of the ATF criteria, the expanded set of ATF criteria, and other criminal propensity indicators on the probability of selection as a defendant.

4. Defendant Prior Records

In addition to examining the racial distribution, I arrayed the Stash House defendants using the measures of criminal activity that describe the "criminal propensity" indicia listed in the ATF Manual.[31] The defendants are a heterogeneous group, including some

[31] ATF Manual at A-31 – A-32; *see supra* Section II.A.2 of this Report.

who have very limited criminal histories while others have extensive histories. Specifically, with respect to the conviction criteria:

- 19 of the 94 defendants had no prior convictions for any offense prior to the Stash House case.
- 65 of the 94 defendants had no prior convictions for any of the ATF UCR Part I Violent Offenses.[32]
- 78 of the 94 defendants had no prior convictions for any of the ATF Expanded Violent Offenses.
- 22 defendants had only one prior conviction for the ATF UCR Part I Violent Offenses
- 15 defendants had only one prior conviction for the ATF Expanded Violent Offenses.
- 39 defendants had no prior convictions for drug or weapons offenses.

The patterns of prior arrests show much the same. Specifically:

- 37 of the 94 defendants had no prior arrests for any of the ATF UCR Part I Violent Offenses.
- 29 of the 94 defendants had no prior arrests for the ATF Expanded Violent Offenses.
- 13 of 94 defendants had no prior arrests for drug or weapons offenses.

For the post-2010 recruitment period:

- 35 of 57 defendants had no prior convictions for the ATF UCR Part I Violent Offenses or the ATF Violent Expanded Offenses.

These patterns suggest that a substantial number of the Stash House defendants did not meet the ATF offense criteria as stated in the ATF Manual.[33] Nor did many of these defendants meet the expanded criteria, including a broader list of violent crimes. The widening of the offense criteria for recruitment resulted in the prosecution of dozens of persons who fail to meet either the stated or expanded ATF criteria in targeting the most violent offenders in the community. In turn, many of those who were recruited were lured into criminal conspiracies that exposed them to lengthy terms of confinement under federal criminal law without having satisfied the government's own objectives with respect to the most serious offenders in the community.

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[32] *See infra* notes 42–44 and accompanying text for definitions of which offenses are included in ATF UCR Part I Violent Offenses and ATF Expanded Violent Offenses.

[33] ATF Manual at A-31 – A-32.

C. Comparing Stash House Defendants and Potential Eligibles

Before proceeding to the results of the three tests for disparate treatment, a preliminary step is to examine the composition of the Stash House defendant and potential eligible populations. Table 4 provides summary statistics to compare the Stash House defendants to the population of 292,442 potential eligibles. *See infra* at 21. The potential eligibles were identified according to the criteria listed in Appendix B. Table 3 compares the 94 defendants to the potential eligibles on parameters of demographics and several dimensions of criminal history. The table shows that the two populations are well-matched along several dimensions, but poorly matched along several others. Specifically:

- 55% of the potential eligibles are Black, compared to 79% of the defendants.
- 17% of the potential eligibles are Hispanic,[34] compared to 10% of the defendants.
- Stash House defendants are younger (28.6 years) compared to potential eligibles (33.4 years).
- Stash House defendants were younger at first arrest: 18.5 years of age, compared to 21.6 years of age for potential eligibles.
- Potential eligibles had fewer prior convictions (2.3 compared to 2.8) but about the same number of prior arrests, compared to the Stash House defendants. The two groups had equivalent numbers of prior jail sentences.
- Of the total number of prior arrests for each group, about half were made by the Chicago Police Department.
- Defendants had more UCR Part I violent arrests (0.96 per person) compared to potential eligibles (0.69). Defendants also had more UCR Part I violent convictions (0.38 per person) compared to potential eligibles (0.21).
- Similar differences were observed for arrests and convictions for weapons offenses, and drug sale and possession charges.

It is important to note that in Table 4, for each of the criminal history and conviction parameters, the standard deviations (i.e., the variances) are quite large. This means that there is a large spread in these parameters, and there are large "tails" to the distributions. For example, the standard deviation for prior arrest for UCR Part I violent crimes is almost the same for potential eligibles as it is for the defendants, even though the average for the Stash House defendants is higher. In these instances, the mean (average) value can be misleading, as there may well be comparably large populations at the extreme values of those distributions. The disparate treatment tests control for those tails and distributions, and provide a more definitive test of differences in the populations.

[34] This statistic uses the Hispanic 60% cutoff. The range of Hispanic population is 12% to 17%.

Table 4. ISP Data and Rap Sheet Data Summary Statistics (Defendant N = 94)

	ISP Data (Excluding All Defendant Data)					Rap Sheet Data (All Charged Defendants)				
Variable	**Obs**	**Mean**	**Std. Dev.**	**Min**	**Max**	**Obs**	**Mean**	**Std. Dev.**	**Min**	**Max**
General Demographics										
Female	292,442	0.15		0	1	94	0.00		0	0
Black	292,442	0.55		0	1	94	0.79		0	1
Hispanic (60%)	292,442	0.17		0	1	94	0.10		0	1
Hispanic (70%)	292,442	0.17		0	1	94	0.10		0	1
Hispanic (80%)	292,442	0.16		0	1	94	0.10		0	1
Hispanic (90%)	292,442	0.12		0	1	94	0.04		0	1
Hispanic (60%) Plus Verified Hispanic	292,442	0.17		0	1	94	0.13		0	1
Age	292,329	33.36	11.86	10.00	80.00	94	28.58	8.20	13.50	46.50
Criminal History										
Age at First Arrest	291,953	21.59	7.63	10.03	79.98	94	18.47	3.58	11.09	36.92
Number of Arrests	292,442	10.55	11.28	0.00	294.75	94	11.14	8.80	0.00	49.00
Number of Convictions	292,442	2.34	2.65	0.00	63.50	94	2.79	3.09	0.00	20.00
Number of Prison Sentences	292,442	0.48	1.16	0.00	31.00	94	1.21	1.78	0.00	9.00
Number of Jail Sentences	292,442	0.99	1.55	0.00	50.00	94	0.98	1.42	0.00	8.00
Percent of Arrests by CPD	292,442	0.50	0.43	0.00	1.00	94	0.56	0.43	0.00	1.00
Arrest History										
Arrests for ATF Manual Violent (UCR Part 1)	292,442	0.69	1.21	0.00	25.38	94	0.96	1.24	0.00	6.00
Arrests for ATF Manual Violent (Expanded)	292,442	1.53	2.34	0.00	65.00	94	1.31	1.59	0.00	8.50
Arrests for Weapons	292,442	0.38	0.82	0.00	26.50	94	0.87	1.11	0.00	4.00
Arrests for Drug Sale	292,442	0.35	0.78	0.00	11.25	94	0.46	0.76	0.00	3.00
Arrests for Drug Possession	292,442	1.55	2.42	0.00	57.00	94	2.12	2.58	0.00	12.43
Arrests for Marijuana Sale	292,442	0.10	0.37	0.00	9.00	94	0.15	0.57	0.00	4.75
Arrests for Marijuana Possession	292,442	0.91	1.68	0.00	49.75	94	0.97	1.36	0.00	6.50
Conviction History										
Convictions for ATF Manual Violent (UCR Part 1)	292,442	0.21	0.52	0.00	10.00	94	0.38	0.75	0.00	4.00
Convictions for ATF Manual Violent (Expanded)	292,442	0.26	0.55	0.00	9.00	94	0.16	0.38	0.00	2.00
Convictions for Weapons	292,442	0.14	0.39	0.00	7.00	94	0.35	0.65	0.00	3.00
Convictions for Drug Sale	292,442	0.31	0.74	0.00	10.00	94	0.44	0.77	0.00	4.00
Convictions for Drug Possession	292,442	0.40	0.78	0.00	16.63	94	0.51	0.92	0.00	5.00
Convictions for Marijuana Sale	292,442	0.05	0.22	0.00	5.00	94	0.03	0.19	0.00	1.50
Convictions for Marijuana Possession	292,442	0.10	0.34	0.00	9.50	94	0.11	0.35	0.00	2.00

Note: Data is at the person level. For the ISP data, the data represents an 8-year average of 2006-2013. For the rap sheet data, the data represents an average of all years up to and including the year in which the defendant was involved in a stash house bust.

IV. METHODS FOR TESTING FOR DISPARATE TREATMENT

A series of three empirical tests provides the basis for assessing the selective enforcement claims underlying these cases.[35] Using multiple arrays of selection criteria and three different analytic models, I test to determine whether race predicts selection into the Stash House defendant pool, controlling for the selection criteria as stated in the ATF Manual and other documents. Each successive test is increasingly rigorous in isolating the role of race – net of other factors such as criminal history – in the selection of Stash House defendants. The tests begin with simple regressions and move on to analyses that approximate clinical trials to test the role of race in the selection of Stash House defendants.

A. Test 1

The first test is a disparate treatment test. The general test for evidence of disparate treatment is a regression equation that takes the form:

$$\text{Outcome} = \alpha + \beta_1 * \text{Minority} + \Sigma_i \beta_i * (\text{Plausible Non-Race Influences}) + \varepsilon,$$

where *Outcome* is the event or status of interest, *Minority* is an indicator for the racial composition or status of the unit observed, *Plausible Non-Race Influences* are a set of variables representing non-race factors that also might influence the outcome, and an error term ε that captures the variation in the outcome that cannot be explained by either Minority status or the Plausible Non-Race Influences. These models may include non-race influences that are correlated with race, so as to better identify the unique effects of race that are present once the influence of proxies for race are removed.[36]

Consider the following example, from *Griggs v. Duke Power Co.*, a seminal employment discrimination case.[37] In a disparate treatment claim, one could test whether the use of a high school diploma requirement biases the hiring process since African American job applicants may be less likely to have obtained a high school diploma. Had this race-correlated control been introduced, it would likely have reduced the racial disparity in the hiring rates – for the simple reason that minority applicants at that time were less likely to have obtained a high school diploma. Should a statistical test control for whether or not

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[35] *See, e.g.*, Sonja B. Starr, "Explaining Race Gaps in Policing: Normative and Empirical Challenges," U of Michigan Law & Economics Research Paper No.15-003 (Jan. 19, 2015), *available at* http://ssrn.com/abstract=2550032.

[36] For a general discussion of the specification of regression models to test for disparate treatment, *see generally* D. James Greiner, "Causal Inference in Civil Rights Litigation," 122 *Harvard L. Rev.* 533 (2008). For a general discussion of how regressions sort out the influences of predictors of an outcome, *see* Thomas J. Campbell, "Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet," 36 *Stanford L. Rev*. 1299 (1984).

[37] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

an applicant had a high school diploma? As Ian Ayres points out,[38] in a disparate treatment case, the answer is yes. Under a disparate treatment theory, the critical question is whether an applicant's race was the cause of being denied employment. If applicants were rejected because the employer chose not to hire diploma-less applicants, the applicants' race would not be a "motivating factor" in the employer's decision (unless there was evidence to establish that the employer adopted the diploma requirement with the intention of excluding minority applicants from the work force). The goal in specifying these models is to identify the effects of race on outcomes after simultaneously considering factors that may be relevant as well. Failure to do so raises the risk of "omitted variable bias", which could lead to erroneous conclusions about the effects of variables that do appear in a regression test.[39]

The test is performed using a logistic regression procedure.[40] Logistic regression is well-suited for analysis of dichotomous outcomes, such as selection into a specific category or program. The results show the log odds of being selected into the category of interest, adjusted for the effects of other variables entered into the regression. The model takes the form of

$$\pi_i = Pr(Y_i=1|X_i=x_i) = \frac{\exp(\beta_0+\beta_1 x_i)}{1+\exp(\beta_0+\beta_1 x_i)}$$

where Y is the outcome of interest (0 or 1), π is the probability that an individual *i* will be in the category of interest, β_0 is the intercept, and βx represents the concurrent effects of a set of explanatory variables or predictors of that outcome. In this case, we are interested in selection as a Stash House defendant, and race is one of the predictors included in the vector *x*.

In this and subsequent analyses, all defendants were pooled for the analyses. In each instance, the outcome of interest is selection as a defendant. Separate models are

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[38] Ian Ayres and Jonathan Borowsky, *A Study of Racially Disparate Outcomes in the Los Angeles Police Department* at 5, 15 (October 2008), *available at* https://www.aclusocal.org/wp-content/uploads/2015/09/11837125-LAPD-Racial-Profiling-Report-ACLU.pdf.

[39] *See, e.g.*, Ian Ayres, "Testing for Discrimination and the Problem of 'Included Variable Bias'," Yale Law School Working Paper (2010), *available at* http://islandia.law.yale.edu/ayres/ayresincludedvariablebias.pdf; Ian Ayres, "Three Tests for Measuring Unjustified Disparate Impacts in Organ Transplantation: The Problem of 'Included Variable' Bias," 48 *Perspectives in Biology and Medicine* 68 (2005).

[40] *See generally* David W. Hosmer Jr, and Stanley Lemeshow, *Applied Logistic Regression* (2004). *See also* Scott Menard, *Applied Logistic Regression Analysis* (2002) (discussing the assumptions of a logistic regression model and its difference from ordinary multiple (least squares) regression models).

estimated with cumulative sets of predictors that adds blocks of variables to the prior model.

Table 1 shows the design of the separate models. Each model iterates additional information and allows us to see if there are particular types or thresholds of information, such as demographic factors or criminal history, that explain whether and why the selection of Stash House defendants is based on race or ethnicity.

Model 1 includes only a variable for Black. This model simply tests whether defendants are more likely to be Black than the potential eligibles. Model 2 tests whether defendants are more likely to be Black or Hispanic than the potential eligibles. Model 3 re-estimates Model 2, adding gender and age variables. In criminological research, *age at first arrest* is a robust predictor of the length and seriousness of criminal careers.[41] Since all the defendants are males, there is no estimate (odds) reported for females.

Model 4 includes the variables specified in the eligibility criteria in the ATF Home Invasions Operations Manual, including both robbery and armed robbery.[42] Because the ATF Manual's eligibility criteria closely parallel the offenses set out in the list of violent crimes in Part I of the FBI's Uniform Crime Report (UCR), these variables are labeled "ATF Manual UCR Part I Violent Arrests" and "ATF Manual UCR Part I Violent Convictions."[43] This model also includes a variable with an expanded list of additional violent felony crimes. (ATF Manual – Expanded). This expanded list is included because the definition of "violent crime" proffered by ATF is broader than the enumerated offenses; it includes *all* offenses that "involve force or threat of force."[44] Model 5

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[41] Alex R. Piquero, David P. Farrington, and Alfred Blumstein. "The Criminal Career Paradigm," 30 *Crime and Justice* 359–506 (2003). *See also* Alex Piquero, Raymond Paternoster, Paul Mazerolle, Robert Brame, and Charles W. Dean, "Onset age and offense specialization," 36 *Journal of Research in Crime and Delinquency* 275-299 (1999).

[42] ATF Manual at A-31 – A-32.

[43] The first four of the ATF's enumerated offenses make up the entire category of what the FBI terms "violent index crimes": "[V]iolent crime is composed of four offenses: murder and nonnegligent manslaughter, rape, robbery, and aggravated assault." *See* FBI Uniform Crime Report, Crime in the United States (2014), *available at* https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/offenses-known-to-law-enforcement/violent-crime. The FBI likewise defines violent crimes "as those offenses that involve force or threat of force." *Id.*

[44] ATF Manual at A-31. Based on the statutes cited in the arrest and conviction records in the ISP database of criminal histories of potential eligibles, the following violent crimes are included in the "ATF Expanded" category: domestic battery, battery/bodily harm, battery, assault, unlawful restraint, armed violence, intimidation, aggravated unlawful restraint, involuntary manslaughter/reckless homicide, vehicular invasion, disarming a peace officer, kidnaping, aggravated kidnaping, aggravated fleeing/bodily injury, kidnaping/armed with firearm, aggravated intimidation, concealing homicidal death, interference/assault official, involuntary/reckless homicide/unborn child, mob action.

includes three additional parameters of criminal career. The number of prison and jail sentences is included as a measure of the person's criminal propensity and crime seriousness spanning his or her criminal career.

Model 6 adds several variables that were identified as inclusive of the selection criteria, based on statements made in court and in the media that expanded the scope of offenses in the ATF Manual. These variables are arrayed in Subsection II.A.2 and accompanying notes above.

In each regression model, fixed effects are included for year in the interval from 2006-2013, grouping the cases by the year when they began. Fixed effects allow for statistical control of any unique or unobservable conditions that may have influenced the selection and recruitment of defendants in each year. All models are estimated with robust standard errors that are clustered for each individual. [45]

[45] *See, e.g.*, Guido Imbens and Joshua Angrist, "Identification and Estimation of Local Average Treatment Effects," 62 *Econometrica* 467-475 (1994).

Table 1. Variables and Measures Used in Each Estimation Model (Cumulative)

Model	Model Parameters	Variables
1	Black defendants only	Black
2	Black and Hispanic defendants	Hispanic (60%)
3	Demographic variables	Age at First Arrest (logged) Age at Jan 1st (logged) Female
4	ATF Manual and ATF Manual (Expanded)	N of ATF Manual UCR Part I Violent Arrests (logged) N of ATF Manual UCR Part I Violent Convictions (logged) N of ATF Manual (Expanded) Violent Arrests (logged) N of ATF Manual (Expanded) Violent Convictions (logged)
5	Other Criminal History Variables	N of Prison Sentences (logged) N of Jail Sentences (logged) % of Arrests by Chicago Police Department
6	US Attorney Statements (Post-Hoc)	N of Arrests for Weapons Offenses (logged) N of Convictions for Weapons Offenses (logged) N of Arrests for Drug Sale (logged) N of Convictions for Drug Sale (logged) N of Arrests for Drug Possession (logged) N of Convictions for Drug Possession (logged) N of Arrests for Marijuana Sale (logged) N of Convictions for Marijuana Sale (logged) N of Arrests for Marijuana Possession (logged) N of Convictions for Marijuana Possession (logged)

Note: Logged measures use the natural log of the value. This transformation is done to limit the influence of extreme values in the regression estimates. When the value is zero, the natural log is not computed. To avoid missing data for those values, a value of zero is recoded to 0.01 before the log transformation is computed.

B. Test 2

The second test analyzes race as a "treatment" variable predicting selection of individuals of specific races – Black compared to White, or non-White compared to White – as a Stash House defendant or target. In this test, the model assumes that persons are assigned to a treatment – in this case, race – in a manner that in theory is independent of the outcome – in this case, selection as a defendant. The model then estimates the effects of the treatment *race* on the outcome *Stash House Program selection*. The study population

in this test is the pooled sample of defendants and potential eligibles, with each group marked by their group membership (the outcome variable).

The procedure again uses the logistic regression equation. The distinction in this analysis is that the procedure first estimates one logistic regression model to predict treatment status – in this case, race – and then uses another logistic regression model to predict the outcomes given the results of the first model. The second model incorporates the covariates, or other predictors, including those that may be correlated with the treatment variable. This is known as Augmented Inverse Probability Weighting.[46] The model produces consistent estimates of the predictors because the treatment (race) is assumed to be independent of the potential outcomes after conditioning on the other predictors (the covariates). If a predictor is statistically significant, it is presumed to be not independent of the outcome, but instead a predictor of that outcome. This procedure is called a *double robust* model because of the use of the separate regression models to estimate the effects of the treatment on the outcome.[47]

As before, the models include fixed effects for year. The models are estimated in a sequence from Table 1, with the first model combining the predictors from models 1-3, and then separate estimates for models 4-6. The models are estimated with two specifications for race and ethnicity. One set of models compares Black and White persons (excluding Hispanic persons), and a second compares non-White persons (Black and Hispanic combined) with White persons.

C. Test 3

The third test uses propensity score matching (PSM) to simulate an experiment to determine the effect of race on the outcome of interest: selection as a defendant into the Stash House Program. Ideally, an experiment would be conducted that adopts the logic of fair housing audits. In those audits, prospective renters with identical rental and income histories but who are from different racial or ethnic groups are sent to housing agents (sellers or rental agents) to determine whether there are differences by race in

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[46] Adam N. Glynn and Kevin M. Quinn, "An introduction to the augmented inverse propensity weighted estimator," *18 Political Analysis* 36-56 (2010); Andrea Rotnitzky, "Inverse probability weighted methods," in *Longitudinal Data Analysis* (Garrett Fitzmaurice et al., eds.), 453-476 (2009).

[47] *See* Heejung Bang and James M. Robins, "Doubly robust estimation in missing data and causal inference models," 61 *Biometrics* 962-973 (2005). *See also* Michele Jonsson, Funk Daniel Westreich, Chris Wiesen, Til Stürmer, M. Alan Brookhart, and Marie Davidian, "Doubly robust estimation of causal effects," 173 *American Journal of Epidemiology* 761-767 (2011); James R. Carpenter, Michael G. Kenward, and Stijn Vansteelandt, "A comparison of multiple imputation and doubly robust estimation for analyses with missing data," 169 *Journal of the Royal Statistical Society: Series A (Statistics in Society)* 571-584 (2006).

several dimensions of renter or seller responses.[48] Any disparity in these measures of housing assistance are attributable to the race or ethnicity of the seller or agent, since all other variables are equally distributed among the auditors.

For obvious reasons, such an experiment is not possible in the context of selection of defendants for the Stash House Program. When experiments on a *treatment* are not possible, propensity score matching (PSM) is a statistical technique that attempts to estimate the effect of a treatment by accounting for the covariates that predict receiving the treatment. The goal of the analysis is to reduce the confounding effects of factors that may predict *receiving the treatment* with the effects of the treatment itself.[49]

For each person in the "treatment" group – Black or non-White people – one or more persons is selected from the "control" group – White people – that are matched to the first group on all characteristics except race. This simulates random assignment to a treatment group – *race* – by matching persons on numerous predictors of treatment assignment. Similarity between subjects is based on estimated treatment probabilities, known as propensity scores.

The average treatment effect (ATE) is computed by taking the average of the difference in probability of selection between the observed and potential outcomes (Stash House defendant v. potential eligible) for each subject. The precision of the match for subjects is adjustable, so that the effects can be calibrated along a precision scale (a *caliper*). A smaller caliper or precision implies a more rigorous estimate of the treatment effects. The difference in estimates for different levels of precision provides a range of effects, with the "true" effect somewhere in that range.

As in Test 2, separate models are estimated for Blacks versus Whites (with Hispanics excluded) and Blacks and Hispanics (non-White) versus Whites. The same four sets of models are estimated for each race/ethnicity comparison. The models are in turn estimated at two calipers: .100 and .025. Smaller calipers are more precise but risk

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[48] For example, the number of housing units made available to the two prospective renters or buyers, the terms and conditions of the rental or sale, information or assistance in obtaining financing, the racial and ethnic composition of neighborhoods where prospective renters or buyers are looking for homes. *See* Margery Austin Turner, "Discrimination in urban housing markets: Lessons from fair housing audits," 3 *Housing Policy Debate* 183-215 (1992).

[49] *See generally* Paul R. Rosenbaum and Donald B. Rubin, "The central role of the propensity score in observational studies for causal effects," 70 *Biometrika* 41-55 (1983). *See also* Alberto Abadie and Guido W. Imbens, "Matching on the estimated propensity score," 84 *Econometrica* 781-807 (2016); Daniel Ho, Kosuke Imai, Gary King, and Elizabeth Stuart, "Matching as nonparametric preprocessing for reducing model dependence in parametric causal inference," *15 Political Analysis* 199-236 (2007); Andrew Gelman and Jennifer Hill, *Data Analysis Using Regression and Hierarchical Models* 208-12 (2007); Peter C. Austin, "Optimal caliper widths for propensity-score matching when estimating differences in means and differences in proportions in observational studies," 10 *Pharmaceutical Statistics* 150-161 (2011).

finding no suitable matches among the untreated. Because of the large sample size in this analysis, there were no unmatched cases in these analyses. In each estimation, a control variable is included as a fixed effect for year in the interval from 2006-2013 when the cases began.

V. RESULTS

Three tests for disparate treatment were conducted. Each shows statistical evidence of discrimination against Black persons in the selection of defendants for Stash House prosecutions.

A. Test 1

The first test shows results of a series of regressions that examine whether race explains selection of suspects for the Stash House Program. Six models were estimated, as described in Part IV of this Report. The results are shown in Tables 5.1 and 5.2. The results show that after controlling for criminal propensity, race remains statistically significant, meaning that the ATF is selecting defendants on the basis of race. In other words, Black status is a significant predictor of selection as a Stash House defendant after controlling for both formal and informal but articulated ATF criteria and other criminal propensity scores.

Table 5.1 shows the results of the logistic regressions for the defendants. Model 1 estimates the effects of Black race alone on selection as Stash House defendants compared to the pool of potential eligibles. Race is significant: Blacks are significantly more likely than Whites or Hispanics to be selected as a Stash House defendant. Model 2 estimates the same probability, this time with separate predictions for Black and Hispanic (60%) defendants. Again, Blacks are significantly more likely to be selected as a Stash House defendant compared to Whites, but Hispanics are not significantly more likely to be selected as a defendant. Model 3 adds demographic characteristics of the defendant. The results for the race and ethnicity variables remain the same, although the size of the coefficient for Black defendants is somewhat smaller (1.217 compared to 1.020).

Model 4 adds a block of predictors that measure the effects of the ATF Criteria (as stated in the ATF Manual). Black status is again significant, and again, the size of the coefficient is reduced to 0.903. Again, Hispanic status is not a significant predictor. Model 5 adds additional criminal history variables. Important in this block of variables are the predictors for prison sentences and jail sentences, proxies for the seriousness of a criminal career and also for criminal propensity. Again, Black status is significant, but Hispanic status is not. Blacks again are more likely to be selected for the Stash House

Table 5.1. Logistic Regression Results (Defendant N = 94)

	Baseline	Add Hispanic Variable	Add Demographic Variables	Add ATF Manual Variables	Add Other Criminal History Variables	Add Post-Hoc Variables
	1	2	3	4	5	6
Black	1.093***	1.217***	1.020***	0.903***	0.956***	0.852**
	(0.252)	(0.323)	(0.327)	(0.338)	(0.349)	(0.357)
Hispanic (60%)		0.298	0.157	0.080	0.179	0.068
		(0.449)	(0.450)	(0.452)	(0.463)	(0.470)
Female			-	-	-	-
Log of Age at First Arrest			-1.523***	-0.886*	-0.253	0.227
			(0.557)	(0.538)	(0.640)	(0.669)
Log of Age			0.048	-0.309	-1.318***	-1.622***
			(0.300)	(0.323)	(0.469)	(0.479)
Log of Arrests for ATF Manual Violent (UCI				0.081	0.074	0.051
				(0.054)	(0.054)	(0.053)
Log of Convictions for ATF Manual Violent				0.032	0.038	0.025
				(0.044)	(0.046)	(0.046)
Log of Arrests for ATF Manual Violent (Exp				0.056	0.001	0.017
				(0.059)	(0.059)	(0.063)
Log of Convictions for ATF Manual Violent				-0.075	-0.089	-0.078
				(0.061)	(0.061)	(0.062)
Log of Number of Prison Sentences					0.257***	0.247***
					(0.055)	(0.056)
Log of Number of Jail Sentences					0.000	-0.007
					(0.050)	(0.052)
Percent of Arrests by CPD					-0.216	-0.301
					(0.283)	(0.307)
Log of Arrests for Weapons						0.136**
						(0.055)
Log of Convictions for Weapons						0.036
						(0.060)
Log of Arrests for Drug Sale						-0.013
						(0.063)
Log of Convictions for Drug Sale						-0.015
						(0.068)
Log of Arrests for Drug Possession						0.058
						(0.059)
Log of Convictions for Drug Possession						-0.045
						(0.056)
Log of Arrests for Marijuana Sale						0.090
						(0.064)
Log of Convictions for Marijuana Sale						-0.291*
						(0.156)
Log of Arrests for Marijuana Possession						0.036
						(0.049)
Log of Convictions for Marijuana Possession						-0.028
						(0.078)
Constant	-10.763***	-10.886***	-6.236***	-6.682***	-4.723***	-5.592***
	(0.344)	(0.405)	(1.325)	(1.355)	(1.630)	(1.893)
Observations	2,047,752	2,047,752	1,742,793	1,742,793	1,742,793	1,742,793
Pseudo R-squared	0.0274	0.0276	0.0332	0.0373	0.0509	0.0610
Year FE	YES	YES	YES	YES	YES	YES
SE Clustered at SID Level	YES	YES	YES	YES	YES	YES

Significance: *** = p < .01; ** = p < .05; * = p < .1

Notes:
[1] Robust standard errors are in parentheses.
[2] For cells populated with a "-", observations with this characteristic have been dropped as a result of the estimation methodology.

Program, after controlling for several criminal history variables. In Models 1-5, Black status is significant at the p <.01 level.[50]

Model 6 adds several predictors that were identified through statements made in court, in other memoranda and documents, and other public utterances. Again, Black status is a significant predictor of selection into the Stash House Program, although significance here is slightly lower: p < .05. Hispanic status is not. In Models 5 and 6, the number of prior prison sentences also is significant. It is important to remember in this test that the population of Hispanic defendants was based on the results of the Hispanic Surname analysis, using a 60% probability threshold. As discussed before, Hispanic ethnicity was verified for the defendants. Table 5.2 shows the results of those analyses, showing only the regression coefficients and standard errors for the race and ethnicity predictors for potential eligibles for both Hispanic (60%) and Verified Hispanic.

Table 5.2. Summary and Comparison of Logistic Regression Results with Estimated Hispanic (60%) and Verified Hispanic

	Null	Add Hispanic Variable	Add Demographic Variables	Add ATF Manual Variables	Add Other Criminal History Variables	Add Post-Hoc Variables
	1	2	3	4	5	6
Table 5.1 (Defendant N = 94)						
Black	1.093***	1.217***	1.020***	0.903***	0.956***	0.852**
	(0.252)	(0.323)	(0.327)	(0.338)	(0.349)	(0.357)
Hispanic (60%)		0.298	0.157	0.080	0.179	0.068
		(0.449)	(0.450)	(0.452)	(0.463)	(0.470)
Table 5.1 with Verified Hispanic (Defendant N = 94)						
Black	1.093***	1.535***	1.339***	1.226***	1.300***	1.204***
	(0.252)	(0.372)	(0.380)	(0.391)	(0.400)	(0.408)
Hispanic (60%) Plus Verified Hispanic		0.904**	0.765*	0.690	0.802*	0.700
		(0.456)	(0.453)	(0.458)	(0.469)	(0.478)

Significance:* = p < .01; ** = p < .05; * = p < .1**

Notes:
[1] Robust standard errors are in parentheses.
[2] All models are run with the same covariates, year FE, and SE clustering as Tables 5.1

The results in Table 5.2 show some changes when the verified Hispanic population is included. Overall, there now is a substantial shift in the size and statistical significance

[50] The significance level means that this is not a chance occurrence, and that it would recur if a similar test were conducted in more than 99% of the tests under the same sampling and measurement conditions. In technical terms, it means that the probability of rejecting the null hypothesis – in this case, that there is *no* race or ethnicity effect in selecting defendants for fictitious Stash House stings – is 99%. For the seminal discussion on statistical significance and its meaning, *see* Ronald A. Fisher, *Ronald A. Statistical Methods for Research Workers 43* (1925).

of the Hispanic coefficients. First, the substitution of the Hispanic-Verified group results in statistically significant effects ($p < .1$) in all but two of the models. In two of the four models, the predictor for Hispanic defendants is significant. The effects of Hispanic ethnicity are significant when the formal ATF and Expanded ATF criteria are included. However, Hispanic ethnicity is not significant when predictors beyond the ATF Manual – a set of post-hoc considerations of eligibility – are included.

B. Test 2

The second test shows results of a series of regressions that examine whether race explains selection of suspects for the Stash House Program using a doubly robust estimation method. Here, race is regarded as a "treatment", and the models estimate the effects of the treatment on selection into the Stash House Program. The model applied Augmented Inverse Probability Weighting (AIPW) to estimate first a predictor of race (the treatment) adjusted for the covariates, and then the effects of the adjusted treatment variable on the outcome (selection into the Stash House Program).[51] As before, regressions were estimated for the total defendant population. Here, instead of six models, four models are estimated. The first model combines Model 1-3 from the previous analyses, and Models 2-4 here correspond to models 4-6 in the previous section. For each model, the coefficient for treatment as Black v. White is estimated,[52] and then for non-White (Black and Hispanic 60% combined) v. White is estimated. Because of the size of the pool of potential eligibles, these models were estimated based on a 25% sample of that group and the full population of defendants. The estimates are shown as "average treatment effects," or ATE.[53] Table 6 shows the results.

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[51] *See* Bang and Robins, "Doubly Robust Estimation," *supra* note 47. *See also* Greg Ridgeway and John MacDonald, "Methods for assessing racially biased policing," in *Race, Ethnicity, and Policing: New and Essential Readings* 180-204 (Steven Rice and Michael White, eds., 2010).

[52] Hispanics are eliminated from both the defendant and potential eligible populations for this analysis.

[53] Alberto Abadie, David Drukker, Jane Leber Herr, and Guido W. Imbens, "Implementing matching estimators for average treatment effects in Stata," 4 *Stata Journal* 290-311 (2003). *See also* Alberto Abadie and Guido W. Imbens, "Large sample properties of matching estimators for average treatment effects," 74 E*conometrica* 235-267 (2006); Keisuke Hirano, Guido W. Imbens, and Geert Ridder, "Efficient estimation of average treatment effects using the estimated propensity score." 71 *Econometrica* 1161-1189 (2003).

Table 6. Augmented Inverse Probability Weighting (AIPW) Analysis (Defendant N = 85 (Black v. White), 94 (Non-White v. White))

	Black v. White ATE of Black	Non-White v. White ATE of Non-White
Demographic Variables Only	0.000146*** (0.000035)	0.000113*** (0.000031)
Add ATF Manual Variables	0.000127*** (0.000039)	0.000095*** (0.000035)
Add Other Criminal History Variables	0.000118** (0.000053)	0.000101** (0.000044)
Add Post-Hoc Variables	0.000131*** (0.000045)	0.000112*** (0.000039)

Significance: *** = p < .01; ** = p < .05; * = p < .1

Notes:
[1] Robust standard errors are in parentheses.
[2] Models are run using a 25% sample of non-defendants.
[3] N = 484,692 for Black v. White models, N = 582,697 for Non-White v. White models. Hispanics (Estimated Hispanic - 60%) are dropped from the Black v. White models (N = 98,005 dropped).

Table 6 shows consistent evidence across 8 models of racial and ethnic discrimination in the selection of Stash House defendants from a large pool of potential eligibles. Each model increasingly augments the set of covariates for estimating and adjusting the "treatment", and then models the adjusted treatment variable to determine the treatment effect. All models were significant at either the $p < .01$ or $p < .05$ levels.

C. Test 3

The analyses in Test 3 employ a matching procedure. As in the procedure for Test 2, a propensity score is developed (propensity for "treatment"). In this case, the procedure estimates a propensity score for either Black status or non-White status (Black and Hispanic 60% combined). Subjects from the Stash House population are matched on their propensity scores with samples from the potential eligibles. One match per Stash House defendant was computed. The matches were matched on the propensity scores at one of two thresholds: either .100 or .025. This is known as the caliper for estimating the match between populations.

As discussed earlier, this procedure allows for the approximation of an experiment. Experiments are common in criminal procedure, criminology and public policy.[54] In a

[54] Christoph Engel, "Experimental Criminal Law. A Survey of Contributions from Law, Economics and Criminology," MPI Collective Goods Preprint, No. 2016/7 (Apr. 26, 2016), *available at* http://ssrn.com/abstract=2769771.

true experiment, subjects are randomly assigned to treatment and control groups.[55] Under those conditions, researchers can observe the effects of a treatment with confidence that the differences are due to the treatment effect and not to any differences in the characteristics between the subjects in each group. Obviously, random assignment to race is not possible. There may be differences in the characteristics of the persons in each group that are correlated both with their selection to the group and with their outcomes.

Accordingly, methods are required to adjust for any differences between the "treatment" and "control" groups. In this design, adjustments are made based on the covariates that might be correlated with the "treatment assignment." The "propensity score" is a measure that takes into account all background characteristics (i.e., covariates) other than race that might be correlated with race. In this test, subjects in each group – Stash House defendants and potential eligibles – are matched on their propensity score. This procedure approximates an experiment, and is widely used in research on law and policy.[56]

Each successive model expands on the previous model, as before. For example, the model adding ATF variables (manual and expanded) also includes the predictors from the model above it (demographics). The models are cumulative, in other words with respect to the predictors. A total of 8 models were estimated for the defendants at each of the two calipers. Then, these eight models were estimated twice, once for a Black-White defendant comparison, and again for a White – non-White comparison. Because of the size of the pool of potential eligibles, these models were estimated based on a 25% sample of that group and the full population of defendants. The tables show, as in the previous tests, the average treatment effect across the very large sample. Table 7 shows the results.

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[55] *See generally* William R. Shadish, Thomas D. Cook, and Donald Thomas Campbell, *Experimental and Quasi-Experimental Designs for Generalized Causal Inference* (2002).

[56] Abadie, et. al, "Implementing matching estimators for average treatment effects in Stata," *supra* note 53. *See also* Abadie and Imbens, "Large sample properties of matching estimators for average treatment effects," *supra* note 53.

Table 7. Propensity Score Matching Analysis (Defendant N = 85 (Black v. White), 94 (Non-White v. White))

		Black v. White	Non-White v. White
	Caliper	ATE of Black	ATE of Non-White
Demographic Variables Only	0.100	0.000145***	0.000067
		(0.000045)	(0.000052)
Demographic Variables Only	0.025	0.000145***	0.000067
		(0.000045)	(0.000052)
Add ATF Manual Variables	0.100	0.000121**	0.000073*
		(0.000050)	(0.000042)
Add ATF Manual Variables	0.025	0.000105**	0.000073*
		(0.000047)	(0.000041)
Add Other Criminal History Variables	0.100	0.000146***	0.000123***
		(0.000036)	(0.000044)
Add Other Criminal History Variables	0.025	0.000146***	0.000110**
		(0.000036)	(0.000044)
Add Post-Hoc Variables	0.100	0.000115**	0.000089*
		(0.000047)	(0.000046)
Add Post-Hoc Variables	0.025	0.000115**	0.000089*
		(0.000047)	(0.000046)

Significance:* = p < .01; ** = p < .05; * = p < .1**

Notes:
[1] Robust standard errors are in parentheses.
[2] Models are run using a 25% sample of non-defendants.
[3] N = 485,190 for Black v. White models, N = 583,252 for Non-White v. White models. Hispanics (Estimated Hispanic - 60%) are dropped from the Black v. White models (N = 98,005 dropped).

Each of the models in Table 7 comparing Black and White persons is significant, suggesting race differences in the selection of Stash House defendants. Blacks are more likely than similarly situated Whites to be selected as a Stash House defendant using the pool of potential eligibles as a benchmark, after controlling for increasingly rich sets of covariates. Six of the eight models comparing White with non-White defendants also are significant, again suggesting race differences in the selection of defendants for Stash House cases compared to a large pool of potential eligibles. Notably, the White – non-White models in Table 7 become significant, and the coefficient grows larger, as more covariates are added to the model. The increasing role of race as additional legally relevant and programmatically relevant confounding variables are added reveals a pattern of discrimination in the selection of defendants.

VI. CONCLUSION

The results of several empirical analyses converge to show a pattern of discrimination by defendant race and ethnicity in the targeting of Black and Hispanic persons for fictitious Stash House stings. The tests use a variety of analytic methods to examine the patterns of racial and ethnic differences, and each shows evidence of discrimination.

From 2006-2013, the probability of selection of a cohort of Stash House Program defendants with their observed racial and ethnic composition from among a large pool of similarly situated potential eligibles is less than .1% for the 94 defendants in these cases. This is a simple test that asks whether the composition of this pool is uncommonly low. The evidence is stronger looking at the period from 2011- 2013. During that time, only one White defendant was targeted for a fictitious Stash House sting, out of 57 defendants. The probability of selecting a cohort of 56 non-White defendants out of 57 from among potential eligibles is also less than .1%. These extremely low probabilities provide evidence of race-based selection of Stash House defendants.

Large numbers of Stash House defendants were recruited into the Stash House Program without having met the explicit criteria of violent crime set forth in ATF policy and guidelines.[57] Many defendants also appear to fail to meet expanded offense criteria articulated by the ATF and prosecutors during the course of these investigations.

Using three distinct statistical tests for disparate racial treatment, there is strong, consistent and statistically significant evidence that non-White suspects were more likely than White suspects to be targeted for recruitment into the Stash House Program, compared to a large population of similarly situated and matched potentially eligible persons with one or more prior convictions for any of the ATF target offenses. Non-White persons were more likely to be recruited into the Stash House Program after controlling for criminal histories relevant to the Stash House Program policies.

The results of these three tests, as well as the unadjusted tests of simple selection probabilities, show a pattern of selective enforcement in the recruitment of Stash House defendants. The results show that after controlling for several indicia of criminal propensity, race remains a statistically significant predictor of selection as a Stash House defendant. These analyses show that the ATF is discriminating on the basis of race in selecting Stash House defendants. In other words, race is a significant predictor of selection as a Stash House defendant after controlling for both formal and informal but articulated ATF criteria.

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[57] *See* ATF Manual at A-35 – A-37 (reprinting ATF O 3250.1B.g).

DECLARATION

I have been compensated for this work at the rate of $350 per hour. My compensation is not dependent on my opinions or the outcome in this matter.

Jeffrey Fagan, Ph.D.
May 11, 2016

APPENDICES

A. Data Sources

B. Criminal History Records Ordered

C. ATF Manual 2013, "Appendix: ATF O 3250.1B, Undercover Operations", Subsection entitled "Target Identification"

D. Categories of Arrest Charges

E. Coding of Specific Statutes into Crime Categories

F. Hispanic Surname Analysis

G. Credentials and Curriculum Vitae

Appendix A. Data Sources

A: Illinois State Police Records

1. Arrest Data ("arr_1026.csv")
2. Court Data ("crt_1026.csv")
3. Sentences Data ("sent_1026.csv")

B: Rap Sheets

1. Rap Sheets (94)

C: Federal Government Documentation

1. Takedown Memoranda (20)
2. Reports of Investigation (4)

D: Case Documentation

1. Case Complaints (24)

E: Attorney Documentation

1. Defendant List with Verified Race and Ethnicity

F: United States Census Bureau

1. Surname List ("Demographic Aspects of Surnames from Census 2000," available at http://www.census.gov/topics/population/genealogy/data/2000_surnames.html)

Note: All tables, figures, and analyses rely on the above list of sources.

Appendix B. Criminal History Records and Data - Specifications

Criminal history records were ordered produced from the Illinois State Police (ISP) for each person convicted of (A) any of the offenses listed below, (B) committed in one of the counties below, and in each year from 2000 to 2015 (inclusive). In addition, the ISP was ordered to produce (C) each individual's race/ethnicity and certain identifying information, (D) geographic information on location of arrest and last known residential address, and (E) transactional criminal history record information.

A. Offenses by Statute:

- All index crimes
- All drug offenses reported to UCR
- All violations of 720 ILCS 570-401 through 414 (the Controlled Substances Act)
- All violations of 720 ILCS 550 (the Cannabis Control Act)
- All violations of 720 ILCS 646, 647, 648, 649 (the Methamphetamine Offenses Act)
- All violations of 720 ILCS 635 (the Hypodermic Syringes and Needles Act)
- All violations of 720 ILCS 600 (the Drug Paraphernalia Act)
- All violations of 720 ILCS 5/24 (Deadly Weapons)
- All violations of 720 ILCS 5/31A-1.1 & 5/31A-1.2 (Possession of or bringing firearm, firearm ammunition or explosive into penal institution)
- All crimes of violence, including but not limited to violations of the following statutes:
    - Forcible felony, 720 ILCS 5/2-8
    - Solicitation of murder, 720 ILCS 5/8-1
    - Solicitation of murder for hire, 720 ILCS 5/8-1.2
    - Conspiracy, 720 ILCS 5/8-2
    - All offenses under 720 ILCS 5/9 (Homicide)
    - Kidnapping, 720 ILCS 5/10-1
    - Aggravated kidnapping, 720 ILCS 5/10-2
    - Unlawful restraint, 720 ILCS 5/10-3
    - Aggravated unlawful restraint, 720 ILCS 5/10-3.1
    - Forcible detention, 720 ILCS 5/10-4
    - Child abduction, 720 ILCS 5/10-5
    - Aiding or abetting child abduction, 720 ILCS 5/10-7
    - Trafficking in persons, involuntary servitude, and related offenses, 720 ILCS 5/10-9
    - All offenses under 720 ILCS 5/11 (Sex Offenses)
    - All offenses under 720 ILCS 5/12 (Bodily Harm)
    - All offenses under 720 ILCS 5/18 (Robbery)
    - All offenses under 720 ILCS 5/19 (Burglary)
    - All offenses under 720 ILCS 5/20 (Arson)
    - All offenses under 720 ILCS 5/25 (Mob Action)
    - All offenses under 720 ILCS 5/33A, 33B, 33C, 33D, 33F, 33G

B. The counties in which a Stash House case took place from 2006-2013:

- Cook
- Lake
- Will
- DuPage
- Kane
- Kendall
- LaSalle
- Winnebago

C. Defendant identifying information:

- IR number
- State ID Number ("SID")
- Last name
- Year of birth

D. Geographic information:

- Home address
- Location of arrest
- ORI of arresting agency

E. Transactional Criminal History Records Information including four kinds of criminal history data:

- Arrest information
- Charge information
- Disposition and sentencing information (i.e., conviction information)
- Custody information (including custodial time served)

Appendix C. ATF Manual 2013, "Appendix: ATF O 3250.1B, Undercover Operations", Subsection entitled "Target Identification"

b. Target Identification. Investigations should only be pursued that target persons who show a propensity of doing harm to the public through violent behavior/armed robberies and whose activities have been documented either through criminal history, criminal reputation, or self-incrimination. Violent crime is defined as offenses that involve force or threat of force and includes murder, forcible rape, robbery, aggravated assault, and arson. The below minimum criteria must be followed in making these considerations:

(1) At least two targeted offenders must be identified as violent offenders.
(2) At least one target must have a past violent crime arrest or conviction.
(3) Targets must be currently involved in criminal activity.,
(4) The undercover agent must meet with at least two members of the robbery crew.
(5) Targets must conspire to commit the armed robbery.

Appendix D. Categories of Arrest Charges

Thousands of distinct statutes appear in the ISP and rap sheet data. A two-step process was used to construct charge categories that translate rap sheet and ISP charges into the ATF charge categories. (1) Each of the specific statutory charges in the ISP dataset and on the rap sheets were assigned to one of 26 categories. I manually assigned a category to 99.5% of the statutes in the ISP dataset of potential eligibles. The remaining 0.5% are categorized as "Other." I manually assigned an offense category to 100% of the statutes in the rap sheet dataset. (2) I classify the relevant charges to the "ATF Manual Violent (UCR Part I)" category, or to the set of violent offenses that expand on the ATF violent offense charges ("ATF Violent Expanded"). Additional charge categories include weapons offenses and drug offenses. The table below shows the categories and indices, as well as the prevalence of the categories in the ISP arrest dataset.

Indices	Category	ISP Arrest %
ATF Violent (UCR Part I)	Aggravated Assault/Battery	2.8%
	Armed Robbery/Home Invasion	0.9%
	Robbery	0.9%
	Murder	0.3%
	Forcible Sexual Assault/Rape	0.1%
	Arson	0.1%
ATF Violent (Expanded)	Assault	10.3%
	Mob Action/Riot	0.5%
Drug Possession	Drug Possession	10.6%
Drug Sale	Drug Sale	2.6%
Marijuana Possession	Marijuana Possession	6.4%
Marijuana Sale	Marijuana Sale	0.8%
Weapons and Related	Weapons and Related	3.4%
Property		14.3%
Vehicle and Traffic Laws		12.4%
Local Ordinance		7.1%
Trespass		6.1%
Warrantable Offenses		5.5%
QOL/Disorder		5.0%
Other		3.3%
DUI		2.4%
DV and Crimes against Children		1.2%
Prostitution and Related		1.1%
Fraud and Related		0.9%
Sex Crimes and Related		0.8%
Bribery and Official Misconduct		0.0%

Appendix E. Coding of Specific Statutes into Crime Categories

The subpoenaed records and defendant rap sheets listed over 3,000 specific statutes. The table below lists approximately 50 commonly occurring statutes and their classification into the categories shown in Appendix B.

Statute	Arrest Charge Description	Count	Manual Classification
	ORDINANCE	402977	Local Ordinance
720 ILCS 570.0/402-C	POSSESSION CONTROLLD SUBSTANCE	328052	Drug Possession
725 ILCS 5.0/110-3	ISSUANCE OF WARRANT	244115	Warrantable Offenses
720 ILCS 5.0/16A-3-A	RETAIL THEFT	171248	Property
625 ILCS 5.0/6-303-A	DRIVING ON SUSP/REVOKD LICENSE	170910	Vehicle and Traffic Laws
720 ILCS 550.0/4-B	POSSESS CANNABIS	130559	MJ Possession
720 ILCS 570.0/402	POSSESSION CONTROLLED SUB	126433	Drug Possession
720 ILCS 5.0/12-3.2-A-1	DOMESTIC BATTERY	121139	Violent
625 ILCS 5.0/3-707	INSURANCE--OPERATE UNINSURED	116118	Vehicle and Traffic Laws
720 ILCS 550.0/4-A	POSSESS CANNABIS	114242	MJ Possession
720 ILCS 5.0/12-3-A-1	BATTERY/BODILY HARM	90920	Violent
720 ILCS 5.0/26-1-A-1	DISORDERLY CONDUCT	88128	QOL/Disorder
720 ILCS 5.0/21-2	CRIMINAL TRESPASS VEHICLE	85094	Trespass
720 ILCS 5.0/16-1-A-1	THEFT	84753	Property
720 ILCS 5.0/21-3-A-2	CRIMINAL TRESPASS TO LAND	84178	Trespass
720 ILCS 5.0/21-1-1-A	KNOWINGLY DAMAGE PROPERTY	75573	Property
720 ILCS 5.0/12-3.2	DOMESTIC BATTERY	71193	Violent
720 ILCS 5.0/12-3-A	BATTERY	70314	Violent
625 ILCS 5.0/11-501-A-2	DUI/ALCOHOL	67295	DUI
720 ILCS 5.0/12-3	BATTERY	63132	Violent
720 ILCS 600.0/3.5-A	POSSESS DRUG PARAPHERNALIA	62435	Drug Possession
720 ILCS 5.0/19-1-A	BURGLARY	59903	Property
720 ILCS 5.0/21-5	CRIMINL TRESPASS TO STATE LAND	59493	Trespass
720 ILCS 5.0/31-1	RESIST PEACE OFFICER	58973	QOL/Disorder
720 ILCS 5.0/12-1-A	ASSAULT	55728	Violent
720 ILCS 5.0/31-1-A	RESIST PEACE OFFICER	52973	QOL/Disorder
720 ILCS 550.0/4-C	POSSESS CANNABIS	52357	MJ Possession
720 ILCS 5.0/19-1	BURGLARY	49920	Property
720 ILCS 5.0/12-3.2-A-2	DOMESTIC BATTERY	47624	Violent
720 ILCS 5.0/12-3-A-2	BATTERY	47189	Violent
720 ILCS 5.0/16-1	THEFT	44814	Property
720 ILCS 5.0/12-2-A-1	AGGRAVATED ASSAULT	43542	Aggravated Assault/Battery
720 ILCS 550.0/4	POSSESSION OF CANNABIS	40811	MJ Possession
720 ILCS 570.0/401-D	MFG/DEL CONTROLLED SUBSTANCES	33218	Drug Sale
625 ILCS 5.0/6-101	NO DRIVERS LICENSE/PERMIT	33207	Vehicle and Traffic Laws
720 ILCS 5.0/11-14-A	PROSTITUTION	32308	Prostitution and Related
625 ILCS 5.0/11-501-A-1	DUI/ALCOHOL	32054	DUI
625 ILCS 5.0/6-303	DRIV LIC REVOKED OR SUSPENDED	31204	Vehicle and Traffic Laws
625 ILCS 5.0/4-103-A-1	IVC FELONIES	30229	Property
720 ILCS 5.0/21-3-A-1	CRIMINAL TRESPASS BUILDING	28666	Trespass
720 ILCS 5.0/24-1.1-A	UNLAW POSSESS WEAPON BY FELON	28390	Weapons and Related
625 ILCS 5.0/12-603.1	NOT WEARING SEAT BELT	27939	Vehicle and Traffic Laws
720 ILCS 5.0/21-1	CRIMINAL DAMAGE TO PROPERTY	26816	Property
720 ILCS 5.0/16-1-A	THEFT	26499	Property
720 ILCS 5.0/16-3-A	THEFT LABOR/SERVICES	26487	Property
720 ILCS 5.0/21-3-A	CRIMINAL TRESPASS TO LAND	26209	Trespass
720 ILCS 550.0/4-D	POSSESS CANNABIS	24938	MJ Possession
720 ILCS 570.0/401-C-2	MAN/DEL CONTROL SUBSTANCES	23988	Drug Sale
720 ILCS 5.0/19-3-A	RESIDENTIAL BURGLARY	23184	Property
720 ILCS 5.0/12-5-A	RECKLESS CONDUCT	22628	Other

Appendix F. Hispanic Surname Analysis

Both sources of criminal history information provided for this litigation have limited data on the Hispanic ethnicity either of the defendants or the potentially eligible population. For the defendants, criminal history records ("rap sheets") have no information on Hispanic ethnicity. For the potentially eligible population, the ISP data identified less than .1% of the 292,442 potentially eligibles as Hispanic ("H" in the ISP database).

Classification Method

To address the missing Hispanic ethnicity data, I applied a commonly-utilized methodology that assigns Hispanic ethnicity based on an inventory of surname data matched to self-reported ethnicity from the 2000 United States Census. This methodology has been accepted and cited by a federal district court in recent litigation on traffic stop data alleging discrimination against Hispanics.[1]

The method uses a list of all surnames occurring 100 or more times created by the U.S. Census Bureau from the 2000 Census data.[2] For each surname, the Census Bureau has calculated the proportion of people with each surname self-reporting as Hispanic.[3] For example, the surname "Garcia" has a Hispanic probability of 91%, while the surname "Smith" has a Hispanic probability of only 2%.

Classification of Potential Eligibles

Using this list, I determined the Hispanic probability associated with the surname for each of the defendants and each person in the ISP dataset of potential eligibles for *Stash House* stings.[4] If a person's surname Hispanic probability is over 60%, I classify that person as "Hispanic (60%)." If the probability is over 70%, 80%, or 90%, I do the same at these higher cutoffs.

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[1] Ralph B. Taylor, Initial Expert Report (Dec. 2, 2010), *Melendres v. Arpaio*, 07-CV-2513, Dkt. No. 424-2, Ex. B (D. Ariz. Apr. 29, 2011); Ralph B. Taylor, Rebuttal Expert Report (Feb. 4, 2011), *id.*, Dkt. 424-3, Ex. C (D. Ariz. Apr. 29, 2011).

[2] This list covers all Americans with surnames occurring 100 times or more, about 2.4 million people. "File B: Surnames Occurring 100 Times or More," United States Census Bureau, available at http://www.census.gov/topics/population/genealogy/data/2000_surnames.html, accessed on March 31, 2016.

[3] "Frequently Occurring Surnames from the Census 2000," United States Census Bureau, available at http://www.census.gov/topics/population/genealogy/data/2000_surnames.html, accessed on March 31, 2016.

[4] Because the ISP data often lists multiple last names for the same SID, I use the median Hispanic surname probability across arrests for my analysis. This is not an issue when using the rap sheets, which contain only one last name.

As with any estimation method, this method has an error rate. In this case, the Census list methodology slightly underestimates the number of Hispanic persons.[5] Empirically, an undercount of approximately 10% has been shown in U.S. Census research comparing the performance of the Passel-Word (PW) 1990s Spanish surname list – against self-reports of ethnicity in the 1990 Census Spanish Origin Research file.[6]

Classification of Defendants

In order to ensure that the ethnicity of defendants and non-defendants are estimated using a consistent method, I performed the surname analysis for both populations. I use the 60% Hispanic cutoff for both defendants and potential eligibles throughout the analysis, with a robustness check using the 90% Hispanic cutoff. I use this conservative measure—which identifies only 9 of 12 Hispanic defendants as such—in order to provide a consistent basis for statistical tests to determine disparate treatment.

Table 4 *supra* shows that the summary statistics for Hispanic ethnicity at the 60%, 70%, and 80% thresholds are nearly identical for the potential eligibles across the thresholds: .17, .17, and .16, respectively. Comparing the results of this method for defendants and potential eligibles, the summary statistics in Table 4 are identical for the defendants at the 60%, 70%, and 80% thresholds: .10. This reduces the chance of error or bias that might be a function of the surname classification method and any differences between the thresholds. I perform a robustness check in the analyses at 90% for Table 5.1, as these values do substantially differ. The coefficients on Black and Hispanic do not substantially differ.

Reconciling Verified and Classified Estimates for Defendants

However, defense counsel for the defendants has independently determined the race and Hispanic ethnicity of the 94 defendants ("verified race").[7] Twelve of the 94 defendants self-identify as Hispanic. However, the surname methodology correctly identifies only 9 of the 12 Hispanic defendants at probabilities of 60%, 70%, and 80%, and identifies only 4 of them at the

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[5] Colby Perkins, *Evaluating the Passel-Word Spanish surname list: 1990 decennial census post enumeration survey results*, US Department of Commerce, Economics and Statistics Administration, Bureau of the Census (1993). Using the 2000 Census Bureau data, I calculate that at the 60% cutoff for the US population as a whole, the total number of Hispanics is underestimated by about 4.4%.

[6] *Id.*

[7] Three of the defendants in *United States v. Elias*, Adrian and Salvador Elias and Angel Olsen, have been classified as white using the Spanish surname methodology at the 60% cutoff. In reality all three are Hispanic. This conclusion is based on discovery and communications with defense counsel in consultation with the defendants. Specifically, Adrian and Salvador Elias self-identify as Hispanic and the ATF takedown memo in this case identifies them as Hispanic. Olson self-identifies as Hispanic (see 13 CR 0476, Doc. #162, ¶1 and #171), and, based on communications with defense counsel, Olson has one Hispanic parent and one black parent. In addition, the U.S. Attorney's Office previously categorized him as black in an earlier filing in which Hispanic categorizations were omitted. *Williams*, 12 CR 887, Dkt. 74-1 at 2 (Aug. 21, 2013).

90%. I also show analytic results using the *Hispanic-Verified* classification that applies these corrections.

We can estimate error rates using this method for the defendants, as true ethnicity is known. At the 60% cutoff, the Hispanic surname analysis correctly identifies 9 of the 12 Hispanic defendants. It does not identify anyone else as Hispanic. Therefore, the analysis using estimated Hispanic ethnicity (60%) for defendants has a false negative rate of 3/12 (25%) and a false positive rate of 0/9 (0%).[8] To contextualize these error rates, I calculated the error rates for the US population a whole, using surname and Hispanic ethnicity data from the 2000 United States Census. Using these data, I calculate the rate of false negatives to be about 14.5% at the 60% cutoff (percent of Hispanic people who are not classified as such), and the rate of false positives to be about 10.5% (percent of people classified as Hispanic who are not Hispanic). The false negative rate is higher for defendants (25% v. 14.5%) and the false positive rate is lower (0% v. 10.5%). Again, false negative implies that there are people who are classified as non-Hispanic who actually are Hispanic. False positive implies that there are people who are classified as Hispanic who are not Hispanic.

Accordingly, the estimates of racial and ethnic discrimination computed in this report are in fact conservative estimates. The false negative rate, or under-reporting rate, is greater than the false positive (or over-reporting rate) for the defendant Hispanic ethnicity data. To assess the implications of the underestimates for this report, I also perform a robustness check using the verified race and ethnicity of the defendants, as compared to the 60% cutoff for the potential eligibles, in Table 6.

[8] These are referred to as the "surname omission rate" (false negative rate) and the "surname commission rate" (false positive rate). R. Colby Perkins, "Evaluating the Passel-Word Spanish Surname List: 1990 Decennial Census Post Enumeration Survey Results," Population Division Working Paper No. 4, August 1993, available at http://www.census.gov/population/www/documentation/twps0004.html, accessed April 6, 2016.

Appendix G. Credentials and Curriculum Vitae of Jeffrey Fagan

Summary

I am the Isidor and Seville Sulzbacher Professor of Law at Columbia Law School, and Professor of Epidemiology at the Mailman School of Public Health at Columbia University. I was the Director of the Center for Community and Law at Columbia Law School from 2003 – 2009, and again from September 2011 - 2015. I was a Visiting Professor of Law at Yale Law School from July 2009 – June 2010 and again from January – June 2013. From 1996-2006, I was the Founding Director of the Center for Violence Research and Prevention at the Mailman School of Public Health. From 1996-2006, I was a founding member of the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice.

Prior to my appointment at Columbia University, I was Professor of Criminal Justice at Rutgers - The State University of New Jersey (1989-96), and Associate Professor, John Jay College of Criminal Justice in the City University of New York. I have co-authored three books and published numerous articles on law and social policy in professional peer-reviewed journals, law reviews, and other scholarly publications. I have received honors and awards from academic and professional associations. I served on the Committee of Law and Justice of the National Reserch Council from 2000-2006, and was appointed to two scientific committees of the National Academy of Science (Intimate Partner Violence, Fairness and Effectiveness of Policing). I have served on committees of the American Society of Criminology, and the National Science Foundation, and also to committees of several prestigious government agencies and private foundations. I am a Fellow of the American Society of Criminology. I have a Ph.D. in Engineering from the University at Buffalo of the State University of New York.

I have previously served as expert witness in litigation alleging Fourth and Fourteenth Amendment civil rights violations resulting from racially selective police enforcement in the conduct of investigative stops by police in New York City.[9] In 2008-9, I consulted with the Governor's Commission on Law Enforcement Standards and Practices for the State of New Jersey in its response to civil rights litigation alleging Fourth and Fourteenth Amendment violations by the New Jersey State Police. From 2012-5, I advised the Boston Police Department in its review of its practice of investigative stops.

[9] *Floyd v City of New York*, 959 F. Supp. 2d 540 (2013); *Ligon, et al*., v. *City of New York*, et al., 12-CV-2274 (AT); and *Davis et al., vs. City of New York,* et al., 10-CV-00699 (AT).

Curriculum Vitae

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212-854-2624 (v)
212-854-7946 (f)

PROFESSIONAL EXPERIENCE:

2011 – present:	Isidor and Seville Sulzbacher Professor of Law, Columbia Law School
2013 (Spring):	Florence Rogatz Visiting Professor of Law, Yale Law School
2001-2011:	Professor, Columbia Law School
2010-11:	Fellow, Straus Institute for the Advanced Study of Law and Justice, New York University School of Law
2010-present:	Senior Research Scholar, Yale Law School
2009-10	Florence Rogatz Visiting Professor of Law, Yale Law School
2004-2015:	Director, Center for Crime, Community and Law, Columbia Law School
2001-2006	Director, Doctor of Juridical Science in Law (JSD) Program, Columbia Law School
2008 – present:	Faculty Fellow, Columbia Population Research Center
1999-present	Faculty Fellow, Institute for Social and Economic Research and Policy, Columbia University
1998-2001:	Visiting Professor, Columbia Law School
1996-present:	Professor, Department of Epidemiology, Mailman School of Public Health, Columbia University
1995-2002:	Founding Director, Center for Violence Research and Prevention, Mailman School of Public Health, Columbia University
1989-1996:	Associate Professor to Professor, School of Criminal Justice, Rutgers-The State University of New Jersey
1988-1989:	Associate Professor, Department of Law and Police Science, John Jay College of Criminal Justice, City University of New York; Associate Professor, Doctoral Program in Criminal Justice, City University of New York Graduate Center; Associate Director for Research, Criminal Justice Center, John Jay College of Criminal Justice, City University of New York
1986-1988:	Senior Research Fellow, New York City Criminal Justice Agency.
1977-1986:	Director, Center for Law and Social Policy, URSA Institute, San Francisco.
1975-1976:	Research Director, Northern California Service League, San Francisco, California.
1974-1975:	Associate Research Analyst, Office of Criminal Justice Planning, Oakland, California.
1970-1974:	Director, College of Urban Studies, State University of New York at Buffalo.
1969-1971:	Teaching Assistant and Research Associate, Department of Psychology, State University of New York at Buffalo

EDUCATION:

PhD, 1975, Policy Science, Department of Civil Engineering, State University of New York at Buffalo. Dissertation: "A Predictive Model of Success in Criminal Justice Employment Programs."
MS, 1971, Human Factors Engineering, Department of Industrial Engineering, State University of New York at Buffalo.
BE, 1968, Industrial Engineering, New York University.

AWARDS AND HONORS:

Power of One Racial Justice Award, Center for Race, Crime and Justice, John Jay College, May 2016
Lillie and Nathan Ackerman Lecture in Equality and Justice, Baruch College, November 2013
Fellow, American Society of Criminology, elected April 2002
Fellow, Davenport College, Yale University
Darrow K. Soll Memorial Criminal Law and Justice Lecture, *Indignities of Order Maintenance*, Rogers College of Law, University of Arizona, March 2013.
Lecturer, Hoffinger Colloquium, *Profiling and Consent: The Trouble with Police Consent Decrees*, New York University School of Law, April 2011
National Associate, National Research Council and Institute of Medicine, 2011 – present
Member, Committee on Law & Justice, National Research Council, 2002-2008
Senior Justice Fellow, Open Society Institute, 2005-6
Health Policy Scholar, Robert Wood Johnson Foundation, 2002-2004
Book Award, "Best Book on Adolescence and Social Policy" for *Changing Borders of Juvenile Justice* (with F. Zimring), Society for Research on Adolescence, 2002
Public Interest Achievement Award, Public Interest Law Foundation of Columbia University, Spring 2001
Bruce Smith Senior Award, Academy for Criminal Justice Sciences, March 2000.
Lecturer, Fortunoff Colloquium, *Social Contagion of Violence.* New York University School of Law, April 1999
Fellow, Earl Warren Legal Institute, School of Law, University of California-Berkeley, 1999-present
University Faculty Merit Award, Rutgers University, 1990-94
Lecturer in Colloquium on Race, Ethnicity and Poverty Workshop, Center for the Study of Urban Inequality, University of Chicago, June 1992
University Research Council Grantee, Rutgers University, 1989-90
Lecturer, Fortunoff Colloquium, *Preventive Detention and the Validity of Judicial Predictions of Dangerousness.* New York University School of Law, October, 1988
Delegate, Criminal Justice and Criminology Delegation to the People's Republic of China, Eisenhower Foundation, l985
NDEA Title IV Fellowship, Department of Industrial Engineering, State University of New York at Buffalo, June 1968-June 1971

PUBLICATIONS:

Books:

Tyler, T., A. Braga, J. Fagan, et al. (eds.), *Legitimacy, Criminal Justice, and the State in Comparative Perspective.* New York: Russell Sage Foundation Press (2008).
J. Fagan and F.E. Zimring (eds). *The Changing Borders of Juvenile Justice: Waiver of Adolescents to the Criminal Court.* Chicago: University of Chicago Press (2000). (Received Society for Research on Adolescence Award for "Best Book on Adolescence and Social Policy," 2002).
D. Baskin, I. Sommers, and J. Fagan, *Workin' Hard for the Money: The Social and Economic Lives of Women Drug Dealers.* Huntington NY: Nova Science Press (2000).

Journal Articles and Chapters (by Topic):

1. Policing

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Fagan, J. "Terry's Original Sin, University of Chicago Legal Forum (2016, forthcoming)

Fagan, Jeffrey, and Amanda B. Geller, "Following the Script: Narratives of Suspicion in Terry Stops in Street Policing, 82 *University of Chicago Law Review* 51 (2015)

Tyler, Tom R., and Jeffrey Fagan, "American Policing in the 21st Century: Legitimacy is a Key Concern." 40 *Fordham Urban Law Journal* 119 (2015) and online

Braga, Anthony, et al. "The Salience of Social Contextual Factors in Appraisals of Police Interactions with Citizens: A Randomized Factorial Experiment." *Journal of Quantitative Criminology* (2014, online, 1-29.)

Geller, Amanda B., Jeffrey Fagan, and Tom R. Tyler, "Aggressive Policing and the Health of Young Urban Men," 104 *American Journal of Public Health* 2311 (2014)

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Gelman, A., J. Fagan, and A. Kiss. "An analysis of the New York City police department's "stop-and-frisk" policy in the context of claims of racial bias." 102 *Journal of the American Statistical Association* 479 (2007).

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2. Capital Punishment

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4. Deterrence and Development

Nguyen, H., T.A. Loughran, R. Paternoster, J. Fagan, and A. Piquero, "Institutional Placement and Illegal Earnings: Examining the Crime School Hypothesis," *Journal of Quantitative Criminology* (forthcoming)

Loughran, T. A., H. Nguyen, A. R. Piquero, & J. Fagan. "The Returns to Criminal Capital." 78 *American Sociological Review* 925-948 (2013)

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Loughran, T.A., R. Paternoster, J. Fagan, and A.R. Piquero, A. "A Good Man Always Knows His Limitations": The Role of Overconfidence in Criminal Offending," 50 *Journal of Research in Crime & Delinquency* 327-58 (2013).

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Mulvey, E.P., Steinberg, L., Piquero, A., Fagan, Jeffrey, et al., "Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders," 22 *Development and Psychopathology* 453–475 (2010)

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Piquero, A., Brame, R., Fagan, J., & Moffitt, T.E., "Assessing the Offending Activity of Criminal Domestic Violence Suspects: Offense Specialization, Escalation, and De-Escalation Evidence from the Spouse Assault Replication Program," 121 *Public Health Reports* 409 (2006).

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"Community, Courts, and Legitimacy," Fordham University Law School Symposium on Problem-Solving Courts, New York, February 2002 (with V. Malkin).

"Specific Deterrent Effects of Jurisdictional Transfer of Adolescent Felony Offenders," American Society of Criminology, Atlanta, November 2001 (with A. Kupchik).

"Assessing the Theoretical and Empirical Status of 'Broken Windows' Policing," Faculty of Law, University of Cambridge, Cambridge UK, October 2001.

"Social Contagion of Youth Violence," Grand Rounds Lecture, Johns Hopkins University School of Medicine, Baltimore MD, March 2001.

"Street Stops and Broken Windows: Terry, Race and Disorder in New York City," Presented at the Annual Meeting of the American Society of Criminology, San Francisco, CA , November 2000.

"Social and Legal Consequences of Judicial Waiver of Adolescents: Human Rights Implications," Presented at the Annual Meeting of the American Association for the Advancement of Science, Washington DC, February 2000.

"Crime in Poor Places: Examining the Neighborhood Context of New York City's Public Housing Projects," Presented at the Research Institute on Neighborhood Effects on Low-Income Families, Joint Center for Poverty Research, The University of Chicago, September 1999 (with Tamara Dumanovsky and J. Philip Thompson).

"Social Contagion of Violence,"Presented at the Fortunoff Colloquium, New York University School of Law, April 1999. Previous versions presented at the Winter Roundtable, Teachers College, Columbia University, February 1998, and the International Roundtable on Urban Security, Foundation Jean Jares, Paris, April 1998.

"This is Gonna' Hurt Me More than It'll Hurt You: Consequences of the Criminalization of Youth Crime." Presented at the Workshop on the Juvenile Justice System, National Research Council Panel on Juvenile Crime, Washington DC, January 1999.

"Use, Misuse and Nonuse of Social Science in Law: Case Studies from Criminal Law." Presented at the Annual Meeting of the American Association of Law Schools, New Orleans, January 1999.

"Consequences of Waiver: Recidivism and Adolescent Development." Presented at the Symposium on The Juvenile Justice Counter-Reformation: Children and Adolescents as Adult Criminals, Quinnipiac College School of Law, Hamden CT, September 17-18, 1998.

"Drugs and Youth Violence: The Tripartite Framework Revisited." Presented at the Annual Meeting of the American Society of Criminology, San Diego, November 1997.

"The Criminalization of Delinquency and the Politics of Juvenile Justice." Presented at the Annual Meeting of the National Conference of State Legislatures, Philadelphia PA, August 1997.

"Crack in Context: Myths And Realities From America's Latest Drug Epidemic." Presented at the NIJ/NIDA Conference on *The Crack Decade*: *Research Perspectives and Lessons Learned.* Baltimore MD: June 1997.

"Alcohol and Violent Events." Presented at the Annual Meeting of the American Society of Criminology, Chicago, November 1996 (with D.L. Wilkinson).

"Crime and Public Housing: Conceptual and Research Issues." Presented at the Joint Conference on Research in Public Housing, National Institute of Justice and Department of Housing and Urban Development, Washington DC, July 1997.

"The Functions of Adolescent Violence." Presented at the Bi-National Forum on Youth Violence, The French American Foundation, United Nations, New York, October 1996.

"Mirror Images of Violence: The Historical Socialization of Willie Bosket." Author-Meets-Critic Panel on *All God's Children*, by Fox Butterfield. Presented at the Annual Meeting of the American Society of Criminology, Boston, November 1995.

"Crime and Work." Presented at the Annual Meeting of the American Society of Criminology, Boston, November 1995.

"Drugs and Violence: Lessons from Three Epidemics." Presented at a joint session of the Annual Meetings of the American Sociological Association and the Society for the Study of Social Problems, Washington DC, August 1995.

"Social and Legal Control of Spouse Assault: Ironies in the Effectiveness of Punishment for Wife Beating." Presented at the Conference on Research and Evaluation, National Institute of Justice, Washington DC, July 1995.

"Cocaine and Federal Sentencing Policy." Testimony before the Subcommittee on Crime,

Committee on the Judiciary, U.S. House of Representatives, Washington DC, June 29, 1995.

"Gangs, Youth, Drugs, and Violence." Presented to the Drugs-Violence Task Force of the U.S. Sentencing Commission, Washington DC, May 1995.

"Community Risk Factors in Workplace Violence." Presented at the Symposium on Violence in the Workplace, New York Academy of Medicine, New York, March 1995.

"Situational Contexts of Gun Use among Young Males." Presented at the Annual Meeting of the American Association for the Advancement of Science, Atlanta, February 1995, and at the Annual Meeting of the American Society of Criminology, Miami, November 1994.

"The Social Control of Violence among Intimates: Neighborhood Influences on the Deterrent Effects of Arrest for Spouse Assault" (with J. Garner & C. Maxwell). Presented at the Annual Meeting of the American Society of Criminology, Miami, November 1994.

"Crime, Drugs and Neighborhood Change: the Effects of Deindustrialization on Social Control in Inner Cities." Presented at the Annual Meeting of the American Association for the Advancement of Science, San Francisco, February 1994.

"The Social Context of Deterrence." Plenary paper presented at the Annual Meeting of the American Society of Criminology, Phoenix, October 1993.

"Doubling Up: Careers in Legal and Illegal Work." Presented at the Annual Meeting of the American Society of Criminology, Phoenix, October 1993.

"Promises and Lies: The False Criminology of "Islands in the Street." Presented at the Annual Meeting of the American Sociological Association, Miami, August 1993.

"Deindustrialization and the Emergence of Youth Gangs in American Cities." Colloquium at the Institute of Politics, University of Pittsburgh, April 1993.

"Women and Drugs Revisited: Female Participation in the Crack Economy." Colloquium at the Research Institute on the Addictions, State of New York, March 1993.

"Neighborhood Effects on Gangs and Ganging: Ethnicity, Political Economy and Urban Change." Presented at the Annual Meeting of the American Society of Criminology, New Orleans, November 1992.

"Enterprise and Ethnicity: Cultural and Economic Influence on Social Networks of Chinese Youth Gangs" (with K. Chin). Presented at the Annual Meeting of the American Society of Criminology, New Orleans, November 1992.

"The Specific Deterrent Effects of Criminal Sanctions for Drug and Non-Drug Offenders." Presented at the Annual Meeting of the Law & Society Association, Philadelphia, May 1992.

"The Changing Contexts of Drug-Violence Relationships for Adolescents and Adults." Presented at the Annual Meeting of the American Academy for the Advancement of Science, Washington DC, February 1991.

"Youth Gangs as Social Networks." Presented at the Annual Meeting of the American Society of Criminology, Baltimore MD, November 1990.

"Context and Contingency in Drug-Related Violence." Presented at the Annual Meeting of the American Psychological Association, Boston MA, August 1990.

"The Dragon Breathes Fire: Chinese Organized Crime in New York City" (R. Kelly, K. Chin, and J. Fagan). Presented to the Political Sociology Faculty of the University of Florence, Firenze, Italy, May 1990.

"The Political Economy of Drug Use and Drug Dealing among Urban Gangs (J. Fagan and A. Hamid). Presented at the Annual Meeting of the American Society of Criminology, Reno NV, November 1989.

"The Comparative Impacts of Juvenile and Criminal Court Sanctions for Adolescent Felony Offenders" (J. Fagan and M. Schiff). Presented at the Annual Meeting of the American Society of Criminology, Reno NV, November 1989.

"Symbolic and Substantive Effects of Waiver Legislation in New Jersey" (M. Schiff and J. Fagan). Presented at the Annual Meeting of the Law and Society Association, Vail CO, June, 1988.

"The Predictive Validity of Judicial Determinations of Dangerousness: Preventive Detention of Juvenile Offenders in the Schall v. Martin Case" (J. Fagan and M. Guggenheim). Presented at the Annual Meeting of the American Society of Criminology, Montreal, Quebec,

November, 1987; and, at the Fortunoff Colloquium Series, New York Unversity School of Law, November, 1988.

"The Comparative Effects of Legal and Social Sanctions in the Recurrence of Wife Abuse" (J. Fagan and S. Wexler). Presented at the Third National Conference on Family Violence Research, University of New Hampshire, Durham, NH, July, 1987

"The Stability of Delinquency Correlates in Eight High Crime Neighborhoods" (J. Deslonde and J. Fagan). Presented at the 1986 Annual Conference of Blacks in Criminal Justice, Washington DC, March 1986

"Complex Behaviors and Simple Measures: Understanding Violence in Families" (J. Fagan and S. Wexler). Presented at the Annual Meeting of the American Society of Criminology, San Diego, November, 1985

"Social Ecology of Violent Delinquency" (J. Fagan, P. Kelly and M. Jang). Presented at Annual Meeting of the Academy of Criminal Justice Sciences, Chicago, IL, March, 1984.

"Delinquent Careers of Chronically Violent Juvenile Offenders" (E. Hartstone, J. Fagan and M. Jang). Presented at Pacific Sociological Association, San Jose, CA, April 1983.

"*Parens Patriae* and Juvenile Parole." Presented at the National Conference on Criminal Justice Evaluation, Washington, DC, November 1978.

"Indigenous Justice: The San Francisco Community Board Program" (J. Fagan). Presented at the Annual Meeting of the American Society of Criminology, November 1977, Atlanta, Georgia.

"An Assessment of the Impact of Treatment and Other Factors on Successful Completion of a Pretrial Intervention Program" (J. Fagan). Presented at the National Conference on Criminal Justice Evaluation, February 1977.

EXPERT TESTIMONY:

U.S. v. Antonio Williams and John Hummons, 12-CR-887, Chief Judge Ruben Castillo, U.S. District Court, Northern Division of Illinois (2013)

In re: Ferguson Police Department, Special Litigation Section, Civil Rights Division, U.S. Department of Justice, DJ 207-42-6

Floyd, et al. v. City of New York, et al., U.S. District Court, Southern District of New York, 08 Civ. 1034 (SAS) (2008)

Davis et al. v. City of New York, U.S. District Court, Southern District of New York, 10 Civ. 0699 (SAS) (2010)

Ligon et al. v. City of New York, U.S. District Court, Southern District of New York,12 Civ. 2274 (SAS) (2012)

State v. Raheem Moore, Circuit Court # 08CF05160, State of Wisconsin, Criminal Division, Milwaukee County

Connecticut v Arnold Bell, Docket # CR02-0005839, District Court of Connecticut, New Haven

Jessica Gonzales v. United States, Petition No. 1490-05, Inter Am. C.H.R., Report No. 52/07, OEA/Ser.L./V/II.128, doc. 19 (2007)

U.S. v. Joseph Brown and Jose Lavandier, U.S. District Court for the District of Vermont, Docket No. 2:06-CR-82-2

United States v. Khalid Barnes, U.S. District Court, Southern District of New York, 04 Cr. 186 (SCR)

Loggins v. State, 771 So. 2d 1070 (Ala. Crim. App. 1999)

Truman-Smith v. Bryco Firearms et al. (02-30239 (JBW)), and *Johnson v. Bryco Firearms et al.* (03-2582 (JBW)), Eastern District of New York

U.S. v. Alan Quinones, S3 00 Cr. 761 (JSR), Southern District of New York

National Association for the Advancement of Colored People (NAACP) and National Spinal Cord Injury Association (NSCIA) v. American Arms Corporation, Accu-sport Corporation, et. al., Eastern District of New York, 99 CV 3999 (JBW), 99 CV7037 (JBW)

U.S. v. Durrell Caldwell, J-2045-00; J-2250-00, Family Division, Juvenile Branch, Superior Court of the District of Columbia

Nixon v. Commonwealth of Pennsylvania, Department of Public Welfare, 839 A.2d 277 (Pa. 2003)
National Congress of Puerto Rican Rights v. City of New York, 99 Civ. 1695 (SAS) (HBP)
State of Wisconsin v. Rodolfo Flores, 99-CF-2866, Circuit Branch 28 (Hon. Thomas R. Cooper)
State of Wisconsin v. Rolando Zavala, 97-CF-547, Circuit Branch 3 (Hon. Bruce E. Shroeder)
Hamilton v. Accu-Tek et al., 935 F. Supp. 1307 (E.D.N.Y. 1996)
U.S. v. Yohann Renwick Nelson, 920 F.Supp. 825 (M.D. Tenn., 1996)

OTHER PRESENTATIONS:

"Guns, Social Contagion, and Youth Violence." Presented at the Annual Conference of the Cuyahoga County Mental Health Institute, Case Western Reserve University, Cleveland, May 1998.
"The Future of the Criminal Law on Domestic Violence." Presented to the Governor's Criminal Justice Conference, Albany, New York, October 1996.
"Women, Law and Violence: Legal and Social Control of Domestic Violence." Presented at the 29th Semi-Annual Research Conference of the Institute for Law and Psychiatry, School of Law, University of Virginia, Charlottesville VA, November 1995.
"Punishment versus Treatment of Juvenile Offenders: Therapeutic Integrity and the Politics of Punishment," Delaware Council on Criminal Justice, Wilmington DE, October 1995.
Keynote Speaker, "The Criminalization of Domestic Violence: Promises and Limitations," National Conference on Criminal Justice Evaluation, National Institute of Justice, Washington DC, July 1995.
"Limits and Promises of New Jersey's Prevention of Domestic Abuse Act," Institute of Continuing Legal Education, Bar Association of the State of New Jersey, New Brunswick, July 1993.
"Technical Review on Alcohol and Violence," National Institute on Alcoholism and Alcohol Abuse, Rockville MD: May 1992.
Plenary Speaker, "Race and Class Conflicts in Juvenile Justice," Annual Meeting of the Juvenile Justice Advisory Groups, Washington DC, April 1991
Plenary Speaker, "Punishing Spouse Assault: Implications, Limitations and Ironies of Recent Experiments on Arrest Policies," Annual Meeting of the Society for the Study of Social Problems, Washington DC, August 1990.
"Drug Use, Drug Selling and Violence in the Inner City," Joint Center for Political Studies, Washington DC: November 1989.
"Technical Review on Drugs and Violence," National Institute on Drug Abuse, Rockville MD: September, 1989.
Carnegie Council on Adolescent Development, "Workshop on Adolescent Violence." Washington DC: May 1989.
"National Symposium on Families in Courts." National Judicial College, National Center for State Courts, and the American Bar Association (joint conveners). Reno NV, May 1989.
Plenary Panelist, "Delinquency Research in the 1990's." Annual Meeting of the Western Society of Criminology, Anaheim CA, February 1989.
Keynote Speaker, Philadelphia Coalition for Children and Youth, Juvenile Justice Conference, June, 1988
Ohio Governor's Task Force on Juvenile Violence, Statewide Conference on Gangs, May, 1988
OJJDP State Advisory Groups, Regional Workshops, 1982, 1987
Michigan Commission on Juvenile Justice, Symposium on Contemporary Programs in Rehabilitation of Serious Juvenile Offenders, 1986
Interagency Panel on Research and Development on Children and Adolescents, National Institute of Education, 1985, 1987
Symposium on Addressing the Mental Health Needs of the Juvenile Justice Population, National Institute of Mental Health, l985
OJJDP/ADAMHA Joint Task Force on Serious Juvenile Offenders with Drug and Alcohol

Abuse and Mental Health Problems, National Institute on Drug Abuse, 1984
National Conference on Family Violence as a Crime Problem, National Institute of Justice, 1984
Governor's Task Force on Juvenile Sex Offenders, California Youth Authority, Sacramento, CA, 1984
Los Angeles County Medical Association, Los Angeles, California: Family Violence and Public Policy, 1983
Minority Research Workshop, National Institute of Law Enforcement and Criminal Justice, LEAA, Department of Justice, 1979

TECHNICAL REPORTS (SELECTED):

Project Safe Neighborhoods in Chicago: Three Year Evaluation and Analysis of Neighborhood Level Crime Indicators, Final Technical Report (J. Fagan, A. Papachristos, T.L. Meares), Grant # 2004-GP-CX-0578, Bureau of Justice Assistance, U.S. Department of Justice (2006).
Social and Ecological Risks of Domestic and Non-Domestic Violence against Women in New York City (J. Fagan, J. Medina-Ariza, and S.A. Wilt). Final Report, Grant 1999-WT-VW-0005, National Institute of Justice, U.S. Department of Justice (2003).
The Comparative Impacts of Juvenile and Criminal Court Sanctions on Recidivism among Adolescent Felony Offenders(J. Fagan, A. Kupchik, and A. Liberman). Final Report, Grant 97-JN-FX-01, Office of Juvenile Justice and Delinquency Prevention (2003).
Drug Control in Public Housing: The Impact of New York City's Drug Elimination Program on Drugs and Crime (J. Fagan, J. Holland, T. Dumanovsky, and G. Davies). Final Report, Grant No. 034898, Substance Abuse Policy Research Program, Robert Wood Johnson Foundation (2003).
The Effects of Drug Enforcement on the Rise and Fall of Homicides in New York City, 1985-95 (J. Fagan). Final Report, Grant No. 031675, Substance Abuse Policy Research Program, Robert Wood Johnson Foundation (2002).
Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases after Furman (J. Fagan, J. Liebman, A. Gelman, V. West, A. Kiss, and G. Davies). Final Technical Report, Grant 2000-IJ-CX-0035, National Institute of Justice (2002).
Analysis of NYPD AStop and Frisk Practices" (J. Fagan, T.Dumanovsky, and A. Gelman). Office of the Attorney General, New York State, 1999 (contributed chapters and data analyses).
Situational Contexts of Gun Use by Young Males in Inner Cities (J. Fagan and D.L.Wilkinson). Final Technical Report, Grant SBR 9515327, National Science Foundation; Grant 96-IJ-CX-0021, National Institute of Justice; Grant R49/CCR211614, Centers for Disease Control and Prevention (NIH), 1999.
The Specific Deterrent Effects of Arrest on Domestic Violence (C. Maxwell, J. Garner and J. Fagan). Final Technical Report, Grant 93-IJ-CX-0021, National Institute of Justice, 1999.
The Epidemiology and Social Ecology of Violence In Public Housing (J. Fagan, T. Dumanovsky, J.P. Thompson, G. Winkel, and S. Saegert). National Consortium on Violence Research, National Science Foundation, 1998.
Reducing Injuries to Women in Domestic Assaults (J. Fagan, J. Garner, and C. Maxwell). Final Technical Report, Grant R49/CCR210534, Centers for Disease Control, National Institutes of Health, 1997.
The Effectiveness of Restraining Orders for Domestic Violence (J. Fagan, C. Maxwell, L. Macaluso, & C. Nahabedian). Final Technical Report, Administrative Office of the Courts, State of New Jersey, 1995.
Gangs and Social Order in Chinatown: Extortion, Ethnicity and Enterprise (K. Chin, J.Fagan, R. Kelly). Final Report, Grant 89-IJ-CX-0021 (S1), National Institute of Justice, U.S. Department of Justice, 1994.
The Comparative Impacts of Juvenile and Criminal Court Sanctions for Adolescent Felony Offenders: Certainty, Severity and Effectiveness of Legal Intervention (J. Fagan). Final Report, Grant 87-IJ-

CX-4044, National Institute of Justice, U.S. Department of Justice, 1991.

Final Report of the Violent Juvenile Offender Research and Development Program, Grant 85-MU-AX-C001, U.S. Office of Juvenile Justice and Delinquency Prevention:

- *Volume I: Innovation and Experimentation in Juvenile Corrections: Implementing a Community Reintegration Model for Violent Juvenile Offenders* (J. Fagan and E. Hartstone), 1986.
- *Volume II: Separating the Men from the Boys: The Transfer of Violent Delinquents to Criminal Court* (J. Fagan and M. Forst), 1987.
- *Volume III: Rehabilitation and Reintegration of Violent Juvenile Offenders: Experimental Results* (J. Fagan, M. Forst and T. Scott Vivona), 1988.

Drug and Alcohol Use, Violent Delinquency, and Social Bonding: Implications for Policy and Intervention (J. Fagan, J.G. Weis, J. Watters, M. Jang, and Y. Cheng), Grant 85-IJ-CX-0056, National Institute of Justice, 1987.

Minority Offenders and the Administration of Juvenile Justice in Colorado (E. Slaughter, E. Hartstone, and J. Fagan). Denver: Colorado Division of Criminal Justice, 1986.

Final Report: The Impact of Intensive Probation Supervision on Violent Juvenile Offenders in the Transition Phase Adolescence to Adulthood (J. Fagan and C. Reinarman), Grant 82-IJ-CX-K008, National Institute of Justice, 1986.

Final Report: National Family Violence Evaluation (J. Fagan, E. Friedman, and S. Wexler), Grant 80-JN-AX-0004, Office of Juvenile Justice and Delinquency Prevention, 1984. (Also, three interim reports: History and Development, Process Analysis, Client and Program Characteristics.)

A Resident Mobilization Strategy for Prevention of Violent Juvenile Crime (J. Deslonde, J. Fagan, P. Kelly, and D. Broussard). San Francisco: The URSA Institute, 1983.

Background Paper for the Violent Juvenile Offender Research and Development Program (J. Fagan, S. Jones, E. Hartstone, & C. Rudman), Washington, DC: Office of Juvenile Justice and Delinquency Prevention, April 1981.

EDITORIAL:

Senior Editor, *Criminology and Public Policy*, 2001 - 2008
Advisory Board, *Family and Child Law Abstracts*, Legal Scholarship Network, 1999-present
Editorial Advisory Board, *Journal of Criminal Law and Criminology*, 1996-2010
Editorial Board, *Criminology*, 1997-2001
Editorial Board, *Journal of Quantitative Criminology*, 2001-2008
Editorial Board, *Crime and Justice: A Review of Research*, 1998-present
Editorial Board, *Journal of Research in Crime and Delinquency*, 1997-present
Editor, *Journal of Research in Crime and Delinquency*, 1990 - 1995
Editor, *Contemporary Drug Problems*, Special Issues on Crack (Winter 1989, Spring 1990)
Co-Editor, *Oxford Readers in Crime and Justice* (w. Michael Tonry), Oxford University Press, 1994-95

ADVISORY BOARDS AND COMMITTEES:

Research Advisory Board, The Innocence Project (2009 – present)
Committee on Law and Justice, National Academy of Sciences (2000-2006) (Vice Chair, 2004-6)
Member, Committee to Review Research on Police Policy and Practices, National Research Council, National Research Council (2001-2003)
Working Group on Law, Legitimacy and the Production of Justice, Russell Sage Foundation (2000-present)
Working Group on Incarceration, Russell Sage Foundation (2000-2006)
Academic Advisory Council, National Campaign Against Youth Violence (The White House)

(1999-2001)
Fellow, Aspen Roundtable on Race and Community Revitalization (1999 - 2001)
Fellow, Earl Warren Legal Institute, University of California School of Law (1998 - present)
Research Network on Adolescent Development and Juvenile Justice, MacArthur Foundation (1996-2006)
National Consortium on Violence Research, Carnegie Mellon University (NSF) (1996-present)
Committee on the Assessment of Family Violence Interventions, National Research Council, National Academy of Sciences (1994-1998)
Advisory Board, Evaluation of the Comprehensive Gang Intervention Program, University of Chicago (1997-present)
Committee on Opportunities in Drug Abuse Research, Institute of Medicine, National Academy of Sciences (Special Consultant) (1995 - 1996).
Initial Review Group, Violence and Traumatic Stress Research Branch, National Institute of Mental Health, National Institute of Health (1994-1998)
Chair, Working Group on the Ecology of Crime in Inner Cities, Committee for Research on the Urban Underclass, Social Science Research Council (1989-1994)
Advisory Board, Evaluation of the Jobs Corps, U.S. Department of Labor (1993-present)
Advisory Board, National Service Action Corps, Robert F. Kennedy Memorial (1993-1997)
Advisory Board, Evaluation of Family Violence Prevention and Services Act, The Urban Insitute (1993-1994)
Scientific Core Group, Program on Human Development and Criminal Behavior, MacArthur Foundation (1991-1992)
Injury Control Panel on Violence Prevention, Centers for Disease Control and Prevention, U.S. Department of Health and Human Services (1990-1991)
Princeton Working Group on Alternatives to Drug Prohibition, Woodrow Wilson School of Public and International Affairs, Princeton University (1990-1994)
Racial Disparities in Juvenile Justice, Pennsylvania Juvenile Court Judges Commission (1991-92)
Racial Disparities in Juvenile Justice, Missouri Department of Law and Public Safety (1990-91)
Conditions of Confinement of Juveniles, National Institute for Juvenile Justice and Delinquency Prevention (1990-1992)
Research Program on "Linking Lifetimes -- Intergenerational Mentoring for Youths at Risk and Young Offenders," Temple University (1989-91)
Research Program on Juvenile Court Sanctions for Family Violence, National Council of Juvenile and Family Court Judges, Bureau of Justice Assistance, U.S. Department of Justice (1987-1988)
School Crime Research and Development Program, Office of Juvenile Justice and Delinquency Prevention, National Institute for Juvenile Justice and Delinquency Prevention (1986-1988)
Research and Development Project on Sexually Exploited Children, Tufts University, New England Medical Center Hospital, Boston, MA (1980-83)
Administration of Justice Program, National Urban League, New York, NY (1982-1987)

PROFESSIONAL ASSOCIATIONS:

Society for Empirical Legal Studies
American Society of Criminology
American Sociological Association
Law and Society Association
American Association for the Advancement of Science
American Public Health Association

RESEARCH GRANTS:

Principal Investigator, *Citizens, Police and the Legitimacy of Law in New York*, Grant # 20033258, Open Society Foundations, October 2011-September 2013

Principal Investigator, *Proactive Policing and Mental Health: Individual and Community Effects*, Grant # 69669, Public Health Law Research Program, Robert Wood Johnson Foundation, 2011-13

Co-Investigator, *Street Stops and Police Legitimacy*, Grant 2010-IJ-CX-0025 from the National Institute of Justice, U.S. Department of Justice, subcontract from New York University, 2011 – 2012

Principal Investigator, "Evaluation of Project Safe Neighborhoods in Chicago," May 2004 – September 2010, Grant # 2004-GP-CX-0578, Bureau of Justice Assistance, Office of Justice Programs, U.S. Department of Justice.

Principal Investigator, "Capital Sentencing of Adolescent Murder Defendants," March – December 2004, Grant #20012433 from the Open Society Institute. Additional support from the Wallace Global Fund.

Principal Investigator, "Legitimacy, Accountability, and Social Order: Majority and Minority Community Perspectives on the Law and Legal Authorities," September 2002 - August 2003, Russell Sage Foundation.

Principal Investigator, "Social Contagion of Violence," Investigator Awards in Health Policy Program, Robert Wood Johnson Foundation, September 2002 – June 2004

Principal Investigator, "Getting to Death: Fairness and Efficiency in the Processing and Conclusion of Death Penalty Cases after Furman," Grant #2000-IJ-CX-0035, September 2000 - August 2001, National Institute of Justice, U.S. Department of Justice.

Co-Principal Investigator, "Columbia Center for the Study and Prevention of Youth Violence," Grant R49-CCR218598, October 1, 2000 - September 30, 2005, Centers for Disease Control, U.S. Department of Health and Human Services.

Principal Investigator, "Neighborhood Effects on Legal Socialization of Adolescents," John D. and Catherine T. MacArthur Foundation, October 1, 2000 - September, 30, 2002.

Principal Investigator, "Violence Prevention through Legal Socialization," 1 R01-HD-40084-01, October 1, 2000 - September 30, 2003, National Institute of Child and Human Development, U.S. Department of Health and Human Services.

Principal Investigator, "The Effects Of Incarceration On Crime And Work In New York City: Individual And Neighborhood Impacts," Russell Sage Foundation, Grant 85-00-11, September 2000 - August 2002.

Principal Investigator, "Community Courts And Community Ecology: A Study of The Red Hook Community Justice Center," Grant 2000-MU-AX-0006, June 1, 2000 - December 31, 2002, National Institute of Justice, U.S. Department of Justice.

Principal Investigator, "Age, Crime and Sanction: The Effect of Juvenile Versus Adult Court Jurisdiction on Age-specific Crime Rates of Adolescent Offenders," Grant JR-VX-0002, June 1999 - August 2000, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice.

Principal Investigator, "Social and Ecological Risks of Domestic and Non-domestic Violence Against Women in New York City," Grant WT-VX-0005, April 1999 - December 2000, National Institute of Justice, U.S. Department of Justice.

Principal Investigator, "Drug Control in Public Housing: An Evaluation of the Drug Elimination Program of the New York City Public Housing Authority," September 1998 - August 2001, Robert Wood Johnson Foundation.

Principal Investigator, "The Criminalization of Delinquency: Comparative Impacts of Juvenile and Criminal Court Sanctions on Adolescent Felony Offenders," March 1997 - September 2000, Office of Juvenile Justice and Delinquency Prevention, Annie E. Casey Foundation, Open Society Institute.

Co-Principal Investigator, "Post-Traumatic Stress Among Police," October 1997 - April 2000, National Institute of Mental Health, 1 R01 MH56350-01, National Institute of Health (subcontract from University of California at San Francisco).

Principal Investigator, "The Rise and Fall of Drug-Related Homicides in New York City: 1985-95," July 1997 - June 2000, Robert Wood Johnson Foundation.

Principal Investigator, "Lethal and Non-Lethal Violence: Individual, Social and Neighborhood Risk Factors," October 1996 - September 1999, Centers for Disease Control and Prevention, National Institute of Health, R49/CCR212753-01; National Institute of Justice, 97-IJ-CX-0013.

Principal Investigator, "The Situational Context of Gun Use by Young Males," October 1995 - January 1998, National Science Foundation, SBR-9515327; National Institute of Justice, 96-IJ-CX-0021; Centers for Disease Control and Prevention (NIH) R49/CCR211614.

Principal Investigator, "The Situational Context of Gun Use by Young Males in Inner Cities," February 1995 - August 1996, The Harry Frank Guggenheim Foundation.

Principal Investigator, "Reducing Injuries to Women from Spouse Assault," September 1994 - February 1996, Centers for Disease Control and Prevention, National Institute of Health, R49/CCR210534-01.

Co-Principal Investigator, "Crime Commission Rates of Incarcerated Prisoners: Estimates from the Second Generation of Inmate Surveys," June 1994 - February 1995, National Institute of Justice, 94-IJ-CX-0017.

Principal Investigator, "Impacts of Arrest on the Social Control of Violence Among Intimates," October 1993 - June 1994, National Institute of Justice, 93-IJ-CX-0021.

Principal Investigator, "The Role of Legal and Social Controls in Controlling Violence among Intimates," July 1993 - December 1994, The Harry Frank Guggenheim Foundation.

Co-Principal Investigator, "Measuring the Use of Force by Police," September 1993 - August 1994, National Institute of Justice, 92-IJ-CX-K028.

Co-Principal Investigator, "Female Participation in Drug Selling," September 1992 - August 1994, National Science Foundation, SES-92-07761. Also supported by the Rockefeller Foundation.

Principal Investigator, "Civil and Criminal Sanctions for Domestic Violence," June 1992 - September 1994 Administrative Office of the Courts, State of New Jersey.

Co-Principal Investigator, "Careers in Crack, Drug Use and Distribution, and Non-Drug Crime," February 1991 - January 1993, National Institute on Drug Abuse, National Institute of Health, 1R01-DA-06615-01.

Principal Investigator, "Patterns of Organized Crime Activities among Asian Businesses in the New York Metropolitan Area," October 1989 - March 1991, National Institute of Justice, 89-IJ-CX-0021.

Principal Investigator, "Desistance from Family Violence," July 1990 - January 1992, The Harry Frank Guggenheim Foundation.

Principal Investigator, "Pipeline Study for a Field Experiment on Drug Testing in Community Corrections," June-December, 1990, National Institute of Justice, 90-IJ-R-026

Principal Investigator, "Changing Patterns of Drug Abuse and Criminality among Crack Users," December 1987 - September 1989, National Institute of Justice, 87-IJ-CX-0064-S1.

Principal Investigator, "The Comparative Impacts of Criminal and Juvenile Sanctions for Adolescent Felony Offenders," October 1987 - September 1989, National Institute of Justice, 87-IJ-CX-4044.

Principal Investigator, "Drug Abuse and Delinquency among Dropouts and Gang Members: A Secondary Analysis," October 1987 - December 1988, National Institute for Juvenile Justice and Delinquency Prevention, 87-JN-CX-0012.

Principal Investigator, "Drug and Alcohol Use, Violent Delinquency, and Social Bonding," October 1985 - December 1986, National Institute of Justice, 85-IJ-CX-0056.

Principal Investigator, "Violent Juvenile Offender Research and Development Program," November 1980 - June 1987, National Institute for Juvenile Justice and Delinquency Prevention, 80-JN-AX-0012, 85-MU-CX-0001.

Principal Investigator, Preventive Detention and the Prediction of Dangerousness Among Juveniles: Pretrial Crime and Criminal Careers in the *Schall v. Martin* Cohort, New York City Criminal Justice Agency.

Principal Investigator, "AIDS Community Education Effectiveness Study," January 1986 - June 1987, California Department of Health, Grant D0056-86.
Principal Investigator, "Longitudinal Evaluation of Intensive Probation Supervision for Violent Offenders," October 1982 - June 1985, National Institute of Justice, 82-IJ-CX-K008.
Principal Investigator, National Evaluation of the LEAA Family Violence Program," October 1978 -January 1984, National Institute for Juvenile Justice and Delinquency Prevention, 80-JN-AX-0003.

PEER REVIEW:

Scholarly Journals

Law and Society Review
Journal of Contemporary Ethnography
American Sociological Review
Crime and Justice: An Annual Review of Research
Sociological Methods and Research
Justice Quarterly
Violence and Victims
Social Science Quarterly
Social Problems
American Journal of Sociology
Journal of Drug Issues
Journal of Quantitative Criminology
Journal of Criminal Justice
Alcohol Health and Research World
Criminal Justice Ethics
Contemporary Drug Problems

University Presses

Rutgers University Press
State University of New York Press
Temple University Press
University of Chicago Press
Cambridge University Press
Oxford University Press
Princeton University Press

Other Presses

MacMillan Publishing
St. Martins Press
Greenwood Publications
Sage Publications

Research Grant Reviews

National Institute on Mental Health, Violence and Traumatic Stress Branch
Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, USPHS
Law and Social Science Program, National Science Foundation
Sociology Program, National Science Foundation
National Institute on Drug Abuse, Prevention Branch
National Institute on Drug Abuse, Epidemiology Branch
National Institute of Justice
Office of Juvenile Justice and Delinquency Prevention
The Carnegie Corporation of New York
The W.T. Grant Foundation

COURSES TAUGHT:

Seminar on Incarceration
Seminar on Policing
Criminal Law
Capital Punishment
Empirical Analysis of Law
Juvenile Justice
Seminar on Crime and Justice in New York

Pro-Seminar on Race, Crime and Law
Pro-Seminar on Community Justice and Problem-Solving Courts
Seminar on Regulation in the Criminal Law
Law and Social Science
Seminar on Criminology
Foundations of Scholarship
Seminar on Violent Behavior
Seminar on Drugs, Law and Policy
Seminar on Communities and Crime
Research Methods in Criminal Justice and Criminology
Advanced Research Methods
Qualitative Research Methods
Criminal Justice Policy Analysis
Administration of Juvenile Corrections
Research Methods
Seminar on Deterrence and Crime Control Theory

CONSULTATIONS:

Robina Institute, University of Minnesota School of Law, 2012
Boston Police Department, 2012-present
New Jersey Commission on Law Enforcement Standards and Practices, 2006-7
London School of Economics, Urban Age Colloquium, 2005
Inter-American Development Bank, Urban Security and Community Development, 2002-3
Trans.Cité (Paris, France), Security in Public Transportation, 2002
Institute for Scientific Analysis, Domestic Violence and Pregnancy Project, 1995-96
Department of Psychology, University of Wisconsin (Professor Terrie Moffitt), 1995-1999
National Funding Collaborative for Violence Prevention (Consortium of foundations), 1995
National Council on Crime and Delinquency, 1989-94
Victim Services Agency, City of New York, 1994-2000
National Conference of State Legislatures, 1994-2001
U.S. Department of Labor, 1994
City of Pittsburgh, Office of the Mayor, 1994
Center for the Study and Prevention of Violence, Colorado University, 1993 - 2000
Washington (State) Department of Health and Rehabilitative Services, 1993
National Council of Juvenile and Family Court Judges, 1993
Center for Research on Crime and Delinquency, Ohio State University, 1992, 1993
New York City Criminal Justice Agency, 1992, 1993
Violence Prevention Network, Carnegie Corporation, 1992-3
Research Triangle Institute, 1993
National Institute of Corrections, 1992, 1993
Colorado Division of Criminal Justice, 1991
Juvenile Delinquency Commission, State of New Jersey, 1991
University of South Florida, Dept. of Criminology, 1991-92
Florida Mental Health Institute, 1991
Rand Corporation, 1991-92
Juvenile Corrections Leadership Forum, 1990
Texas Youth Commission, 1990
California State Advisory Group on Juvenile Justice, 1989
New York State Division of Criminal Justice Services, Family Court Study, 1989
Juvenile Law Center, Philadelphia, 1988
American Correctional Association, 1988
Institute for Court Management, National Center for State Courts, 1987-present
Correctional Association of New York, 1987
Eisenhower Foundation, Washington DC, 1987-1990

New York City Department of Juvenile Justice, 1987-1990
Juvenile Justice and Delinquency Prevention Council, Colorado Division of Criminal Justice, 1983-87
Office of Criminal Justice Services, State of Ohio, 1983
Utah Youth Corrections Division, Salt Lake City, Utah, 1982
Office of Criminal Justice, State of Michigan, 1982,1986
National Center for the Prevention and Control of Rape, NIMH, 1980

SERVICE:

Columbia University
University Senate, Mailman School of Public Health, 2003-2007
Director, JSD Program, Columbia Law School, 2001-2010

Professional
Chair, Sutherland Award Committee, American Society of Criminology, 2006-7
Chair, National Policy Committee, American Society of Criminology, 2002-2003
Delegate from the American Society of Criminology to the American Association for the Advancement of Science, 1995-1999
Executive Counselor, American Society of Criminology, 1994-97
Chair, Nominations Committee, American Society of Criminology, 1995-96.
Counsel, Crime, Law and Deviance Section, American Sociological Association, 1993-94
Nominations Committee, American Society of Criminology, 1993-94
Site Selection Committee, American Society of Criminology, 1992
Program Committee, American Society of Criminology, 1988, 1990, 2000
Awards Committee, Western Society of Criminology, 1988

Public
Domestic Violence Working Group, New Jersey Administrative Office of the Courts, 1991-1998
Prevention Task Force, New Jersey Governor's Commission on Drug and Alcohol Abuse, 1990
State Judicial Conference, State of New Jersey, Administrative Office of the Courts, 1990
Task Force on Youth Gangs, State of New York, Division for Youth, 1989-90

Exhibit B:

County-Level Racial Composition Data

Estimated Racial Composition of Eight Counties Associated with the Stash House Cases

Counties:	Est. Total Adult Pop.	Est. Black	% Black	Est. White	% White	Est. Hispanic	% Hispanic
Cook	3959803	937010	24	2309598	58	816482	21
DuPage	689453	28035	4	563900	82	76871	11
Kane	363266	18723	5	280600	77	94183	26
Kendall	76453	3764	5	66355	87	10149	13
Lake	508379	33033	6	405546	80	85139	17
LaSalle	87264	1511	2	82650	95	5435	6
Will	479103	50393	11	377010	79	63058	13
Winnebago	220423	23580	11	184071	84	18672	8
TOTAL	**6384143**	**1096047**	**17%**	**4269728**	**67%**	**1169986**	**18%**

Sources:

- U.S. Census Bureau, 2006-2010 American Community Survey (ACS)
- U.S. Census Bureau, 2009-2013 ACS
- Tables: B01001, B01001A, B01001B, B01001I (https://factfinder.census.gov)

Notes:

- 2006-2013 average created by averaging the 2006-2010 ACS 5-year estimates and the 2009-2013 ACS 5-year estimates
- Black defined as "Black or African American Alone"
- White defined as "White Alone"
- Hispanic defined as "Hispanic or Latino"
- Adult population defined as individuals 18 years of age and older, including non-citizens

Exhibit C:

ATF Departures from Criteria

Exhibit C-1:

Chart Summarizing ATF Departures from Criteria

ATF Departures from Criteria, by Case and Race

No.	Case Name	Case No.	Def. Name	Def. Race	Fulfilled requirement to target established robbery groups	Fulfilled requirement that two targets be violent offenders	Fulfilled requirement that all members be currently criminally active	Fulfilled requirement that one target have a past violent conviction	Fulfilled requirement that the group have access to weapons	Fulfilled requirement to document all known suspects in a Takedown Memo	Fulfilled requirement to identify all suspects before the arrest day	Fulfilled requirement to meet with at least two members of the crew	Fulfilled requirement to meet with the targets three times	Total No. Deviations
Cases Involving All Black Defendants														
1	United States v. Jackson	13-CR-636	Thomas Jackson	Black	No	Yes	No	Yes	Yes	Yes	No	Yes	Yes	3
			Calvin Williams, Jr.	Black										
			Demetrius Wrotten	Black										
			Nolan Swain	Black										
2	United States v. Paxton	13-CR-103	Cornelius Paxton	Black	Yes	No	No	Yes	Yes	No	No	Yes	Yes	4
			Randy Walker	Black										
			Randy Paxton	Black										
			Adonis Berry	Black										
			Matthew Webster	Black										
3	United States v. Davis	13-CR-063	Paul Davis	Black	No	No	No	No	Yes	No	No	No	Yes	7
			Alfred Withers	Black										
			Julius Morris	Black										
			Jayvon Byrd	Black										
			Vernon Smith	Black										
			Corey Barbee	Black										
			Dante Jeffries	Black										
4	United States v. Williams	12-CR-887	Antonio Williams	Black	No	Yes	No	Yes	No	No	No	Yes	Yes	5
			John T. Hummons	Black										
			Howard Lee	Black										
5	United States v. Cousins	12-CR-865	David Cousins	Black	No	Yes	No	Yes	Yes	No	No	Yes	Yes	4
			Michael Cousins	Black										
			Dunwon Lloyd	Black										
6	United States v. Payne	12-CR-854	William Payne	Black	No	No	Yes	Yes	Yes	Yes	No	Yes	Yes	3
			Brandon Jackson	Black										
			Brian Jackson	Black										
			Deandre Bruce	Black										
7	United States v. Brown	12-CR-632	Abraham Brown	Black	No	Yes	No	Yes	Yes	No	No	Yes	Yes	4
			Kenneth Taylor	Black										
			Alfred Washington	Black										
			Dwaine Jones	Black										
			Christopher Davis	Black										

ATF Departures from Criteria, by Case and Race

No.	Case Name	Case No.	Def. Name	Def. Race	Fulfilled requirement to target established robbery groups	Fulfilled requirement that two targets be violent offenders	Fulfilled requirement that all members be currently criminally active	Fulfilled requirement that one target have a past violent conviction	Fulfilled requirement that the group have access to weapons	Fulfilled requirement to document all known suspects in a Takedown Memo	Fulfilled requirement to identify all suspects before the arrest day	Fulfilled requirement to meet with at least two members of the crew	Fulfilled requirement to meet with the targets three times	Total No. Deviations
8	United States v. Flowers	11-CR-779	Myreon Flowers	Black	Yes	No	Yes	No	Yes	No	No	No	Yes	5
			David Flowers	Black										
			Anwar Trapp	Black										
			Duane Jones	Black										
			Anthony Adams	Black										
			Tracy Conley	Black										
			Rudy Space	Black										
9	United States v. Alexander	11-CR-148	William Alexander	Black	No	No	Yes	No	No	Yes	No	Yes	Yes	5
			Hugh Midderhoff	Black										
			Devin Saunders	Black										
10	United States v. Mayfield	09-CR-687, 15-CR-497	Leslie Mayfield	Black	No	No	No	Yes	Yes	Yes	No	Yes	No	5
			Montreece Kindle	Black										
			Nathan Ward	Black										
			Dwayne White	Black										
11	United States v. Mahan	08-CR-720	Tony Mahan	Black	No	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	2
			James McKenzie	Black										
			Mario Barber	Black										
			Steven Stewart	Black										
12	United States v. Hall	08-CR-386	Shamonte Hall	Black	No	Yes	Yes	Yes	Yes	No	No	Yes	No	4
			Karinder Gordon	Black										
			Rodney Ray	Black										
13	United States v. Tanner	07-CR-707	Rodney Tanner	Black	No	No	No	Yes	No	No	No	No	Yes	7
			Keith Calvert	Black										
			Fred Calvert	Black										
14	United States v. Sidney	07-CR-652	Ben Sidney	Black	Yes	No	Yes	Yes	No	Yes	Yes	Yes	Yes	2
			Jerome Scott	Black										
			Charles Lawrence	Black										
15	United States v. Walker	07-CR-270	Hurreon Walker	Black	No	No	No	Yes	Yes	Yes	Yes	Yes	No	4
			Rashad Logan	Black										
16	United States v. Lewis	07-CR-007	Scott Lewis	Black	No	Yes	No	Yes	No	No	No	Yes	No	6
			Vernon Williams	Black										
			Lavoyne Billingsley	Black										
17	United States v. Harris	06-CR-586	Michael Harris	Black	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	2
			Chris Blitch	Black										
			Devarl Washington	Black										
			Michael Carwell	Black										
18	United States v. Tankey	06-CR-50074	Joaquin J. Tankey	Black	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No	3
			James T. King	Black										
			Demarlon J. Lewis	Black										

ATF Departures from Criteria, by Case and Race

No.	Case Name	Case No.	Def. Name	Def. Race	Fulfilled requirement to target established robbery groups	Fulfilled requirement that two targets be violent offenders	Fulfilled requirement that all members be currently criminally active	Fulfilled requirement that one target have a past violent conviction	Fulfilled requirement that the group have access to weapons	Fulfilled requirement to document all known suspects in a Takedown Memo	Fulfilled requirement to identify all suspects before the arrest day	Fulfilled requirement to meet with at least two members of the crew	Fulfilled requirement to meet with the targets three times	Total No. Deviations
Cases Involving Mostly Hispanic Defendants														
19	United States v. Elias	13-CR-476	Salvador Elias	Hispanic	No	Yes	No	Yes	Yes	No	No	Yes	Yes	4
			Adrian Elias	Hispanic										
			Angel Olson	Hispanic										
			Demetrio Benitez	Hispanic										
			Miguel Ledesma	Hispanic										
			Paul Reding	White										
			Cornelius Sistrunk	Black										
			Deeric Stevens	Black										
			Mishon Washington	Black										
20	United States v. Davila	12-CR-713	Justin R. Davila	Hispanic	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	1
			Jason J. Davila	Hispanic										
			Nieko E. Hadley	Black										
21	United States v. DeJesus	12-CR-511	Benjamin DeJesus	Hispanic	No	Yes	No	Yes	No	Yes	No	Yes	Yes	4
			Jesus Corona	Hispanic										
			Ceferino Malave	Hispanic										
			Luis Borrero	Hispanic										
Cases Involving Mostly White Defendants														
22	United States v. Farella	09-CR-087	Frank Farella	White	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	1
			Donald Catanzaro	White										
			Michael Blais	White										
23	United States v. George	07-CR-441	Robert George	White	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	0
			Michael Spagnola	White										
24	United States v. Corson	06-CR-930	Aaron Corson	White	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	1
			Marcus Corson	White										
			Oscar Alvarez	Hispanic										

Exhibit C-2:

Defense Counsels' Interpretations of ATF Criteria

Defense Counsels' Interpretations of ATF Criteria

1. Substantive Criteria

- Requirement to target established robbery groups

This criterion assesses whether the ATF had a verified reason to believe that the defendants in a given case were a viable robbery crew, not whether the defendants *actually* were a viable robbery crew. In order to give the government the benefit of the doubt, the defense looks to the government's practice in its White cases to define this criterion. In those cases, the government explains that its targeting decision was based on: "[I]nformation [that] is a result of interviews, police reports, and confidential informant debriefings." *Farella* Takedown Memo, Supp. Appx E-9. In addition, as noted in the Motion, the defense counted even marginal cases, such as *Paxton*, in favor of the government.

- Requirement that two suspects are violent offenders

The defense construes the "violent offender" requirement broadly. The defense counts a named defendant as a "violent offender" for the purpose of this criterion if the defendant: (1) had a prior conviction that possibly could be deemed violent (including a misdemeanor), whether or not the ATF was aware of it, (2) self-reported a previous armed robbery or other violent crime, and the ATF reported undertaking some investigation/confirmation of that claim, (3) was suspected or reported as the perpetrator in other specific, verifiable violent crimes, and the ATF had a reason to believe that suspicion or report was accurate, or (4) had a reputation as a gang leader. This criterion is limited to defendants whom the ATF met prior to the day of arrest, even if the ATF did not identify those individuals until after arrest. Those cases listed as departures are cases in which there were fewer than two targets who showed up on the day of arrest for whom any of those factors was true.

The defense interprets this criterion extremely generously to the government. If the defense had interpreted this criterion more fairly, there would be even more deviations for people of color. The *Williams* case is illustrative of how defendants' interpretation understates the true number of departures. First, it appears that the government sometimes does not consider misdemeanor convictions to be evidence of a "violent offender" under its criterion. In the *Williams* case, for example, the government discussed Antonio Williams's felony convictions only. *Williams* Takedown Memo, Supp. Appx. E-18. The defense nonetheless counts Mr. Williams as a violent offender for the purpose of this argument, due to a misdemeanor conviction. As another example, the defense counts John Hummons as a violent offender for this criterion because of his criminal history. However, the ATF could not have taken Mr. Hummons's criminal history into account when deciding to move forward with the Operation because the ATF did not identify him until after the day of arrest. Complaint at 13 n.5, *United States v. Williams*, 12-CR-887, Dkt. 1 (N.D. Ill. Nov. 15, 2012). Had the defense limited their interpretation of this criterion, the *Williams* case also would be a deviation.

- Requirement that all suspects are currently criminally active

The defense interprets "currently" generously to the government, to encompass any criminal activity that occurred two years before the date the targets were arrested. In determining whether the ATF met this criterion, the defense examined each Takedown Memo and Complaint for evidence that a target participated in criminal activity with the CI other than the fictitious stash house scheme, or that the ATF had any other verified information about current criminal activity. We also examined the defendants' rap sheets to determine whether targets' convictions within two years of arrest satisfied this requirement.

- Requirement that one target have a past violent conviction

ATF Order 3250.1B.12.b(2) states: "At least one target must have a past violent crime arrest or conviction." The defense interprets this criterion to include convictions, not arrests, for three reasons: First, Agent Zayas appears to be training agents that only convictions count for this criterion, and not arrests. Zayas Training at 5. The ATF's Takedown Memos confirm this practice in that they do not consistently list targets' arrests. *See, e.g.*, *Corson* Takedown Memo, Supp. Appx. E-2 (arrests omitted); *Davila* Takedown Memo, Supp. Appx. E-15 (arrests omitted); *Payne* Takedown Memo, Supp. Appx. E-16 (arrests omitted). Finally, the government has publicly argued that convictions are the key criterion. *See, e.g.*, Oral Argument, *Davis*, 14-1124, DE 40 at 11:49 (7th Cir. 2014) ("The comparison group should be individuals who have sustained prior state or federal *convictions* for offenses involving robbery, narcotics, or firearms.") (emphasis added).

The defense evaluates this criterion generously to the government by asking whether one of the targets of whom the government was aware before the day of the arrest, and who also showed up on the day of arrest, had a violent conviction. If this criterion were interpreted more narrowly to apply at an earlier point in the Operation, then of course it would be harder for the government to meet.

- Requirement that the group have access to weapons

The defense interprets this requirement to be violated if targets had serious difficulty finding firearms as documented in a Takedown Memo or the Complaint, or if defendants ultimately could find only one firearm for the whole group by the day of arrest.

2. Procedural Criteria

- Requirement to document all known suspects in a Takedown Memorandum

The defense interprets this criterion to mean that the Takedown Memo does not need to identify all the people *ultimately arrested*. Instead, it needs to identify by full name only the people known to the ATF at the time of the mandatory Takedown Memo.

- Requirement to identify all suspects before the arrest day

This criterion is different from the previous requirement that the ATF document in the Takedown Memo all suspects it knows of at the time the Memo is written. This criterion, in contrast, requires that the ATF endeavor to simply identify, at some point before arrest, all of the people who are ultimately arrested.

- Requirement to meet with at least two members of the alleged robbery crew before the arrest day

The defense interpreted this criterion to refer to two members who ultimately were arrested.

- Requirement to meet in person with the targets three times before the arrest

In evaluating this requirement, defendants identify departures where the ATF agent only met with the targets once or twice in person before the arrest date but did not request a waiver in the Takedown Memo. (A telephone conversation cannot be used to meet this requirement. ATF O 3250.1B.12.f(1).) ATF materials allow agents to request a waiver of the three-meeting requirement in certain situations. ATF O 3250.1B.12.f(2), (3). However, the ATF Takedown Memoranda in *Davila* and *DeJesus* demonstrate that an agent must actually request such a waiver (rather than have it granted implicitly) and that a meeting on the day of arrest cannot count as one of the required meetings. *Davila* Takedown Memo, Supp. Appx. E-15; *DeJesus* Takedown Memo, Supp. Appx. E-13.

In *Davila*, the ATF agent met with the targets on both July 27, 2012, and August 27, 2012, but requested to be excused from the three-meeting requirement even though he knew he would see the defendants again on the day of the arrest. *Davila* Takedown Memo, Supp. Appx. E-15. The agent thus plainly understood the three-meeting policy to require three meetings *before* the day of the arrest. The ATF agent in *DeJesus* made the same exemption request, also after meeting with the target and other defendants twice and knowing he would see them on the arrest date. *DeJesus* Takedown Memo, Supp. Appx. E-13.

Exhibit D:

Transcript Excerpts from Recorded Conversations

Exhibit D-1:

Transcript Excerpt from
United States v. Williams, 12-CR-887

Excerpt from Discovery in U.S. v. Williams, 12-CR-887

Transcription of recording from December 8, 2012; beginning 1:20
(prepared by Susan Igras of the Federal Defender Program)

UC: What's good, homie? (Greetings)

Brown: This is my nigga-this is family right here. They gone go with me.

UC: Oh yea? Nice. nice.

Brown: You know them niggas?

UC: You good with the Mex?

A. Williams & Brown: Hell yea. Yea.

UC: That's what I'm talkin' about. That's what I'm talking about. Yea man, I've been working for these dudes awhile now, you know.

Brown: Doing construction and shit? (A. Williams laughs) No but like, "working" working for them?

UC: No no no, like work work like…..

Brown: What they Mexican or something?

UC: Yea they Mexicans just like me. You know so what I was tellin my boy Tweet here yesterday was that, you know they're always like between 8-10 kilos of cocaine up in this spot.

Brown: But do anybody be in there?

UC: Yea two dudes. Strapped. I mean they gotta be in there takin care of their shit, you know.

CI: So you gone have to catch them comin' in? Cause you just try and go in and them motherfuckers spring-

A. Williams: No he's going to go in (CI-Ohh okay.) and we're right behind.

UC I mean however you guys with it—that's why I'm coming to you. You know, I roll with my cuz, but this shit can't come back on me. You know if they see m-if they see some other Mexicans doin' it, they're gonna know they that they're with me. (Background A. Williams and CI verbally acknowledging) You know what I'm saying?

Recording continues. Transcript stops at 3 minutes and 2 seconds.

Exhibit D-2:

Transcript Excerpts from
United States v. Brown, 12-CR-632

TRANSCRIPT

Exhibit #: E-002

Date: 7/23/12

Participants:

S/A Gomez: ATF Special Agent Dave Gomez
CI: ATF Confidential Informant
Jones: Dwaine Jones

Unintelligible: (UI)

[[12:31:50]]

CI: You gotta jump out and get in the back seat.

Jones: What's happenin' wit' ya?

CI: No, man. Come and sit in the front, man.

Jones: Oh (UI)

CI: (UI)

S/A Gomez: Can you close that door?

CI: Fuck, yeah. Yeah. This my man I was tellin' you about right here, that got the bu-, the business (UI)

S/A Gomez: Wha's up, man?

Jones: (UI)

S/A Gomez: Call me

Jones: Yeah.

Exhibit #: E-002
Date: 7/23/12

S/A Gomez: Blanco.

Jones: A'ight.

CI: Yeah.

[[12:32:31]]

****

****

[[12:33:29]]

CI: Sh. Alright. So, my man-you know what I'm sayin'?-wanta holler at you about, ya know, what, what, what needs to be done.

Jones: Mm. (UI) Go on, talk.

S/A Gomez: (Clears throat) Listen. Here, here's what I do bro'-I mean, he's, he's cosignin' for you, and he's, ya know, he's cosignin' both ways. You feel

Jones: Right.

S/A Gomez: me?

CI: (Clears throat)

S/A Gomez: What I do is I move some, some of my shit, some shit for some o' my people from back home. Okay?

Jones: Mmm-hmm.

Exhibit #: E-002
Date: 7/23/12

S/A Gomez: Alls I do is I move it from point A to point B, and then I get paid later.

S/A Gomez: Okay? But let's just say-alls I'm 'a say is the money ain't right

Jones: It ain't right?

S/A Gomez: right now. You feel me?

S/A Gomez: They're fuckin' me over. And what I like about you is that nobody can put me and you together. You feel me?

S/A Gomez: See, but, but the way these mother-fuckers are slick is, is that what they do is, like, say, this shit's-it, it only happens once a month.

Jones: Right.

S/A Gomez: You feel me? And what happens is, like, say it's gonna happen tomorrow-my guy calls me. He says, "Hey, Blanco. Be ready to go tomorrow." Okay? So, I clear my whole fuckin' day, and I don't do shit. I wait by my phone 'til I get that phone call. Okay? The next day when I get that phone call, they're only gonna give me about twenty minutes to get there. You feel me? 'Cause I aint there in twenty minutes, they're gonna fuckin'

(UI), they're gonna wonder where the fuck I'm at, and they're gonna get spooked and they're gonna pull up their shit,

Jones: Yeah.

S/A Gomez: and get the fuck out o' there. You feel me? Now, I've never been to the same house twice. That's how they're slick. Okay? I get there. My guy, Carlos, is always there with two other guys.

CI: (UI)

S/A Gomez: Me and Carlos, I mean, we're tight but-ya know what I'm sayin'?-the money aint right.

Jones: Right.

S/A Gomez: Okay? (Clears throat) I get into the place, and I just stay right there, right by the front door. That's it. But what I c-, what I see when I'm in there is twenty o' them things. Okay? So, it's not (UI)-what I'm tryin' to tell you right now is that this aint no little nickel and dime shit. I'm talkin' twenty kilos of cocaine. Okay? What I need to make it look like is that I had not'in' to do with it-

Jones: Right.

S/A Gomez: you feel me?-so that they can't put me to it. Okay? So, I ran this past him. He says, "Hey. You know what?" That's how we're here today talkin'.

Jones: Mm-hm.

S/A Gomez: You feel me? But my main thing is, my whole fuckin' main thing is that I gotta make it look like I had not'in' to do with (UI)

Jones: Right. It can't get back to you, no

S/A Gomez: Yeah.

Jones: way.

S/A Gomez: Okay? Now (Clears throat) the other thing is, um, and, and we're talkin', this aint no little nickel and dime shit. 'Kay? So, I'm lookin' for a professional crew and I need to make sure (UI). Know what I'm sayin'? 'Cause there's a lot o' shit on my end. I mean, you, have you even done this shit before? Never have?

Jones: Nope.

S/A Gomez: Okay. Well, then, fuck. I mean, this sounds like it's-n–, no offense to you, bro', but, ya know, this is, this, (UI) this is way too much for you to handle.

Jones: No. I could do it. I mean, the, the, the niggers, the niggers that I hang with, they done did this shit before,

S/A Gomez: Oh. They,

Jones: you know?

S/A Gomez: they-no shit?

Jones: Yeah.

S/A Gomez: Okay.

Jones: They done did this shit before, but I aint never did this shit. (UI)

S/A Gomez: So, you'd be able to-will you be able to hook me into some guys that-ya know what I'm sayin'? I mean, 'cause this like a job interview, bro'.

Jones: Yeah.

S/A Gomez: Ya know what I'm sayin'? And

Jones: (Laughs)

S/A Gomez: the thing about it is, is that-ya know what I'm sayin'?-I need you just as much as you need me.

Jones: Mm-hm.

S/A Gomez: You know, you know what I'm sayin'? I need somebody to take up the whole house. And let me ask you this: were you lookin' to be, were you

lookin' to be in, in it, or were you just gonna put us in touch with some guys? Because what I like, what I like is that nobody could put me and you together.

Jones: (UI)

S/A Gomez: So, who you come with nobody's gonna be able to put, put me and them together.

Jones: Together. Right.

S/A Gomez: You feel what I'm sayin'? And listen. I've been down around the block before. You feel me? So, if you can put me in touch with a crew-right?-then, I'll take care o' you on my chop. I'm sayin'? You aint gotta worry about them takin' care o' you.

Jones: Right.

S/A Gomez: You feel me?

Jones: Well, that, that'll work, too. Yeah.

S/A Gomez: But I need to-you know what I'm sayin'?-like, I need, ya know, I need these other guys-I need to talk to these other guys, because these guy-the other guys inside the house, they're always fuckin' strapped. Okay? They're Mexicans like me, and I can't have-ya know what I'm sayin'? I need these

Exhibit #: E-002
Date: 7/23/12

guys-see,'cause I aint about-I don't wanta take no round.

Jones: Right.

S/A Gomez: You feel what I'm sayin'? So, ya know what I'm sayin'? I mean, if you think you guys are in-ya know, if you got a crew that

Jones: Yeah. (UI)

S/A Gomez: that you wanta bring.

CI: A serious crew.

Jones: Yeah.

S/A Gomez: And, ya know, I'm saying this is, this-you, you know-I'm telling you right now, I'm keepin' it one hundred.

Jones: Yeah.

S/A Gomez: This aint no n–, little nickel and dime shit. Okay? So, you want me to cut you in on your chops, that's fine. I aint got no prob'm with that. Ya know what I'm sayin'? 'Cause then you're gonna be my guy, and-ya know what I'm sayin'?-I need to fuckin'-we need to fuckin' come together and sit down and talk about how the fuck they're gonna do it.

TRANSCRIPT

Exhibit #: E-004

Date/Time: 7/24/12

Participants:

S/A Gomez: ATF Special Agent Dave Gomez
CI: ATF Confidential Informant
Jones: Dwaine Jones
Brown: Abraham Brown
Taylor: Kenneth Taylor

Unintelligible: (UI)

[[12:41:03]]

Jones: What's happenin',

S/A Gomez: Hey, what's

Jones: bro?

S/A Gomez: goin' on, dawg?

Jones: Chillin'.

S/A Gomez: These your guys here?

Jones: Yeah.

S/A Gomez: Where at?

Jones: There's two of 'em right there.

S/A Gomez: Two of 'em right here?

Jones: Yeah.

S/A Gomez: How many you think you gonna have total?

Exhibit #: E-004
Date: 7/24/12

S/A Gomez: and pull up all their shit. Okay? I'm usually the first-I'm-uh, I gotta be, like, one o' the first ones there to pick up. See, they're slick enough, 'cause they're never gonna let-a-, all's I am is a mule. You feel me?

Taylor: Right.

Brown: (UI) mule (UI)

S/A Gomez: Okay? Take it from Point A to Point B. I get my directions where I gotta take it.

Taylor: Right.

S/A Gomez: You feel me? Now, they're slick enough that they never have me and another one o' their fuckin' mules bumpin' heads, okay? But when I get in there, what I see is-uh, and this aint no little sh-, nickle and dime shit. And I'm talkin' about-what I see them fuckin' around with is about 20 kilos of cocaine.

Taylor: Yeah.

S/A Gomez: You feel me? They're fuck-two guys are usually fuckin' around with repackagin',

Taylor: Yeah.

Exhibit #: E-004
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S/A Gomez: okay? My guy lets me in. I stay right by the door. I don't go nowhere, okay? My guy Carlos, he goes to another room and gets my shit. Now, I'm usually carryin' about seven to eight o' them things,

Taylor: A'ight.

S/A Gomez: okay? So, that's separate from the 20 that I already see. Now, I was tellin' my mans here I gotta make it-my, my whole thing is that I gotta make it look like I had not'in' to do with it.

Brown: Mm-hm.

Taylor: Right.

S/A Gomez: You feel me?

Taylor: Right.

S/A Gomez: That's a lot o' shit

Taylor: Right.

S/A Gomez: on my end. So, I told him "listen, I need a professional crew." You feel me? I mean, have you guys even done this shit before?

Brown: Uh, yeah, (UI)

Taylor: That's what I do.

Brown: (UI) to the joint for armed robbery, that was my first case.

Exhibit #: E-004
Date: 7/24/12

S/A Gomez: What do you think, bro? Yeah.

Brown: Now, look, check this out, okay? If it's, like-right now the street value for a key is high as hell.

S/A Gomez: Mm-hm.

Brown: Like, we, we, we could, we could get, we could get thirty some thousand for them keys without even-ya know what I'm sayin'? We already got somebody to buy 'em and e'rything-ya know what I'm sayin'?-

S/A Gomez: You do?

Brown: that'll buy, like, ten

Taylor: Right.

Brown: fifteen of 'em, and we aint gotta go to the streets with 'em and make ourself hot.

[[12:50:14]]

****

****

[[12:51:43]]

S/A Gomez: Well, let's do this, man, just so that I can feel comfortable, because the other guys in the house are Mexican, like me.

TRANSCRIPT

Exhibit #: E-009

Date: 8/1/2012

Participants:

S/A Gomez: Special Agent David Gomez, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)
CI: ATF Confidential Informant
Brown: Abraham Brown
Jones: Dwaine Jones
Taylor: Kenneth Taylor
Washington: Alfred Washington

Unintelligible: (UI)

[[11:16:33]]

S/A Gomez: Pull that

CI: (UI)

S/A Gomez: (UI)

CI: Ya'll hop in so you can talk to my man. Nasty, what's the fuck up, man?

Jones: What's happenin'?

S/A Gomez: What's goin' on, man?

CI: What color that baby's gonna be?

Jones: Man, I'm tellin' you.

Brown: (UI)

Jones: Either white or black.

Exhibit #: E-009
Date: 8-1-12

Brown: I gave,

S/A Gomez: rundown, right?

Brown: I gave him a little bit o' insight, like, far as, like, how you, uh, say, I mean, it's, like, three people in the crib. But, see, the whole thing is, like-okay, you say you want us to go in there while you in there, right?

S/A Gomez: Well, look, man, I'm s-I-the on-my only main concern is that I want to make it look like I had not'in' to do with it. Ya know what I'm sayin' on that? This aint what I do.

Washington Right.

Taylor: Right.

S/A Gomez: You know what I'm sayin'?

Jones: Mm-hm.

S/A Gomez: I aint-

Brown: This is what I-this, this, this, this, this is why I say it's best for us to go in there while you in there, 'cause you could, like, fake see what's, what the look like, lookout is, look like

S/A Gomez: (Clears throat)

Brown: -know what I'm sayin'?-in that mo'-fucker.

Exhibit #: E-009
Date: 8-1-12

S/A Gomez: Yeah.

Brown: and shit, too, but (UI)

S/A Gomez: You, and ya know, a-, and you know what I was tellin'

Taylor: (UI)

S/A Gomez: him is what I like I about you is nobody could put me and you together.

(Washington nods in the affirmative.)

S/A Gomez: You feel me?

Washington: (UI)

(Washington nods in the affirmative.)

S/A Gomez: And I wanted-ya know what I'm sayin'?-I just needed a fuckin' professional fuckin' crew. Ya know what I'm sayin'? And, and, like I said, I'm just meetin' you on a first time. And I'm 'a tell, I'm 'a, I'm 'a-I'm just gonna keep it one hundred. Ya know what I'm sayin'? If this is way too much for you to handle-ya know what I'm sayin'?-I mean, this m—, this meeting never happened.

Washington: Right.

S/A Gomez: You feel me? But

Washington: I'm good.

S/A Gomez: I just, I just

Exhibit D-3:

Transcript Excerpt
from United States v. Paxton, 13-CR-103

Excerpt from Discovery in U.S. v. Paxton, 13-CR-103

Transcription of video recorded on Dec. 5, 2012; beginning 13:41:30 and ending 13:47:10 (prepared by Susan Igras of the Federal Defender Program)

UC: This one ain't, ya know, no hittin some pies over the head, ya know? This is—

Paxton: Right

UC: Has he told what's going on? Has he said anything?

Paxton: Yea he kinda wired me up.

UC: Yea um, yea I hooked up with these brothers when putting some pockets in their cars, puttin' some boxes in, ya know—with the electronics and shit (Paxton: Yea) so I started driving for 'em, ya know taking a little bit here a little bit there (CI: Yea) Ya know they'd give me a fuckin buck every trip but lately they've been fuckin with my money, man. It's like every time I go "it's on the books, it's on the books," ya know well I don't know when I'm getting paid on the fuckin books, know what I'm sayin?

Paxton: And if something goes wrong that ain't on the books.

UC: Yea no shit I'm takin all the fuckin risk.

Paxton: And you know then right there if something go wrong, you on the books.

UC: You know it's gotten, ya know, fuck these motherfuckers, ya know? Um, but like I said this is, these guys are fuckin connected, man. This ain't—I can't have anybody ya know that knows me. (P: Yea…) I got brothers that'll fuckin go to war for me. But man, (Paxton: Yea…) they're gonna know it's me if I got guys looking like me coming in, they're gonna—it's automatically gonna come back on me and they know where I fuckin lay my head, they know where I work and shit, so that-that's why. Me and T been talkin about it trying to come up with somebody that—

Paxton: First of all, like doing the drop off, I mean who is waiting?

U: Well here's how it goes man—I pick up. I get the call, these fuckers, I pick up—they must have a connect with a realator or something because I'll pick up at a house that's never the same fuckin house. It's always a different fuckin house but I know it's had "For Sale" signs on it so that's what I'm sayin, there's no furniture in the fuckin houses so they're in-and-out (P: Right) know what I'm sayin. They'll give me a call and say "you're working tomorrow." I fuckin show up, boom, I'll take my three and I'm on the road. They'll punch it in to my GPS and I'm on the road, you know. (Paxton: Yea.) The problem they're switching all the houses, I don't know til the day of where I gotta pick up. I mean I know the area (Paxton: Yea) it's always the same area, old part of Chicago over there by Midway airport, it's there, it's that Berwyn area where you get all those Mexican dudes hanging out.

Paxton: I was just gonna say, they Mexican?

UC: Yea. Of course.

Paxton: Yea Yea yea. Over there in that area.

UC: Um, but I'm not the only—yea exactly. But I'm not the only one picking up. I mean there's guys coming after me. So when I go in the house, I'll grab my three, you know they'll bag up my three, but I seen the least, at least fifteen bricks sittin in there. Um. But like I said these motherfuckers ain't makin moves like that not ready for a war, man. These fuckers, um they're strapped up. That's the only problem, so I don't even know if we can do this shit. I don't know if it's, you know, it's not going to be an easy run in there, run out. (Paxton: Mmm.) That's the only thing. So I mean I don't even know if it can get done. I just can't have anything with me. You know what I'm saying. They cannot know . . .

Paxton: Nobody—nobody want nothing to come back to them. (UC: No. No.) Know what I'm sayin.

UC: No and that's the thing; these people are too close to me that's the fuckin problem (P: Yea.) It's not like they don't know—they know my family and shit.

Paxton: I know what you mean. Yea I know what you mean. Yea. Ya'll rendezvous together and shit.

UC: It's like. I don't know if this is your deal if it's…if you've been through this shit. But these motherfuckers, I mean it's not like they're sitting there, you know, I go in the house—

Paxton: Who do—do they leave any security outside?

UC: No I've never seen anybody outside. There's always like two guys inside-

Paxton: And they always switching, right?

UC: It's always—I get a call you're working tomorrow, man you're working tomorrow. And so I just know to be that area, that fucking (P: Right.) I always go hang out—there's a Portillo's right over there by Harlem, I go over there-

Paxton: Okay but when they say you working, when they say you working, what do you have to do? Are you the pick-up and drop-off somewhere?

UC: Yea I drive—it used to be—and that's another thing, man. I used to drive Indianapolis to Milwaukee so you know it's a few hours. Last time it's Minneapolis. I'm fucking driving six hours with this shit and they're telling me it's on the books.

Paxton: Yea. Okay and when you go to Minneapolis and all that, who's, who's the weaker link?

UC: It's just I meet somebody it's either at a gas station, just something boom and I'm here. But they know how much time I got-

Paxton: Just a street deal when you get out?

UC: Yea but it's like I mean I can't run with the three bricks you know I can't do that. They're going to know so it's…it's got to look like I'm not involved . . .

Paxton: I got you. I see what you're saying.

UC: I mean I've never been through something this big, you know what I'm saying. It's fucking…

Paxton: But you're safe. Okay not just say we suspecting—it's-it's a suspecting it's supposed to be fifteen or you never seen no less than fifteen.

UC: I mean no less. I'm telling—I get there, I take my three-

Paxton: When it's time to work, it's time to work.

UC: It's time and they're only in there, I guarantee they're in there cause I only got- Cause that's why I gotta be in that area, when they say you're going to get called tomorrow, you're going to work tomorrow. So I'm in that area, they call me, you got twenty minutes to get to this fucking house. Here's the address. You got twenty minutes to get here. And that's because they keep moving this shit. Cause if I'm not there, they know something's up and they're getting the fuck out. I've never seen any bread in there, it's always, you know they're obviously going to keep that somewhere else.

Paxton: No scale?

UC: No, I just see, you know, they got the duffle bags sitting there…

Paxton: The duffle bags with the things in them.

UC: There's usually two dude—I see two dudes maybe one time. I seen one more, but it's always just usually two guys. You know. I go up, they open the door, they fucking close the door behind me, dude grabs my shit right off the table, gives it to me and I'm out. (Paxton: Okay.) I mean it's normally thirty seconds and I'm out.

Exhibit E:

Excerpts from Complaint for Search Warrants (Panozzo-Koruluk Crew) (July 17, 2014)

(3-81) CCMC-1-219

COURT BRANCH COURT DATE

DOROTHY BROWN, CLERK OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

COMPLAINT FOR SEARCH WARRANTS

as the P-K Street Crew.[1]) PANOZZO and his associates are known to conduct armed robberies and home invasions on houses where they believe that kilogram or greater quantities of cocaine and heroin are present. The P-K Street Crew is also known to commit residential burglaries on houses, often in affluent neighborhoods, that are known to contain large quantities of cash or other valuable items within.

As detailed later herein, the members of the P-K Street Crew are prone to acts of extreme violence and are linked to homicides as well as a plan to assassinate a key prosecution witness in a home invasion/kidnapping case that was pending against one of their members in the Criminal Courts Building at 26th and California. In that case, members of the P-K Street Crew actually went so far as to take steps to learn the home address of the Circuit Court Judge who was presiding over that kidnapping case.

The members of the P-K Street Crew are very well organized and close-knit. They are known to conduct surveillance on potential victims through the use of electronic tracking devices and have conducted computerized searches on intended targets, even utilizing a licensed attorney and a law school student to assist in gathering intelligence.

[1] Throughout this Master Complaint Affidavit the group of individuals believed to be responsible for the crimes under investigation are described as the "P-K Street Crew." While it is believed that PANOZZO and KOROLUK are central figures in many of the crimes under investigation, this label is not intended to diminish the level of criminal culpability of any other co-conspirators in the group.

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Through proffers, your affiant has learned of the existence of surreptitious and unauthorized links between members of the P-K Street Crew and certain employees of state and local government, as well as insurance agents, jewelers, currency exchanges, banks, and business owners. All of these individuals have provided aid to the P-K Street Crew in furtherance of their criminal efforts. Some of these individuals provide information to members of the P-K Street Crew regarding the identity and location of potential targets of their criminal activity, and thereby assist in the facilitation of those crimes.

B. Identities of the Targets:

A review of the criminal histories of the individual P-K Street Crew members who are the subject of this Master Complaint Affidavit reveal numerous arrests for residential burglary and theft relating to items reported stolen during residential burglaries. [2] Some of these individuals were co-defendants with one another on these prior burglary and theft offenses.

The Targets of this investigation include Robert PANOZZO (IR 491916), Paul KOROLUK (IR 455106), Maher ABUHABSAH (IR 1279424) and Dionisio GARCIA (IR 1107518), among others.

[2] The criminal histories in this section may be incomplete since your affiant was concerned that running criminal histories of the violators could alert the targets of this ongoing investigation as a LEADS check for criminal history records will leave a record of that request which can be viewed by anyone with access to the LEADS system.

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1. Robert PANOZZO (IR 491916)

Robert PANOZZO, along with co-defendants INDIVIDUAL A and INDIVIDUAL B, was arrested and charged by indictment number 91CR-5292 for the offenses of residential burglary and possession of burglary tools. The defendants in that case were seen leaving the victim's residence with a safe that contained approximately $50,000 in cash. PANOZZO pled guilty to amended charges and was sentenced to serve a period of 710-1410 probation.

PANOZZO was charged by indictment in 2000 with the offense of unlawful use of a weapon by a felon, was convicted, and was sentenced to serve a 2 year period of probation. Under case number 03CR-25922, PANOZZO, together with his co-defendants Paul KOROLUK and INDIVIDUAL C, was charged by indictment with the offenses of residential burglary and possession of burglary tools. These charges were nolle prosse'd on October 30, 2006, the same date that PANOZZO pled guilty to residential burglary charges in cases 05CR-3160 and 05CR-3161. PANOZZO was sentenced to serve concurrent 7 year terms of imprisonment in the Illinois Department of Corrections (IDOC). PANAZZO's co-defendants in each of these burglaries were fellow members of the P-K Street Crew, namely Paul KOROLUK, INDIVIDUAL D and INDIVIDUAL E.

2. Paul KOROLUK (IR 455106)

In 1992, KOROLUK was charged by indictment with the offenses of unlawful use of a weapon by a felon and possession of a silencer. He was sentenced to serve a term of 8 years

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imprisonment in IDOC, however, this term of imprisonment was later reduced to 5 years on resentencing following a new trial on those charges. In case number 86CR-11294, KOROLUK was charged with Burglary and sentenced to serve a 3 year period of probation.

In indictment number 03CR-25292, KOROLUK, along with Robert PANOZZO and INDIVIDUAL C, was charged with the offenses of residential burglary, attempt residential burglary and possession of burglary tools. These charges were nolle prossed against KOROLUK on the same day that he entered guilty pleas to the residential burglary charges in cases 05CR-3160 and 05CR-3161. KOROLUK was sentenced to serve concurrent 7 year terms of imprisonment in IDOC in those cases. KOROLUK's co-defendants on those residential burglaries included Robert PANOZZO, INDIVIDUAL D and INDIVIDUAL E.

In indictment number 93CR-6701, KOROLUK was charged with theft of property of a value of over $10,000 after stolen weapons, furs, and jewelry were recovered from KOROLUK's residence during the execution of a search warrant. These facts and charges in this case were used against KOROLUK as evidence in aggravation at sentencing, were nolle prosse'd and KOROLUK was sentenced to serve an 8 year term of imprisonment in that case. Also used as evidence against KOROLUK in aggravation at the same sentencing hearing was a charge of intimidation filed under 94CR-20365. In that case, that KOROLUK threatened to blow-up the victim's dry cleaning business and hire officers to kill the victim in order to prevent the victim from testifying against him at trial.

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3. Maher ABUHABSAH (IR 1279424)

ABUHABSAH was indicted and convicted under case number 04CR-23467 for the offense of kidnapping, and was sentenced to serve 4 years IDOC for kidnapping. He was charged in that case with home invasion, aggravated kidnapping, armed violence and residential burglary along with co-defendants INDIVIDUAL F and INDIVIDUAL G.

4. Dionisio GARCIA (IR 1107518)

Dionisio GARCIA was convicted under case number 00CR-1810 for possession of cannabis and was sentenced to Cook County Department of Corrections (CCDOC) Boot Camp. GARCIA has also been arrested and charged in cases which did not result in conviction. GARCIA was indicted for unlawful use of weapons under case number 99CR-164, and for the manufacture / delivery of heroin (100-400 grams) under case number 12CR-1533.

The members of the P-K Street Crew have a long history of arrests for the offenses of armed violence, aggravated kidnapping, residential burglary, home invasion, narcotics offenses, theft, unlawful use of weapons, intimidation. In the case of PANNOZO and KOROLUK, these individuals kept stolen items and other proceeds from these crimes in their residences which were later recovered during the execution of search warrants.

The current investigation as described in this affidavit demonstrates that the above individuals habitually engage in the commission of these same crimes and that it is likely, based on the information obtained from the following cooperating individuals and from my own

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experience, that evidence relating to the crimes which are the subject of this warrant will be found at their residences and at the other locations identified herein.

C. The Premises to Be Searched and the Instruments, Articles and Things to be Searched for, Seized and Analyzed

Based upon the facts discussed herein, you affiant believes that probable cause exists to search the following locations:

1) 2048 W. Hubbard Street, Chicago, IL (MANDIK's Service Battery warehouse)

2) 514 N. Claremont Avenue, Top Floor, Chicago, IL (PANOZZO's residence)

3) 1236 N. Maplewood Avenue, Chicago, IL (ABUHABSAH's residence)

4) 2149 Race Street (KOROLUK's Residence)

5) 2153 Race Street (House owned by KOROLUK)

6) 2155 Race Street (Vacant lot owned by KOROLUK)

7) 518 North Oakley Ave. (Lot owned by KOROLUK used to store stolen property);

8) 3709 West 84th Place, Chicago (ABUHABSAH's childhood home)

and to search for, seize and analyze the following instruments, articles and things:

All records, books, ledgers, computer hardware, computer software, computer discs and all records, documents, notes, memoranda or other writings stored on a computer in any format, which may be evidence of the below offenses, or which may be evidence of the location of assets derived from these offenses;

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familiar with all aspects of this investigation, including, but not limited to, information provided by the Chicago Police Department, and other law enforcement officials, including transcripts and oral and written reports that Your Affiant has received directly or indirectly from other law enforcement officials; oral and written physical surveillance reports that I, the Affiant, have received directly or indirectly from other law enforcement officials; information provided from sources of information including confidential sources, telephone toll records, pen register, trap and trace information and subscriber information.

Because this affidavit is being submitted for the limited purpose of securing the issuance of warrants to search the locations described herein, and other relief related to the take down of this investigation, your affiant has not included each and every fact known to me concerning this investigation. Your affiant has set forth only the facts that your affiant believes are necessary to establish probable cause for the award of the relief requested.

III. THE INVESTIGATION:

The current investigation into the criminal activities of the P-K Street Crew originated with the discovery of evidence that indicated that a member of the P-K Street Crew, referred to herein as INDIVIDUAL H, was attempting to prevent the victim in his pending home invasion/kidnapping case from testifying by having him murdered before the trial. In October of 2013, INDIVIDUAL I, another criminal associate of Robert PANOZZO and the P-K Street Crew, provided information to the police that PANOZZO and INDIVIDUAL H had solicited INDIVIDUAL I

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to commit this murder for hire. This began the investigation into the P-K Street Crew and its wide array of criminal activities.

A) INTERVIEW OF INDIVIDUAL I

On October 21, 2013, your affiant and other Chicago Police Detectives interviewed a subject who will be referred to hereinafter as INDIVIDUAL I, a witness who wishes to remain anonymous for fear of reprisals.[3]

In summary and not verbatim, INDIVIDUAL I said that he has known Robert PANOZZO, AKA "Bobby", for more than six years and that he knows "Bobby" to be involved in organized crime. INDIVIDUAL I related that PANOZZO represents himself to be a "made man" with the Chicago "Outfit" and that PANOZZO associates with a number of other known organized crime members. During this interview your affiant showed a computer generated Chicago Police Department (CPD) arrest and booking photo of ROBERT PANOZZO (IR 491916) to INDIVIDUAL I who identified the person depicted in the photo as "Bobby".

INDIVIDUAL I related that within the past two months, INDIVIDUAL I had met several times with PANOZZO and another individual who identified himself as "Mike" who the investigation has revealed to be INDIVIDUAL H. Your affiant showed a CPD arrest and booking photo of INDIVIDUAL H to INDIVIDUAL I who immediately identified INDIVIDUAL H as the man

[3] INDIVIDUAL I has several felony convictions and cooperated with law enforcement in the hope of receiving consideration on pending felony charges. No promises of consideration have been made to INDIVIDUAL I in exchange for his cooperation.

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INDIVIDUAL I knows as "Mike".

During these meetings with "Mike" and "Bobby", INDIVIDUAL I stated that PANOZZO did most of the talking. PANOZZO explained to INDIVIDUAL H that he was in a predicament because the pending trial involved the kidnapping of INDIVIDUAL J. PANOZZO asked INDIVIDUAL I if INDIVIDUAL I would be able to make this problem "go away" if PANOZZO and INDIVIDUAL H would furnish an address where INDIVIDUAL I could find INDIVIDUAL J. INDIVIDUAL I said that he understood that if the witness was to "go away" it meant that this witness (INDIVIDUAL J) would be killed.

INDIVIDUAL I related that he drove with PANOZZO and INDIVIDUAL H to an address in Cicero where INDIVIDUAL H identified the place where INDIVIDUAL J lived. INDIVIDUAL I stated that PANOZZO had recently attempted to contact INDIVIDUAL I on multiple occasions about the matter with INDIVIDUAL J. INDIVIDUAL I also related that PANOZZO previously had solicited INDIVIDUAL I to commit an arson in Skokie which INDIVIDUAL I did, in fact, commit at PANOZZO's behest.

B) INTERVIEW OF INDIVIDUAL H

On November 13, 2013, your affiant and other law enforcement officers conducted a debriefing of INDIVIDUAL H who hoped to receive consideration on his pending kidnapping case. No promises of consideration have been made to INDIVIDUAL H in exchange for his cooperation. Attorney INDIVIDUAL K represented INDIVIDUAL H on the kidnapping charges but

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INDIVIDUAL H stated that he did not want INDIVIDUAL K, his current attorney, to conduct the debriefing since INDIVIDUAL H believes that INDIVIDUAL K has represented PANOZZO and KOROLUK in the past and that INDIVIDUAL K still maintains a relationship with PANOZZO. Because of this, INDIVIDUAL H did not want INDIVIDUAL K to be aware of INDIVIDUAL H's cooperation. Therefore, special court appointed counsel was assigned by the Honorable Judge Kazmierski to represent INDIVIDUAL H for purposes of the debriefing. In summary and not verbatim, INDIVIDUAL H related the following information.

INDIVIDUAL H admitted to participating in criminal activities with members of the P-K Street Crew, a group of people including Robert PANOZZO, Paul KOROLUK, INDIVIDUAL L, and others who assist them in the commission of their crimes as they are needed. INDIVIDUAL H stated that the crimes committed by the P-K Street Crew included home invasions, armed robberies, residential burglaries, insurance fraud, and prostitution. INDIVIDUAL H stated that the P-K Street Crew commits 5-6 major drug "rips" per year while posing as police officers. INDIVIDUAL H also said that he believed that Robert PANOZZO has been involved in more than one murder.

INDIVIDUAL H stated that PANOZZO has a relationship with members of the Spanish Cobras and the Latin Dragons street gangs who supply him with the identities of suppliers of large quantities of cocaine, heroin, and marijuana. INDIVIDUAL H stated that PANOZZO purchases global positioning system tracking devices (GPS) by ordering from vendors online and

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in person at a spy shop located in Skokie. INDIVIDUAL H stated that he has affixed these trackers to narcotic dealer's vehicles for PANOZZO.

INDIVIDUAL H described how the P-K Street Crew typically operates. They will receive information that a house or other location is believed to contain narcotics. The house is often located through the use of the GPS. Then, members of the P-K Street Crew will pose as law enforcement officers and invade the house while wearing body armor, police badges (stars), gun belts, firearms, and handheld two-way radios. INDIVIDUAL H related that two of the police stars used in past crimes were obtained through prior burglaries of police officers' homes. These police items are stored in a shed that PANOZZO has next to his garage at 514 North Claremont according to INDIVIDUAL H.

INDIVIDUAL H stated that he and other members of the P-K Street Crew who INDIVIDUAL H knows as "Max" and "Woody" would utilize GPS tracking to monitor drug dealers and other individuals who they also intended to rob, burglarize, or kidnap for monetary gain. The GPS trackers would be placed on the vehicles of the intended victims and then monitored on laptops or cellular phones. INDIVIDUAL H related that "Max" would be the one that set up the targets of the drug robberies and kidnappings on behalf of the P-K Street Crew.

INDIVIDUAL H related that he participated, along with PANOZZO, KOROLUK, and INDIVIDUAL L, in a home invasion and kidnapping in the spring of 2013 during which 25 kilograms of cocaine were stolen from a residence along with two vehicles. During the

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kidnapping, PANOZZO sliced off an ear of a male resident after hearing him speak the English language when the resident had originally claimed that he only spoke the Spanish language. INDIVIDUAL H stated that the victims of the robberies are usually Latinos, specifically Mexican nationals, who are employed to guard stash houses.

During some of the robberies, the P-K Street Crew members and associates included members of Spanish Cobra street gang to act as lookouts and get-away drivers, including two individuals who INDIVIDUAL H knows as "Max" and "Jose". INDIVIDUAL H gave details about additional robberies that were committed. INDIVIDUAL H related how a victim was beaten for several hours by PANOZZO and KOROLUK in order to obtain information about the location of drugs and money. The drugs obtained through these robberies are then sold by INDIVIDUAL M, INDIVDIUAL N, and INDIVIDUAL O, who is a co-defendant on INDIVIDUAL H's pending kidnapping case.

According to INDIVIDUAL H, a van that PANOZZO has previously reported to the police as having been stolen is used during these robberies. The van is kept covered by a tarp and parked in a lot owned by KOROLUK that is located near the intersection of Grand and Oakley Avenues, later determined to be 518 North Oakley. Fraudulent license plates are put on the vehicle when it is being used by the P-K Street Crew according to INDIVIDUAL H.

INDIVIDUAL H further related that PANOZZO uses an insurance salesman who helps identify potential targets by providing information about items insured through homeowner's

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policies. One such burglary that occurred approximately four years ago, took place at a Wilmette residence during which numerous items of sports memorabilia were stolen. While some stolen items are kept by members of the P-K Street Crew, most of the stolen items are fenced or sold soon after the burglary occurs.

INDIVIDUAL H stated PANOZZO keeps a "job book" listing information about potential "scores" that are still in the pending stage and the group occasionally goes back and re-initiates surveillance on these targets, some of which have been listed as potential targets for years. INDIVIDUAL H stated that PANOZZO uses INDIVIDUAL P, a jeweler on Wabash Avenue, to sell some of the stolen items including a collection of gold coins.

INDIVIDUAL H provided information about a prostitution service that PANOZZO runs out of the 800 block of West Superior, in Chicago, Illinois. The location is rented under the name of INDIVIDUAL E and there are four women who work there in addition to a male working security. PANOZZO collects a portion of the earnings from each of the women. It should be noted that INDIVIDUAL E is listed as a co-defendant in PANOZZO's most recent residential burglary convictions.

According to INDIVIDUAL H, sometime around 1987 PANOZZO befriended an elderly woman who lived at 2347 W. Ohio. INDIVIDUAL H said that PANOZZO and INDIVIDUAL Q deceived this elderly woman into signing a quit claim deed for her property. Shortly after the quit claim deed was signed, PANOZZO threw the woman down several flights of stairs several

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times until she died. INDIVIDUAL H said that PANOZZO still jokes about throwing someone down three flights of stairs three times and jokes about how surprisingly difficult it was to murder an elderly woman.

Your affiant has learned that a 77 year old woman named INDIVIDUAL R who resided at 2347 W. Ohio died on December 17, 1987. Public records indicate that INDIVIDUAL Q resided at that location after 1987. INDIVIDUAL Q was murdered in 1991 and police reports of that incident indicate that PANOZZO was the individual who drove INDIVIDUAL Q to the hospital where PANOZZO gave a false name.

INDIVIDUAL H stated that he and PANOZZO have had discussions about murdering INDIVIDUAL J, the victim on INDIVIDUAL H's pending kidnapping case, to prevent him from testifying. In July or August of 2013, while he was free on bond, INDIVIDUAL H was contacted by his attorney, INDIVIDUAL K, who asked to meet with him at the Caribou Coffee shop located at Maxwell and Halsted Streets. During the meeting, INDIVIDUAL K gave INDIVIDUAL H a sheet of paper (computer printout) that had INDIVIDUAL J's name and address on it. INDIVIDUAL K stated, "Give this to Bob, he knows what to do with it, this is your only problem."

INDIVIDUAL H said he made a copy of the paper on his fax machine and gave the other copy to Robert PANOZZO. INDIVIDUAL H and PANOZZO later met with INDIVIDUAL I and had a discussion about INDIVIDUAL I finding and killing INDIVIDUAL J prior to his testifying against

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INDIVIDUAL H at his upcoming trial. On subsequent court dates, INDIVIDUAL H stated that INDIVIDUAL K consistently repeated says to INDIVIDUAL H, "You only have one problem."

On November 12, 2013, detectives met with INDIVIDUAL H's wife and recovered from her an Accurint printout listing for INDIVIDUAL J. This document had markings on it indicating that it was either faxed to or from a company named Echo investigations, and then to or from INDIVIDUAL K. The name INDIVIDUAL K and a fax number appear at the top of the paper in the transmission information. The document has been inventoried as evidence.

During the proffer, INDIVIDUAL H also stated that PANOZZO blew up a building that he owned on Claremont Avenue more than 10 years ago. INDIVIDUAL H stated that PANOZZO did this to collect the insurance money on the building.

INDIVIDUAL H pled guilty on the pending kidnapping charges and has been sentenced to 15 years IDOC thereby limiting INDIVIDUAL H's usefulness in the covert portion of this investigation. Prior to his guilty plea, your affiant learned through another informant that PANOZZO suspected INDIVIDUAL H of being an informant for the police.

C) INTERVIEW OF MAHER ABUHABSAH

On November 23, 2013 Chicago Police Detectives Keith OLSON and Amalio CORRAL interviewed Maher ABUHABSAH (IR 1279424) who was at that time in custody in the 14th District station after being stopped by police while in possession of a car that was reported by the wife of INDIVIDUAL H, as having been stolen.

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The interview indicated that ABUHABSAH is "Max", an individual referred to by more than one cooperating individual thus far as being a member of P-K Street Crew, and specifically as the person whose role within the group includes the provision of digital/technical support for their criminal activities, i.e. the monitoring of GPS tracking devices that the group places on potential robbery and burglary victim's vehicles. During a custodial search upon his arrest, ABUHABSAH was found to be in possession of three cellular telephones.

ABUHABSAH stated that he was in possession of the stolen car because it was collateral for a $9,500.00 loan that he made to INDIVIDUAL H to pay for legal fees in INDIVIDUAL H's pending criminal case. ABUHABSAH related to officers that he had title to the vehicle and could arrange to have the title brought to the police by contacting a person listed in his I-phone's contacts under the name of "Tall Guy". When asked who "Tall Guy" was, ABUHABSAH responded that he is INDIVIDUAL H's friend "Bobby". INDIVIDUAL H had earlier stated that PANOZZO is sometimes referred to as "Bobby."

ABUHABSAH gave consent to the officer to search his I-Phone bearing cellular telephone number 636-633-0660. While looking for "Tall Guy", the officer observed text messages on the home screen which appeared to be associated with GPS tracking software. The text messages listed Geofence settings where a GPS tracker had entered or exited a specific location.

The tracking devices were being monitored by a company called Brickhouse Security and these email updates were being sent from Brickhouse Security to blackpeacestone@gmail.com.

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The Brickhouse Security account providing the tracing information appeared to be in the name of INDIVIDUAL S. As will be discussed later in the affidavit, search warrants were obtained for a full search of the phone's contents based on the information observed in plain view and after consent.

Preliminary investigation has indicated that INDIVIDUAL S is an associate and possible roommate of ABUHABSAH. Information received during the course of the investigation from INDIVIDUAL L, INDIVIDUAL W, as well as INDIVIDUAL H and other cooperating sources is that PANOZZO and his associates, one of whom is known as "MAX", utilize GPS tracking devices to monitor the movements of potential robbery victims.

While at the 14th Police District Station, ABUHABSAH was communicating via text messages with Robert PANOZZO's cellular telephone number 773-908-7050. A short time later, Dionisio GARCIA, who is another Target of this investigation, arrived at the police station and inquired as to the custody status of ABUHABSAH. Cell phone records reveal that PANOZZO was in contact with GARCIA before arriving at the station.

GARCIA's photograph has been displayed to and identified by INDIVIDUAL L, INDIVIDUAL W, INDIVIDUAL 2, INDIVIDUAL Y, and INDIVIDUAL H as the subject alternately referred to as "J.B." or "WOODY" by the members of P-K Street Crew. The above cooperators have also stated that GARCIA is an integral member of the conspiracy whose role includes the identification of illicit narcotics suppliers who are targeted for home invasions and robberies.

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GARCIA is also a lead-participant in the sale of the drugs stolen during these thefts and robberies.

These cooperating individuals advised that during these home invasions and robberies, the older male white members of the group (INDIVIDUAL H, INDIVIDUAL L, PANOZZO and KOROLUK) often dress as police officers, and that GARCIA and ABUHABSAH, will remain outside conducting surveillance, listening to police radios, and operating electronic surveillance equipment. This division of assignments during the robberies, according to individual H, is due to the fact that GARCIA and ABUHABSAH appear more like gang members than police officers and because GARCIA and ABUHABSAH often know the targets of the robberies.

On December 12, 2013, the following Search Warrants were signed by Cook County Circuit Court Judge Joseph Kazmierski and subsequently executed for accounts associated with Maher ABUHABSAH. These search warrants were for photos, text messages, and other content stored on the three cellular phones possessed by MAHER ABUSABAH at the time of his arrest on November 23, 2013.

1) 13 SW 8549 – the Google Inc. email (Google mail also known as "Gmail") account using address blackpeacestone@gmail.com and registered with Google mail to Maher ABUHABSAH;

2) 13 SW 8550 - physical phone Samsung CDMA Galaxy, SPH-D710BST at the time using telephone number (773) 553-9813;

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3) 13 SW 8551 –physical phone Apple I-Phone 5 CDMA, unique device ID # 81961703504c298fb57c8111a81817864ad5464571 at the time using telephone number (636) 633-0660;

4) 13 SW 8552 – physical phone Samsung SGH-T139 at the time using telephone number (773) 814-1461.

Analysis of ABUHABSAH'S phones, the text messages, digital photographs contained within and messages sent from and received by the email account blackpeacestone@gmail.com has revealed consistent contact and/or association between ABUHABSAH, INDIVIDUAL T, KOROLUK, PANOZZO, INDIVIDUAL H and GARCIA. The tone and content of the contact between these individuals reveals apparent references to the planning, commission and proceeds from more than one illegal venture including theft, perjury, and fraud. There is extensive contact (via text message and email) between ABUHABSAH and INDIVIDUAL T, and also between ABUHABSAH and INDIVIDUAL H. INDIVIDUAL T routinely provides advice to ABUHABSAH when assorted dilemmas are presented by ABUHABSAH to INDIVIDUAL T.

ABUHABSAH offers advice to INDIVIDUAL H (at the time on bond for kidnapping and other serious charges) via text message conversations with INDIVIDUAL H, most notably in the crafting of several different versions of a false affidavit that INDIVIDUAL H hoped to use in his defense. Additionally, and among the numerous text and email based conversations between INDIVIDUAL T and ABUHABSAH, there is a particular conversation in which INDIVIDUAL T agrees

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to use his access to a Lexis-Nexis account to research personal information on various people on ABUHABSAH'S behalf. The results of these inquiries are later sent in email form to ABUHABSAH (blackpeacestone@gmail.com) from INDIVIDUAL T's account with gmail.com.

In an email exchange between blackpeacestone@gmail.com, which is linked to ABUHABSAH, and INDIVIDUAL T's account with gmail.com, on November 14, 2012, ABUHABSAH asks INDIVIDUAL T if he has access to property records for 3535 E. Goodenow, Crete, Illinois. INDIVIDUAL T responds, "N". Further investigation revealed that on November 15, 2012, a residential burglary occurred at this same location, in which the victims described the theft of jewelry, watches, and a firearm, reported under Will County Sheriff's Department Incident No. LW1121115015831.

D) INTERVIEW OF INDIVIDUAL L

On February 20, 2014, Sergeant Thomas MASON #2368 and other Chicago Police detectives interviewed an individual who will be referred to as INDIVIDUAL L.[4] INDIVIDUAL L admitted to the commission of robberies and kidnappings performed in the past which were done with INDIVIDUAL H and were planned by "JB", who was subsequently identified as Dionisio GARCIA.

[4] INDIVIDUAL L gave this information pursuant to a proffer arranged by INDIVIDUAL L's attorney in the hope of receiving consideration on pending criminal charges. No promises of consideration have been made to INDIVIDUAL H in exchange for his cooperation. INDIVIDUAL L has multiple felony convictions. INDIVIDUAL L wished to remain anonymous due to fear of reprisals for his cooperation.

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INDIVIDUAL L stated that he knows that PANOZZO and KOROLUK commit burglaries and that INDIVIDUAL L has participated in some of these burglaries with them and with other members of the P-K Street Crew. During some of these burglaries members of the P-K Street Crew were armed with handguns. INDIVIDUAL L also related that an "insurance guy" will sometimes provide information about "jobs" (houses which are to be robbed). INDIVIDUAL L related that he has observed cell phone jammers, police radios, scanners and two-way radios in PANOZZO's residence, subsequently identified as 514 N. Claremont, during January or early February of 2014. INDIVIDUAL L provided information about numerous robberies/home invasions that he and other co-conspirators committed. The details of some of those robberies/home invasions are listed below.

In around 2007 or 2008, INDIVIDUAL L and INDIVIDUAL H kidnapped a suspected heroin dealer. Both INDIVIDUAL L and INDIVIDUAL H identified themselves as Chicago Police officers and displayed fake police badges. The victim was tied up and beaten before INDIVIDUAL L and INDIVIDUAL H demanded the payment of $150,000 from the victim's sister in exchange for the victim's safe release. The sister delivered $115,000 which was divided into three shares and INDIVIDUAL L was paid between $30,000 and $32,000 for his role in the kidnapping. Also involved in this kidnapping was INDIVIDUAL V, who was present when the beating was inflicted on the victim, as well as GARCIA who was the one who had set up the kidnapping but who was not present for the commission of the crime since he knew the victim and presumably been

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identified by him.

INDIVIDUAL L related that he and PANOZZO, KOROLUK, INDIVIDUAL W, and ABUHABSAH committed a residential burglary on November 15, 2012 at 3535 E. Goodenow in Crete, Illinois. INDIVIDUAL L described the residence as a ranch house and identified a photo of the residence. INDIVIDUAL L related that the burglary was orchestrated after communications he received from INDIVIDUAL X and INDIVIDUAL Y.

INDIVIDUAL L also related that he and PANOZZO, KOROLUK, INDIVIDUAL W, ABUHABSAH, INDIVIDUAL H, and GARCIA, acting upon information received from individuals that the police have subsequently identified as INDIVIDUAL X and INDIVIDUAL Y, were involved in a home invasion reported to the Cicero Police under 13-4329 that occurred on April 16, 2013, at 1914 S. 55th Ct., Cicero, Illinois. The victims of that home invasion stated that the offenders entered the residence by forcing open the rear door. Once they were inside, the offenders tied up the occupants and beat one of them. INDIVIDUAL L stated that they knew that the homeowner would be there because they had installed trackers on the target's vehicle.

INDIVIDUAL L's admission mirrored the account given by the victims. INDIVIDUAL L stated that some members of the P-K Street Crew went to the front door dressed as officers while others went to the rear door and broke in. During the Home Invasion, GARCIA was in phone contact with INDIVIDUAL H providing INDIVIDUAL H with information. INDIVIDUAL L related that he and the other offenders (PANOZZO, KOROLUK, INDIVIDUAL W, ABUHABSAH,

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INDIVIDUAL H, and GARCIA), were able to steal two cars and approximately 34 or 35 kilograms of cocaine from a trap in one of the stolen vehicles.

INDIVIDUAL L stated that the cars and drugs were taken to Service Battery where PANOZZO and ABUHABSAH were waiting. INDIVIDUAL L was supposed to get two kilograms of cocaine as his share for participating in the home invasion but opted to let GARCIA sell the cocaine and then get paid in cash. INDIVIDUAL L related that he only got $10,000 and feels that INDIVIDUAL H ripped him off as INDIVIDUAL L was expecting $75,000 from the sale of the kilograms of cocaine.

In November of 2013, INDIVIDUAL L along with GARCIA, PANOZZO, KOROLUK, INDIVIDUAL W, and ABUHABSAH committed a residential burglary of an apartment near Lawrence and Harlem Avenues. INDIVIDUAL L stated that ABUHABSAH had placed a tracker on the target's vehicle prior to the actual robbery. Approximately six pounds of cannabis was stolen from the residence.

INDIVIDUAL L stated that on another occasion, INDIVIDUAL L along with GARCIA, INDIVIDUAL H and an unknown person broke into a house in the area of Grand Ave. and Moody Avenue or Melvina Avenue and took approximately 30 bricks of cocaine from the residence.

INDIVIDUAL L stated that they wore police badges and identified themselves as officers to the residents during the home invasion. INDIVIDUAL L admitted to being armed with a handgun during the robbery and further related that INDIVIDUAL H was in phone

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communication with GARCIA as the robbery was happening. After the home invasion was over, INDIVIDUAL L and the others went to Service Battery warehouse located off of Western Avenue near Hubbard and Hoyne that is operated by INDIVIDUAL Z. INDIVIDUAL L stated that INDIVIDUAL H had keys to Service Battery.

INDIVIDUAL L also described a burglary of a storage locker in St. Charles that contained a coin collection and collection of baseball and hockey cards. INDIVIDUAL L and INDIVIDUAL H were tipped off about this target from INDIVIDUAL #1, an insurance agent that works at State Farm Insurance Company. The coin collection, valued at $67,000, was given to INDIVIDUAL Z. INDIVIDUAL L stated that he heard from KOROLUK / INDIVIDUAL H that INDIVIDUAL Z still has two big cardboard boxes of stolen baseball cards and silver coins stored at Service Battery on Hubbard Street. INDIVIDUAL L also admitted to still having a binder in his house with some paper currency and other collectables that was taken from the storage locker. Detectives went to INDIVIDUAL L's residence and retrieved the binder containing the stolen items which has since been placed into evidence.

INDIVIDUAL L stated that he committed a robbery of a ranch style home near Homer Glen off of I-394. INDIVIDUAL L said they were able to do this burglary without being armed with firearms and that a total of 28 kilograms of cocaine were stolen for subsequent distribution. KOROLUK and INDIVIDUAL H kept 7 kilograms to sell and that INDIVIDUAL H again held back INDIVIDUAL L's portion from the robbery.

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INDIVIDUAL L said that two or three years ago he and INDIVIDUAL H burglarized a stash house and got 10 bricks of cocaine and $10,000. The drugs and money were then brought back to INDIVIDUAL Z's warehouse/the scrap yard on Hubbard Street

INDIVIDUAL L also described an armed robbery of a tractor trailer which involved INDIVIDUAL L, GARCIA, PANOZZO, KOROLUK, INDIVIDUAL W, and ABUHABSAH. INDIVIDUAL L, INDIVIDUAL W, and an unknown male Hispanic known only as "SPOOKY" dressed as police officers and intercepted the truck in Morris, Illinois. Hoods were placed over the two truck drivers and the truck and drivers were relocated to Service Battery where they were met by GARCIA, PANOZZO, KOROLUK, and ABUHABSAH. The cover load of oranges was removed from the truck and the P-K Street Crew was then able to retrieve 40 kilograms of cocaine from the truck.

During the interview, INDIVIDUAL L stated that INDIVIDUAL H had discussed with INDIVIDUAL L and KOROLUK about killing the victim in INDIVIDUAL H's pending kidnapping case, INDIVIDUAL J. INDIVIDUAL L admitted that in his cell phone was a text message with the address for INDIVIDUAL J's brother. The address was found by ABUHABSAH through internet searches.

INDIVIDUAL L stated that INDIVIDUAL H related to him that INDIVIDUAL H had a false affidavit prepared in a matter pending before a Cook County Circuit Court Judge. INDIVIDUAL H had some guns that he was not supposed to have and wanted to report them as missing.

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INDIVIDUAL H had a false affidavit drawn up and presented it to the Judge. The Judge ordered that the person who signed the affidavit appear before him but that person never showed up which angered the Judge. INDIVIDUAL L related that he believed the attorney who drew up the false affidavit may have been INDIVIDUAL K.

INDIVIDUAL L also discussed a burglary from a house in St. Charles, Illinois and admitted to still having currency and other collectable items taken during that robbery at INDIVIDUAL L's house. Officers assigned to the investigation retrieved the stolen items from INDIVIDUAL L's residence and placed them into evidence.

INDIVIDUAL L learned from ABUHABSAH that PANOZZO and KOROLUK believed that INDIVIDUAL H was "selling them out" to law enforcement. PANOZZO and KOROLUK related that they could get INDIVIDUAL H transferred to a division in Cook County Jail where INDIVIDUAL H could be "whacked", referring to killing INDIVIDUAL H.

INDIVIDUAL L stated he heard that KOROLUK, INDIVIDUAL H and INDIVIDUAL W stole a .50 caliber handgun from an "Arab weed house" near 78th and Western in the summer of 2013. According to INDIVIDUAL L, KOROLUK or INDIVIDUAL H now has the gun.

When asked about PANOZZO keeping a "job book", INDIVIDUAL L stated that he has heard that PANOZZO keeps a book that contains addresses and names of past and future jobs, i.e. robberies, but INDIVIDUAL L stated he has never seen this book.

PANOZZO has admitted to INDIVIDUAL L that PANOZZO has buildings inspectors working

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for him and that he pays them off to look the other way when there is a violation on one of his buildings.

E) INTERVIEW OF INDIVIDUAL W

On May 1, 2014, Investigator Bryan CARR #5006, Cook County Sheriff's Department, Sergeant Thomas MASON #2368, C.P.D., Detective James SHERLOCK #20212, C.P.D. and Special Agent Michael LOVERNICK, F.B.I. interviewed a cooperating individual who shall be referred to for the purposes of this affidavit as INDIVIDUAL W.[5]

INDIVIDUAL W admitted to being a member of the P-K Street Crew that included INDIVIDUAL X, Dioniso GARCIA, INDIVIDUAL H, INDIVIDUAL L, Paul KOROLUK, Robert PANOZZO and Maher ABUHABSAH. INDIVIDUAL W identified each of these individuals by photograph during the proffer. Other individuals are sometimes employed in addition to the above named individuals to assist as needed during the robberies. INDIVIDUAL X was identified as the member of the P-K Street Crew who supplies the identity of drug dealers and stash houses that the other members of the crew will rob. ABUHABSAH was identified as the "computer guy" who advises and operated trackers on targets' vehicles and supplies additional information through computer searches on the targets.

[5] INDIVIDUAL W gave this information pursuant to a proffer arranged by INDIVIDUAL W's attorney in the hope of receiving consideration on pending criminal charges. No promises of consideration have been made to INDIVIDUAL W in exchange for his cooperation. INDIVIDUAL W is a convicted felon. Individual W wishes to remain anonymous for fear of retribution for his cooperation.

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INDIVIDUAL W detailed several robbery/home invasions that he was aware of and/or participated in with other members of the P-K Street Crew. INDIVIDUAL W described his knowledge of the robbery of the tractor trailer truck that INDIVIDUAL L described above and INDIVIDUAL W was also aware of the plan to kill the victim in INDIVIDUAL H's kidnapping case, INDIVIDUAL J. INDIVIDUAL W stated that a gang member who associates with PANOZZO and KOROLUK was to be hired as the hit man being paid $10,000 up front and another $10,000 after the murder.

When describing one of the attempted robberies of a drug dealer that he participated in with GARCIA, INDIVIDUAL L, KOROLUK, PANOZZO, and ABUHABSAH, INDIVIDUAL W related that members of the P-K Street Crew were dressed as police officers, which is consistent with information provided by the other debriefed individuals as described herein. INDIVIDUAL W also related that PANOZZO keeps the badges, scanners, cellphone jammers, and other electronic devices that the P-K Street Crew uses and that PANOZZO stores handguns at his 514 514 Claremont residence. Information on arsons for fraudulent insurance claims committed by PANOZZO and a massage parlor/prostitution house owned by PANOZZO and KOROLUK was also detailed by INDIVIDUAL W during the proffer.

INDIVIDUAL W advised that Robert PANOZZO is currently using an older Dodge Durango sport utility vehicle to engage in criminal activity or "jobs" and that this vehicle has fictitious registration in the name of a nonexistent person. INDIVIDUAL W further related that PANOZZO

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registered this vehicle to a fictitious name and address but had the license plates mailed to a currency exchange.

On multiple dates throughout the month of May, 2014, detectives assigned to this investigation have observed a Dodge Durango matching the description provided by INDIVIDUAL W parked and unoccupied on the 500 Block of North Claremont. Robert PANOZZO is known by your affiant to currently reside at 514 North Claremont.

The Dodge Durango had an Illinois license plate of S378244 which was issued to "Joe MANDELL" of 1653 Pinnacle, Aurora, Illinois, in November of 2013. A search of several law enforcement databases shows no record of a "Joe MANDELL" before this issuance of a license plate, leading this affiant to the conclusion that this is a fictitious person.

On May 22, 2014, at approximately 3:00 p.m., Chicago Police Officer Patrick Johnson observed PANOZZO standing on the 500 Block of North Claremont speaking with an elderly white female. The Dodge Durango in question was observed parked and unoccupied on this block nearby. Approximately two minutes later, the Dodge Durango was observed leaving the area and turning east on Grand Avenue being driven by a male white believed to be Robert PANOZZO.

F) INTERVIEW OF INDIVIDUAL 2 AND INDIVIDUAL Y

Based on information from the other cooperating individuals described above, officers assigned to this investigation were able to identify two individuals who supplied names and

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address of potential targets to members of the P-K Street Crew. These individuals will be referred to as INDIVIDUAL 2 and INDIVIDUAL Y as they wish to remain anonymous for fear of reprisals. These two individuals often work together in overseeing and arranging for narcotic shipments in and around the Chicago area and admitted to supplying information concerning these shipments, including the locations of stash houses where narcotics were being stored, to members of the P-K Street Crew. Because much of the information obtained during interviews of INDIVIDUAL 2 and INDIVIDUAL Y was the same or similar, the information that they provided is being included in one section of this Affidavit.[6]

Beginning on May 29, 2014, interviews were conducted of these two individuals by Chicago Police Department officers and federal agents. These informants know both Maher "Max" ABUHABSAH, and Dionisio GARCIA, A.K.A. "J.B", A.K.A. "Junebug". They know ABUHABSAH and GARCIA work with a street crew consisting of "older white guys" committing robberies but they do not know the other individuals that ABUHABSAH and GARCIA are currently working with, specifically KOROLUK and PANOZZO.

The informants indicate they are free-lance narcotics buyers, and do not belong to a drug cartel. They stated they are able to order numerous kilogram shipments of cocaine from drug cartels. A certain percentage of those shipments are waved off by the informants, and set

[6] INDIVIDUAL 2 and INDIVIDUAL Y cooperated in the hope of receiving consideration on a pending criminal case. No promises of consideration have been made to either in exchange for their cooperation.

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up to be robbed by the street crew by feeding information to ABUHABSAH and GARCIA. As described above, the proffers of other John Doe informants and INDIVIDUAL H revealed that it was the P-K Street Crew including INDIVIDUAL W, INDIVIDUAL H, INDIVIDUAL L, KOROLUK and PANOZZO that would commit these robberies with assistance from ABUHABSAH and GARCIA.

INDIVIDUAL 2 and INDIVIDUAL Y met with Sergeant Thomas MASON, Detective James SHERLOCK, Detective David FELTMAN and Investigator Bryan CARR on June 9, 2014. INDIVIDUAL 2 and INDIVIDUAL Y related information to the investigators that they have been in contact both by phone and in-person with ABUHABSAH on multiple occasions in the past two years regarding home invasions and robberies, most recently supplying information about a target in April of 2014. INDIVIDUAL 2 and INDIVIDUAL Y also related that they were aware that ABUHABSAH and GARCIA installed tracking devices on intended robbery target's vehicles and that ABUHABSAH would track vehicles using a computer.

INDIVIDUAL 2 and INDIVIDUAL Y were asked about and provided their knowledge of several of the P-K Street Crew home invasions and robberies that investigators were aware of based on the information provided INDIVIDUAL H, INDIVIDUAL I and INDIVIDUAL L. INDIVIDUAL 2 and INDIVIDUAL Y were able to independently confirm details of these robberies that your affiant was aware of from the earlier proffers. For example, INDIVIDUAL 2 and INDIVIDUAL Y admitted to providing the information regarding the robbery of a tractor trailer that was loaded with approximately 40-50 kilograms of cocaine. INDIVIDUAL 2 stated that he was in

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communication using "burner" phones with ABUHABSAH and GARCIA during the planning of this robbery and that INDIVIDUAL 2 received $200,000 after the stolen kilograms of cocaine were sold, and INDIVIDUAL Y got $100,000.

INDIVIDUAL 2 and INDIVIDUAL Y stated that the "white guys" associated with Max and JB would often tie up the targets and smack them around to get the locations where the drugs and/or money were hidden. They have even tied up the wives and children of targets if they were present. INDIVIDUAL 2 and INDIVIDUAL Y also related that the members of the P-K Street Crew have the ability to run license plates and check on addresses because they have provided this information to these informants in the past when they requested it. INDIVIDUAL 2 and INDIVIDUAL Y do not know how the members of the P-K Street Crew obtain this information.

INDIVIDUAL 2 and INDIVIDUAL Y, stated that they would be able to work with GARCIA and ABUHABSAH to set up future drug robberies. In furtherance of this plan, on June 11, 2014, INDIVIDUAL 2 purchased a Blackberry cellular phone to communicate with GARCIA and ABUHABSAH regarding an upcoming drug robbery. On June 11, 2014, INDIVIDUAL Y also purchased a Blackberry cellular phone. On June 12, 2014, Horseshoe Casino security informed law enforcement that ABUHABSAH had entered the casino. INDIVIDUAL 2 was notified by the police, and went to the Horseshoe Casino in Hammond, Indiana where INDIVIDUAL 2 met with ABUHABSAH.

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INDIVIDUAL 2 indicated that he had a narcotics rip-off robbery for ABUHABSAH and GARCIA. ABUHABSAH expressed his interest but indicated he would be out of town in Las Vegas and that GARCIA would be in Miami. ABUHABSH stated they would discuss the robbery when he and GARCIA returned. ABUHABSAH stated to INDIVIDUAL 2 that ABUHABSAH's current "burner" cellular number is 872-233-5725.

INDIVIDUAL 2 and INDIVIDUAL Y indicate that the Blackberry "burner" phones are just temporary phones that are used among the co-conspirators to coordinate an upcoming robbery/home invasion and then the phones are disposed of. INDIVIDUAL 2 and INDIVIDUAL Y believe that the only individuals who are contacted through the P-K Street Crews' "burner" blackberry phones are other co-conspirators who are needed for that specific robbery.

INDIVIDUAL 2 indicated that the way that drug rip-offs have been done in the past is that INDIVIDUAL Y would reach out to ABUHABSAH and let him know about a potential robbery target. ABUHABSAH would then get in touch with GARCIA and the rest of the P-K Street Crew. INDIVIDUAL 2 and INDIVIDUAL Y know that others assist ABUHABSAH and GARCIA in the robberies but have not been entrusted to know who those individuals are, however, INDIVIDUAL 2 and INDIVIDUAL Y knows that ABUHABSAH and GARCIA use the newly purchased "burner" Blackberry phones to communicate details of the planned robbery among those planning and participating in the robbery.

V. P-K Street Crew's Planned Robbery of the Stash House

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In preparation for this robbery, law enforcement obtained access to a house to be used as a "stash house" where the kilograms of cocaine that are to be robbed will be located. Law enforcement is planning to wire the house for audio and video to capture the members of PANOZZO'S robbery crew who engage in the residential burglary and who take the cocaine from the house.

INDIVIDUAL Y was advised of the neighborhood that the stash house is in, but not given a specific address. INDIVIDUAL Y indicated that this was a good neighborhood, it was quiet, and that he believed he could pass along this information and the P-K Street Crew would be interested in it or another robbery/burglary opportunity.

On June 30, 2014, at approximately 2:30pm, your affiant received a phone call from INDIVIDUAL 2 who related that INDIVIDUAL 2 had just been contacted by ABUHABSAH who stated he wanted to meet with INDIVIDUAL 2 right then. INDIVIDUAL 2 agreed to a meeting with ABUHABSAH and then notified Detective Sherlock of the meeting.

Your affiant were not aware that INDIVIDUAL 2 would be engaging in conversation with ABUHABSAH on this day and thus had not yet obtained a Consensual Overhear Order as of this time. When notified by INDIVIDUAL 2, your affiant was only able to make contact with your Investigator Brian Carr to come to the location of the meeting between INDIVIDUAL 2 and ABUHABSAH, which occurred on a side street off of Archer Avenue and Keating Avenue.

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Believing that ABUHABSAH wanted to meet with INDIVIDUAL 2 for purposes of providing INDIVIDUAL 2 with the Blackberry PIN number of the "burner phone" that ABUHABSAB would be using in the robbery of the "stash house", your affiant contacted Assistant State's Attorneys (ASA) Patrick Morley and Patrick Coughlin to advise them of the meeting which was occurring. ASA Patrick Coughlin granted authority to utilize an Emergency Consensual Overhear Order pursuant to 725 ILCS 5/108A-6 so that INDIVIDUAL Y could record the meeting with ABUHABSAH which was subsequently approved by Judge Kazmierski.

INDIVIDUAL 2 and ABUHABSAH met at the agreed location and immediately following the meeting, INDIVIDUAL 2 met with your affiant who retrieved the recording of the meeting from INDIVIDUAL 2. In summary and not verbatim, the following conversation occurred during the meeting between INDIVIDUAL Y and ABUHABSAH.

ABUHABSAH told INDIVIDUAL 2 he had been laying low, and that two of their "white boys" had been locked up, one was in jail, the other had lost at trial. ABUHABSAH indicated that he and the crew were still "in the game" and still together. When INDIVIDUAL 2 asked them if they wanted a job, ABUHABSAH replied in the affirmative, and asked if this job would be as good as the last job. INDIVIDUAL 2 stated this job would be better, that he was working with a guy from Mexico, and that he would let ABUHABSAH know where and when the guy had the narcotics. As INDIVIDUAL 2 and ABUHABSAH talked, ABUHABSAH allowed INDIVIDUAL 2 to enter Doe's PIN into ABUHABSAH's Blackberry. At that time, the phones linked. ABUHABSAH's

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PIN number for his Blackberry is "332B2FB9". A short time late ABUHABSAH sent a message to INDIVIDUAL 2 via a pin-to-pin Blackberry message asking if the message went through.

In furtherance of the plan to electronically monitor the P-K Street Crew members who will be taking place in the planned robbery at the stash house, an application for the issuance of an Electronic Surveillance Order (ESO) was drafted and submitted to Judge Paul P. Biebel, Jr., Presiding Judge of the Criminal Division. Judge Biebel signed the order on July 11, 2014 which authorized the installation of electronic interception devices in the stash house, and authorized the interception of the private oral communications of the robbery crew during the commission of their criminal activities.

On July 14, 2014, Individual Y sent a series of Blackberry PIN-to-PIN messages to Maher ABUHABSAH. These message were sent to ABUHABSAH as a follow up to an earlier discussion between ABUHABSAH and Individual Y which occurred on June 30, 2014 during which Individual Y asked, in summary and not verbatim, if ABUHABSAH and the robbery crew wanted a job. ABUHABSAH replied in the affirmative, and asked if this job would be as good as the last job. Individual Y stated this job would be better, that he was working with a guy from Mexico, and that he would let ABUHABSAH know where and when the guy had the narcotics. The following PIN-to-PIN messages were sent on July 14, 2014:

Individual Y: Hey what's new

ABUHABSAH: Shit what's up

Individual Y: Checking on u if u guys ready

ABUHABSAH: We don't have a magnet anymore but we can ordere

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ABUHABSAH: One

Individual Y: they telling me like Wednesday or Thursday

ABUHABSAH: ok let us know

Individual Y: Ima try and get the place so ill see maybe we won't need one

Individual Y: ok I will

ABUHABSAH: K

On July 15, 2014, the following PIN-to-PIN messages were sent:

Individual Y: Yo

ABUHABSAH: Sup

Individual Y: Tommorrow ima go and get some stuff from dude
Individual Y: So get the team ready so we can get that done

ABUHABSAH: Ok

Individual Y: Its gonna be like in the afternoon dude is supposed to call me
Individual Y: U guys alright or what

ABUHABSAH: Ya we good we just chillin

Individual Y: Oh I was askin cus all u said was ok

ABUHABSAH: Lol I'm talki8ng to my guys now on the phone

Individual Y: Ok cool well get it ready and ill text you when I get the call it's a big one

ABUHABSAH: its not gonna be a semi right cause we don't have a person for that

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Individual Y: no it's a house ill give u guys details tomorrow though when I see you in person

ABUHABSAH: Ok
ABUHABSAH: Do u know around what time or not yet

Individual Y: like 2 but not sure
Individual Y: will let u know as soon as I know

ABUHABSAH: k

On July 16, 2014, Chicago Police Department Officers and agents from the Federal Bureau of Investigation placed approximately 40 kilograms of cocaine inside the residence located at 13451 S. Brandon, the "stash house." A court order had previously been issued on July 11, 2014 authoring electronic surveillance orders to capture private conversations occurring within the stash house as well as over ABUHABSAH's Blackberry device/phone bearing PIN number 332B2FB9. Also on July 16, 2014, law enforcement provided Individual Y with the address of the stash house for the first time and instructed Individual Y to contact ABUHABSAH.

Surveillance was maintained on the stash house and in the evening hours of July 16, 2014, Robert PANOZZO and Paul KOROLUK broke into the stash house and took possession of the approximately 40 kilograms of cocaine. Once they exited the stash house both PANOZZO and KOROLUK were placed into custody. Also arrested were Robert PANOZZO Jr. and Maher ABUHABSAH who were in vehicles driving around the stash house believed to be conducting counter surveillance.

VI. PREMISES TO BE SEARCHED:

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Based upon the facts discussed herein, and as stated at the outset of this affidavit, your affiant asserts that probable cause exists to search the following locations: 1) 2048 W. Hubbard Ave. (Service Battery Warehouse); 2) 514 N. Claremont Avenue, (PANOZZO's residence); 3) 1236 N. Mapplewood Avenue, (ABUHABSAH's Residence); 4) 2149 Race Street, (KOROLUK's residence); 5) 2153 W. Race Street, (Vacant lot owned by KOROLUK); 6) 2155 W. Race Street (Lot used to store stolen property); 7) 518 N. Oakley Avenue, (Lot used to store stolen property) and 8) 3709 W. 84th Place, (ABUHABSAH's childhood home).

2048 WEST HUBBARD, CHICAGO IL, MANDIK's SERVICE BATTERY WAREHOUSE

2048 West Hubbard, Chicago, IL, is a single story, grey utility brick commercial/industrial building with a loading dock visible from the street and a paved area to store, load or park vehicles. The building is surrounded by a chain link fence that is gated at the entrance driveway. At the driveway entrance and affixed to the front of the building is a metal sign that says "Service Battery Inc." The business purports to be engaged in the principal occupation of recycling batteries. Other signs on the front of the building states "We buy batteries, copper, aluminum, stainless scrap" and "Customer Service" with an arrow pointed toward the loading dock. The loading dock is covered and stands in front of an office potion of the premises.

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INDIVIDUAL Z, an associate of PANOZZO and KOROLUK, owns Service Battery, the business that is located at this address. There is a mural on the outside facing fence of the business with a painted depiction a woman, a leopard-skin chair, jewelry, and a martini glass, with an exclamation underneath stating, "I like the Wiseguys." The term "Wiseguys," of course, is a commonly known euphemism for members of organized crime.

Service Battery has an internet web site that shows: Service Battery Inc., 2048 W Hubbard St., Chicago, IL 60612, Email servicebatteryinc@yahoo.com, Phone 312-666-2874, Fax 312-666-2887, Business Hours: Monday – Friday: 7:00am – 4:00pm, Saturday: 7:00am – 12:00pm. Owners: listed as INDIVIDUAL Z and INDIVIDUAL 3.

INDIVIDUAL L, INDIVIDUAL W, INDIVIDUAL X, INDIVIDUAL Z and other individuals have indicated that this Service Battery location serves an important function in the burglaries and the thefts of narcotics and cash committed by the P-K Street Crew. These informants have stated that after the kilos of narcotics and all available cash are taken in these burglaries, the entire crew relocates to 2048 West Hubbard to split up the narcotics and cash. Some of these kilos are repackaged at this location for re-distribution. This is the standard operating procedure for the PK Street Crew. INDIVIDUAL Z is sometimes present at this split.

The P-K Street Crew relocated to 2048 West Hubbard the last time they committed a burglary to steal 54 kilos of narcotics and cash in February 2014. INIDIVIDUAL Z was not

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present at this split, however, his partner, INDIVIDUAL 3, was present. INDIVIDUAL 3 is also listed as a partner on Service Battery's website.

In Affiant's experience, a facility used to break down narcotics and split the proceeds should contain evidence of the racketeering conspiracy and equipment and products used to perform these post-robbery tasks. Products including scales, money counters, plastic baggies, tape, cutting instruments can reasonably be expected to be found in such a location. Further, the presence of any of these items could also contain narcotics residue.

514 NORTH CLAREMONT, TOP FLOOR, CHICAGO IL

Your Affiant requests the issuance of a warrant to authorize search of the premises located at 514 North Claremont, top floor, Chicago, IL. 514 North Claremont, Chicago, is a three story, residential building constructed of gray utility brick, built in 2006, situated on a 2,900 sq. ft. lot., surrounded by a black wrought iron fence with a gangway located on either side of the building. Each floor of this building has a large picture window that faces the street.

Probable cause supports a conclusion that this location is the residence of Robert PANOZZO, Sr. According to public records, each of the three units of the building are individual condominium units. According to public records, Robert W. PANOZZO, took out a mortgage on the property on November 30, 2006 with First Security Trust & Savings Bank, Chicago. Also, a 2013 Chicago Police Report shows that PANOZZO reported a break-in at 514 North Claremont, unit 3, which he reported as his residence address.

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Much of the equipment used in the home invasions and burglaries are kept this location. Three independent informants have indicated that the burglary tools and equipment are kept and maintained on the second floor of this location, which includes walkie-talkie radios, cell phones, and cell phone jammers.

Moreover, multiple motor vehicles connected to Robert PANOZZO, Sr. have also been closely associated with this address. Numerous times investigators have observed a Dodge Durango and a white GMC pickup parked on the street outside this address. The Dodge Durango is registered to a nonexistent person, which is consistent with PANOZZO's habitual desire to maintain personal anonymity.

Nevertheless, this automobile has been observed parked in front of 514 North Claremont on numerous occasions and PANOZZO has also been seen driving this vehicle. For 30 days a court-ordered GPS device tracked the movements of this Dodge Durango. Every night during this period this vehicle was parked in the street outside 514 North Claremont.

INDIVIDUAL W has also indicated that PANOZZO drives a Dodge Durango. In fact, INDIVIDUAL W has indicated that PANOZZO drives the Dodge Durango to the sites of burglaries and home invasions. This fact further explains why PANOZZO is utilizing a vehicle registered to a nonexistent person.

Also, a white GMC pickup has also been sighted consistently parked in front of 514 North Claremont. PANOZZO has also been observed numerous times driving this vehicle. This

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car is actually registered to him. The proximity of these vehicles to 514 North Claremont further strengthens the nexus between PANOZZO and the compelling inference that this building is his residence.

Robert PANOZZO, Sr. has been identified by the witnesses discussed herein as the organizer and planner of numerous crimes, including racketeering, home invasion, burglary and the thefts of narcotics. PANOZZO is a career criminal who plans and executes complicated criminal conspiracies involving numerous other individuals. PANOZZO has a checkered criminal past including a previous arrest in which over one million dollars in proceeds was recovered from the homes and property of the defendants in that case. In affiant's experience, it is likely that evidence of these crimes can be expected to be found in his residence, including articles pertaining to the planning of crimes as well as stolen proceeds.

1236 NORTH MAPLEWOOD, CHICAGO IL

"Max" Maher ABUHABSAH resides at 1236 North Maplewood Avenue with INDIVIDUAL S. This location is a 3,164 square foot, 3.5 bathroom, single family home of brick construction with a detached parking garage. Maher ABUHABSAH serves the P-K Street Crew by supplying digital / computer technology skills and expertise. This expertise includes tracking the whereabouts of intended burglary victims and their vehicles. INDIVIDUAL W, an admitted member of the P-K Street Crew identified ABUHABSAH as the "computer guy" who tracks victim vehicles and obtains additional information on potential victims using computer searches.

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According to the U.S. Postal Letter Carrier, two males live on the first floor and an elderly woman resides on the second floor. ABUHABSAH is the registered owner of a used car lot in Indiana. Investigators have observed two cars with Indiana dealer plates parked in front of 1236 North Maplewood. Investigators have also observed ABUHABSAH leaving the residence. ABUHABSAH's email communication clearly shows he actually resides at 1236 North Maplewood.

Records show that in March, 2011 ABUHABSAH ordered a Dell computer and had it shipped it under his own name to 1236 North Maplewood, according to the receipt and Shipping Order emailed from Dell. In September 2013, INDIVIDUAL T asked ABUHABSAH for his address so that INDIVIDUAL T could mail him ABUHABSAH's car remote. ABUHABSAH directed INDIVIDUAL T to mail his car remote to him and use the name INDIVIDUAL S at 1236 North Maplewood on the package. Further, in January 2013, ABUHABSAH asked INDIVIDUAL U via email to have a van towed to 1236 North Maplewood.

It is not surprising that ABUHABSAH would want to leave as little official proof of his actual address as possible. In Affiant's experience, persons involved in criminal conspiracies prefer to make it difficult for law enforcement or other criminals to easily discover their residence. In fact, in a Gmail Chat with INDIVIDUAL T, ABUHABSAH admits he wants to live anonymously. INDIVIDUAL T mentions to ABUHABSAH that ABUHABSAH is now a North Sider. ABUHABSAH tells INDIVIDUAL T that he doesn't want anyone to know he's living there, that he

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won't have any bills under his own name, the lease will not be under his name, that he won't change his official address. ABUHABSAH has a mailing address at 3709 West 84th Place, Chicago, IL, which is his childhood home.

ABUHABSAH has, in fact, tried to keep his name off bills. ABUHABSAH tracks victim vehicles with GPS technology and uses a company called Brickhouse Security. Brickhouse Security sends out coordinates of GPS devices, allowing ABUHABSAH to track vehicles. However, ABUHABSAH does not pay for this service personally. This Brickhouse Security service is paid for and billed to INDIVIDUAL S at 1236 North Maplewood. This is another example of ABUHABSAH's attempts to keep himself anonymous.

ABUHABSAH uses technology to aid the PK Street Crew. His phones, computers and other computing platforms can reasonably be expected to contain evidence of his involvement and contribution to the crimes of the P-K Street Crew. These devices, as well as documents relating to these items can reasonably be expected to be found in his residence.

2149 WEST RACE, CHICAGO IL

2149 West Race, Chicago, IL is brick, 1-1/2 story, 900 sq. ft., single family residence with a basement and a chain link fence in the front on a 2,300 sq. ft. lot. and a detached garage in the back. Public records show that on April 7, 2005, Paul KOROLUK's wife, took out a mortgage on the property with Taylor Bean & Whitaker, Chicago. This is where Paul KOROLUK, Sr. has

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lived for a very long time. KOROLUK's Ford F-150 Truck has been sighted parked in front of this house numerous times.

2153 West Race is a vacant house next door and is also owned by KOROLUK. 2155 West Race is a vacant lot next door to 2153 West Race and is also owned by KOROLUK. All these addresses can be expected to contain evidence of KOROLUK's criminality.

2153 WEST RACE AVENUE, KOROLUCK'S OTHER PROPERTY

2153 West Race, Chicago, IL is brick, 1-1/2 story, 900 sq. ft., single family residence with a basement. 2153 West Race has been identified as a building dedicated to KOROLUK's criminal enterprises and the work of the P-K Street Crew.

KOROLUK has been identified by Investigators as exiting from this location and an informant actually went to the residence accompanied covertly by Investigators (when). KOROLUK, along with PANOZZO, plans and executes major conspiracies involving many co-conspirators. Further, KOROLUK is known to keep proceeds of past burglaries as trophies of his crimes. In Affiant's experience, it is likely that evidence of these crimes can be expected to be found in his residence, including articles pertaining to the planning of crimes as well as stolen proceeds.

2155 WEST RACE AVENUE, KOROLUK'S VACANT LOT

2155 West Race is a vacant lot behind a high wall owned by KOROLUK. There is a shed on located this property, as well as a great deal of metal scrap, debris and other unknown

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items. Investigators are unable to discern other specifics without compromising the investigation.

KOROLUK is known to keep proceeds of past burglaries. Newspaper articles chronicling KOROLUK's past detail several arrests in which over $1 million proceeds was recovered. In a 1997 arrest, over $1 million dollars in proceeds was recovered from KOROLUK and his crew, as well as several hundred thousand dollars. A 1992 arrest of KOROLUK led to more than $2 million dollars in stolen property being recovered, some from KOROLUK's property.

518-522 NORTH OAKLEY

There are vacant lots at 518-522 North Oakley Ave. Law enforcement sources received a tip that a boat stolen by Robert PANOZZO was being stored at the vacant lot at this location. Police went to that location and saw a motor boat, underneath a tarp, with identifying marks such as the hull identifying number (HIN) and registration shielded from view. That boat was connected to a trailer, 5639GBTA 2003 Roadmaster trailer. The lot had been owned by Paul KOROLUK until 1999, when he quit claimed deeded it to individual, who then obtained a mortgage on the lot.

3709 WEST 84TH PLACE, CHICAGO (ABUHABSAH'S CHILDHOOD HOME)

ABUHABSAH resides at 1236 North Maplewood but he has retained 3709 West 84th place as his permanent mailing address. 3709 West 84th place, Chicago IL Is a single family home on a residential block. This residence will likely contain U.S. mail addressed to

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ABUHABSAH and other items that have been delivered to ABUHABSAH. Further, since ABUHABSAH trusts this location as a repository for his mail, it is reasonable to believe he keeps other documents at this residence, including articles related to this racketeering conspiracy.

VII. ARTICLES, INSTRUMENTS AND THINGS TO BE SEARCHED FOR, SEIZED AND ANALYZED

Based upon the foregoing, probable cause exists to search for, seize and analyze the following instruments, articles and things:

All records, books, ledgers, computer hardware, computer software, computer discs and all records, documents, notes, memoranda or other writings stored on a computer in any format, which may be evidence of the below offenses, or which may be evidence of the location of assets derived from these offenses;

Photographs, film, video tape, audio tape, electronic communication devices, cellular telephones, and pagers along with all electronic information stored in or accessed on or via these devices, phones and pagers;

Bank statements, bank books, bank notes, bank drafts, money orders, money order purchase records, checks, canceled checks, deposit records, loan documents;

Safe deposit box records, safe deposit box keys, safes, lock boxes, storage facility records and keys;

Business, payroll benefits, source of income records;

Real estate contracts, real estate appraisals, real estate maintenance records;

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Assets, jewelry, precious metals, cash and any papers and documents or items evidencing the obtaining, secreting, transfer or concealment of assets, jewelry, precious metals or cash received from the sale of the below offenses;

The seizure is to include the opening, search and removal, if necessary, of any safe or other locked container, receptacle or any other container, in which some or all of the property hereto described herein may be contained; and

Any other instruments, articles or things that have been used in the commission of, or which constitute evidence of the commission of the offenses of, or constitute the direct of derivative proceeds of: violations of the Illinois street gang and racketeer influenced and corrupt organizations law (RICO), 720 ILCS 5/33G-1, et. seq., first degree murder, 720 ILCS 5/9-1, armed violence, 720 ILCS 5/33A-1, possession of a controlled substance with the intent to deliver, 720 ILCS 570/401 et. seq., drug conspiracy, 720 ILCS 570/405.1, and aggravated unlawful use of a weapon, 720 ILCS 5/24-1.6.

VIII. CONCLUSION:

Based on the foregoing, there is probable cause to believe that the felony offenses of violations of the Illinois street gang and racketeer influenced and corrupt organizations law (RICO), 720 ILCS 5/33G-1, et. seq., first degree murder, 720 ILCS 5/9-1, armed violence, 720 ILCS 5/33A-1, possession of a controlled substance with the intent to deliver, 720 ILCS 570/401 et. seq., drug conspiracy, 720 ILCS 570/405.1, and aggravated unlawful use of a weapon, 720 ILCS

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5/24-1.6 have been, are being and will be committed and that evidence of those crimes will be found in the locations that are to be searched, and that the items described above are subject to seizure and forfeiture.

Det. James Sherlock #20212, Chicago Police Dept.

Sworn and subscribed to before me
This 17th day of July, 2014
At 1:00 p.m. / am.

Judge, Circuit Court of Cook County

Discovery Motions & Briefing

Alison Siegler, Univ. of Chicago Law School

Defendant's Motion to Compel Discovery re Selective Enforcement in *United States v. Lonnie Jackson*, 16-CR-2362-MCA (D.N.M.) (DE 29, filed 4/19/17)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff, CR 16-2362 MCA

vs.

LONNIE JACKSON,

Defendant.

DEFENDANT'S MOTION TO COMPEL DISCOVERY PERTAINING TO CLAIM OF SELECTIVE ENFORCEMENT[1]

COMES NOW the Defendant Lonnie Jackson, by and through undersigned counsel, John F. Robbenhaar, Assistant Federal Public Defender, and respectfully moves this Court, pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, to compel the disclosure of the following discovery items:

1. A list of all cases brought by the United States Attorney's Office located in Albuquerque, New Mexico, resulting from the 2016 ATF sting operation conducted in Bernalillo County, New Mexico (hereinafter, "ATF sting"), as publicized in the press release attached as Defendant's Exhibit A;

2. In every ATF sting case:
    a. Each defendant's race and ethnicity;
    b. A complete history of each defendant's prior criminal convictions and arrests;
    c. A statement of the prior criminal investigations, if any, that ATF had conducted into each defendant before initiating confidential informant contact;
    d. Addresses of CI approaches with all potential and ultimate targets;

3. The same information requested in ¶ 2 for all individuals who were investigated during the ATF sting operation, but who were not ultimately arrested and/or charged;

[1] This Motion is being filed in several cases in the District of New Mexico arising out of the ATF sting.

4. Any grant proposals or funding requests delineating the purpose and intended effect of the ATF sting operation;

5. The names of the agents involved in the sting;

6. The target selection criteria for the ATF sting;

7. Any policies, practices, or selection criteria that influenced or dictated target selection in the ATF sting cases;

8. What, if anything, any confidential informant was told about the criteria being used to target individuals in the ATF sting;

9. The number of confidential informants that the ATF used in the ATF sting, their races and ethnicities, and the number of those confidential informants who had knowledge of and/or contact with non-African American or non-Latino persons who could be targeted;

10. All communications, including all e-mails, text messages, voicemail messages, audio and video recordings, recorded phone calls, and social media communications, between any confidential informant used in the ATF sting and any target of the ATF sting, whether the target was ultimately arrested and charged or not;

11. All contemporaneous writings, records, and/or memorializations setting out the reasons the ATF gave for pursuing – or not pursuing – an individual for arrest in the ATF sting;

12. All documents and communications, including all e-mails, memos, text messages, press releases, voicemail messages, audio and video recordings, between any persons employed or contracted by the ATF, related to: the investigation of any individuals pursuant to the ATF sting; the decision to investigate (or not to investigate) anyone pursuant to the ATF sting; the charging criteria for the ATF sting; the decision to charge (or not to charge) anyone as a result of the ATF sting; the race of any defendant in the ATF sting, and the decision to decline charging someone in the ATF sting. Such documents and communications include those made on personally owned devices and/or personally maintained e-mail accounts or social media accounts;

13. All national and Phoenix Field Division ATF manuals, circulars, field notes, correspondence, or any other material which discusses “stings” or entrapment

operations, including protocols and/or directions to agents and confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that targets do not seek to quit or leave the conspiracy before an arrest can be made, and how to ensure that agents and confidential informants are not targeting persons for such operations on the basis of their race, color, ancestry, or national origin;

14. All documents containing information on how supervisors and managers of the Phoenix Field Division ATF were to ensure and/or did ensure that their agents and confidential informants were not targeting persons on the basis of their race, color, ancestry, or national origin for these ATF sting cases, and what actions those supervisors and managers took to determine whether agents were, in fact, targeting persons for those reasons.

Undersigned counsel mailed a letter to AUSA Dave Walsh on January 4, 2017, requesting production of the above-referenced discovery items.[2] *See* Defendant's Exhibit B – Discovery Request Letter. On January 24, 2017, defense counsel received a letter from AUSA Walsh stating that the United States did not intend to comply with the defense's discovery request. *See* Defendant's Exhibit C – USA's Response to Discovery Request Letter. Pursuant to paragraph 8 (page 5) of the Discovery Order issued in this case (Doc. 10), defense counsel now moves this Court to order the disclosure of the requested items.

PROCEDURAL BACKGROUND

On May 24, 2016, a Grand Jury returned an Indictment (Doc. 2) against Lonnie Jackson, charging him with distribution of 50 grams and more of a mixture and substance containing methamphetamine. Mr. Jackson was arrested on this charge on July 6, 2016, and on July 11, 2016 he entered a plea of not guilty to all counts. *See* Doc. 9 – Clerk's Minutes from Arraignment. On the same date, Mr. Jackson was ordered detained pending trial, and he remains

[2] With the exception of paragraphs 5, 6, and 10, which are newly-added requests. In addition, some of the requests from the initial discovery request letter have been removed or modified, but the general nature of the requests remains the same.

in custody. *See* Doc. 11 – Detention Order Pending Trial.

FACTUAL BACKGROUND

Lonnie Jackson is a lifelong resident of Albuquerque, New Mexico, and lives in his family home in a historically Black neighborhood ("Kirtkand Park") near University Blvd. and Gibson Blvd. SE. Mr. Jackson graduated from the Albuquerque High School in 1988 and has four surviving siblings who reside in Albuquerque. Mr. Jackson has one child and, at the time of his arrest, was acting as caregiver for his then –elderly mother (who has since passed away subsequent to Mr. Jackson's arrest). Mr. Jackson suffers from high blood pressure and diabetes, has a permanently damaged left leg and ankle, and was deemed medically disabled in 2008 even though he was not receiving benefits from social security. Mr. Jackson is 48 years old and is African American.

In May 2016, Confidential Informant (CI) 11438 contacted Lonnie Jackson regarding the possible purchase of methamphetamine. Discovery reveals numerous telephone calls and text communications between the two, which allegedly resulted in two separate transactions, one on April 27, 2016 and the second on May 24, 2016 (even though Mr. Jackson is formally charged by Indictment only with the April incident). Regarding April 27, 2016, it is alleged that, after the CI and the undercover agent (UC) arrived and entered Mr. Jackson's home, a source of supply arrived by car, and Mr. Jackson was surveilled meeting with this person at his car in the street. Upon returning to the house, Mr. Jackson then allegedly sold the drugs to the CI and UC. The pattern then essentially repeated itself on May 24, except this time it is alleged that Mr. Jackson sold the controlled substances directly to the UC. It is alleged that Mr. Jackson sold two ounces of methamphetamine on each occasion. The recordings reveal that the UC pressed Mr. Jackson to locate and sell him illegal firearms, stating that he would take anything but that he prefers long

arms. Outside of firearms being generally discussed in this conversation, Mr. Jackson never sold any firearms in this case. As noted above, Mr. Jackson was arrested without incident approximately six weeks later, on July 6.

Blacks are vastly overrepresented within the defendant class resulting from the Albuquerque ATF sting.

Blacks represent 3.4% of the population of Bernalillo County,[3] the geographic area encompassed by this sting, which resulted in a total of 104 federally-charged defendants.[4] Were Blacks represented at a rate proportionate to their presence in the Bernalillo County population, one would expect to see three or four Black defendants in the resulting defendant class.

It is commonly known and accepted, however, that minority populations – for whatever reason – are overrepresented in the criminal justice system. United States Sentencing Commission data bears this out. Between 2006 and 2015, in the United States District Court for the District of New Mexico,[5] Blacks have constituted 5.4% of Drug Trafficking offenders and 5.9% of Firearms offenders.[6] *See* Defendant's Exhibit D – Race of Offenders in Each Primary Offense Category. So, one might expect to see a slightly higher representation of Blacks in the Albuquerque ATF sting defendant class than a direct proportion of their representation within the population would produce – between five and seven, extrapolating.

Out of the 104 federal defendants resulting from the Albuquerque ATF sting, 28 of them are Black. *See* Defendant's Exhibit E – Table of ATF Sting Defendant Data.[7] Blacks represent

[3] Source: United States Census Bureau website (https://www.census.gov/quickfacts/table/PST045216/35001,00), as of July 1, 2015.
[4] *See* Exhibit A. Although the U.S. Attorney's press release broadcast 104 federal defendants, defense counsel has only been able to identify 103 individuals charged at the federal level. All statistical calculations pertaining to the defendant class herein are, therefore, based on a defendant class of 103, not 104, as publicized.
[5] The data available through the USSC Interactive Sourcebook does not allow for further refining, for example, by county.
[6] The indictments resulting from this sting all contain charges of drug trafficking or firearms offenses.
[7] The information in this table is accurate, to the best of counsel's knowledge, as of date of filing.

27.2% of the defendants swept up in this sting. They are overrepresented within this defendant class, compared to their presence in the Bernalillo County population, by a factor of eight. Relative to their historical representation in the United States District Court for the District of New Mexico, they are overrepresented within this defendant class by a factor of approximately five.

1. The ATF has a history of running reckless, "tawdry," and discriminatory operations.

The Bureau of Alcohol, Tobacco, Firearms and Explosives has a sordid history. Its dubious investigative techniques have caught the unfavorable attention of Circuit Court Judges, national newspapers, and the Department of Justice itself.

a. Operation Fast and Furious

Between 2006 and 2011, the ATF ran a series of drug operations in the Tucson and Phoenix area where it "purposely allowed licensed firearms dealers to sell weapons to illegal straw buyers, hoping to track the guns to Mexican drug cartel leaders and arrest them."[8]

During Operation Fast and Furious, the ATF monitored the sale of about 2,000 firearms, of which only 710 were recovered as of February 2012.[9] A number of straw purchasers were arrested and indicted; however, as of October 2011, none of the targeted high-level cartel figures had been arrested.[10]

Guns tracked by the ATF were found at crime scenes on both sides of the Mexico-United States border, and the scene where United States Border Patrol Agent Brian Terry was killed in

[8] Serrano, Richard (October 3, 2011). "Emails show top Justice Department officials knew of ATF gun program". *Los Angeles Times*. Retrieved March 29, 2017.
[9] "A Review of ATF's Operation Fast and Furious and Related Matters" (PDF). U.S. Department of Justice Office of the Inspector General. November 2012. Retrieved March 29, 2017.
[10] Serrano, *supra* note 8.

December 2010.[11] According to Humberto Benítez Treviño, former Mexican Attorney General and chair of the justice committee in the Chamber of Deputies, related firearms were found at numerous crime scenes in Mexico where at least 150 Mexican civilians were maimed or killed.[12]

b. Undercover Storefront Operations

In 2013, the Milwaukee Wisconsin Journal Sentinel published a series of articles entitled "Backfire,"[13] describing numerous problems with the ATF's undercover storefront operations in Milwaukee and around the nation, including the theft of firearms, improper handling of sensitive information, and the alleged targeting of persons with disabilities.

Critics of an undercover storefront operation in St. Louis complained that "the surge was not really aimed at the worst – that it was not aimed at all."[14] They characterized it as "a program that opened an inviting door of crime to just anybody – and snared mainly low-level, black drug users who were mentally incapacitated, drug addicted, homeless or just too desperate for money to run away from a deal too good to be true."[15]

The Department of Justice conducted an investigation into five ATF undercover storefront operations across the nation and issued a report of its findings. It faulted the St. Louis location for setting up shop within sight of a Boys and Girls Club and failing to better investigate a confidential informant who was using drugs, having sexual relationships with targets, and patronizing prostitutes while working at an earlier storefront operation in Kansas City.[16] It also

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[11] Jonsson, Patrik. "How Mexican killers got US guns from 'Fast and Furious' operation". The Christian Science Monitor. Retrieved March 29, 2017.
[12] Murphy, Kim (March 11, 2011). "Mexico demands answers on guns". *Los Angeles Times*. Retrieved March 29, 2017.
[13] Diedrich, John and Raquel Rutledge. "Backfire". *Milwaukee Wisconsin Journal Sentinel*. Retrieved March 29, 2017.
[14] Patrick, Robert (January 31, 2015). "St. Louis ATF crime sweep went for the 'worst' - or did it?" *St. Louis Post-Dispatch*. Retrieved March 29, 2017.
[15] Patrick, *supra* note 14.
[16] "A Review of ATF's Undercover Storefront Operations" (PDF). U.S. Department of Justice Office of the Inspector General. September 2016. Retrieved March 29, 2017.

found, generally, that the ATF lacked adequate policies and guidance for its agents, needed to do a better job defining the crime problem that the storefront was designed to address and explaining how the strategy underlying it would lead to the apprehension of persons warranting federal prosecution, and had failed to apply Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities.[17]

c. Phony Stash House Cases

Another questionable technique utilized by the ATF is the so-called "phony stash house" plot. These phony stash house plots generally involve an undercover agent posing as a disgruntled drug courier, who proposes robbing a fictional house stashed with drugs or money and attempts to enlist others to join in the venture. Agents encourage the unwitting target to recruit others to join in the robbery, and to bring as many guns as possible. Shortly before the elaborate plan is to be executed, agents swarm in to arrest the unwitting participants, who then face conspiracy and firearms charges. These phony stash house cases have been the target of heavy criticism recently.

Many federal judges have condemned phony stash house stings in no uncertain terms. At a sentencing hearing, Judge Joseph Irenas, a Senior District Court Judge for the District of New Jersey, asked of the prosecutor, "So you want to throw him in jail for life for a crime that was – never going to happen and that was a fairy tale?"[18] Senior Judge Edward Leavy of the Ninth Circuit devoted five pages of a simple notice denying the right to appeal to a condemnation of the sting tactic, writing "The infliction of a 121-month prison sentence on a defendant who, if

[17] "DOJ OIG Releases Report on ATF's Undercover Storefront Operations" (PDF) U.S. Department of Justice Office of the Inspector General. September 2016. Retrieved March 29, 2017.
[18] Wisnieski, Adam (November 19, 2015). "Can law enforcement use 'fairy tales' to step up sentences?" CBS News. Retrieved March 30, 2017.

simply left alone by our government, would otherwise be free, is a manifest injustice."[19]

Judge Stephen Reinhardt of the Ninth Circuit, joined by Chief Judge Alex Kozinski, mused, in a dissent to a denial of rehearing *en banc*, that:

> In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth, it is especially curious that the government feels compelled to invent fake crimes and imprison people for long periods of time for agreeing to participate in them – people who, but for the government's scheme, might not have ever entered the world of major felonies.

United States v. Black, 750 F.3d 1053, 1057 (9th Cir. 2014). In the original *Black* opinion, Ninth Circuit Judge John Noonan, appointed to the Ninth Circuit by Ronald Reagan in 1985, opened a blistering dissent by writing:

> "Lead us not into temptation" is part of a prayer familiar to many. But few, I believe, would think of this prayer as addressed to the government of the United States or would think it necessary to address the government with such a request. The present case creates a precedent and sets a framework in which such a prayer addressed to the government becomes comprehensible and probable. Today our court gives our approval to the government tempting persons in the population at large currently engaged in innocent activity and leading them into the commission of a serious crime, which the government will then prosecute.

United States v. Black, 733 F.3d 294, 313 (9th Cir. 2013), and closed it with the equally forceful:

> Massively involved in the manufacture of the crime, the ATF's actions constitute conduct disgraceful to the federal government. It is not a function of our government to entice into criminal activity unsuspecting people engaged in lawful conduct; not a function to invent a fiction in order to bait a trap for the innocent; not a function to collect conspirators to carry out a script written by the government. As the executive branch of our government has failed to disavow this conduct, it becomes the duty of the judicial branch to refuse to accept these actions as legitimate elements of a criminal case in a federal court.

[19] Wisnieski, Adam (November 18, 2015). "Can law enforcement use "fake" crimes to create criminals?" CBS News. Retrieved March 30, 2017.

Black, 733 F.3d, at 318.

In March 2014, California Central District Judge Otis Wright II issued a scathing order to dismiss indictment for outrageous government conduct, in which he accused the ATF of "trawling for crooks in seedy, poverty-ridden areas – all without an iota of suspicion that any particular person has committed similar conduct in the past."[20] He also noted that the stings had done little to deter crime and instead were "ensnaring chronically unemployed individuals from poverty-ridden areas,"[21] and that "[t]he time has come to remind the Executive Branch that the Constitution charges it with law enforcement – not crime creation."[22] Judge Wright's dismissal of the indictment was later overturned by the Ninth Circuit, but during the oral argument of that appeal in late 2014, Ninth Circuit Judge William Fletcher observed "You guys are dragging half a million dollars through a poor neighborhood . . . I think it's a totally misguided policy."[23] Photos that the ATF provided to the Albuquerque Journal for an article about the Albuquerque ATF sting - of olive green mini-tanks and a squad of agents in combat gear and black masks – represent a similarly cringe-inducing juxtaposition.[24]

A federal judge in the Central District of California, Judge Manuel Real, similarly accused the ATF of "trolling poor neighborhoods to . . . ensnare its poor citizens."[25] Seventh Circuit Judge Evans classified the stash house stings as "tawdry," writing in an opinion, "[w]e use the word "tawdry" because the tired sting operation seems to be directed at unsophisticated,

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[20] Eckholm, Erik (November 20, 2014). "More Judges Question Use of Fake Drugs in Sting Cases". *The New York Times*. Retrieved March 30, 2017.
[21] Eckholm, *supra* note 20.
[22] Heath, Brad (March 18, 2014). "Federal judge blasts ATF stings". *USA Today*. Retrieved March 30, 2017. *See also United States v. Cedrick Marquet Hudson, et al.*, USDC DCAC, Case No. 2:13-cr-00126-JFW, Doc. 112, Order Granting Motion to Dismiss Indictment for Outrageous Government Conduct.
[23] Wisnieski, *supra* note 19.
[24] Sandlin, Scott. "Firearm/drug crackdown targets 104 suspects". *Albuquerque Journal*. Retrieved March 31, 2017.
[25] *See United States v. Rene Flores et al.*, Ninth Circuit Court of Appeals, CA No. 14-50227, Doc. 8, p. 9 (p. 7 of Transcript), ln. 15-16, Transcript of May 12, 2014 Proceedings.

and perhaps desperate, defendants who easily snap at the bait put out for them by [agents]." *United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011).

Seventh Circuit Judge Richard Posner characterized the stash house stings as a "disreputable tactic," and questioned whether they verged on entrapment. "Criminals do sometimes change and get their lives back on track and we don't want the government pushing them back into a life of crime." *United States v. Kindle*, 698 F.3d 401, 414–16 (7th Cir. 2012), *reh'g en banc granted, opinion vacated* (Jan. 16, 2013), *on reh'g en banc sub nom. United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). During the sentencing of a stash house defendant in St. Louis, U.S. District Judge Audrey Fleissig "questioned the value of creating criminal opportunities that defendants 'hadn't thought of.'"[26]

Clearly, ATF's phony stash house tactic is unpopular with many. But more importantly, for our purposes, ATF has been found to overwhelmingly target racial minorities to participate in these "disreputable" stings. U.S. District Judge John Darrah of the Northern District of Illinois ordered the government to disclose documents on how individuals were targeted and who was arrested in these stings, saying, "The prosecution in this district has brought at least 20 purported phony stash house cases, with the overwhelming majority of the defendants named being individuals of color."[27] In an order granting discovery in *United States v. Abraham Brown*, USDC NDIL, Case: 1:12-cr-00632, Doc. 153, U.S. District Court Judge Ruben Castillo said that there was "a strong showing of potential bias" in the stash house stings.[28]

The Chicago Tribune recently released a front-page article discussing ATF stash house cases from the Chicago area. It wrote that a "nationally renowned expert concluded that ATF

[26] Patrick, *supra* note 14.
[27] Wisnieski, *supra* note 18.
[28] Heath, Brad (August 1, 2013). "Judge: ATF stings may be targeting minorities". *USA Today*. Retrieved March 30, 2017.

showed a clear pattern of racial bias in picking its targets for the drug stings. The disparity between minority and white defendants was so large that there was a 'zero percent likelihood' it happened by chance."[29] This expert, Jeffrey Fagan from Columbia Law School, ran three statistical analyses and concluded that "[b]eing black significantly increased a person's chance of being targeted by the ATF."[30]

USA Today published a series of articles about the ATF stings in Chicago and other cities around the nation.[31] As a result of its independent investigation, it found that the ATF "overwhelmingly targeted racial and ethnic minorities as it expanded its use of controversial drug sting operations," noting that "[a]t least 91% of the people agents have locked up using those stings were racial or ethnic minorities" and that "[t]hat rate is far higher than among people arrested for big-city violent crimes, or for other federal robbery, drug and gun offenses."[32] The ATF said it could not confirm the numbers because it does not track the demographics of the people it arrests. The article quoted Benjamin N. Cardozo School of Law professor Katharine Tinto as saying, "When you have a possibly discriminatory effect, it should require you to go back and look at the structure of the operation," such as how ATF chooses its targets and where it decides to conduct its operations.

d. The ATF Sting in Albuquerque

Apparently, the ATF has not done that. We are now presented with essentially the same targeting techniques as the vilified stash-house cases, only without the stash house. In its Albuquerque operation, the ATF appears simply to have invented yet another iteration of its

[29] Meisner, Jason and Annie Sweeney (March 3, 2017). "ATF sting operation accused of using racial bias in finding targets, with majority being minorities". *Chicago Tribune*. Retrieved March 30, 2017.
[30] Meisner, *supra* note 29.
[31] *See, e.g.*, Heath, Brad (June 27, 2013). "ATF used fake drugs, big bucks to snare suspects". *USA Today*. Retrieved March 30, 2017.
[32] Heath, Brad (July 20, 2014). "Investigation: ATF drug stings targeted minorities". *USA Today*. Retrieved March 30, 2017.

modus operandi of sweeping up poor, vulnerable, addicted minorities.

In fact, the defense suspects that at least three of the key players behind the phony stash house stings played a role in the Albuquerque sting as well.

The discovery provided to the defense redacts all but the ATF agents' first and last initials. In some instances, an agent's first name appears unredacted. Based on paper discovery, combined with independent defense investigation, the defense suspects that at least three of the ATF agents involved in the Chicago stash house stings – Carlos Valles, Michael Ramos, and Richard Zayas – were also present in the Albuquerque sting. *See* Defendant's Exhibit F – List of undercover agents in Chicago stash house stings from *United States v. David Cousins, et al.*, USDC NDIL, Case: 1:12-cr-00865, Doc. 265, Defendants' Motion to Dismiss for Racially Selective Law Enforcement.

Agent Carlos Valles has a checkered history. In addition to being involved in the ATF's Fast and Furious operation, he "played a major role[] in the Stash House cases in [Chicago] . . . in which the ATF recruited a far greater percentage of people of color." *See United States v. Paul Davis, Jr., et al.*, USDC NDIL, Case: 1:13-cr-00063, Doc. 434, p. 69 (p. 64 in footer), Motion to Dismiss for Racially Selective Law Enforcement. In fact, the defendants in *Davis* cite to portions of undercover recordings of Valles in a separate case to document their allegation that, "[i]n [*United States v.*] *Williams*, ATF Agent Carlos Valles (who is Hispanic) said in no uncertain terms that he was coming to defendants Antonio Williams and Mario Brown with the stash house robbery proposition *because* Mr. Williams was Black." (*Ibid*. at 66-67 (61-62 in footer)).

Agent Richard Zayas – the undercover agent involved in numerous cases brought by A.T.F. in its notorious "sweep" in Albuquerque – has a similarly checkered past. Specifically, Agent Zayas was found not credible under oath in a stash house case when he claimed that a

defendant pointed a handgun at him. *United States v. Ryan*, 2009 U.S. Dist. LEXIS 88204, at *7 (D. Ariz. Sept. 24, 2009) ("I do not find that Special Agent Zayas is credible on this issue."), *vacated on other grounds* (mootness), *Ryan*, 09-CR-1145, Doc. 84 (D. Ariz. Nov. 19, 2009).[33]

In addition to having been found not credible under oath, Agent Zayas is the architect behind the infamous phony stash house cases. He helped originate the tactic, authored the playbook on the tactic, and has travelled around the country leading trainings on the tactic. *See generally Davis*, Doc. 434. Zayas, quite literally, "wrote the book" on these infamous stings, which have been responsible for locking up a group of people nationwide comprised of 91% minorities.

2. Confidential Informants utilized in the Albuquerque ATF sting

The defense has identified five confidential informants (CIs) whose CI numbers appear consistently throughout the defendant class. Those numbers are 11438, 9097, 489, 3302, and 2478. Of the five CIs working this investigation, three are Black. The other two are Hispanic. None are White.

Recordings of interactions between Black CIs and Black defendants evidence an acute understanding of intraracial camaraderie and interracial mistrust. In Lonnie Jackson's case, CI 11438 is African American and sets up the two purchases of controlled substances through persistent text communications and telephone calls with Mr. Jackson. Some of the vernacular utilized by the CI and Mr. Jackson can be seen as unique to the African American community and would not be heard within or among other racial groups. The defendants in the "ATF Sting" cases who were targeted by the CIs are keenly aware of the importance of race in their

[33] In a minute order entered on November 19, 2009, the District Judge vacated "any arguable finding of fact that wasn't necessary to [the Magistrate Judge's] ruling on the detention of the defendant. Specifically, any arguable finding related to Agent Zayas."

interactions. For example, in one case, a Black defendant remarks that he does not do "black on black crime" and observes that "Mexicans do not typically like black people."[34]

3. Areas of the city where defendants were targeted

This racially-stacked group of CIs, in turn, sought out targets in locations that would virtually guarantee netting an inordinate number of minorities – and specifically, Blacks.

The Albuquerque office of the Federal Public Defender set out to investigate where the CIs made their initial contact with each defendant.[35] It sent out an inquiry to all counsel representing an ATF sting defendant, requesting the address where the CI in a case made initial contact with the defendant.

Many of the initial contacts were made outside gas stations located in low-income areas of Albuquerque. *See* Defendant's Exhibit E. The CIs approached the defendants with offers of deeply-discounted cigarettes for sale, engaged them in conversation, and eventually, offered to pay them for any firearms or drugs that they could find for the CI.[36]

Other target locations were even more unusual, however. One CI made initial contact with the defendant at a soul food restaurant, Bucket Headz Southern Home Cookin', located near Gibson and San Pedro. Two separate cases list the point of original contact between the defendant and the CI as a Black barbershop located near Zuni and Louisiana, Trendsettas Barbershop and Boutique. In one case, the initial point of contact was Kirkland Park, a city park located smack-dab in the middle of "The Kirk," an approximately five-block by five-block neighborhood in Albuquerque whose residents are predominantly African-American.

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[34] These remarks were pulled from discovery in a case represented by the Federal Public Defender's Office. For the sake of confidentiality, this individual's name has not been released.

[35] Instances where a defendant was recruited by another person – that person being the original target of the CI - were not considered, because they would not shed any light on where, geographically, the CIs were seeking out targets. Only "principal" targets were considered.

[36] *See*, *e.g.*, *United States v. Julian Brown*, USDC DNM, Case: 1:16-cr-03212-WJ, Docs. 20 and 23, Motion to Identify Witness/Informant and Reply to Response to Motion.

Incidentally, most of these targeting locations do not fall in high-crime areas of Albuquerque, as evidenced by a heat map of crime in the city.[37] Furthermore, many of the high-crime parts of Albuquerque located in wealthier, predominantly White areas, such as the Northeast Heights, appear not to have been infiltrated by the CIs at all.

4. Incidents of ATF declining to enforce on non-Blacks

The defense asks this Court to take judicial notice of Defendant's Motion to Compel Disclosure of Information (Doc. 29) in *United States v. Yusef Casanova*, USDC DNM Case 1:16-cr-02917-JAP, which details a specific instance of Mr. Casanova – a fellow Black defendant resulting from the Albuquerque ATF sting – brokering an in-person methamphetamine deal between a white male source of supply and an undercover ATF agent. In spite of Mr. Casanova's clearly less culpable role, and evidence of the white male's identity and criminal activity, Mr. Casanova is the sole object of the Indictment in his case, and to the best of counsel's knowledge, the white male source of supply was never arrested or charged as a result of the ATF sting.

The defense is able to point to this specific instance because it was produced in discovery. The defense seeks additional discovery, in part, to determine whether there were other instances of similarly situated non-Black offenders whom the ATF declined to investigate, target, or arrest.

ARGUMENT

1. The legal standard to obtain discovery pertaining to a potential claim of selective enforcement merely requires the defense to present "some evidence tending to show" each element of the claim.

United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996),

[37] Crime Data in Albuquerque, based on data from SpotCrime.com and CrimeReports.com.

governs the right to discovery on a claim of selective prosecution. To be successful on a claim of selective prosecution, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Armstrong*, 517 U.S. 456, 465 (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

Understandably, courts have recognized that the standard to obtain discovery on an issue is lower than that required to prove a claim. "Obviously, a defendant need not prove his case in order to justify discovery on an issue." *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998).

To be entitled to discovery, the claimants bear the "burden of making a credible showing of 'some evidence' on each element." *United States v. Olvis*, 97 F.3d 739, 746 (4th Cir. 1996) (quoting *Armstrong*, 517 U.S., at 468-469). The standard is, in fact, even lower than "some evidence." "In light of *Armstrong*'s seemingly less stringent 'some evidence tending to show' standard, the defendants need not establish a prima facie case of selective prosecution to obtain discovery on these issues." *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001) (quoting *Armstrong*, 517 U.S., at 468-469). To obtain discovery on a selective prosecution claim, the defense must only present "*some evidence tending to show* the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." *Armstrong*, 517 U.S., at 468 (emphasis added).

2. The standard required to obtain discovery on a selective enforcement claim is less rigorous than that required for a selective prosecution claim.

Lonnie Jackson is advancing a claim of selective enforcement, not selective prosecution. And while courts have recognized that the "presumption of regularity" applies to prosecutors, that same presumption is not afforded to law enforcement agencies. *Armstrong*, at 464. As the Seventh Circuit pointedly observed, "Agents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior. . . . [T]he sort of considerations

that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution." *United States v. Davis*, 793 F.3d 712, 720-21 (7th Cir. 2015). Courts, therefore, apply a greater level of scrutiny to the criteria employed by law enforcement in the selection of targets for investigation and arrest. The threshold for production of discovery into their investigative techniques and targeting methods is lower than that required to peek behind the curtain of prosecutorial charging decisions.

3. A selective enforcement claim is cognizable, and the remedy, if proven, is dismissal.

The "Constitution prohibits selective enforcement of the law based on considerations such as race. . . . [T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection clause . . . ." *Whren v. United* States, 517 U.S. 806, 813 (1996). *See also Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) ("Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of justice is still within the prohibition of the constitution.")

"Racially selective action by law enforcement inflicts . . . substantial injury on the victim and society: in addition to violating the victim's rights to equality and liberty, such discriminatory conduct impugns the integrity of the criminal justice system and compromises public confidence therein." *United States v. Mumphrey*, 193 F. Supp. 3d 1040, 1055 (N.D. Cal. 2016) (concluding that dismissal of an indictment is a proper remedy for a selective enforcement claim if proven).

Every circuit that has addressed a motion to dismiss for selective enforcement has

addressed the merits of the claim – no circuit has held that selective enforcement cannot result in dismissal. *See, e.g., United States v. Davis*, 793 F.3d 712, 720 (7th Cir. 2015) (*en banc*) ("If the [law enforcement] agencies do [discriminate], they have violated the Constitution – and the fact that the United States Attorney may have prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery, would not matter, since the constitutional problem would have preceded the prosecutor's role and could not be eliminated by the fact that things didn't get worse at a later step."); *Gibson v. Superintendent*, 411 F.3d 427, 441 ("[I]f a person can demonstrate that he was subjected to selective enforcement in violation of his Equal Protection rights, his conviction will be invalid."); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006); *United States v. James*, 257 F.3d 1173, 1179 (10th Cir. 2001).

4. The defense has presented "some evidence tending to show" each element of a selective enforcement claim.

A selective enforcement claim requires that the defendant demonstrate the presence of 1) discriminatory effect and 2) discriminatory intent. To merit discovery for such a claim, a defendant must only present "some evidence tending to show" the presence of both these elements. Lonnie Jackson has done so. For purposes of the "effect" prong of this test, Mr. Jackson can demonstrate, both with statistical evidence and with a documented example, that non-Black, similarly-situated individuals could have been targeted for investigation and arrest, but were not. Similarly, for the "intent" prong of this test, Lonnie Jackson can demonstrate through the racial composition of the confidential informants, the areas of Albuquerque targeted as part of the ATF sting, the racially charged remarks in the recordings, and the presence of ATF agents who are also involved in other suspect ATF stings around the country, the circumstantial presence of a discriminatory intent.

a. The defense has presented "some evidence tending to show" discriminatory effect.

To demonstrate discriminatory effect, a defendant is required to "produce some evidence of differential treatment of similarly situated members of other races." *Armstrong*, at 470.

i. The defense has demonstrated, through the use of statistical evidence, and the identification of a specific instance, that similarly-situated persons could have been targeted for investigation and arrest by the ATF, but were not.

The "effect" prong of a selective enforcement claim requires that the defendant "must . . . make a credible showing that a similarly-situated individual of another race could have been, but was not, arrested or referred for federal prosecution for the offense for which the defendant was arrested and referred." *Jones*, 159 F.3d at 977.

"The defendant may satisfy the "credible showing" requirement by identifying a similarly-situated individual or through the use of statistical evidence." *United States v. James*, 257 F.3d 1173, 1179 (10th Cir. 2001) (quoting *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir.2001)). Lonnie Jackson can both identify a similarly situated individual and demonstrate with statistical evidence that other similarly situated persons could have been targeted and arrested by the ATF, but were not.

1. Statistical evidence

The staggering disproportion of Blacks within the defendant class produced by the ATF sting, alone, is not enough to demonstrate discriminatory effect. "Without an appropriate basis for comparison, raw data about the percentage of black crack cocaine defendants proves nothing. Such statistics could have relevance only if it could be presumed that crack cocaine violations were committed proportionately by all races—a presumption the Supreme Court rejected in *Armstrong* as 'at war' with unchallenged statistics." *United States v. Olvis*, 97 F.3d 739, 745 (4th

Cir. 1996). Without a basis for comparison, the government could simply argue that Blacks commit crime in Bernalillo County at a rate eight times greater than their representation in the population.

Fortunately, there is a highly-trustworthy basis for comparison that is readily available: the United States Sentencing Commission Interactive Sourcebook. The data presented in Defendant's Exhibit D plainly demonstrate that Blacks in the District of New Mexico do *not* commit firearms and drug trafficking offenses at the disproportionately high rate of 27.2% of all defendants, as in this sting. Their commission of firearms and drug trafficking offenses is only slightly elevated from a direct proportion of their 3.4% representation of the Bernalillo County population – 5.9% and 5.4%, respectively. An overrepresentation within the class of firearms and drug trafficking defendants produced by this sting of a factor of *eight* is, therefore, a clear-cut case of discriminatory effect.

2. Identification of a specific instance

In Mr. Casanova's case, in June 2016 ATF agents and undercover informants conducted an investigation which began with an undercover informant hanging out at an Allsup's gas station and convenience store on Zuni Street near San Pablo in Albuquerque. The informant ultimately approached an African-American resident nicknamed "Cash" and asked Cash if Cash knew anyone could sell him guns or drugs. The operation then proceeded after Cash introduced the confidential informant to Mr. Casanova, who is also African-American. The CI persuaded Mr. Casanova to introduce him to an individual who could sell the informant methamphetamine. A few days later, Mr. Casanova arranged a sale of one ounce of methamphetamine between a white male dealer named John and the informant. Shockingly, after the white male dealer sold the informant an ounce of methamphetamine, the white male dealer was not arrested and was

allowed to leave the scene of the crime. Mr. Casanova, like Lonnie Jackson, was arrested, charged in federal court, and is now in custody awaiting trial.

The actions of the ATF in allowing a white male supplier of an ounce of methamphetamine to leave the scene of a drug transaction and go undeterred, even until today, while a Black defendant who merely arranged the transaction was arrested, charged and prosecuted, speaks volumes about the presence of discriminatory effect (and, for that matter, discriminatory intent).

This is precisely what the *Armstrong* Court contemplated when it envisioned a scenario requiring the production of discovery. As the Court observed, "[i]n the present case, if the claim of selective prosecution were well-founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For instance, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court." *Armstrong*, at 470.

Even had the White male source of supply in Mr. Casanova's case been prosecuted alongside Mr. Casanova, Lonnie Jackson still would have a strong showing of entitlement to discovery on the issue of selective enforcement. "The fact that law enforcement never considered foregoing the prosecution of Billings, Jones's white co-defendant, in federal court does not change our analysis. It would have been beyond foolish for law enforcement to have done such a thing, considering that Jones's and Billings's cases involved the same events." *United States v. Jones*, 159 F.3d 969, 978 (6th Cir. 1998). Here, the ATF has shown itself to be beyond foolish, foregoing the arrest of a White drug supplier in a case involving the exact same events as a Black drug addict.

b. The defense has presented "some evidence tending to show" discriminatory intent.

"Discriminatory intent can be shown by either direct or circumstantial evidence." *United States v. Deberry*, 430 F.3d 1294, 1299 (10th Cir. 2005) (citing *Batson v. Kentucky*, 476 U.S. 79, 93 (1986)). The defense has presented ample circumstantial evidence demonstrating discriminatory intent and seeks, through discovery, direct evidence of discriminatory intent.

Discovery of the ATF's target selection criteria could resolve this issue. "Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination . . . is justified." *United States v. Davis*, 793 F.3d 712, 723 (7th Cir. 2015). The ATF's purported targeting criteria will enable the defense to accurately construct a "similarly-situated" comparison group and thereby determine with certainty whether the ATF targeted and arrested individuals in accordance with its targeting criteria or – as the defense has demonstrated thus far – in accordance with skin color.

There is considerable circumstantial evidence tending to show discriminatory intent on behalf of the ATF in the Albuquerque sting. For example, utilizing a group of confidential informants that is 60% Black in a community that is 3.4% Black is – at best – disingenuous. That a group of confidential informants, the majority of whom were Black, interacted with, developed relationships with, and ultimately targeted Black men in Albuquerque, is exactly what a sociologist, or anyone with common sense, and especially law enforcement, who presumably have experience with the use of confidential informants, would expect to happen. The selection of confidential informants, therefore, prefigures the selection of defendants and, in this foreshadowing, manifests the existence of selective enforcement.

In fact, sociologists have a term for this type of intra-group affinity: homophily, which stands for the proposition that similarity breeds connection. *See, e.g.*, McPherson, Miller, Lynn

Smith-Lovin, and James M Cook, *Birds of a Feather: Homophily in Social Networks*, Annu. Rev. Sociol. 2001. 27:415–44 ("We find strong homophily on race and ethnicity in a wide variety of relationships, ranging from the most intimate bonds of marriage and confiding, to the more limited ties of schoolmate friendship and work relations, to the limited networks of discussion about a particular topic, to the mere fact of appearing in public together or "knowing about" someone else." McPherson, at 420 (internal citations omitted)).[38] The strong existence of homophily, even in simply "knowing about" someone else, explains why for every Black "principal" a CI targeted, a web of several Black codefendants was often spun.

For this reason, the defense seeks, as part of its discovery request, all documents containing information on how ATF ensured that their agents/confidential informants were not targeting persons on the basis of their race, color, ancestry, or national origin for these ATF sting cases, and what actions those supervisors and managers took to determine whether agents were, in fact, targeting persons for those reasons.

In short, an agency with a troubled history took a traveling crew of agents with suspect backgrounds, including ones with demonstrated instances of racial targeting, employed a racially-stacked group of CIs, deployed them in areas of the city overwhelmingly concentrated with minorities, and had them utilize their racial similarity as a means of breeding connection and trust. This is discriminatory intent.

5. Courts have granted discovery in cases presenting similar or weaker evidence of selective enforcement than that presented in this case.

Lonnie Jackson has far exceeded his legal burden of presenting "some evidence tending to show" discriminatory effect and discriminatory intent to merit discovery on the issue of selective enforcement. There exists precedent for the issuance of discovery orders on this issue,

[38] Accessible at http://aris.ss.uci.edu/~lin/52.pdf. Retrieved March 31, 2017.

even in cases lacking the strength of evidence that Mr. Jackson has set forth in this Motion.

The Seventh Circuit's decision in *United States v. Davis* provides a case in point. In *Davis*, the Seventh Circuit addressed both a claim of selective prosecution and selective enforcement. In *Davis*, the defense relied exclusively on statistical evidence to make a showing of selective enforcement, and did not present an identifiable instance of ATF declining to enforce on a non-Black offender, as Lonnie Jackson has done. Further, the overrepresentation of Blacks in the Chicago ATF stings discussed in *Davis* was nowhere near the stunning eight-fold overrepresentation presented in this sting. Nevertheless, the Seventh Circuit observed that "[t]he racial disproportion in stash-house prosecutions remains troubling . . . and it is a legitimate reason for discovery . . . ." *United States v. Davis*, 793 F.3d 712, 722 (7th Cir. 2015). It is precisely Albuquerque's miniscule Black population that makes their 27.2% composition of this defendant class so jarring – and impossible to attribute to chance. *See also United States v. Mumphrey*, 193 F.Supp.3d 1040 (N.D. Cal. 2016), *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998).

CONCLUSION

"Racially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment." *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1167 (10th Cir. 2003). Lonnie Jackson seeks to vindicate these principles, has amply satisfied his burden and has presented evidence tending to show that ATF's actions in this sting ran afoul of constitutional equal protection principles. That is all he needs to show to warrant an order to compel discovery.

WHEREFORE, Lonnie Jackson, by and through undersigned counsel, respectfully

requests that this Court order the disclosure of the above-listed items pertaining to the issue of selective enforcement.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing pleading was served on Assistant United States Attorney Dave Walsh by operation of the Court's CM/ECF electronic filing system and pursuant to the CM/ECF Administrative Procedures Manual §§ 1(a), 7(b)(2), on April 19, 2017.

filed electronically on April 19, 2017
JOHN F. ROBBENHAAR

United States Department of Justice

THE UNITED STATES ATTORNEY'S OFFICE
DISTRICT of NEW MEXICO

Department of Justice

U.S. Attorney's Office

District of New Mexico

FOR IMMEDIATE RELEASE Friday, August 12, 2016

Federal Investigation Targets Violent Crime in Bernalillo County

108 Individuals Charged as a Result of ATF-Led Investigation Pursued In Support of Federal "Worst of the Worst" Anti-Violence Initiative

ALBUQUERQUE – U.S. Attorney Damon P. Martinez and Special Agent in Charge Thomas G. Atteberry of the Phoenix Field Division of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) today announced the results of a four-month, multi-agency investigation targeting violent crime in Bernalillo County, N.M., during a press conference. Joining them in making the announcement were 2nd Judicial District Attorney Kari E. Brandenburg, Special Agent in Charge Will R. Glaspy of DEA's El Paso Division, Chief Deputy U.S. Marshal Alex Ramos, New Mexico State Police Chief Pete N. Kassetas, Albuquerque Police Chief Gorden E. Eden, Jr., Bernalillo County Sheriff Manuel Gonzales III, New Mexico Corrections Department Secretary Gregg Marcantel, and Rio Rancho Police Chief Michael Geier.

The ATF-led investigation resulted in the filing of 58 federal indictments and one federal criminal complaint charging 104 Bernalillo County residents with federal firearms and narcotics trafficking offenses. The investigation also developed information leading to the indictment of four other individuals on state charges arising out of two murders in Bernalillo County in May and June 2016.

The investigation began in mid-April 2016, when ATF personnel from throughout the country joined forces with federal, state, county and local law enforcement agencies in New Mexico to combat the high rate of violent crime in the Albuquerque metropolitan area. The investigators utilized a number of investigative techniques, including undercover operations, historical investigation and targeting of multi-convicted felons in possession of firearms. The investigation, which concluded yesterday, was the ninth multi-agency, multi-month investigation completed throughout the United States under the ATF's Enhanced Enforcement Initiative (EEI).

The investigation was also undertaken in support of a federal anti-violence initiative that targets "the worst of the worst" offenders for federal prosecution. Under this initiative, the U.S. Attorney's Office and federal law enforcement agencies collaborate with New Mexico's District Attorneys and state, local and tribal law enforcement agencies to target violent or repeat offenders for federal prosecution primarily based on their prior criminal convictions with the goal of removing repeat offenders from communities in New Mexico for as long as possible.

DEFENDANT'S EXHIBIT
A

In announcing the results of the investigation, U.S. Attorney Damon P. Martinez said, “The purpose behind this investigation and its resulting prosecutions is to ensure that we keep control of our streets. The law enforcement community is sending a loud and clear message to the worst of the worst offenders in our community: you cannot commit crime in New Mexico with impunity and without consequence. We are putting you on notice. We are watching, and we will continue to be vigilant.”

“ATF’s Enhanced Enforcement Initiative (EEI) has cut a distinctive path through the violent criminal element in the Albuquerque metropolitan area. Utilizing the federal firearms and narcotics laws, our undercover agents have arrested 98 individuals and taken 127 firearms off the streets, making this EEI the most successful and impactful enforcement operation to date said,” ATF Special Agent in Charge Thomas G. Atteberry. “The federal prosecution of these individuals, some of whom have significant criminal histories, puts the brakes on the turnstile justice often experienced in the state judicial system. Our goal is simple: to put violent, repeat offenders behind bars for as long as possible, and keep them from interacting with the good people of New Mexico.”

“The results of this enforcement initiative exceeded our expectations. It has confirmed, however, what those of us in law enforcement already knew: there is a clear and direct correlation between drugs, guns and violence,” said DEA Special Agent in Charge Will R. Glaspy. “DEA will continue to work with our law enforcement partners to target those individuals and criminal organizations who spread their poison on the streets of Albuquerque, and in doing so we will make our community a safer place for all.”

Deputy U.S. Marshal Alex Ramos added, “By combining the resources of the various agencies, we are able to accomplish many things that one agency by itself would be hard pressed to achieve. When law enforcement and the public join forces, each are doing their part to make our communities, our homes and most importantly, our families safer. This was truly a team effort.”

To date, 94 of the 104 federal defendants and the four state defendants have been arrested. The defendants were arrested during two phases of the investigation. The first began in mid-April 2016 and concluded on July 7, 2016, and the second began on July 8, 2016 and concluded on August 10-11, 2016. As of the issuance of this press release, ten federal defendants have yet to be arrested and are considered fugitives. Information about the defendants and the charges against them is attached to this press release.

During the course of the investigation, law enforcement officers took 127 firearms, including a number of assault-type weapons, off the streets of Albuquerque and Bernalillo County. They also purchased and seized more than 17 pounds of methamphetamine, more than 2.5 pounds of heroin, 14 ounces of crack cocaine, more than a pound and a half of cocaine, and 100 pills. Four vehicles were also seized during the investigation.

“Once again, we are proud to be part of the cooperative effort by federal and state agencies to effect greater public safety for our citizens,” said 2nd Judicial District Attorney Kari E. Brandenburg. “Our prosecutors are dedicated to doing their best to ensure justice for the families and friends of the victims. I want to personally thank each agency for their hard work and assure them of our continued commitment.”

“The citizens of New Mexico are safer today because of the collaborative effort between law enforcement agencies. When law enforcement agencies combine resources and assets, we are able to prevent violent crimes,” said New Mexico State Police Chief Pete N. Kassetas. “This operation is a great example of how local, county, state and federal agencies are working with State District Attorneys and the U.S. Attorney to prevent violent crimes. It also reinforces that there are consequences to those that choose to commit violent crimes in our state.”

“The Albuquerque Police Department greatly appreciates that ATF selected Albuquerque for this complex operation, which has been extremely successfully because of strong support from the U.S. Attorney’s

Office," said Albuquerque Police Chief Gorden E. Eden, Jr. "This operation demonstrates yet again the critical cooperation necessary to fight crime and the criminal element that preys on the innocent. As these cases advance through the criminal justice system, we will all witness the strength of our collaborative commitment to the safety and security of this community."

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ATF Takedown Defendants and Charges

ATF Fugitive Ayala ATF Fugitive Barela ATF Fugitive Bowman ATF Fugitive Chestnut ATF Fugitive CropseyATF Fugitive Loya ATF Fugitive Parra ATF Fugitive Rivas ATF Fugitive RuizATF Fugitive Torrez

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USAO - New Mexico

Topic:
Drug Trafficking
Violent Crime

Updated August 12, 2016

January 4, 2017

Via e-mail and U.S. Mail

DAVE WALSH
United States Attorney's Office
District of New Mexico
Post Office Box 607
Albuquerque, NM 87103

Re: ***United States v. Lonnie Jackson, CR 16-2362 MCA***

Dear Mr. Walsh:

As counsel to Lonnie Jackson, I write to request certain discovery items pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and the Fifth Amendment's Due Process clause. This discovery is necessary for filing various pretrial motions attacking the indictment for, among other reasons, outrageous government conduct and selective enforcement.

Specifically, I request:

1. A list of all cases brought by your office resulting from the 2016 ATF sting operation conducted in Bernalillo County, New Mexico, as publicized in the attached press release (hereinafter, "ATF sting");
2. In every ATF sting case:
    a. Each defendant's race and ethnicity;
    b. A complete history of each defendant's prior criminal convictions and arrests;
    c. A statement of the prior criminal investigations, if any, that ATF had conducted into each defendant before initiating confidential informant contact;
    d. Home address, address of arrest, address of most recent pre-ATF sting conviction, addresses of ATF sting-related approaches, contacts, meetings, or recordings for each defendant;
    e. State ID Number, IR number, Date of Birth, and Social Security Number of each defendant;
3. The same information requested in ¶ 2 for all individuals who were investigated during the ATF sting operation, but who were not ultimately arrested and/or charged;
4. Any grant proposals or funding requests delineating the purpose and intended effect of the ATF sting operation;
5. Any policies, practices, or selection criteria that influenced or dictated target selection in the ATF sting cases;
6. What, if anything, any confidential informant was told about the criteria being used to target individuals in the ATF sting;
7. The number of confidential informants that the ATF used in the ATF sting and the number of those confidential informants who had knowledge of and/or contact with non-African American or non-Latino persons who could be targeted;

8. All contemporaneous writings, records, and/or memorializations setting out the reasons the ATF gave for pursuing – or not pursuing – an individual for arrest in the ATF sting;
9. The charging selection criteria for the ATF sting;
10. All documents and communications, including all e-mails, memos, text messages, press releases, voicemail messages, audio and video recordings, between any persons employed or contracted by the ATF, related to: the investigation of any individuals pursuant to the ATF sting; the decision to investigate (or not to investigate) anyone pursuant to the ATF sting; the charging criteria for the ATF sting; the decision to charge (or not to charge) anyone as a result of the ATF sting; the race of any defendant in the ATF sting, and the decision to decline charging someone in the ATF sting. Such documents and communications include those made on personally owned devices and/or personally maintained e-mail accounts or social media accounts;
11. All national and Phoenix Field Division ATF manuals, circulars, field notes, correspondence, or any other material which discusses "stings" or entrapment operations, including protocols and/or directions to agents and confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that targets do not seek to quit or leave the conspiracy before an arrest can be made, and how to ensure that agents and confidential informants are not targeting persons for such operations on the basis of their race, color, ancestry, or national origin;
12. All documents containing information on how supervisors and managers of the Phoenix Field Division ATF were to ensure and/or did ensure that their agents were not targeting persons on the basis of their race, color, ancestry, or national origin for these ATF sting cases, and what actions those supervisors and managers took to determine whether agents were, in fact, targeting persons for those reasons.

Sincerely,

John F. Robbenhaar

JR/sdp

Attachment: USAO Press Release dated August 12, 2016

cc: file of Lonnie Jackson

United States Department of Justice

THE UNITED STATES ATTORNEY'S OFFICE
DISTRICT of NEW MEXICO

Department of Justice

U.S. Attorney's Office

District of New Mexico

FOR IMMEDIATE RELEASE

Friday, August 12, 2016

Federal Investigation Targets Violent Crime in Bernalillo County

108 Individuals Charged as a Result of ATF-Led Investigation Pursued In Support of Federal "Worst of the Worst" Anti-Violence Initiative

ALBUQUERQUE – U.S. Attorney Damon P. Martinez and Special Agent in Charge Thomas G. Atteberry of the Phoenix Field Division of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) today announced the results of a four-month, multi-agency investigation targeting violent crime in Bernalillo County, N.M., during a press conference. Joining them in making the announcement were 2nd Judicial District Attorney Kari E. Brandenburg, Special Agent in Charge Will R. Glaspy of DEA's El Paso Division, Chief Deputy U.S. Marshal Alex Ramos, New Mexico State Police Chief Pete N. Kassetas, Albuquerque Police Chief Gorden E. Eden, Jr., Bernalillo County Sheriff Manuel Gonzales III, New Mexico Corrections Department Secretary Gregg Marcantel, and Rio Rancho Police Chief Michael Geier.

The ATF-led investigation resulted in the filing of 58 federal indictments and one federal criminal complaint charging 104 Bernalillo County residents with federal firearms and narcotics trafficking offenses. The investigation also developed information leading to the indictment of four other individuals on state charges arising out of two murders in Bernalillo County in May and June 2016.

The investigation began in mid-April 2016, when ATF personnel from throughout the country joined forces with federal, state, county and local law enforcement agencies in New Mexico to combat the high rate of violent crime in the Albuquerque metropolitan area. The investigators utilized a number of investigative techniques, including undercover operations, historical investigation and targeting of multi-convicted felons in possession of firearms. The investigation, which concluded yesterday, was the ninth multi-agency, multi-month investigation completed throughout the United States under the ATF's Enhanced Enforcement Initiative (EEI).

The investigation was also undertaken in support of a federal anti-violence initiative that targets "the worst of the worst" offenders for federal prosecution. Under this initiative, the U.S. Attorney's Office and federal law enforcement agencies collaborate with New Mexico's District Attorneys and state, local and tribal law enforcement agencies to target violent or repeat offenders for federal prosecution primarily based on their prior criminal convictions with the goal of removing repeat offenders from communities in New Mexico for as long as possible.

In announcing the results of the investigation, U.S. Attorney Damon P. Martinez said, "The purpose behind this investigation and its resulting prosecutions is to ensure that we keep control of our streets. The law enforcement community is sending a loud and clear message to the worst of the worst offenders in our community: you cannot commit crime in New Mexico with impunity and without consequence. We are putting you on notice. We are watching, and we will continue to be vigilant."

"ATF's Enhanced Enforcement Initiative (EEI) has cut a distinctive path through the violent criminal element in the Albuquerque metropolitan area. Utilizing the federal firearms and narcotics laws, our undercover agents have arrested 98 individuals and taken 127 firearms off the streets, making this EEI the most successful and impactful enforcement operation to date said," ATF Special Agent in Charge Thomas G. Atteberry. "The federal prosecution of these individuals, some of whom have significant criminal histories, puts the brakes on the turnstile justice often experienced in the state judicial system. Our goal is simple: to put violent, repeat offenders behind bars for as long as possible, and keep them from interacting with the good people of New Mexico."

"The results of this enforcement initiative exceeded our expectations. It has confirmed, however, what those of us in law enforcement already knew: there is a clear and direct correlation between drugs, guns and violence," said DEA Special Agent in Charge Will R. Glaspy. "DEA will continue to work with our law enforcement partners to target those individuals and criminal organizations who spread their poison on the streets of Albuquerque, and in doing so we will make our community a safer place for all."

Deputy U.S. Marshal Alex Ramos added, "By combining the resources of the various agencies, we are able to accomplish many things that one agency by itself would be hard pressed to achieve. When law enforcement and the public join forces, each are doing their part to make our communities, our homes and most importantly, our families safer. This was truly a team effort."

To date, 94 of the 104 federal defendants and the four state defendants have been arrested. The defendants were arrested during two phases of the investigation. The first began in mid-April 2016 and concluded on July 7, 2016, and the second began on July 8, 2016 and concluded on August 10-11, 2016. As of the issuance of this press release, ten federal defendants have yet to be arrested and are considered fugitives. Information about the defendants and the charges against them is attached to this press release.

During the course of the investigation, law enforcement officers took 127 firearms, including a number of assault-type weapons, off the streets of Albuquerque and Bernalillo County. They also purchased and seized more than 17 pounds of methamphetamine, more than 2.5 pounds of heroin, 14 ounces of crack cocaine, more than a pound and a half of cocaine, and 100 pills. Four vehicles were also seized during the investigation.

"Once again, we are proud to be part of the cooperative effort by federal and state agencies to effect greater public safety for our citizens," said 2nd Judicial District Attorney Kari E. Brandenburg. "Our prosecutors are dedicated to doing their best to ensure justice for the families and friends of the victims. I want to personally thank each agency for their hard work and assure them of our continued commitment."

"The citizens of New Mexico are safer today because of the collaborative effort between law enforcement agencies. When law enforcement agencies combine resources and assets, we are able to prevent violent crimes," said New Mexico State Police Chief Pete N. Kassetas. "This operation is a great example of how local, county, state and federal agencies are working with State District Attorneys and the U.S. Attorney to prevent violent crimes. It also reinforces that there are consequences to those that choose to commit violent crimes in our state."

"The Albuquerque Police Department greatly appreciates that ATF selected Albuquerque for this complex operation, which has been extremely successfully because of strong support from the U.S. Attorney's

Office," said Albuquerque Police Chief Gorden E. Eden, Jr. "This operation demonstrates yet again the critical cooperation necessary to fight crime and the criminal element that preys on the innocent. As these cases advance through the criminal justice system, we will all witness the strength of our collaborative commitment to the safety and security of this community."

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USAO - New Mexico

Topic:
Drug Trafficking
Violent Crime

Updated August 12, 2016

U.S. Department of Justice

United States Attorney
District of New Mexico

P.O. Box 607
Albuquerque, NM 87103

Phone: (505) 346-7274
Fax: (505) 346-7296

January 24, 2017

John F. Robbenhaar
Assistant Federal Public Defender
Office of the Federal Public Defender
111 Lomas Blvd. #501
Albuquerque, New Mexico 87102

Re: *United States of America vs. Lonnie Jackson*
CR 16-2362 MCA

Dear Mr. Robbenhaar,

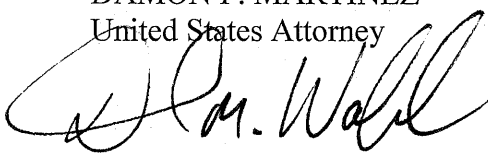
I am in receipt of your letter dated January 4, 2017, in which you request supplemental discovery related to the referenced matter. I am sending this response to you as a courtesy to advise that the United States will not provide the materials you requested.

By way of explanation, a fair reading of your correspondence suggests that the discovery you seek is aimed toward a future race-based selective prosecution claim. The United States will not provide discovery related to such a claim because you have not met the threshold showing necessary to entitle you to the materials you seek. As you know, the flow of discovery related to selective-prosecution claims is controlled by *United States v. Armstrong*, 517 U.S. 456 (1996), a case in which the Supreme Court placed a significant burden on defendants who demand the type of material outlined in your letter. Recognizing that prosecutorial decision-making enjoys a presumption of regularity, the Supreme Court held that defendants who seeks to rebut the presumption by claiming selective enforcement are not entitled to discovery unless and until he presents some evidence that similarly-situated defendants could have been, but were not, prosecuted. *Id.* at 469; *see also United States v. Bass*, 536 U.S. 862 (2002)(per curiam). Neither the record nor your letter meets the *Armstrong* standard, therefore discovery is not available under Fed. R. Crim. P. 16.

As indicated above, this letter is provided to you as a courtesy to afford you adequate time to file any motions you deem appropriate. Please let me know if you have any questions.

Very truly yours,

DAMON P. MARTINEZ
United States Attorney



DAVID M. WALSH
Assistant United States Attorney
P.O. Box 607
Albuquerque, New Mexico 87103
505-846-7274

RACE OF OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY[1]

Fiscal Years: 2006-2015

District: New Mexico

		WHITE		BLACK		HISPANIC		OTHER(+)	
PRIMARY OFFENSE	TOTAL	N	%	N	%	N	%	N	%
TOTAL	**31,921**	**2,120**	**6.6**	**483**	**1.5**	**28,378**	**88.9**	**940**	**2.9**
Murder	**56**	2	3.6	4	7.1	5	8.9	45	80.4
Manslaughter	**88**	2	2.3	0	0.0	3	3.4	83	94.3
Kidnapping/Hostage Taking	**7**	2	28.6	0	0.0	4	57.1	1	14.3
Sexual Abuse	**240**	15	6.3	1	0.4	12	5.0	212	88.3
Assault	**363**	32	8.8	5	1.4	42	11.6	284	78.2
Robbery	**176**	57	32.4	15	8.5	77	43.8	27	15.3
Arson	**21**	2	9.5	0	0.0	3	14.3	16	76.2
Drugs - Trafficking	**5,946**	693	11.7	320	5.4	4,887	82.2	46	0.8
Drugs - Communication Facility	**44**	5	11.4	0	0.0	38	86.4	1	2.3
Drugs - Simple Possession	**29**	11	37.9	1	3.4	14	48.3	3	10.3
Firearms	**1,101**	281	25.5	65	5.9	683	62.0	72	6.5
Burglary/B&E	**4**	2	50.0	0	0.0	0	0.0	2	50.0
Auto Theft	**1**	0	0.0	0	0.0	1	100.0	0	0.0
Larceny	**113**	42	37.2	4	3.5	52	46.0	15	13.3
Fraud	**320**	96	30.0	10	3.1	193	60.3	21	6.6
Embezzlement	**32**	5	15.6	0	0.0	11	34.4	16	50.0
Forgery/Counterfeiting	**32**	17	53.1	0	0.0	14	43.8	1	3.1
Bribery	**11**	3	27.3	0	0.0	6	54.5	2	18.2
Tax	**28**	15	53.6	0	0.0	12	42.9	1	3.6
Money Laundering	**32**	6	18.8	2	6.3	23	71.9	1	3.1
Racketeering/Extortion	**38**	19	50.0	3	7.9	15	39.5	1	2.6
Gambling/Lottery	**0**	0	--	0	--	0	--	0	--
Civil Rights	**5**	4	80.0	0	0.0	1	20.0	0	0.0
Immigration	**22,695**	639	2.8	31	0.1	22,007	97.0	18	0.1
Child Pornography	**92**	68	73.9	3	3.3	19	20.7	2	2.2
Prison Offenses	**74**	12	16.2	1	1.4	49	66.2	12	16.2
Administration of Justice Offenses	**245**	49	20.0	16	6.5	148	60.4	32	13.1
Environmental/Wildlife	**6**	3	50.0	0	0.0	2	33.3	1	16.7
National Defense	**9**	1	11.1	0	0.0	6	66.7	2	22.2
Antitrust	**0**	0	--	0	--	0	--	0	--
Food & Drug	**4**	2	50.0	0	0.0	1	25.0	1	25.0
Other Miscellaneous Offenses	**109**	35	32.1	2	1.8	50	45.9	22	20.2

[1] Of the 34,207 cases, 2,286 were excluded due to missing information on offender's race. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Sourcebook (isb.ussc.gov) using the Commission's fiscal year 2006-2015 Datafiles, USSCFY2006-USSCFY2015.

DEFENDANT'S EXHIBIT

D

	A	B	C	D	E	F	G	H	I	J	K
1	**Name**	**Race**	**Race Audit**	**Attorney**	**Judge**	**Case Number**	**Charge**	**CI**	**UC**	**Address of contact with initial target**	**Principal or Recruit?**
2	ANDERSON, Carlos	Black	Complete	Monnica Garcia	Herrera	16-cr-2922-JCH	Guns, Meth	11438		12600 Central Ave. SE ABQ, NM 87123 - Circle K	Principal
3	BANKS, Adrian	Black	Complete	Amy Sirignano	Herrera	16-cr-2926-JCH	Guns	11438			
4	BOWMAN, Janet	Black	Complete	John Samore	Armijo	16-cr-3206-MCA	Meth	2478	M.R.		
5	BROWN, Jovas	Black	Complete	Chuck Knoblauch	Johnson	16-cr-2913-WJ	Meth, Crack	9097, 3302			
6	BROWN, London	Black	Complete	Ian King	Browning	16-cr-2932-JB	Guns	11438			
7	BURNS, Shawn Anthony	Black	Complete	J.D. Herrera	Vazquez	16-cr-2360-MV	Crack				
8	CARR, Maurice	Black	Complete	Steve McCue	Herrera	16-cr-2908-JCH	Guns	11438	A.B.=5096		
9	CASANOVA, Yusef	Black	Complete	Brian Pori	Parker	16-cr-2917-JAP	Guns, Meth	3302	R.J.	6901 Zuni Rd. SE ABQ, NM 87108 - Allsup's	Recruit
10	CHESTNUT, Paul	Black	Complete - confirmed by Co-D's attorney, Phil Sapien	Unassigned	Johnson	16-cr-2918-WJ	Meth	2478		7000 Zuni Rd. SE ABQ, NM - Trendsettas Barbershop and Boutique	Principal
11	COLEMAN, Diamond	Black	Complete	Aric Elsenheimer	Armijo	16-cr-2363-MCA	Guns, Meth	11438	R.Z.		Principal
12	CUNNINGHAM, Dwayne	Black	Complete	Alonzo Padilla	Browning	16-cr-2930-JB	Meth				
13	DAVIS, Jesse James	Black	Complete	John Anderson	Armijo	16-cr-2927-MCA	Meth	9097	C.V.	7817 Central Ave. NE ABQ, NM 87108 - Circle K	Principal
14	DEVOUAL, Devell	Black	Complete	B.J. Crow	Browning	16-cr-2930-JB	Meth				
15	GILES, Damon	Black	Complete	Darrell Allen	Herrera	16-cr-2926-JCH	Guns, Cocaine	11438	C.V.		Principal
16	GRANDBERRY, Inkosi	Black	Complete	Darrell Allen	Armijo	16-cr-2920-MCA	Guns, Heroin	9097			
17	GRIFFIN, Willie	Black	Complete	Wayne Baker	Vazquez	16-cr-2366-MV	Meth	9097			
18	HAMMOND, Adrian D.	Black	Complete	Nicole Moss	Parker	16-cr-3071-JAP	Guns	2478	M.R.		
19	JACKSON, Lonnie	Black	Complete	John Robbenhaar	Armijo	16-cr-2362-MCA	Meth	11438	Gettler		
20	JOHNSON, Davon	Black	Complete	John Samore	Vazquez	16-cr-2915-MV	Ecstasy	9097	A.B.	7000 Zuni Rd. SE ABQ, NM - Trendsettas Barbershop and Boutique	Principal
21	JONES, Cody	Black	Complete	Donavon Roberts	Vazquez	16-cr-2914-MV	Meth	11438	Gettler		Recruit
22	LANEHAM, Cedric	Black	Complete	Amy Sirignano	Browning	16-cr-2930-JB	Meth				
23	LEWIS, Marcus	Black	Complete	Aric Elsenheimer	Herrera	16-cr-2926-JCH	Cocaine	11438	C.V.		Recruit
24	RAYFORD, David	Black	Complete	Amy Sirignano	Herrera	16-cr-2929-JCH	Guns, Meth	11438			
25	REVET, Gonzalo	Black	Complete	Ed Bustamante	Vazquez	16-cr-2366-MV	Meth				
26	SOWELL, Marcus	Black	Complete	Keith Romero	Herrera	16-cr-2926-JCH	Guns	11438			
27	SWINT, Dustin	Black	Complete	Sylvia Baiz	Vazquez	16-cr-2914-MV	Meth	11438	Gettler		Recruit
28	THOMPSON, Keith	Black	Complete	Tom Jameson	Herrera	16-cr-2697-JCH	Heroin, Meth	3302	A.B.=5096	3001 University Blvd. SE ABQ, NM 87106 - Kirkland Park	Principal
29	WILLIAMS, Brent	Black	Complete	Angela Arellanes	Johnson	16-cr-2913-WJ	Meth, Crack	9097, 3302			
30	ANTILLON-PARRA, Fernando	Hispanic	Complete	Margaret Katze	Vazquez	16-cr-2704-MV	Meth	11438			
31	ARAGON, Jonathan	Hispanic		Rivas, Irma	Johnson	16-cr-2916-WJ	Heroin, Meth	2478	M.R.		
32	ARREOLA-PALMA, Luis	Hispanic	Complete	Devon Fooks	Browning	16-cr-3308-JB	Conspiracy	2478			
33	AYALA, Jeneill	Hispanic		Unassigned	Vazquez	16-cr-3208-MV	Meth				
34	BACA, Dominic	Hispanic		Tom Clear	Johnson	16-cr-3303-WJ	Heroin				
35	BARELA, Anthony	Hispanic	Complete	Dan Tallon	Armijo	16-cr-3206-MCA	Meth	2478	M.R.		
36	BELTRAN-AHUMADA, Maria Citlaly	Hispanic	Complete	Ken Gleria	Armijo	16-cr-3206-MCA	Meth	2478	M.R.		
37	BORREGO, Michael	Hispanic	Complete	Erlinda Johnson	Herrera	16-cr-2926-JCH	Guns	11438			
38	BROWN, Julian	Hispanic	Complete	Steve McCue	Johnson	16-cr-3212-WJ	Guns, Heroin	11438	A.B.	10000 DeVargas Rd. SW ABQ, NM 87121 - Circle K	Principal
39	CANDELARIA, Brandon	Hispanic		Ron Sanchez	Browning	16-cr-3069-JB	Meth	2478			

DEFENDANT'S EXHIBIT

E

	A	B	C	D	E	F	G	H	I	J	K
40	CARMONA, Daniel	Hispanic	Complete	Tim Cornish	Browning	16-cr-3308-JB	Guns, Meth	2478			
41	CASTILLO, Cody	Hispanic		Devon Fooks	Browning	16-cr-2923-JB	Meth	2478			
42	CHACON, Jorge	Hispanic		Martin Lopez	Armijo	16-cr-2924-MCA	Guns, Meth				
43	CORRAL-VALENZUELA, David	Hispanic	Complete	Ben Wilson	Herrera	16-cr-2919-JCH	Guns, Meth, Reentry	11438	R.Z.		
44	CORTEZ, Richard	Hispanic	Complete	Ahmad Assed	Armijo	16-cr-3302-MCA	Meth	2478	M.R.		Recruit
45	DUARTE, Josue	Hispanic		John Butcher	Vazquez	16-cr-3306-MV	Meth	11438	R.Z.		
46	FLORES, Johnny	Hispanic	Complete	Monnica Garcia	Vazquez	16-cr-3306-MV	Meth	11438	R.Z.		
47	GARCIA, Francisco	Hispanic	Complete	Michael Davis	Armijo	16-cr-2701-MCA	Guns, Meth	9097			
48	GARCIA, Jesus Manuel	Hispanic		Kari Converse	Parker	16-cr-2925-JAP	Guns, Meth	11438	C.V.		
49	GONZALES, Phillip Larry	Hispanic	Complete	Wayne Baker	Johnson	16-cr-3299-WJ	Heroin	11438			
50	GRIEGO, Daniel	Hispanic	Complete	Bob Gorence	Armijo	16-cr-3210-MCA	Cocaine				
51	GRIEGO, Jonathan	Hispanic	Complete	Devon Fooks	Armijo	16-cr-3305-MCA	Meth	2478			
52	HUNT, Brandon Jason	Hispanic	Complete	Alonzo Padilla	Parker	16-cr-2696-JAP	Cocaine, Guns	489	M.R.		
53	LEAL, Gaspar	Hispanic	Complete	Wayne Baker	Browning	16-cr-3069-JB/16-cr-3308-JB	Meth/Conspiracy	2478/2478			
54	LOPEZ, Leo	Hispanic	Complete	Susan Porter	Johnson	16-cr-3211-WJ	Conspiracy	9097	C.V.		Recruit
55	LOVATO, Guajira Maya	Hispanic		Irma Rivas	Armijo	16-cr-3206-MCA/16-cr-3301-MCA/16-cr-3302-MCA	Meth/Heroin/Meth	2478	M.R.		
56	LOVATO, Robert Henry	Hispanic	Complete	Michael Alarid	Armijo	16-cr-2361-MCA	Meth	11438	C.V., R.J.		
57	LOYA, Daniel	Hispanic	Complete	Ed Bustamante	Armijo	16-cr-3302-MCA	Meth	2478	M.R.		
58	LUCERO, Richard	Hispanic	Complete	Aric Elsenheimer	Vazquez	16-cr-3209-MV/16-cr-3304-MV	Meth/Meth	2478/11438			
59	MARQUEZ, Benjamin	Hispanic	Complete	Jackie Robins	Vazquez	16-cr-3209-MV	Heroin, Meth	2478			
60	MARTINEZ, Ray	Hispanic		Sam Winder	Herrera	16-cr-2919-JCH	Meth	11438			
61	MENDEZ, Larry	Hispanic	Complete	Phil Sapien	Johnson	16-cr-2918-WJ	Meth	2478		7000 Zuni Rd. SE ABQ, NM - Trendsettas Barbershop and Boutique	
62	MONTOYA, Thomas	Hispanic	Complete	Michael Alarid	Vazquez	16-cr-2931-MV	Meth	2478	M.R.	Ojos Locos	
63	NAHLE, Waldo	Hispanic		Martin Lopez	Vazquez	16-cr-3304-MV	Guns, Meth	11438			
64	OLIVAS, Rumaldo	Hispanic	Complete	Todd Coberly	Parker	16-cr-3300-JAP	Meth				
65	OTERO, Desiree	Hispanic		Sam Winder	Armijo	16-cr-3301-MCA	Heroin	2478	M.R.		
66	PADILLA, Jennifer	Hispanic	Complete	Val Whitley	Johnson	16-cr-3211-WJ	Conspiracy	9097	C.V.	1218 San Pedro Dr. SE ABQ, NM 87108 - Bucket Headz Southern Home Cookin' (discovery says halfway house)	Principal
67	PARRA, Jesus	Hispanic	Complete	Art Nieto	Armijo	16-cr-2910-MCA	Meth	11438			
68	PEREA, Abel	Hispanic	Complete	Teri Duncan	Vazquez	16-cr-3304-MV	Meth	11438			
69	PEREZ-CONTRERAS, Antonio	Hispanic	Complete	Michael Alarid	Parker	16-cr-2925-JAP	Guns, Meth, Reentry	11438	C.V.		
70	PORRAS, Richard	Hispanic	Complete	J.D. Herrera	Armijo	16-cr-3305-MCA	Guns, Meth	2478			
71	QUEZADA, Ramon	Hispanic	Complete	Molly Schmidt-Nowara	Armijo	16-cr-2703-MCA	Meth	3302	R.J.		
72	RAMIREZ, Jesus	Hispanic	Complete	Ken Gleria	Armijo	16-cr-3305-MCA	Guns, Heroin, Meth	2478			
73	RANGEL, Eulalio	Hispanic	Complete	Dan Tallon	Browning	16-cr-2932-JB	Guns	11438			
74	REPSIS, Eric Dean	Hispanic	Complete	Art Nieto	Vazquez	16-cr-2907-MV	Guns, Meth	9154			
75	RIVAS, Juan Jose	Hispanic		Unassigned	Armijo	16-cr-3206-MCA	Meth	2478	M.R.		
76	RUIZ, Margarito	Hispanic		Unassigned	Herrera	16-cr-2699-JCH	Guns, Meth				
77	RUIZ, Ramon	Hispanic	Complete	Alonzo Padilla	Parker	16-cr-3213-JAP	Crack	9097			
78	SANCHEZ, Elias	Hispanic	Complete	Angela Arellanes	Vazquez	16-cr-2911-MV	Meth	9097			
79	SANDOVAL, Matthew	Hispanic	Complete	Wayne Baker	Herrera	16-cr-2697-JCH	Heroin, Meth	3302	A.B.=5096		Recruit
80	SANTIESTEBAN, Angelica Marie	Hispanic	Complete	Sylvia Baiz	Armijo	16-cr-2912-MCA	Meth	2478			

	A	B	C	D	E	F	G	H	I	J	K
81	SEDILLO, Joshua	Hispanic		Margaret Katze	Armijo	16-cr-2703-MCA	Meth	3302	R.J.		
82	SENA, Joseph	Hispanic	Complete	Stephen Pierce	Johnson	16-cr-3211-WJ	Meth	9097	C.V.		Recruit
83	TALAMANTE, Nathan	Hispanic	Complete	Daniel Salazar	Parker	16-cr-2702-JAP	Heroin, Meth				
84	TAPIA, Bernadette Aurora	Hispanic		Tom Jameson	Browning	16-cr-3069-JB/16-cr-3070-JB	Meth/Meth	2478/2478			
85	TAPIA, Candace	Hispanic	Complete	Phil Sapien	Browning	16-cr-3069-JB	Meth	2478			
86	TORREZ, David	Hispanic		Unassigned	Vazquez	16-cr-3208-MV	Meth				
87	ULIBARRI, Felix	Hispanic		John Butcher	Johnson	16-cr-3211-WJ	Meth	9097	C.V.		Recruit
88	URIAS, Noe	Hispanic		Jerry Walz	Armijo	16-cr-2912-MCA	Meth	2478			
89	VASQUEZ, Carlos	Hispanic		Kari Converse	Herrera	16-cr-2700-JCH	Cocaine, Guns, Meth	3302	R.J.		
90	VILLARREAL, Alex	Hispanic	Complete	Leon Encinias	Herrera	16-cr-2909-JCH	Guns, Meth				
91	ZAMORA, Patrick	Hispanic	Complete	Ed Bustamante	Armijo	16-cr-2912-MCA	Meth	2478			
92	TOYA, Letitia	Native American	Complete	Sylvia Baiz	Armijo	16-cr-2928-MCA	Guns, Meth	489			
93	BOYDSTON, Manuel	White	Complete	Erlinda Johnson	Vazquez	16-cr-2931-MV	Meth	2478	M.R.		
94	BRIGHT, Joshua	White	Complete	Teri Duncan	Armijo	16-cr-2927-MCA	Meth	9097	C.V.		Recruit
95	CROPSEY, Mikai	White	Complete	Ben Wilson	Browning	16-cr-3070-JB	Meth	2478			
96	DILLEY, Timothy	White	Complete	Don Kochersberger	Johnson	16-cr-2916-WJ	Heroin, Meth	2478	M.R.		
97	FALES, Eugene	White	Complete	Monnica Garcia	Armijo	16-cr-2928-MCA	Meth	489			
98	HOFER, Jessica	White	Complete	Charles Fisher	Browning	16-cr-2923-JB	Meth	2478			
99	HOHMANN, Tommy	White		Sam Winder	Herrera	16-cr-3469-JCH	Guns				
100	JENSEN, Mike	White	Complete	Ken Gleria	Vazquez	16-cr-2698-MV	Guns, Meth	11438			
101	JUAREZ, Chere	White	Complete	Bob Cooper	Herrera	16-cr-2929-JCH	Meth	11438			Recruit
102	KYLE, Andrew	White	Complete	Aric Elsenheimer	Vazquez	16-cr-3207-MV	Guns	10991	R.Z.		
103	PROST, Michael Ryan	White	Complete	Tom Jameson	Vazquez	16-cr-2698-MV	Meth	11438			
104	SHIELDS, Simon	White	Complete	John Butcher	Herrera	16-cr-2919-JCH	Meth	11438			

Table of Cases, with Associated Undercover Agent(s)		
Case	**Year**	**Undercover Agent(s)**
Tankey	2006	Dave Gomez
Harris	2006	Dave Gomez
Corson	2006	Dave Gomez
Lewis	2007	Dave Gomez
Walker	2007	Christopher Bayless
George	2007	Christopher Bayless
Sidney	2007	Christopher Bayless
Mahan	2008	Dave Gomez
Farella	2009	Christopher Bayless
Mayfield	2009	Dave Gomez
Alexander	2011	Andrew Karceski
Flowers	2011	Christopher Bayless
DeJesus	2012	Dave Gomez
Brown	2012	Dave Gomez
Davila	2012	Sean Koren
Payne	2012	Michael Ramos; Richard Zayas
Cousins	2012	Leon Edmond
Williams	2012	Carlos Valles
Paxton	2013	Andrew Karceski
Elias	2013	Christopher Labno
Jackson	2013	Christopher Labno; Stan Kogut

See Supp. Appx E (containing the Takedown Memos from which this information was drawn).

E. The Stash House Operation's Selection Procedure is Highly Susceptible to Abuse, Further Demonstrating Discriminatory Intent.

The Supreme Court recognizes that discriminatory intent can be established by a selection procedure that (1) is susceptible to abuse and that (2) results in a statistical discriminatory effect. The Stash House Operation meets this standard.

In *Castaneda v. Partida*, the Court recognized that "a selection procedure that is susceptible of abuse . . . supports the presumption of discrimination raised by [a] statistical showing." 430 U.S. at 494. The Court applied the susceptibility to abuse standard to strike down Texas's grand jury venire selection process under the Equal Protection Clause. First, the Court concluded that Texas employed a highly discretionary selection procedure that was "susceptible of

DEFENDANT'S EXHIBIT F

Discovery Motion with Exhibits A, B, F in
***United States v. Lamar et al*., 14-CR-726 (PGG) (SDNY)**
(DE 28-30, filed 3/16/15)

(hundreds of additional pages of exhibits are available on Pacer)

Alison Siegler, Univ. of Chicago Law School

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Executive Director

Southern District of New York
Jennifer L. Brown
Attorney-in-Charge

March 16, 2015

By hand delivery

Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
40 Foley Square, Room 2204
New York, New York 10007

Re: *United States v. Nakai Lamar et al.*, 14 Cr. 726 (PGG)

Dear Judge Gardephe:

Enclosed, please find a courtesy copy of the defendants' discovery motion, filed today via ECF.

Respectfully,

/s/ Jonathan Marvinny
Jonathan Marvinny
Assistant Federal Defender
(212) 417-8792
jonathan_marvinny@fd.org

cc: All counsel (by ECF)

United States District Court
Southern District of New York
----------x
United States of America

- v. -

Notice of Motion

Nakai Lamar,
Chago Haynes, and
Tyrone Meachem,

14 Cr. 726 (PGG)

Defendants.
----------x

Please take notice, that upon the annexed declaration of Jonathan Marvinny, Esq., and the attached exhibits and memorandum of law, the undersigned will move this Court, before the Honorable Paul G. Gardephe, United States District Judge for the Southern District of New York, 500 Pearl Street, New York, New York, at a time to be designated by the Court, for an order, pursuant to the Fifth Amendment of the United States Constitution and Local Criminal Rule 16.1, compelling the Government to produce certain discovery items, and granting such further relief as the Court deems just and proper.

Dated: New York, New York
March 16, 2015

Respectfully submitted,

/s/ Jonathan Marvinny
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To: Preet Bharara, Esq.
United States Attorney
Southern District Of New York
One St. Andrew's Plaza
New York, New York 10007
Attn: Megan Gaffney, Esq.
Negar Tekeei, Esq.

United States District Court
Southern District of New York
----------x

United States of America **ATTORNEY DECLARATION**

- v. - **14 Cr. 726 (PGG)**

Nakai Lamar,
Chago Haynes, and
Tyrone Meachem,

Defendants.
----------x

I, Jonathan Marvinny, Esq., hereby declare under the penalties of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am an attorney with the Federal Defenders of New York and have been appointed to represent defendant Nakai Lamar. I make this declaration in support of a motion on behalf of all three defendants pursuant to the Fifth Amendment and Local Criminal Rule 16.1 to compel the Government to disclose certain discovery items. Those items are:

- A list of all reverse-sting cases—and the race of each defendant charged in those cases—involving alleged Hobbs Act robberies of supposedly large narcotics stashes ("phony-stash cases") brought by the United States Attorney's Office for the Southern District of New York ("the USAO"), where the DEA was the federal investigating agency, during the last 10 years;
- For each phony-stash case, a statement of the prior criminal investigations, if any, that the DEA had conducted into each defendant before initiating the reverse sting;
- All national and New York Divisions of the DEA manuals, circulars, field notes, correspondence, or any other material which discusses "stings," "reverse stings," "phony-stash ripoffs," or entrapment operations, including

protocols and/or directions to agents and confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, whether an attempt to disengage by a prospective co-conspirator is timely and whether that prospective co-conspirator can be or should be dissuaded from disengaging, and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry, or national origin;

- All documents containing information on how supervisors and managers of the New York DEA were to ensure and/or did ensure that their agents were not targeting persons on the basis of their race, color, ancestry, or national origin for these phony-stash cases, and what actions those supervisors and managers took to determine whether agents were in fact targeting persons for those reasons;

- The number of confidential informants that the New York DEA has used in phony-stash cases each year during the last 10 years and the number of those confidential informants that had access to non-African-American or non-Hispanic persons who could be targeted for a phony-stash case;

- Discovery from and other information pertaining to phony-stash cases where the USAO or the New York DEA targeted non-African American or non-Hispanic persons;

- All documents that contain information about actions taken during the last 10 years by the USAO to ensure that defendants in phony-stash cases brought by the USAO had not been targeted due to their race, color, ancestry, or national origin.

2. These discovery items are necessary for the subsequent filing of a pretrial motion attacking the indictment on the grounds of, *inter alia*, selective enforcement and/or selective prosecution.[1]

[1] Counsel also anticipate filing a motion attacking the indictment on the ground of outrageous government conduct, and hereby reserve the right to do so.

3. The statements contained in this declaration are based on information and belief, my review of documents and other evidence in this case and similar cases in this district, and publicly available demographic data.

Compliance with Local Criminal Rule 16.1

4. Counsel for the defendants have conferred with the Government in a good-faith effort to obtain the discovery items at issue without requiring the Court's intervention. The defendants sent the Government a letter requesting substantially the same discovery items on December 23, 2014. *See* Defendants' Discovery Request Letter (Exhibit A). On January 12, 2015, the Government responded by letter that it would not provide any of the requested items and that it would oppose any motion to compel them. *See* Government's Response Letter (Exhibit B).

The charges

5. The defendants are indicted on three counts: (1) conspiracy to possess and distribute heroin and cocaine, 21 U.S.C. §§ 846, 841(b)(1)(A); (2) conspiracy to commit robbery, 18 U.S.C. § 1951; and (3) possession of a firearm during a crime of violence and drug trafficking offense, 18 U.S.C. §§ 924(c)(1)(A)(i), 2.

6. The charges stem from a reverse sting engineered by the case agent, Todd C. Riley of the DEA, where the defendants allegedly agreed to rob at gunpoint a multi-kilogram drug shipment traveling by car from Miami to New York City. *See generally* Lamar et al. Complaint, 14 Mag. 2347 (included at Exhibit C). Of course, the drug shipment never existed; it was wholly fabricated by the DEA.

7. According to the complaint, in September 2014, a cooperating witness ("the CW") told Agent Riley and other DEA agents that the CW knew defendant Nakai Lamar

(whom the CW knew as "Love") as someone who "commits robberies [and] has access to guns." *Id.* at ¶ 9. Over the next several weeks, the CW and a confidential informant ("the CI") engaged Lamar in a series of conversations where they discussed Lamar and others' potentially robbing individuals in a car traveling from Miami to New York City with a large quantity of narcotics. *Id.* at ¶¶ 9–12. Lamar allegedly told the CW and the CI that he "had guns" and could be available whenever needed. *Id.* at ¶¶ 10(c)–(d).

8. The complaint alleges that, on October 20, 2014, Lamar attended a meeting with the CW and codefendants Chago Haynes and Tyrone Meachem where the CW informed them that the car they were to rob would have 14 kilograms of cocaine and four kilograms of heroin. *Id.* at ¶ 14. The group discussed that they would make the robbery look like a carjacking. *Id.* Lamar allegedly stated that he would travel to the scene of the robbery in a car with the CW while Haynes and Meachem would drive in a separate car armed with guns. *Id.*

9. According to the complaint, later that evening, the CW and Lamar traveled to a predetermined location in Manhattan in one car, while Haynes and Meachem traveled in a separate car. *Id.* at ¶ 15. When they arrived, law enforcement stopped both cars and arrested Lamar, Haynes, and Meachem. *Id.* A subsequent search of the car in which Haynes and Meachem had arrived yielded two loaded guns. *Id.*

An overview of "phony-stash cases" in this district

10. The alleged fact pattern in this case is nearly identical to those in a number of "phony-stash cases" prosecuted in this district since 2013. The defendants are aware of 18 such cases, including this one. The complaints from these 18 cases are attached in

chronological order as Exhibit C. The DEA is the investigating agency in all 18 cases. Agent Riley is listed as the case agent on all but three of them.[2]

11. The fact patterns alleged in the 18 complaints are remarkably similar. Each involves a cooperating witness's targeting an individual who the CW allegedly knows through firsthand knowledge has participated in previous robberies, or who the CW allegedly has heard boast of participating in previous robberies. The CW then approaches that individual and proposes a robbery almost too good to be true: a massive, often poorly guarded cache of narcotics usually located either in a stash house or in a car traveling to New York City from out of state. The individual is urged to recruit future codefendants to participate in the entirely imaginary robbery and to prepare for the robbery by securing loaded firearms. So armed, the defendants travel in vehicles to the scene of the imaginary robbery, which is always in Manhattan or the Bronx, where agents arrest them. All the defendants, with few exceptions, are subsequently charged with a (b)(1)(A) narcotics conspiracy, a Hobbs Act robbery conspiracy, and § 924(c) firearm possession.

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[2] It is unclear what role, if any, Agent Riley played in the cases where he is not listed as the case agent. It should be noted that the Government recently dismissed all charges against Zykia Speller—a defendant in *United States v. Tyrone Davis et al.*—after it was revealed on the eve of trial that Agent Riley had committed perjury before the grand jury. *See* Nolle Prosequi Order, *United States v. Zykia Speller*, 13 Cr. 986 (LTS) (S.D.N.Y. Jan. 16, 2015), ECF No. 146. Specifically, Agent Riley falsely testified that Ms. Speller had attended a meeting with a confidential informant, and had been present at the scene of the (imaginary) robbery, when she had not.

12. There are a total of 95 defendants in the 18 phony-stash cases of which the defendants are aware.[3] Federal Defenders of New York reached out to the attorneys for all 95 defendants to determine their clients' races. Of the 95 defendants, every single one is a person of color. 93 are black (nonhispanic) or Hispanic.[4] Two are Asian. Not a single defendant is white (nonhispanic).

Nationwide criticism of phony-stash cases

13. Federal law enforcement's use of reverse stings to target defendants for phony-stash cases has come under widespread criticism. An investigation by USA Today found that over 91% of the defendants convicted in such cases are people of color. *See* Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA Today, July 20, 2014, http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/. Recently, federal prosecutors in Chicago elected to dismiss drug-conspiracy charges against 27 defendants in phony-stash cases, likely because such cases have been "highly criticized for targeting mostly minority suspects, many of whom were drawn into the bogus rip-offs by informants who promised easy money at vulnerable points in their lives." Annie Sweeney & Jason Meisner, *Chicago Prosecutors Quietly Drop Charges Tied to Drug Stash House Stings*, Chi. Trib., Jan. 29, 2015, http://www.chicagotribune.com/news/local/breaking/ct-stash-houses-charges-dropped-met-20150129-story.html#page=1. Indeed, the New York Times describes these cases as

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[3] The 18 complaints list 91 total defendants. In one case (*United States v. Javion Camacho et al.*), however, four additional defendants were added to the case at the indictment stage, bringing the total number of defendants in the phony-stash cases to 95.

[4] Of these 93 defendants, 64 are Hispanic and 29 are black (nonhispanic), according to information provided by their attorneys.

having "spurred a national debate over possible entrapment and racial profiling." Erick Eckholm, *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times, Jan. 31, 2015, http://www.nytimes.com/2015/01/31/us/toughest-charges-dropped-in-chicago-drug-stings.html.

Race-specific references in DEA recordings

14. In at least one phony-stash case in this district—the Johnny Terry case,[5] whose complaint is included at Exhibit C—the DEA's confidential informant made explicit and frequent references, which were recorded, to the desirability of recruiting black defendants for the (imaginary) robberies of narcotics stashes.[6]

15. In that case, the CI approached Terry and asked if he wanted to make some money by assisting the CI in stealing drugs and money. The CI explained to Terry that a car containing drugs and money would arrive from Virginia on January 24, 2013. When it arrived, the CI's friend would ask the other passenger to get out of the car, and Terry's codefendants, Maurice Baptiste and Alfredo Rodriguez, would steal the car.

16. The CI—who was Hispanic—explicitly told Terry that black participants were necessary to ensure the plan went smoothly. The CI explained that the "inside job" would fool the victims into never suspecting the CI's involvement, since Terry and his companions were black. This is because the victims would never expect the CI to be involved with "black people." According to the CI, he "would have nothing to do with it.

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[5] 13 Mag. 220. Terry was the lead defendant and represented by Federal Defenders of New York.

[6] At this point, the defendants are unaware of in how many phony-stash cases the DEA used the same CI from the Terry case. Of course, information on the total number of CIs used by the DEA and in how many cases each participated is one of the discovery items the defendants seek.

[He doesn't] know no black people." Draft Transcript of January 16, 2013, Meeting 23 (Exhibit D).

17. Indeed, the CI emphasized at his first recorded meeting with Terry that Terry was the ideal co-conspirator because of the color of his skin. He said, "Yo, this guy is black, he's perfect." *Id.* at 6; *see also id.* at 5 ("And you black, you know what I'm saying? It gonna look good."). At that same meeting, the CI noted that he believed committing the crime with Terry would be easier because Terry was black. *Id.* at 9 ("When you told me the first time I thought about it, like, damn I can't do this. And then I went, but this nigga's black."). Moreover, when instructing Terry to recruit other individuals to participate in the crime, the CI made sure to confirm that "them niggas is dark-skinned, those other niggas?" *Id.* at 10.

18. The CI's reliance on race continued throughout his interactions with Terry. At a meeting on January 23, 2013, the CI explained to Terry that he had told the driver who would be participating in the crime, "Yo, I got some black dudes from the Bronx, they say they get down, they do it. So we was like, oh, that's beautiful." Draft Transcript of January 23, 2013, Meeting 1 (Exhibit E). The CI also reiterated that a black person was the perfect co-conspirator when he said, "[w]ell, this is gonna be just like to test you, you know what I'm sayin? … And you black." *Id.* at 9.

The racial composition of Manhattan, the Bronx, and the Southern District of New York

19. As of the 2010 census, Manhattan and the Bronx collectively had 2,970,981 residents. *See* New York City 2010 Census Data, available at http://www.nyc.gov/html/dcp/pdf/census/census2010/t_pl_p2a_nyc.pdf. Of those residents, 30.7% (912,702) were white (nonhispanic); 20.9% (622,035) were black (nonhispanic); and 38.5%

(1,144,990) were Hispanic. *Id.* The following chart provides the pertinent racial breakdown for the two counties.

County	**Total residents**	**White (nonhispanic)**	**Black (nonhispanic)**	**Hispanic origin**
Manhattan	1,585,873	761,493 (48.0%)	205,340 (12.9%)	403,577 (25.4%)
Bronx	1,385,108	151,209 (10.9%)	416,695 (30.1%)	741,413 (53.5%)

20. The entire Southern District of New York—which includes the additional counties of Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan—has an even greater overall percentage of white residents than Manhattan and the Bronx, as each of those additional counties has a significantly higher percentage of white (nonhispanic) residents. Westchester is 55.7% white (nonhispanic); Orange is 57.2% white (nonhispanic); Rockland is 63.9% white (nonhispanic); Dutchess is 73.3% white (nonhispanic); Sullivan is 73.7% white (nonhispanic); and Putnam is 81.5% white (nonhispanic). *See* New York State Estimated 2013 Census Data, available at http://quickfacts.census.gov/qfd/states/36000.html (select an individual county from the drop-down menu).

Sentencing Commission data on the races of robbery offenders in the Southern District of New York

21. The United States Sentencing Commission maintains data about the races of offenders in federal criminal cases by district and by specific Sentencing Guideline. This data indicates that, in the Southern District of New York during fiscal years 2006–

2012, offenders convicted under the Robbery Guideline (§ 2B3.1[7]) were 10.8% white, 33.9% black, and 52.7% Hispanic. *See* Chart of Race of Offenders in the Southern District 2006–2012 (Exhibit F).[8]

Data pertaining to New York state-court convictions

22. According to the New York State Division of Criminal Justice Services ("DCJS"), in each year from 2009–2013, approximately 5,000 offenders from New York City were convicted of violent-felony offenses in New York state court. DCJS Violent Felony Offense 2013 Annual Report 2, available at http://www.criminaljustice.ny.gov/crimnet/ojsa/nys-violent-felony-offense-processing-2013.pdf. In other words, over those five years, approximately 25,000 offenders from New York City sustained state-court convictions for violent-felony offenses. As for robbery in particular, in 2013 alone, 3,153 offenders from New York City sustained violent-felony robbery convictions. *Id.* at 13.

23. Data from the New York State Department of Corrections ("DOCS") shows that, as of January 2014, the population under custody (i.e., housed in a correctional facility or a DOCS-operated residential drug program) in New York State was 23.8% white, 50% African American, and 24.1% Hispanic. *See* Executive Summary, New York State Department of Corrections, *Profile of Under Custody Population as of January 1, 2014* (September 2014), available at http://www.doccs.ny.gov/Research/Reports/2014/

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[7] § 2B3.1 covers the kind of violent Hobbs Act robbery conspiracies charged in the phony-stash cases—18 U.S.C. § 1951.

[8] This chart can be obtained by going to http://isb.ussc.gov/Login, selecting "Demographic Data," then selecting "Primary Offense and Offender Characteristics," then selecting "Race of Offenders in Selected Primary Sentencing Guidelines," then filtering for data from fiscal years 2006–2012 in the Southern District of New York.

UnderCustody_Report_2014.pdf. 45.8% of the statewide under-custody population came from New York City. *Id.*

Conclusion

24. For the reasons set forth more fully in the attached Memorandum of Law, the Court should grant the defendants' discovery motion.

Dated: New York, New York
March 16, 2015

/s/ Jonathan Marvinny
Jonathan Marvinny

Exhibit A

December 23, 2014

By email

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One St. Andrew's Plaza
New York, New York 10007

Re: *United States v. Nakai Lamar et al.*, 14 Cr. 726 (PGG)

Dear Ms. Gaffney and Ms. Tekeei,

As counsel to Nakai Lamar, Chago Haynes, and Tyrone Meachem, we write jointly to request certain discovery items pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and the Fifth Amendment's due process clause. This discovery is necessary for our filing various pretrial motions attacking the indictment for, among other reasons, outrageous government conduct and selective prosecution.

Courts have ordered the Government to disclose items similar to those we request here. *See, e.g., United States v. Antonio Williams et al.*, 12 Cr. 887 (N.D. Ill. July 31, 2013), ECF No. 70. Specifically, we request:

1. A list of all reverse-sting cases—and the race of each defendant charged in those cases—involving alleged Hobbs Act robberies of supposedly large narcotics stashes ("phony stash cases") brought by your office, where the DEA or the ATF was the federal investigating agency, during the last 10 years;
2. For each phony stash case, a statement of the prior criminal investigations, if any, that the investigating agency had conducted into each defendant before initiating the reverse sting (if the criminal complaint contains all such information for a particular case, a reference to that complaint would be a sufficient response);
3. All national and New York Divisions of the DEA and ATF manuals, circulars, field notes, correspondence, or any other material which discusses "stings," "reverse stings," "phony stash ripoffs," or entrapment operations, including protocols and/or directions to agents and confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that the targets do not seek to quit or leave the conspiracy before an arrest can be made, and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry, or national origin;

Re: *United States v. Nakai Lamar et al.*
14 Cr. 726 (PGG)

4. All documents containing information on how supervisors and managers of the New York DEA/ATF were to ensure and/or did ensure that their agents were not targeting persons on the basis of their race, color, ancestry, or national origin for these phony stash cases, and what actions those supervisors and managers took to determine whether agents were in fact targeting persons for those reasons;
5. The number of confidential informants that the New York DEA/ATF has used in phony stash cases each year during the last 10 years and the number of those confidential informants who had access to non-African American or non-Latino persons who could be targeted for a phony stash case;
6. Discovery from and other information pertaining to phony stash cases where your office or the New York DEA/ATF targeted non-African American or non-Latino persons;
7. All documents that contain information about all actions taken during the last 10 years by your office to ensure that defendants in phony stash cases brought by your office had not been targeted due to their race, color, ancestry, or national origin.

Sincerely,

/s/ Jonathan Marvinny
Jonathan Marvinny
Attorney for Nakai Lamar
jonathan_marvinny@fd.org

/s/ David Touger
David Touger
Attorney for Chago Haynes
dtouger@aol.com

/s/ Frederick Cohn
Frederic Cohn
Attorney for Tyrone Meachem
fcohn@frederickhcohn.com

Exhibit B

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 12, 2015

BY EMAIL

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70 Lafayette Street
New York, NY 10013

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Re: United States v. Lamar et al., 14 Cr. 726 (PGG)

Dear Mr. Marvinny, Mr. Touger, and Mr. Cohn,

We received your December 23, 2014 letter requesting "certain discovery items pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E)(i) and the Fifth Amendment's due process clause."

As an initial matter, as is clear from our initial discovery letter of November 28, 2014, we are aware of our discovery obligations under Federal Rule of Criminal Procedure 16, as well as under *Brady* v. *Maryland,* 373 U.S. 83 (1963), and its progeny, and *Giglio* v. *United States*, 405 U.S. 150, 154 (1972), and its progeny. We have complied, and will continue to comply, with those obligations.

It is our view that the additional materials you have requested, even if they were in our possession, do not fall within any of the categories of information we are obligated to disclose. Therefore, we will not make a supplemental production of the materials you identified. We intend to oppose any motion to compel such discovery made before the Court.

Very truly yours,

PREET BHARARA
United States Attorney

by: __/s/_____
Negar Tekeei / Megan Gaffney
Assistant United States Attorneys
(212) 637-2482 / 2105

Exhibit F

RACE OF OFFENDERS IN SELECTED PRIMARY SENTENCING GUIDELINES[1]

Fiscal Years: 2006-2012

District: New York South

PRIMARY SENTENCING GUIDELINE	TOTAL	WHITE		BLACK		HISPANIC		OTHER(+)	
		N	%	N	%	N	%	N	%
TOTAL	**10,968**	**2,514**	**22.9**	**2,792**	**25.5**	**5,015**	**45.7**	**647**	**5.9**
§2A1.1	**152**	32	21.1	47	30.9	63	41.4	10	6.6
§2A2.2	**14**	3	21.4	3	21.4	1	7.1	7	50.0
§2A3.1	**2**	2	100.0	0	0.0	0	0.0	0	0.0
§2A3.5	**19**	5	26.3	9	47.4	4	21.1	1	5.3
§2A4.1	**43**	7	16.3	9	20.9	20	46.5	7	16.3
§2A6.1	**17**	7	41.2	5	29.4	3	17.6	2	11.8
§2B1.1	**2,115**	836	39.5	692	32.7	436	20.6	151	7.1
§2B3.1	**351**	38	10.8	119	33.9	185	52.7	9	2.6
§2B5.1	**31**	2	6.5	12	38.7	17	54.8	0	0.0
§2B5.3	**87**	27	31.0	10	11.5	6	6.9	44	50.6
§2C1.1	**76**	39	51.3	15	19.7	14	18.4	8	10.5
§2D1.1	**4,293**	438	10.2	1,094	25.5	2,632	61.3	129	3.0
§2D1.2	**2**	0	0.0	1	50.0	1	50.0	0	0.0
§2D1.11	**2**	2	100.0	0	0.0	0	0.0	0	0.0
§2D2.1	**54**	26	48.1	12	22.2	13	24.1	3	5.6
§2G1.3	**24**	13	54.2	7	29.2	4	16.7	0	0.0
§2G2.1	**6**	3	50.0	1	16.7	2	33.3	0	0.0
§2G2.2	**105**	78	74.3	7	6.7	15	14.3	5	4.8
§2J1.2	**35**	19	54.3	5	14.3	7	20.0	4	11.4
§2K2.1	**578**	73	12.6	311	53.8	189	32.7	5	0.9
§2L1.1	**43**	6	14.0	3	7.0	7	16.3	27	62.8
§2L1.2	**1,062**	28	2.6	172	16.2	856	80.6	6	0.6
§2L2.1	**145**	36	24.8	39	26.9	44	30.3	26	17.9
§2L2.2	**146**	28	19.2	42	28.8	61	41.8	15	10.3
§2P1.1	**26**	6	23.1	14	53.8	6	23.1	0	0.0
§2Q2.1	**1**	1	100.0	0	0.0	0	0.0	0	0.0
§2S1.1	**411**	90	21.9	40	9.7	257	62.5	24	5.8
§2S1.3	**41**	15	36.6	9	22.0	12	29.3	5	12.2
§2T1.1	**80**	64	80.0	3	3.8	6	7.5	7	8.8
§2T1.4	**41**	13	31.7	16	39.0	9	22.0	3	7.3
§2X4.1	**68**	11	16.2	17	25.0	34	50.0	6	8.8
§2X5.2	**6**	2	33.3	4	66.7	0	0.0	0	0.0
Other Primary Sentencing Guidelines	**892**	564	63.2	74	8.3	111	12.4	143	16.0

[1] Of the 11,222 cases, 254 were excluded due to one or both of the following reasons: missing guideline applied (221) or missing information on offender's race (197). Descriptions of variables used in this table are provided in Appendix A.

SOURCE: This was produced using the U.S. Sentencing Commission's Interactive Sourcebook (isb.ussc.gov) using the Commission's fiscal year 2006-2012 Datafiles, USSCFY2006-USSCFY2012.

United States District Court
Southern District of New York
----------x
United States of America

- v. - 14 Cr. 726 (PGG)

Nakai Lamar,
Chago Haynes, and
Tyrone Meachem,

Defendants.
----------x

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY

Defendants Nakai Lamar, Chago Haynes, and Tyrone Meachem jointly submit this memorandum of law in support of their motion to compel the Government to disclose certain discovery items. This discovery is necessary for the subsequent filing of a pretrial motion attacking the indictment on the grounds of, *inter alia*, selective enforcement and/or selective prosecution. The requested items are:

- A list of all reverse-sting cases—and the race of each defendant charged in those cases—involving alleged Hobbs Act robberies of supposedly large narcotics stashes ("phony-stash cases") brought by the United States Attorney's Office for the Southern District of New York ("the USAO"), where the DEA was the federal investigating agency, during the last 10 years;

- For each phony-stash case, a statement of the prior criminal investigations, if any, that the DEA had conducted into each defendant before initiating the reverse sting;

- All national and New York Divisions of the DEA manuals, circulars, field notes, correspondence, or any other material which discusses "stings," "reverse stings," "phony-stash ripoffs," or entrapment operations, including protocols and/or directions to agents and confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, whether an attempt to disengage by a prospective co-conspirator is timely and whether that prospective co-conspirator can be or should be dissuaded from disengaging, and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry, or national origin;

- All documents containing information on how supervisors and managers of the New York DEA were to ensure and/or did ensure that their agents were not targeting persons on the basis of their race, color, ancestry, or national origin for these phony-stash cases, and what

actions those supervisors and managers took to determine whether agents were in fact targeting persons for those reasons;

- The number of confidential informants that the New York DEA has used in phony-stash cases each year during the last 10 years and the number of those confidential informants that had access to non-African-American or non-Hispanic persons who could be targeted for a phony-stash case;
- Discovery from and other information pertaining to phony-stash cases where the USAO or the New York DEA targeted non-African-American or non-Hispanic persons;
- All documents that contain information about actions taken during the last 10 years by the USAO to ensure that defendants in phony-stash cases brought by the USAO had not been targeted due to their race, color, ancestry, or national origin.

Preliminary Statement

This case is one in a series of "phony-stash cases" that have justly garnered nationwide criticism for the manner in which defendants—nearly always poor people of color[1]—are targeted. Here, the defendants, who are all black, are charged with conspiring to rob at gunpoint a large stash of narcotics being shipped by car from Miami to New York City. But the stash never existed—it was fabricated in the first instance by the DEA, and the imaginary robbery proposed to the defendants by a confidential informant. For their alleged participation in that contrived plot, the defendants now face massive mandatory prison sentences.

[1] A note on the terminology used in this memorandum: "people of color" is used to mean nonwhite people, or "minorities." "Black" is used interchangeably with "African-American."

The defendants are aware of 18 such phony-stash cases in this district since 2013 prosecuted by the USAO where the DEA was the investigating agency. Those 18 cases have a total of 95 defendants. All 95 are people of color. Not a single one is white.

The defendants now seek discovery to explore the troubling likelihood that the DEA and the USAO unconstitutionally targeted and prosecuted defendants in this district's phony-stash cases.

To obtain discovery in support of either a selective-enforcement or selective-prosecution challenge, defendants need only present "some evidence" tending to show that a given federal law enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose. *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (citation omitted).[2] The stark statistics on the racial makeup of the defendants targeted and prosecuted in the 18 phony-stash cases, by themselves, justify the defendants' discovery request, as they constitute evidence of both discriminatory effect and intent. *See, e.g.*, *United States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *5 (N.D. Ill. Apr. 17, 2014) (finding that statistical data on the races of defendants charged in phony-stash cases in

[2] The defendants seek discovery to explore both selective-enforcement and selective-prosecution challenges. Though occasionally conflated in the caselaw, the two challenges are distinct. Nevertheless, for discovery purposes, they are analyzed under the same legal standard. *See, e.g.*, *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("[A] defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that *Armstrong* outlines for selective prosecution claims.").

the Northern District of Illinois was sufficient to show both discriminatory effect and intent).

But, as discussed in more detail below, the defendants have made an even greater showing. They have presented evidence that, in at least one phony-stash case, the DEA's confidential informant made repeated references to the desirability of recruiting black defendants to participate in the (imaginary) robberies. The defendants also have presented statistical data from the United States Sentencing Commission and other sources demonstrating what should already have been obvious: white people in the Southern District of New York also commit violent robberies. Yet, not one white person of whom the defense is aware was targeted for or prosecuted in a phony-stash case.

In light of the defendants' providing more than "some evidence" that the enforcement policy in this district's phony-stash cases violated the Constitution, the Court should grant the defendants' discovery motion.

The Defendants' Showing

1. *The statistics on defendants in this district's phony-stash cases*

As noted, there are a total of 95 defendants in the 18 phony-stash cases of which the defendants are aware.[3] Declaration of Jonathan Marvinny, Esq. ("Marvinny Decl.") at ¶ 12. Federal Defenders of New York reached out to the attorneys for all 95 defendants to determine their clients' races. Of the 95

[3] The 18 complaints list 91 total defendants. *See* Exhibit C. In one case (*United States v. Javion Camacho et al.*), however, four additional defendants were added at the indictment stage, bringing the total number of defendants in the phony-stash cases to 95.

defendants, every single one is a person of color. 93 are black (nonhispanic) or Hispanic.[4] Two are Asian. Not a single defendant is white (nonhispanic). *Id.*

2. *Race-specific references in DEA recordings*

In at least one phony-stash case in this district,[5] the DEA's confidential informant made explicit and frequent references, which were recorded, to the desirability of recruiting black defendants for the (imaginary) robberies of narcotics stashes.[6] Marvinny Decl. at ¶ 14.

In that case, the CI approached defendant Johnny Terry and asked if he wanted to make some money by assisting the CI in stealing drugs and cash. The CI explained to Terry that a car containing the drugs and cash would arrive in New York City from Virginia on January 24, 2013. When it arrived, the CI's friend would ask the other passenger to get out of the car, and Terry's codefendants, Maurice Baptiste and Alfredo Rodriguez, would steal the car. Marvinny Decl. at ¶ 15.

The CI—who was Hispanic—explicitly told Terry that black participants were necessary to ensure the plan went smoothly. The CI explained that the "inside job" would fool the victims into never suspecting the CI's involvement, since Terry and his companions were black. Marvinny Decl. at ¶ 16. This is

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[4] Of these 93 defendants, 64 are Hispanic and 29 are black (nonhispanic), according to information provided by their attorneys.

[5] *United States v. Johnny Terry et al.,* 13 Mag. 220.

[6] At this point, the defendants are unaware of in how many phony-stash cases the DEA used the same CI from that case. Of course, information on the total number of CIs used by the DEA and in how many cases each participated is one of the discovery items the defendants seek.

because the victims would never expect the CI to be involved with "black people." *Id.* According to the CI, he "would have nothing to do with it. [He doesn't] know no black people." *Id.*

Indeed, the CI emphasized at his first recorded meeting with Terry that Terry was the ideal co-conspirator because of the color of his skin. He said, "Yo, this guy is black, he's perfect," and, "you black, you know what I'm saying? It gonna look good." Marvinny Decl. at ¶ 17. At that same meeting, the CI noted that he believed committing the crime with Terry would be easier because Terry was black. *Id.* ("When you told me the first time I thought about it, like, damn I can't do this. And then I went, but this nigga's black."). Moreover, when instructing Terry to recruit other individuals to participate in the crime, the CI made sure to confirm that "them niggas is dark-skinned, those other niggas?" *Id.*

3. *The racial composition of Manhattan, the Bronx, and the Southern District of New York*

Manhattan and the Bronx in particular, and the Southern District of New York in general, boast an incredible racial diversity. As of the 2010 census, Manhattan and the Bronx collectively had 2,970,981 residents. Marvinny Decl. at ¶ 19. Of those residents, 30.7% (912,702) were white (nonhispanic); 20.9% (622,035) were black (nonhispanic); and 38.5% (1,144,990) were Hispanic. *Id.*

The entire Southern District of New York—which includes the additional counties of Westchester, Rockland, Putnam, Orange, Dutchess, and Sullivan—has an even greater overall percentage of white residents than Manhattan and the Bronx, as each of those additional counties has a significantly higher percentage of white (nonhispanic) residents. Marvinny Decl. at ¶ 20.

Westchester is 55.7% white (nonhispanic); Orange is 57.2% white (nonhispanic); Rockland is 63.9% white (nonhispanic); Dutchess is 73.3% white (nonhispanic); Sullivan is 73.7% white (nonhispanic); and Putnam is 81.5% white (nonhispanic). *Id.*

4. *Sentencing Commission data on the races of robbery offenders in the Southern District of New York*

United States Sentencing Commission data confirms what should already be obvious: white people in the Southern District of New York commit violent crimes, including violent robberies. Indeed, Sentencing Commission data shows that, in the Southern District of New York during fiscal years 2006–2012, offenders convicted under the Robbery Guideline (§ 2B3.1[7]) were 10.8% white, 33.9% black, and 52.7% Hispanic. Marvinny Decl. at ¶ 21; Exhibit F.

5. *Data pertaining to New York state-court convictions*

According to the New York State Division of Criminal Justice Services, in each year from 2009–2013, approximately 5,000 offenders from New York City were convicted of violent-felony offenses in New York state court. Marvinny Decl. at ¶ 22. In other words, over those five years, approximately 25,000 offenders from New York City sustained state-court convictions for violent-felony offenses. *Id.* As for robbery in particular, in 2013 alone, 3,153 offenders from New York City sustained state-court violent-felony robbery convictions. *Id.*

[7] § 2B3.1 covers the kind of violent Hobbs Act robbery conspiracies charged in the phony-stash cases—18 U.S.C. § 1951.

Of course, those offenders were hardly all people of color. Data from the New York State Department of Corrections ("DOCS") shows that, as of January 2014, the population under custody (i.e., housed in a correctional facility or a DOCS-operated residential drug program) in New York State was 23.8% white, 50% African American, and 24.1% Hispanic, with 45.8% of the statewide under-custody population hailing from New York City. Marvinny Decl. at ¶ 23.

Argument

The Court should order discovery where the defendants have amply satisfied their burden to show "some evidence" supporting an equal-protection challenge.

The burden on defendants seeking discovery in support of an equal-protection challenge to a particular law enforcement policy is lower than that required to prevail on the merits. At the discovery stage, defendants need only present "some evidence" tending to show the essential elements of such a challenge: that the policy was motivated by discriminatory intent and that it had a discriminatory effect. *United States v. Armstrong*, 517 U.S. 456, 468 (1996) (citation omitted). Here, the defendants' compelling showing that the enforcement policy in this district's phony-stash cases likely violated constitutional equal-protection principles more than satisfies that burden. The Court should grant the defendants' discovery motion.

A. To obtain discovery, the defendants need only present "some evidence" tending to support an equal-protection challenge.

Law enforcement agencies and United States Attorneys do not enjoy unfettered discretion to enforce federal criminal laws; the Constitution constrains them. *See Armstrong*, 517 U.S. at 464. One such constraint—located

in the equal-protection component of the Fifth Amendment's Due Process Clause—is that a decision to arrest or prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Accordingly, an equal-protection challenge lies where a defendant shows that a particular law enforcement policy is "'directed so exclusively against a particular class of persons … with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." *Id.* at 464–65 (citing *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

Selective-enforcement and selective-prosecution challenges both draw on ordinary equal-protection standards. *See, e.g.*, *id.* at 465 (selective prosecution); *Whren v. United States*, 517 U.S. 806, 813 (1996) (selective enforcement). To prevail on the merits on either challenge, a defendant must show that a given federal enforcement policy "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Armstrong*, 517 U.S. at 465 (citation omitted).

Defendants seeking discovery in support of an equal-protection challenge enjoy a lower burden than that required to prevail on the merits. *United States v. Alameh*, 341 F.3d 167, 174 (2d Cir. 2003). At the discovery stage, defendants need only present "some evidence" tending to show the essential elements of an equal-protection defense. *Armstrong*, 517 U.S. at 468 (citation omitted). Specifically, defendants must provide some evidence that federal authorities have failed to target or prosecute similarly situated defendants of other races. *Id.*

at 469; *see also Alameh*, 341 F.3d at 173–74. Making this showing should not be "an insuperable task." *Armstrong*, 517 U.S. at 470.

Finally, "[i]f discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim." *Id.* at 468.

B. The defendants have satisfied their discovery burden.

The defendants have amply satisfied their discovery burden. They have presented more than "some evidence" that the enforcement policy in this district's phony stash cases likely ran afoul of constitutional equal-protection principles.

To begin, the statistics concerning the defendants' races in the phony-stash cases constitute overwhelming evidence that people of color were unconstitutionally targeted and prosecuted. Indeed, the DEA targeted people of color in all 18 cases of which the defendants are aware. Marvinny Decl. at ¶ 12. Those targets were then encouraged to recruit others to join the conspiracy. Astoundingly, all 95 defendants across the 18 cases are people of color—the USAO has not prosecuted a single white person of whom the defense is aware. *Id.* These profoundly troubling statistics demonstrate both discriminatory effect and intent, and justify the defendants' discovery request. *See United States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *5 (finding that defendants had presented evidence of discriminatory effect and intent where "[t]he defense has demonstrated that no white defendants have been indicted for phony stash house cases since 2009, despite the diverse makeup of the Northern District of

Illinois. Because 'the inexorable zero' may be evidence of discriminatory intent, *Yick Wo v. Hopkins,* 118 U.S. 356, 373–74 (1886), the court finds that defendants have produced 'some evidence' tending to show discriminatory intent."); *see also Alameh*, 341 F.3d at 173 (finding that discriminatory intent may "be demonstrated through circumstantial or statistical evidence").

Additional information presented by the defendants confirms what these statistics suggest: people of color were intentionally targeted and prosecuted in the phony-stash cases. In at least one case, the DEA's confidential informant made explicit his desire to recruit black people for the (imaginary) robbery. The CI told defendant Johnny Terry that black participants were necessary to ensure the plan went smoothly. At a meeting with Terry the CI emphasized that Terry was the ideal co-conspirator because of the color of his skin. He said, "Yo, this guy is black, he's perfect," and, "you black, you know what I'm saying? It gonna look good." Marvinny Decl. at ¶ 17. At that same meeting, the CI noted that he believed committing the crime with Terry would be easier because Terry was black. *Id.* ("When you told me the first time I thought about it, like, damn I can't do this. And then I went, but this nigga's black."). Moreover, when instructing Terry to recruit other individuals to participate in the crime, the CI made sure to confirm that "them niggas is dark-skinned, those other niggas?" *Id.* It is difficult to imagine more compelling evidence that the DEA actively targeted people of color in the phony-stash cases.

The failure to target or prosecute white people is all the more troubling in light of the fact that the population of Manhattan and the Bronx is 30.7% white

(nonhispanic), Marvinny Decl. at ¶ 18, and the population of the entire Southern District of New York is whiter still. Marvinny Decl. at ¶ 19.

It should go without saying that white people also commit serious crimes, including violent robberies. Indeed, Sentencing Commission data indicates that, in the Southern District of New York during fiscal years 2006–2012, offenders convicted under the Robbery Guideline (§ 2B3.1) were 10.8% white. Marvinny Decl. at ¶ 20; Exhibit F. And data from the New York State Department of Corrections ("DOCS") shows that, as of January 2014, the population under custody (i.e., housed in a correctional facility or a DOCS-operated residential drug program) in New York State was 23.8% white, 50% African American, and 24.1% Hispanic, with about half of the under-custody population hailing from New York City. Marvinny Decl. at ¶ 23. Yet, not a single white person of whom the defense is aware was targeted for or prosecuted in a phony-stash case.

District courts have granted similar discovery requests on lesser showings than the defendants have made here. For example, the Chief Judge in the Northern District of Illinois ordered the Government to provide similar discovery where "[t]he defendants' motion has specifically identified 17 phony stash house rip off cases [whose] data shows that the overwhelming targets of these investigations were African Americans [and] none of the defendants … were non-minorities." Order Compelling Discovery, *United States v. Antonio Williams et al.*, 12 Cr. 887 (N.D. Ill. July 31, 2013), ECF No. 70; *see also Paxton*, 2014 WL 1648746, at *5 (ordering discovery where "[a]ll of the cases identified by defendants have involved undercover operations by ATF agents in circumstances

largely similar to the instant case [and where] the statistics appear to be reliable because they are corroborated, in part, by the lists of cases provided by the government, and there is no assertion that the information collected by defendants as to race is inaccurate"); *cf. United States v. Davis*, 766 F.3d 722, 725 (7th Cir. 2014) (declining to review, on jurisdictional grounds, district court's order granting discovery where "[a]n examination of the limited information available to the Defendants indicates that since 2006, the prosecution in this District has brought at least twenty purported phony stash house cases, with the overwhelming majority of the defendants named being individuals of color").

Here, as in the cited cases, the statistics on the defendants targeted for and prosecuted in phony-stash cases in this district are concerning enough that they warrant the requested discovery. But the defendants have provided more, including recorded race-specific remarks by one of the DEA's confidential informants showing that the DEA explicitly, and unabashedly, targeted people of color. Moreover, publicly available data shows what should already be obvious: white people in the Southern District of New York commit serious crimes, including violent robberies. Yet, the inexplicable fact remains that not one white person of whom the defense is aware has been prosecuted in a phony-stash case.

Reverse stings may well be a valid law-enforcement technique, but they must be deployed, and their alleged participants prosecuted, in conformance with the Constitution. The defendants have made a compelling preliminary showing that the enforcement policy in this district's phony-stash cases violated constitutional equal-protection principles. At a minimum, the defendants are

entitled to the requested discovery to further explore this most pressing issue. The Court should grant the defendants' discovery motion.

Conclusion

The Court should order the Government to disclose the requested discovery.

Dated: New York, New York
March 16, 2015

Respectfully submitted,

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Reply Brief with expert declaration in *Lamar* (DE 34, filed 4/20/15)

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David E. Patton
Executive Director

Southern District of New York
Jennifer L. Brown
Attorney-in-Charge

April 20, 2015

By hand delivery

Honorable Paul G. Gardephe
United States District Judge
Southern District of New York
40 Foley Square, Room 2204
New York, New York 10007

Re: *United States v. Nakai Lamar et al.*, 14 Cr. 726 (PGG)

Dear Judge Gardephe:

Enclosed, please find a courtesy copy of the defendants' reply memorandum of law in support of their discovery motion, filed today via ECF.

Should the Court desire oral argument on the defendants' motion, I respectfully note that I will be out of the country from May 13 to May 29, and accordingly request that argument not be scheduled during that time.

Respectfully,

/s/ Jonathan Marvinny
Jonathan Marvinny
Assistant Federal Defender
(212) 417-8792
jonathan_marvinny@fd.org

cc: All counsel (by email)

United States District Court
Southern District of New York
----------x
United States of America

- v. - 14 Cr. 726 (PGG)

Nakai Lamar,
Chago Haynes, and
Tyrone Meachem,

Defendants.
----------x

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY

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DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL DISCOVERY

Defendants Nakai Lamar, Chago Haynes, and Tyrone Meachem jointly submit this reply memorandum of law in support of their motion to compel discovery.

Preliminary Statement

Of the 95 defendants in this district's recent phony-stash cases, not a single one is white. That astonishing statistic should trouble this Court, even if it appears not to trouble the Government. As was shown in the defendants' moving papers, the statistics on this district's phony-stash cases are sufficient on their own to justify the defendants' discovery request. And when those statistics are combined with the additional evidence proffered by the defendants—including racial data from the United States Sentencing Commission and recordings of a DEA confidential informant making explicit his desire to recruit black people for a phony-stash case—it is clear the defendants have satisfied their burden of showing "some evidence" showing an equal-protection violation. Nothing in the Government's response refutes that conclusion.

But, in reply, the defendants now provide even more support, including a declaration from Professor Issa Kohler-Hausmann, Ph.D. (attached as Exhibit A), showing that white people in New York City who could reasonably have been targeted for a phony-stash case were not, and showing that the odds of *randomly* selecting 95 defendants of color in the phony-stash

cases were miniscule. Yet, despite those odds, the fact remains that not a single white person was targeted or prosecuted. That fact is strong evidence of discriminatory intent and supports the conclusion that the defendants here were targeted because of their race.

Crucially, the Government offers no explanation at all for why no white person has been targeted in a phony-stash case. Avoiding that difficult question, the Government instead hides behind its claim that the defendants have not shown evidence that the "decision-makers" in their case acted with specific discriminatory intent. In so doing, the Government suggests that the defendants' discovery motion should not be granted absent their showing some "smoking gun" of racial animus particular to their case. But that is not the law. *Armstrong* itself cautions that showing disparate racial treatment should not be "an insuperable task" and may be accomplished by reference to the facts of other, similar cases. 517 U.S. 456, 470 (1996).

The probative evidence—statistical and other—the defendants have presented amply satisfies their discovery burden. This is especially true given the limited information available to them and the Government's failure to meaningfully contest any of their evidence. For the reasons discussed here and in the defendants' moving papers, the Court should grant their discovery motion.

Arguments in Reply

1. The uncontested statistics about the races of this district's 95 phony-stash defendants are sufficient to warrant the requested discovery, contrary to the Government's claims.

The Government does not dispute—and therefore confirms—the defendants' showing that not a single one of the 95 defendants prosecuted in this district's 18 phony-stash cases since 2013 was white. While the Government does make the curious claim, in a footnote, that the defendants did not explain their "methodology" for identifying these 18 phony-stash cases, Gov't Opp'n 9 n.5, the defendants clearly defined the cases as all those arising from DEA-initiated reverse stings involving conspiracies to commit Hobbs Act robberies of supposedly large narcotics stashes. *See, e.g.*, Defs. Mem. 1. That the Government does not point to a single such case where a white person was targeted or prosecuted is conclusive.

While the Government is correct that the standard for obtaining discovery in support of an equal-protection challenge is "rigorous," Gov't Opp'n 8, that standard is "of course not identical to the standard applied to the merits." *United States. v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003). By providing stark, uncontested statistical data about the races of defendants in this district's phony-stash cases, the defendants' have clearly satisfied the lower "some evidence" discovery standard. *United States v. Armstrong*, 517 U.S. 456, 468 (1996). Nothing in the Government's response diminishes the defendants' showing.

As for the Government's claim that the phony-stash case statistics are insufficient to warrant discovery, *see* Gov't Opp'n 9, the Second Circuit has held that both discriminatory purpose and effect may be demonstrated through statistical evidence of this nature. *See Alameh*, 341 F.3d at 173 ("Such purpose may, however, be demonstrated through circumstantial or statistical evidence."); *see also id.* ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). And the foundational Supreme Court case *Yick Wo v. Hopkins*—in which the Court ruled that San Francisco's prejudicial administration of a facially race-neutral ordinance violated equal-protection principles—itself relied on statistical data: specifically, data showing that the city denied laundry permits to 200 Chinese applicants but granted them to 80 non-Chinese applicants. 118 U.S. 356, 374 (1886) (relying on those statistics to conclude that "no reason for [the discrepancy] exists except hostility to the race and nationality to which the petitioners belong").

Moreover, the statistical data from this district's phony-stash cases is precisely the kind of data the court in *United States v. Paxton* relied upon to grant a similar discovery motion. No. 13 CR 103, 2014 WL 1648746, at *5 (N.D. Ill. Apr. 17, 2014). *Paxton* is indistinguishable from this case except

that the defendants here have provided even more evidence to support their request than did the defendant in *Paxton*.[1]

Indeed, the defendants' moving papers presented far more statistical data than just the troubling numbers from this district's phony stash cases, including highly probative United States Sentencing Commission data showing that offenders convicted under the Robbery Guideline (§ 2B3.1) in the Southern District of New York during fiscal years 2006–2012 were 10.8% white.[2] That data shows that white people in this district frequently commit violent federal robberies, yet no white person was targeted in a phony-stash case—a fact for which the Government offers no explanation.

This statistical data, without more, justifies the defendants' discovery request, as it constitutes evidence of both discriminatory intent and effect in the enforcement policy in this district's phony-stash cases. But, as discussed

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[1] The Government's only response to *Paxton* is to cite one district court case declining to follow its holding that statistics alone may show an equal-protection violation. *See* Gov't Opp'n 11 n.8 (citing *United States v. Cousins*, No. 12 CR 865–1, 2014 WL 5023485, at *5 n.3 (N.D. Ill. Oct. 7, 2014)). But even the *Cousins* court granted the defendant's discovery motion to allow "limited discovery" of the ATF's policies regarding the selection criteria for targets in phony-stash cases. 2014 WL 5023485, at *5 n.3. In any event, as noted, the defendants here have presented far more evidence in support of their discovery motion than did even the defendant in *Paxton*.

[2] Tellingly, the Government elides this Sentencing Commission data entirely when it enumerates the defendants' additional statistical evidence and then claims that evidence "provide[s] no information about individuals of other races who have committed these crimes." Gov't Opp'n 9.

below, the defendants have presented even more evidence to satisfy their discovery burden.

2. Despite the Government's failure to identify any selection criteria employed by the DEA when targeting individuals in the phony-stash cases, the defendants have identified similarly situated white people who could have been targeted but were not.

The Government's response focuses on what it sees as the merits of a selective-prosecution—as opposed to a selective-enforcement—challenge and repeatedly argues that the defendants have failed to show that the Government has not prosecuted similarly situated white defendants. For example, the Government states that "[t]he defendants have not identified any defendants of other races who were caught participating in criminal conduct during the course of these 18 investigations, but were not prosecuted," and, "all of the evidence in this case demonstrates that these defendants were prosecuted not because of their race, but because they were willing to participate in an armed robbery of drug dealers…." Gov't Opp'n 10. In making these arguments, the Government relies heavily on *Armstrong* itself, in which the Supreme Court rejected a group of black defendants' claim that they were unfairly targeted for prosecution for having sold crack, and argues that *Armstrong* compels denial of the defendants' motion here. *See, e.g.*, Gov't Opp'n 9–10.

The Government misses the point. The thrust of the defendants' claim is that they were selectively *targeted* in the first instance because of their race.

See, e.g., Paxton, 2014 WL 1648746, at *3 n.4 ("Defendants' racial profiling claim is essentially a selective enforcement claim, instead of a selective prosecution claim."). In the phony-stash context, it is meaningless to say, as the Government does, that no white people who "committed these crimes" were not prosecuted, Gov't Opp'n 9, since the "crimes" in question were reverse stings fabricated out of thin air by the DEA. Unlike the defendants in *Armstrong*, the defendants in the phony-stash cases were not actively engaged in criminal conduct until they were targeted for a DEA-initiated reverse sting. These cases are therefore wholly unlike *Armstrong*:

> Inherent in the *Armstrong* framework is the assumption that there is a defined class of individuals to whom defendants may compare themselves. As the *Armstrong* court observed, in selective prosecution claims, there should exist records of individuals who were charged and then subsequently treated in a different manner than the defendant. In selective enforcement cases, however, identifying the class of individuals is a much more burdensome endeavor, and one that may prove insurmountable.

Paxton, 2014 WL 1648746, at *4; *cf.* Chavez v. Illinois State Police, 251 F.3d 612, 640 (7th Cir. 2001) ("In a meritorious selective prosecution claim, a criminal defendant would be able to name others arrested for the same offense who were not prosecuted by the arresting law enforcement agency; conversely, plaintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped."); *Cousins*, 2014 WL 5023485, at *4 ("The court is sympathetic … to the argument that

[w]ithout information … as to what ATF is using as its selection criteria in these reverse sting operations … defendant faces a difficult task of identifying similarly-situated non-minorities who were not targeted.") (internal quotation marks omitted).[3]

The Government's response says nothing about the selection criteria the DEA utilized to target prospective defendants for phony-stash cases in this district. Yet the Government repeatedly faults the defendants for not identifying "similarly situated" white people who could have been targeted or prosecuted but were not. The paucity of the Government's response invites the question: similarly situated to whom?

Nevertheless, the defendants now present additional information about white individuals who reasonably could have been targeted for phony-stash cases but were not. The defendants attach the declaration of Issa Kohler-Hausmann, Ph.D., a law professor at Yale Law School and a sociology professor at Yale University. Professor Kohler-Hausmann estimates the number of males ages 16 to 49 living in New York City who have prior New York State felony, and violent felony, convictions, and breaks those numbers

[3] Of course, should the requested discovery reveal that white people were in fact targeted by the DEA for phony-stash cases but then subsequently not prosecuted by the United States Attorney's Office ("USAO"), or that the USAO maintained inadequate safeguards to ensure that phony-stash defendants had not been targeted for unconstitutional reasons, then a selective-prosecution challenge may lie, hence the defendants' request for discovery on that claim.

down by race.[4] She estimates that there are approximately 20,851 white males ages 16 to 49 living in New York City who have prior New York State felony convictions. Declaration of Professor Issa Kohler-Hausmann ("Kohler-Hausmann Decl.") at ¶ 4. And she estimates that there are approximately 6,330 such individuals with prior *violent* felony convictions. *Id.* Any one of those white individuals could have been targeted for a phony-stash case. None was.

Professor Kohler-Hausmann also shows that it is highly improbable that all 95 defendants in the 18 phony-stash cases would be people of color absent their having been targeted because of their race. For example, she shows that the probability of randomly selecting 95 black and/or Hispanic defendants from the pool of male New York City residents ages 16 to 49 with prior New York State felony convictions would be about 0.0003%. Kohler-Hausmann Decl. at ¶ 9. And she shows that the probability of randomly selecting only black and/or Hispanic defendants as the lead defendants in the 18 phony-

[4] As noted, the defendants' efforts to present a comparison group of similarly situated white people is complicated by the Government's failure to disclose the DEA's selection criteria for targeting prospective defendants in the phony-stash cases. For present purposes, the defendants assume that the DEA targeted prospective defendants who had prior felony convictions. Indeed, the Government suggests as much by reporting that, in this case, defendant Nakai Lamar boasted that he previously had done "nine years in penitentiary." Gov't Opp'n 2.

stash cases from among the same pool of males would be about 9%. Kohler-Hausmann Decl. at ¶ 7.[5]

These statistics constitute strong support for the defendants' claim that people of color were actively targeted in this district's phony stash-cases and that similarly situated white people were not. In short, they are compelling evidence of discriminatory purpose. Combined with the statistics presented in the defendants' moving papers, and with the evidence of race-specific references made by a DEA informant to a prospective defendant in another phony-stash case, the defendants have more than satisfied their responsibility to produce "some evidence" that the enforcement policy in this district's phony stash cases violated equal-protection principles. Accordingly, the Court should grant the defendants' discovery motion.

*

[5] Professor Kohler-Hausmann makes clear that these percentages would be even lower, if only slightly, if the pools consisted only of males with prior *violent* felony convictions. Kohler-Hausmann Decl. at ¶ 10.

Conclusion

For the reasons discussed here and in the defendants' moving papers, the Court should grant the defendants' discovery motion.

Dated: New York, New York
April 20, 2015

Respectfully submitted,

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Exhibit A

United States District Court
Southern District of New York
----------x

United States of America

- v. -

Nakai Lamar,
Chago Haynes, and
Tyrone Meachem,

Defendants.
----------x

DECLARATION OF PROFESSOR ISSA KOHLER-HAUSMANN

14 Cr. 726 (PGG)

I, Professor Issa Kohler-Hausmann, Ph.D., hereby declare under the penalties of perjury, pursuant to 28 U.S.C. § 1746, that:

1. I am an Associate Professor of Law at Yale Law School and Associate Professor of Sociology at Yale University. My primary research areas are in criminal law, criminal procedure, empirical legal studies, tort law, sociology of law, and legal theory. Before coming to Yale, I was a Law Research Fellow at Georgetown University. I am admitted to the New York State Bar and previously worked in solo practice and as an associate with Ilissa Browstein & Associates.

2. I received a B.A. in economics with a mathematical emphasis from the University of Wisconsin-Madison in 2000, an M.A. in sociology from Northwestern University in 2006, a J.D. from Yale Law School in 2008, and a Ph.D. in sociology from New York University in 2014. My Ph.D. training involved substantial coursework in quantitative methods.

3. I have published in the *Stanford Law Review*, the *American Journal of Sociology*, and the *Journal of Empirical Legal Studies*, and have work represented in many other journals and books.

Statistical Analyses Pertinent to the Phony-Stash Cases

4. I was retained by Federal Defenders of New York to provide various statistical analyses relevant to the defendants' discovery motion in this matter. First, I was asked to estimate the proportion of males currently living in New York City between the ages of 16 and 49 who have previous New York State felony and violent-felony convictions and who are members of four mutually exclusive and exhaustive racial and ethnic categories: non-Hispanic white, non-Hispanic black, Hispanic of all races, and "other."[1] I estimated that there are approximately 237,786 such individuals with prior felony convictions, and 84,870 such males with prior violent felony convictions. The following tables illustrate my estimates:

Table 1: Racial breakdown of the approximately 237,786 males ages 16 to 49 living in New York City who have prior New York State felony convictions

RACE	**TOTAL**	**PERCENTAGE**
White	20,851	8.8%
Black	103,719	43.6%
Hispanic	104,307	43.9%
Other	8,909	3.7%

[1] The "other" category includes Asian, Indian, and all "other" and "unknown" racial or ethnic designations.

Table 2: Racial breakdown of the approximately 84,870 males ages 16 to 49 living in New York City who have prior New York State violent felony convictions[2]

RACE	TOTAL	PERCENTAGE
White	6,330	7.5%
Black	42,463	50.0%
Hispanic	31,515	37.1%
Other	4,562	5.4%

5. Next, I was asked to combine the proportions of males with prior felony convictions into two mutually exclusive and exhaustive racial and ethnic categories in order to calculate the probability of selecting only Black and Hispanic individuals from a series of random draws from the population of all males ages 16 to 49 with felony convictions, assuming a simple binomial distribution.

6. I understand that in the 18 "phony-stash cases" that are the subject of the defendants' discovery motion, 93 of the 95 defendants are Black or Hispanic, and none of the 95 defendants is white. The relevant question in this case is: What is the probability of selecting that particular grouping of defendants if selecting randomly from a pool of males with previous felony convictions with the above-described estimated proportions of white or other and Black or Hispanic? Using standard statistical techniques, this probability would be estimated by assuming there are a certain number of "draws" from a population with two characteristics: (1) either

[2] I used the same definition of "violent felony" as that used by the New York State Department of Criminal Justice Services. That definition includes all charges listed under N.Y. Penal Law § 70.02 *and* the Class A felonies of murder, arson, and kidnapping.

black or Hispanic or (2) white and other. I calculated this probability in two ways in order to construct an extremely conservative estimate and a more liberal estimate.

7. The most conservative estimate uses 18 "draws," representing each of the separate phony-stash cases, assuming each case has an average number of codefendants. Modeling the probability using 18 draws in this manner is only accurate if the draw on the race or ethnicity of the first defendant will perfectly ensure that the racial and ethnic composition of the entire codefendant group will be homogenous with the race and ethnicity of the first selected defendant. That is, if the first selected defendant was black or Hispanic then there would be only black and Hispanic codefendants on that case, with zero variation mechanically. Using this model, it is estimated that there is approximately 9% probability of selecting exclusively black and/or Hispanic defendants over 18 selections.

8. The binomial distribution formula for calculating the probability of X is given by the following formula: $P(X) = \frac{n!}{(n-x)!(x)!} * p^x * q^{(n-x)}$. Where n = the number of trials or "draws"; x = the number of "successes"; p = probability of "success"; q = probability of "failure" (by definition in a binomial distribution q = 1-p). Here the probability of success is equal to the proportion of the total felony population that is black or Hispanic. Because the number of "successes" is exactly equal to the total number of "draws"—i.e. 100% "success" rate—the formula simplifies to p^x.

9. However, if there is no reason to assume that the selection of the first defendant mechanically and automatically determines the racial composition of the entire remainder of the codefendant group, the probability could also be modeled as

95 independent random drawings of defendants. Using that model, it is estimated that there is a 0.0003% probability of selecting exclusively black and/or Hispanic defendants where there are 95 selections and the selection of one defendant does not determine the racial composition of the remaining codefendants, and each defendant selection is independent.

10. I then repeated all of these above-described calculations using the pool of males with prior *violent* felony convictions. Because the relative racial breakdown of convicted felons did not differ substantially between all felonies and violent felonies, the estimated probabilities were very similar when selecting among males with only previous violent-felony convictions. Using the model of 18 separate draws from a pool of felons with only violent-felony records, it is estimated there is approximately 8.2% probability of selecting exclusively black and Hispanic defendants over 18 selections. Using the model of 95 separate draws from a pool of felons with only violent-felony records, it is estimated there is approximately .0002% probability of selecting exclusively black and Hispanic defendants over 95 selections.

An Explanation of the Methodology

11. In order to calculate the statistics concerning the number of males ages 16 to 49 with prior felony convictions currently living in New York City, estimates had to be constructed of the current number of felons in New York City and the racial and ethnic characteristics of those felons.

12. Those estimates were created in the following way. The New York State Division of Criminal Justice Services ("DCJS") is the agency responsible for

collecting, maintaining, and analyzing data from the Unified Court System of New York State. It should be noted that DCJS data reflects only New York State felony convictions, and therefore undercounts federal felony convictions or felony convictions from other states. Insofar as convicted white felons tend to be more mobile between states, these numbers will underestimate the numbers of white felons in New York City.

13. DCJS provided total counts of individuals convicted of felony offenses in each selected year: 1990, 1995, 2000, 2005, 2010. The years were selected to cover the dramatic changes in the risk of a felony conviction in New York City because the rate of felony arrest and felony conviction was substantially higher in 1990 than it has been over the last five to 10 years. DCJS provided not only the count of unique individuals that were convicted of felonies in each of the selected years, but also the number of individuals that had prior felony convictions at the time of their conviction in the selected year and the number of individuals that had no prior felony convictions at the time of their conviction in the selected year. This allowed me to construct counts of first-time felony convictions for unique individuals in each of the selected years.

14. The DCJS data was further broken down by mutually exclusive and exhaustive racial and ethnic categories and mutually exclusive age categories. The racial and ethnic categories are: non-Hispanic white, non-Hispanic black, Hispanic of all races, Asian or Indian, and unknown or other. The final two categories were combined to create one residual category of "other" to match U.S. Census data. The

age groupings provided by DCJS matched census age categories exactly: ages 16 to 19, 20 to 24, 25 to 29, 30 to 34, 35 to 39, 40 to 44, 45 to 49, and 50 and over.

15. In order to construct a baseline of the total number of individuals "eligible" for felony conviction, data was drawn from the 1990, 2000, and 2010 census for New York City. The DCJS and census data were then combined into a merged file and used to create standard life table estimates of "failure" to a felony conviction for each of the racial and ethnic groups over the five years of cross-sectional felony conviction data provided by DCJS. That is, a life table was constructed to estimate the cumulative risk of "failing" to a felony conviction for a hypothetical "at risk" cohort that faced the risks of felony conviction that were present in each of the five sampled years: 1990, 1995, 2000, 2005, 2010.

16. Life tables are a standard method from demography for estimating the survivorship of a given population, but the method can and often is used to estimate transition from one discrete state to another. The generic term "failure" is used to designate transition from one discrete state to another, such as from life to death or, as in this case, from non-felony to felon.

17. In the simplest terms, the life table method estimates what the cumulative risk of "failing" to a felony conviction would be for a group of people moving through the designated age categories if those people faced the lifetime risks that were associated with the felony conviction rates of each the sampled years. Unsurprisingly, the risks faced by a hypothetical cohort in 1990 and 1995 were substantially higher than the risks faced by a hypothetical cohort in 2005 and

2010.[3] This means that if we want to estimate the actual numbers of males currently living in New York City of different racial and ethnic groups across the currently existing age distribution, we need to combine the life tables of the different years to get an accurate estimate of the true risks faced by individuals as they aged through their life course while, at the same time, accounting for the fact that the risks of felony conviction in New York City changed over time.

18. This was done by taking the five life tables of 1990, 1995, 2000, 2005, and 2010 and then tracing the age cohorts currently existing in 2010 as they moved through the age-specific risks created by the five year-specific life tables over their life course. This produced an estimate of currently existing males with felony convictions of different racial and ethnic categories and different age categories. These numbers were then summed up to create an estimate of total felons, and then the proportion of total felony population of each racial and ethnic category.

Dated: New Haven, Connecticut
April 20, 2015

/s/ Issa Kohler-Hausmann
Issa Kohler-Hausmann

[3] The felony arrest numbers peaked in New York City in 1989 reaching over 153,000 felony arrests. In 1990 there were over 148,000 felony arrests. By 2005 that number had fallen to less than 96,000 and by 2010 there were approximately 92,000 felony arrests in the city. Felony conviction rates followed a similar trend.

Supplemental Discovery Motion in *United States v. Hummons & Williams*, 12-CR-887 (N.D. Ill.) (DE 178, filed 2/16/15) (redacted to comply with protective order)

Alison Siegler, Univ. of Chicago Law School

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 12-CR-887
v.	)	Chief Judge Rubén Castillo
	)	
JOHN T. HUMMONS,	)	
	)	
Defendant.	)	

DEFENDANTS' MOTION FOR STATISTICS-RELATED DISCOVERY REGARDING DEFENDANTS IN PHONY STASH HOUSE CASES

Defendant JOHN T. HUMMONS, by STEVEN SALTZMAN, and the University of Chicago Law School's Federal Criminal Justice Clinic and its attorneys, JUDITH P. MILLER and ALISON SIEGLER, respectfully move this Court to extend its previous discovery orders to the group of 97 defendants who have been arrested and/or charged in phony stash house cases in the Northern District of Illinois (hereinafter "stash house defendants"), and to order the government to produce information responsive to matters the government has put at issue.[1] Such discovery is necessary to the anticipated selective enforcement motion to dismiss in these cases. These discovery requests rest in part on information gleaned from discovery the government has already provided and on public statements by the government regarding its purported selection criteria.

[1] The Court has already ordered certain discovery. This motion is not intended to explore new areas of discovery, but, rather, to elaborate on what has already been ordered and to respond to issues the government has raised that relate to the defense expert's anticipated statistical analysis in this case.

ARGUMENT

Mr. Hummons intends to file a motion to dismiss for selective enforcement/racial profiling, in violation of the Fifth Amendment's equal protection principles. This Court has found that Mr. Hummons has made a "strong showing" of potential discrimination such that discovery on the question of selective enforcement is warranted.[2] *United States v. Brown*, 12-CR-632, DE 153 (N.D. Ill. July 31, 2013); *United States v. Williams*, 12-CR-887, DE 70 (N.D. Ill. July 31, 2013); *see also Williams*, DE 87, 141, 164; *Brown*, DE 171, 261, 291.

Mr. Hummons anticipates presenting both direct and indirect evidence of racial discrimination in his ultimate motion to dismiss for selective prosecution. This motion requests discovery in support of Mr. Hummons' indirect discrimination argument. As Mr. Hummons has previously argued, however, the caselaw cited throughout this motion does not necessarily apply to his direct discrimination argument. This Court has stated, and defendants have argued, "it is far from clear that the *Armstrong* standard, which dealt with historical crimes, applies to the prospective crime situation." *Brown*, 12-CR-632, DE 261 at 5. The argument presented in this motion does not waive or forfeit defendants' additional argument that *Armstrong* simply does not apply to prospective enforcement actions or racial profiling cases. It also does not waive or forfeit defendants' ability to present case-specific evidence of particular discriminatory actions on the part of the government that establish discriminatory effect and intent.[3]

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[2] The Court recently observed in its Order dated February 4, 2015, that "the stakes for the defendants have been reduced since the Court's last discovery order was issued—the government recently dismissed the most serious count of the indictment." *Williams*, 12-CR-887, DE 168. The defendants' sentencing exposure under § 924(c), the Hobbs Act, and the Guidelines nevertheless remains quite high. Moreover, any reduced sentencing exposure does nothing to mitigate prior unconstitutional race discrimination.

[3] It is undisputed that defendants may present defenses in the alternative. Defendants' attempt to meet the historical *Armstrong* standard does not undermine any argument that the standard may not apply—or may apply differently—due to the unique circumstances of the phony stash house ripoff cases. The assumptions and caveats in this footnote apply to the entirety of this motion.

I. Legal Standard

Turning to the indirect discrimination argument on which this discovery motion is based, the Supreme Court has set out a two-prong legal standard for litigating indirect discrimination claims: "The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards,'" meaning a defendant must show that the "prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1984)); *see also Chavez v. Ill. State Police*, 251 F.3d 612, 635–648 (7th Cir. 2001) (applying equal protection analysis to selective enforcement challenge). Demonstrating discriminatory effect requires showing "similarly situated individuals of a different race were not prosecuted," arrested, or targeted to the same degree as people of the defendants' race. *Armstrong*, 517 U.S. at 465.

In order to make the similarly situated showing in these phony stash house ripoff cases, defendants will have to show that the group of stash house defendants in this district is disproportionately composed of people of color, in comparison to white people who met the government's selection criteria but were not arrested or charged. *Chavez*, 251 F.3d at 636. This similarly situated analysis requires statistical evidence when, as in these cases, either the population from which the similarly situated comparison group will be drawn or the "treatment group" (here, the group of stash house defendants actually charged) is large. The Supreme Court has recognized that "it [is] unmistakably clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue." *International Broth. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The Seventh Circuit has specifically emphasized the significance of statistical evidence in the context of selective enforcement challenges. Specifically, it has held that there are two ways to make the

similarly situated showing: by naming "other similarly situated individuals" whom the government treated differently than people of color, or by identifying those similarly situated individuals "through the use of statistics . . . ." *Chavez*, 251 F.3d at 636.

Using statistics to prove the discriminatory effect prong of a selective enforcement claim requires that "[t]he statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Id.* at 638. Thus, statistics alone "can be sufficient to establish discriminatory effect." *Id.* at 640; *id.* at 638 ("While few opinions directly acknowledge that statistics may be used to prove discriminatory effect, the Court has repeatedly relied on statistics to do just that." (citing *Yick Wo*, 118 U.S. at 374)); *see also* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 4:1 at n.3 (2013-2014 ed. West 2013) ("[T]he Supreme Court has made clear that a case of systemic disparate treatment can be made out on the basis of statistical evidence alone.").

Under Seventh Circuit law, the "similarly situated" comparison group is defined by the government's purported selection criteria. Those selection criteria are the relevant characteristics of the group of stash house defendants to which the "similarly situated" comparison group will be compared. In *United States v. Hayes*, 236 F.3d 891 (7th Cir. 2001), for example, the court focused on comparing "African-Americans falling within the Operation Triggerlock guidelines [who] were prosecuted in federal court" to "persons of another race who fell within the Operation Triggerlock guidelines and were not federally prosecuted." *Id.* at 895–896 (7th Cir. 2001); *see also Chavez*, 251 F.3d at 640-45 (defining similarly situated comparison group as white drivers on Illinois highways who met the requirements of law enforcement's "Operation Valkyrie.")

II. Discovery Request

In order for the defense expert to construct an appropriate similarly situated comparison group for the indirect discrimination argument and to perform the legally required comparison of the two groups, it is necessary to understand whether and to what extent the stash house defendants meet the government's purported selection criteria. From [redacted] the government's public statements, defendants have gleaned some information about the selection criteria the government has claimed are part of the ATF's targeting decisions in these cases. This motion seeks discovery about how those selection criteria apply to the stash house defendants.

The defense strongly disagrees that the government's purported selection criteria are, in fact, the actual methods by which they select targets. Indeed, the ultimate motion to dismiss will argue that race is involved in selecting targets, and that many of the purported criteria addressed in these and other motions are mere pretext. However, to make that showing the defense must rebut the government's claims, and the only way to do that is to obtain discovery about them. Accordingly, the defense uses the term "selection criteria" as a term of art throughout, without conceding that the government's purported criteria are, in fact, the real criteria.

Mr. Hummons knows the identities of the 97 defendants prosecuted in phony stash house cases since 2006. He does not, however, know whether or to what extent those defendants fulfill the ATF's stash house selection criteria. In other words, he does not know the *stash house defendants'* criteria-status. To compile the data necessary for the defense expert to perform a statistical comparison—and to respond to the government's claims regarding the selection criteria—defendants need additional information about the group of stash house defendants actually charged in this district. Those data are essential to understanding how the stash house defendants fulfill (or do not fulfill) these selection criteria, as well as to constructing an appropriate

comparison group. Without this information, it will be impossible for the defense expert to ensure that the comparison group is in fact "similarly situated" to the stash house defendants—i.e., to be sure we are comparing apples to apples, not apples to oranges. The requested discovery is thus necessary for the defense expert to perform the similarly situated analysis for the motion to dismiss, including constructing an appropriate comparison group. The information sought is solely in the possession of the government and will not be unduly burdensome to produce.

Defendants request discovery in three broad categories, as detailed below: First, the government has repeatedly and publicly claimed that prior convictions and criminal history are a factor in determining who is targeted for these stash house offenses.[4] [redacted]

For example, the government has publicly stated: "The comparison group should be individuals who have sustained prior state or federal convictions for offenses involving robbery, narcotics, or firearms." *United States v. Davis*, Oral Argument, 14-1124, DE 39, 40 at 11:49 (7th Cir. 2014).[5] Relatedly, the government has publicly stated that it targets the "people that are most violent in a community." Erik Eckholm, *More Judges Question Use of Fake Drugs in Sting Cases*, N.Y.

[4] *See, e.g.*, *Davis*, Reply Brf. at 6 Government Motion for Reconsideration Regarding Discovery Order, *Williams*, 12-CR-887 (Aug. 21, 2013) ("Defendants have failed to identify any individuals remotely similar to themselves – people with criminal histories including narcotics and weapons offenses who sought to commit potentially violent robberies – who were not further investigated or prosecuted because of their race."); *United States v. Jackson*, Government Response to Defendant Williams's Motion for Discovery on Racial Profiling, 13-CR-636, DE 52 at 10 (N.D. Ill. Dec. 18, 2013) (same); *United States v. Payne*, Government's Response to Defendants' Motion for Discovery on the Issue of Racial Profiling/Selective Prosecution, 12-CR-854, DE 80 at 6 (N.D. Ill. Oct. 25, 2013) (same); *United States v. Alexander*, Government's Response to Defendant William Alexander's Motion for Discover on Racial Profiling, 11-CR-148, DE 130 at 6 (N.D. Ill. Sept. 9, 2013) (identifying those "with criminal histories including narcotics and robbery offenses who discuss potentially violent robberies" as "similar to" stash house defendant).

[5] The oral argument is publicly available via the Seventh Circuit's website at http://media.ca7.uscourts.gov/sound/2014/nr.14-1124.14-1124_05_21_2014.mp3 (last accessed February 1, 2015). All time-stamps to the argument in this brief were taken from this online file.

Times (Nov. 20, 2014) (quoting Ginger L. Colbrun, ATF Spokeswoman).[6] Because the ATF's selection criteria focus on the criminal history of the people they target in phony stash house cases, the defense requests that this Court order the government to produce detailed information about the *actual* criminal history of every defendant who has been charged in a phony stash house case in the Northern District of Illinois, as well as the *perceived* criminal history of these defendants. The prior conviction history of the 97 stash house defendants is currently unknown. Without this information about the stash house defendants, the defense expert cannot compare those defendants' prior convictions to the prior convictions of similarly situated white people. The prior conviction history of the stash house defendants is also necessary to enable the expert to identify the correct similarly situated comparison group.

Second, the government has repeatedly and publicly claimed that neighborhood crime rate is a factor in determining who is targeted for phony stash house offenses.[7] Specifically, the government stated that an appropriate geographic comparison "may be high crime areas where the government tends to focus its enforcement energies." *Davis*, Oral Argument, 14-1124, DE

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[6] *See also, e.g.*, Government's Response to Defendants' Joint Revised Motion for Discovery, *Jackson*, 13-CR-636, DE 96 at 15 (comparison involves "individuals with criminal history levels of II or greater"); Expert Report of Max M. Schanzenbach, *Jackson*, DE 96-Exh. 1 at 1 ("I was also advised by the government that, for the purposes of my analysis, I should assume that the criminal histories of the targets in these cases were above a Criminal History Category I under the United States Sentencing Guidelines."); Eric Eckholm, *Prosecutor Drops Toughest Charges in Chicago Stings That Used Fake Drugs*, N.Y. Times (Jan. 30, 2015) ("The A.T.F. said the sting operations had put more than 1,000 'violent, hardened criminals' in prison over the past decade.").

[7] *See, e.g.*, *Davis*, Oral Argument, 14-1124, DE 39, 40 at 36:31 (AUSA: "I think that a more developed factual record would show that this investigation was tied to a particular area of Chicago. And intended to address violent crime problems in a particular area."); *Davis*, Government Reply Brf., 14-1124, DE 29 at 17 (criticizing stash house defendants' proposed comparison group for "fail[ing] to account for the fact that the offense involved individuals in and around a police district with one of the highest robbery rates in Chicago and a 94.4% African-American population."); *id* at 20 (explaining that the ATF targets "regions of the Northern District of Illinois with serious violent crime problems"); Erik Eckholm, *More Judges Question Use of Fake Drugs in Sting Cases*, N.Y. Times (Nov. 20, 2014) ("ATF works with local law enforcement agencies 'to identify the areas and people that are most violent in a community'") (quoting Ginger L. Colbrun, ATF spokeswoman); Bayless Affidavit, *Jackson*, DE 96-Exh. 3 at 3 ("ATF typically works in conjunction with local law enforcement to identify particular violent offenders or communities disproportionately impacted by violence.").

39, 40 at 33:14; *see Williams*, DE 164 at 6 ("[T]he government also states in general terms that it targeted specific neighborhoods within the Chicago area in conducting the expedited sting operations."). As this Court has previously recognized, "[w]hat specific areas of the city were targeted by the ATF—and which areas were passed over—is a key issue with respect to the defendants' racial-profiling defense." *Id*. Because the ATF's asserted selection criteria focus on the neighborhood of the people targeted and the neighborhood crime rate, the defense requests that this Court order the government to produce detailed information about the neighborhoods associated with each of the charged stash house defendants. As with prior convictions, the crime rate of the 97 defendants' neighborhoods is currently unknown to the undersigned. Without this information about the stash house defendants, the defense expert will be unable to construct a proper comparison group or compare the crime rate of those neighborhoods to the crime rate of the neighborhoods of similarly situated white people.

Finally, as set out below, the government has challenged the stash house defendants' statements about the government's selection criteria and the proper comparison group, and has proposed some comparison groups of its own. For example, the government has challenged defendants' time-frame, i.e., 2006 to the present or 2010 to the present.[8] The defense requests detailed discovery on these various government proposals to rebut the government's arguments.

The discovery sought is as follows:

1. For each of the 97 defendants the government states has been charged in a phony stash house case since 2006, *see* Exh. B, Mr. Hummons requests the following information:

   a. Rap sheet for each stash house defendant: The rap sheet will capture each defendant's

[8] *See, e.g.*, *Brown*, Government's Response to Defendants' Motions for Discovery, 12-CR-632, DE 144 at 8 (July 8, 2013); *id.* Government's Motion for Reconsideration Regarding Discovery Order, DE 154 at 8 (Aug. 21, 2013); *United States v. Jackson*, 13-CR-636, DE 52 at 10 (N.D. Ill. Dec. 18, 2013); *United States v. Payne*, Government's Response to Defendants' Motion for Discovery on the Issue of Racial Profiling/Selective Prosecution, 12-CR-854, DE 80 at 6–7.

prior convictions and arrests. This information is in the exclusive possession of the prosecution through the National Crime Information Center (NCIC) database, and will not be burdensome to produce as it requires printing the rap sheet for each defendant.[9]

b. [redacted]

As noted above, the government has repeatedly emphasized criminal history and criminal involvement as a selection criterion for the ATF's phony stash house cases. [redacted] In order to determine the proper composition of the similarly situated group and to permit comparison between the two groups—necessary steps in proving discriminatory effect—Mr. Hummons must learn what the ATF *believed* about the criminal background of the 97 stash house defendants at the time its agents made targeting decisions. [redacted] Without information regarding each defendant and/or case, the defense expert cannot conduct the group-wide comparison or construct an appropriate comparison group.

This information is also vital to demonstrating discriminatory intent, the second

[9] The government routinely runs NCIC reports of defendants' rap sheets and provides them in discovery. The defense does not have access to the NCIC database. The only way the defense could reliably obtain the information without discovery would be to subpoena the entire criminal history of each of the nearly 100 stash house defendants. (These materials cannot be obtained via other attorneys due to protective orders in *those* cases, as well as difficulty of contacting clients who have long since been sentenced for permission to disclose such information.) This process would be quite time-consuming and is unnecessary because the government already possesses the necessary information. The defense recognizes that rap sheets can contain inaccuracies. However, they provide an adequate starting point for investigating Defendants' criminal history for the purpose of this analysis.

prong of the equal protection standard. [redacted] Moreover, if the stash house defendants targeted do not all fit the criminal history selection criteria, this disjunction will also help establish the intent prong. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role.").

Accordingly, the defense requests that this Court order the government to produce—for each stash house defendant and case charged in this district—[redacted] any [redacted] memoranda, writings, records, or memorializations setting out the real-time reasons the ATF gave for pursuing—or not pursuing— an individual stash house defendant or case. This information is in the sole possession of the government and is not otherwise available to the defense. (If it has been produced in other cases, it cannot be disclosed by the attorneys without violating the protective orders in those cases.) Moreover, this information should not be unduly burdensome [redacted].

c. Home address, address of arrest, address of most recent pre-stash house conviction, addresses of stash house related approaches, meetings, or recordings for each stash house defendant and/or case: This requested location information captures the actual neighborhoods associated with the stash house defendants, thereby enabling Defendants to construct a similarly situated group accounting for neighborhood crime rate. This information is necessary because of the government's repeated and public claims that the

phony stash house cases targeted "high crime" areas. *See supra* at 7–8. As this Court has held, there is evidence that, rather than focusing on high crime neighborhoods, the ATF peddles its stash house fictions in "predomina[n]tly minority areas of the city, [although] there are other areas of the city with significant non-minority populations and high violent crime statistics." *Brown*, 12-CR-632, DE 261 at 7; *Williams*, 12-CR-887, DE 141 at 7. Without this location information, defendants cannot describe the stash house defendants in terms of the *geographic* selection criterion, and therefore cannot compare them to any geographically-based similarly situated comparison group.

This Court recently ordered the government to disclose the neighborhoods targeted in its Fall 2012 expedited sting operations. *Williams*, 12-CR-887, DE 164 at 6; *Brown*, 12-CR-632, DE 292 at 6. While this information is critical, the statistical component of the discriminatory effect analysis will also require examining the neighborhoods of *all* stash house defendants, whether or not included in the Fall 2012 operation. This neighborhood data is needed to compare the stash house defendants and the similarly situated comparison group. Comparing the neighborhoods of the stash house defendants with those of anyone else requires information about the neighborhoods of all of the defendants. Without that information, comparison is impossible. As with the other requests, this information is readily available to the government, is not unduly burdensome to produce, and is not otherwise available to the defense.

d. State ID Number, IR Number, Date of Birth, Social Security Number: Such individually identifying information is necessary to link multiple records to one single individual. Without this information, "cleaning" the data—i.e., assembling it into a form in which statistical analysis may be done—will be extremely time-consuming, expensive, and

potentially impossible. This information is routinely collected in each case and so should be readily available to the government, is not unduly burdensome to produce, and is not otherwise available to the defense.

e. Any policies, practices, or selection criteria [redacted] that influenced or dictated target selection in phony stash house cases:

> On July 31, 2013, this Court ordered the government to produce:
>
> Any document prepared by the ATF which summarizes how to investigate and prosecute phony stash house rip off cases, including any guidelines for selecting appropriate targets for these cases including but not limited to the Home Invasion Operations Bulletin referenced in USA Today.

Brown, 12-CR-632, DE 153 at 2; *Williams*, 12-CR-887, DE 70 at 2. [redacted]

The defense [redacted] asks this Court to order the government to definitively list any [redacted] selection criteria for phony stash house cases [redacted]. Without such a list, the defense cannot properly describe the 97 defendants in terms of those selection criteria, nor construct a comparison group defined by those criteria. Moreover, the defense requests that the Court order the production of any [redacted] documents, records, memoranda, emails, or other written material in which the government has formalized any [redacted] selection criteria.

[redacted]

2. The same information requested in ¶ 1 for *non-prosecuted* individuals in phony stash house cases: The government has, at times, contended that the proper comparison group consists of people who are in some way associated with stash house robberies and the ATF's recruiters, but who did not participate or were not arrested. The defense strongly disputes this definition of the comparison group. However, in order to determine if this assertion has any factual basis, Mr. Hummons requests disclosure of the same information specified in ¶ 1, as well as the applicable information (organized by race or ethnicity) ordered produced in the Court's prior discovery orders of July 31, 2013, November 8, 2013, February 24, 2014, October 3, 2014, and January 20, 2015, for the government's proposed comparison group. The government-proposed comparison group is: (1) any individuals who "demonstrate[ed] a willingness to conduct a robbery to a government informant or undercover officer, [but] were not offered the opportunity to conduct a robbery," *Davis*, Reply Brf., DE 29 at 17–18 (7th Cir. Apr. 16, 2014); (2) any individuals who demonstrated a willingness to conduct a robbery to a government informant or undercover officer, were offered the opportunity to conduct a robbery, but ultimately declined to participate or dropped out before the ultimate take-down, and (3) any "people arrested for or present at a stash house takedown but not charged," *Davis*, Gov't Opening Brf., 14-1124 at 44–45 (7th Cir. Mar. 3. 2014).[10] The individuals

[10] *See also, e.g.*, *Government's Motion for Reconsideration Regarding Discovery Order, Williams*, 12-CR-887, DE 74 at 6 (Aug. 21, 2013) ("A similarly situated individual in this instance would be one [sic] told a confidential informant or an undercover agent about a desire to commit an armed robbery and then was either not approached during a proactive investigation or who was approached and then not prosecuted, solely because of his race."); *Davis*, Gov't Opening Brf., 14-1124, DE 19 at 23–24 (7th Cir. Mar. 3. 2014) ("[D]efendants failed to point to a single non-African American person who suggested a

specified in this paragraph include all people who the government believes either *proposed* a stash house robbery or *received a proposal* for a stash house robbery.

3. Pre-2006 Stash House Materials: In stash house briefing in this district, the government has criticized the defense for limiting its time-frame to 2006 to the present. Accordingly, the defense asks this Court to order the government to turn over the following discovery:

   a. Name, Case Number, Race, Confidential Informant Race for each Pre-2006 Stash House Defendant: The Court previously ordered this information be produced for each stash house defendant from 2006 to the present. *Brown*, 12-CR-632, DE 153 (N.D. Ill. July 2013); *Williams*, 12-CR-887, DE 70 (N.D. Ill. July 31, 2013). The defense asks that the same information requested in ¶ 1 and ¶ 2 above be produced for all stash house defendants prosecuted before 2006.

   b. Information Requested in ¶ 1: The defense asks the court to order this information for all stash house defendants prosecuted before 2006, for the reasons set out in ¶ 1.

   c. Information Requested in ¶ 2: Because the government continues to maintain that involved but non-prosecuted individuals identified in ¶ 2 form part of the appropriate comparison group in these cases, we ask this Court to order the same information produced for such individuals before 2006, for the same reasons set out in ¶ 2.

   d. [redacted] Any [redacted] Documentation of Stash House Operations: [redacted]

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drug robbery to a cooperating source or undercover agent and was refused the opportunity; or to a non-African American person with a criminal history involving drugs, firearms, or violence who showed up to participate in a drug robbery conspiracy, and was not prosecuted."); *id.* at 20 ("The definition of a similarly situated group must provide some account for the general circumstances under which defendants presented themselves for prosecution by indicating their willingness to commit robberies.").

[redacted] constructing a comparison group covering *all* stash house defendants, including pre-2006 stash house defendants and post-2006 stash house defendants, requires relying on the selection criteria that were in operation during *all* of the relevant time periods. [redacted]

4. ATF Anti-Discrimination Materials: On July 31, 2013, this Court ordered the United States Attorneys Office for the Northern District of Illinois to produce:

> All documents containing instructions given from 2006 to the present by any supervisors employed by the U.S. Attorney for the Northern District of Illinois about the responsibilities of AUSA's to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry or national origin and specifically that those persons who are defendants in phony stash house cases in which Bureau of Alcohol, Tobacco and Firearms ("ATF") was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendants' race, color, ancestry or national origin.

Brown, 12-CR-632, DE 153; *Williams*, 12-CR-887, DE 70. However, as defense investigation and discovery review has progressed, scrutiny has shifted to the ATF itself. Indeed, the information requested in the instant motion and several prior motions is focused on ATF conduct. *See, e.g.*, *Williams*, 12-CR-887, DE 113 (N.D. Ill. June 2, 2014); *id.* DE 147. Accordingly, Mr. Hummons respectfully requests that this Court supplement the above order by requiring the government to produce any responsive documents authored by the ATF and/or its supervisors.

CONCLUSION

For these reasons, Mr. Hummons respectfully requests that his motion be granted.

Respectfully submitted,

Date: February 16, 2015

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CERTIFICATE OF SERVICE

The undersigned, Judith P. Miller, an attorney with the University of Chicago Law School's Federal Criminal Justice Clinic, hereby certifies that in accordance with Fed. R. Crim. P. 49, Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF), the following document:

DEFENDANTS' MOTION FOR STATISTICS-RELATED DISCOVERY REGARDING DEFENDANTS IN PHONY STASH HOUSE CASES

was served pursuant to the district court's ECF system as to ECF filings, if any, and was sent by first-class mail/hand delivery on February 16, 2015, to counsel/parties that are non-ECF filers.

By: */s/ Judith P. Miller*
Judith P. Miller

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IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	No. 12-CR-887
v.	)	Chief Judge Rubén Castillo
	)	
JOHN T. HUMMONS,	)	
	)	
Defendant.	)	

EXHIBITS

[redacted] [redacted]

Exhibit B: Stash House Defendants Since 2006

Exhibit B:

Stash House Defendants Since 2006

#	Case Name	Case Number	Name and Race of Each Defendant	
1	United States v. Jackson, et al.	13 CR 636	Thomas Jackson	Black
			Calvin Williams, Jr.	Black
			Demetrius Wrotten	Black
			Nolan Swain	Black
2	United States v. Elias, et al.	13 CR 476	Salvador Elias	Hispanic/Latino
			Adrian Elias	Hispanic/Mexican
			Angel Olson	Black
			Demetrio Benitez	Hispanic/Latino
			Miguel Ledesma	Hispanic/Latino
			Paul Reding	White
			Cornelius Sistrunk	Black
			Deeric Stevens	Black
			Mishon Washington	Black
3	United States v. Paxton, et al.	13 CR 103	Cornelius Paxton	Black
			Randy Walker	Black
			Randy Paxton	Black
			Adonis Berry	Black
			Matthew Webster	Black
4	United States v. Davis, et al.	13 CR 063	Paul Davis	Black
			Alfred Withers	Black
			Julius Morris	Black
			Jayvon Byrd	Black
			Vernon Smith	Black
			Corey Barbee	Black
			Dante Jeffries	Black
5	United States v. Williams, et al.	12 CR 887	Antonio Williams	Black
			John T. Hummons	Black
			Howard Lee	Black
6	United States v. Cousins, et al.	12 CR 865	David Cousins	Black
			Michael Cousins	Black
			Dunwon Lloyd	Black

#	Case Names	Case Number	Name and Race of Each Defendant	
7	United States v. Payne, et al.	12 CR 854	William Payne	Black
			Brandon Jackson	Black
			Brian Jackson	Black
			Deandre Bruce	Black
8	United States v. Davila, et al.	12 CR 713	Justin R. Davila	Hispanic/Latino
			Jason J. Davila	Hispanic/Latino
			Nieko E. Hadley	Black
9	United States v. Brown, et al.	12 CR 632	Abraham Brown	Black
			Kenneth Taylor	Black
			Alfred Washington	Black
			Dwaine Jones	Black
			Christopher Davis	Black
10	United States v. DeJesus, et al.	12 CR 511	Benjamin DeJesus	Hispanic/Latino
			Jesus Corona	Hispanic/Latino
			Ceferino Malave	Hispanic/Latino
			Luis Borrero	Hispanic/Puerto Rican
11	United States v. Flowers, et al.	11 CR 779	Myreon Flowers	Black
			David Flowers	Black
			Anwar Trapp	Black
			Duane Jones	Black
			Anthony Adams	Black
			Tracy Conley	Black
			Rudy Space	Black
12	United States v. Alexander, et al.	11 CR 148	William Alexander	Black
			Hugh Midderhoff	Black
			Devin Saunders	Black
13	United States v. Vidal, et al.	10 CR 618	Joshua Vidal	Hispanic/Latino
			Damian Mosley	Black
			Antonio Cobb	Black
14	United States v. Mayfield, et al.	09 CR 687	Leslie Mayfield	Black
			Montreece Kindle	Black
			Nathan Ward	Black
			Dwayne White	Black

#	Case Name	Case Number	Name and Race of Each Defendant	
15	United States v. Farella, et al.	09 CR 087	Frank Farella	White
			Donald Catanzaro	White
			Michael Blais	White
16	United States v. Mahan, et al.	08 CR 720	Tony Mahan	Black
			James McKenzie	Black
			Mario Barber	Black
			Steven Stewart	Black
17	United States v. Hall, et al.	08 CR 386	Shamonte Hall	Black
			Karinder Gordon	Black
			Rodney Ray	Black
18	United States v. Tanner, et al.	07 CR 707	Rodney Tanner	Black
			Keith Calvert	Black
			Fred Calvert	Black
19	United States v. Sidney, et al.	07 CR 652	Ben Sidney	Black
			Jerome Scott	Black
			Charles Lawrence	Black
20	United States v. George, et al.	07 CR 441	Robert George	White
			Michael Spagnola	White
21	United States v. Walker, et al.	07 CR 270	Hurreon Walker	Black
			Rashad Logan	Black
22	United States v. Lewis, et al.	07 CR 007	Scott Lewis	Black
			Vernon Williams	Black
			Lavoyce Billingsley	Black
23	United States v. Corson, et al	06 CR 930	Aaron Corson	White
			Marcus Corson	White
			Oscar Alvarez	Hispanic/Latino
24	United States v. Harris, et al.	06 CR 586	Michael Harris	Black
			Chris Blitch	Black
			Devarl Washington	Black
			Michael Carwell	Black
25	United States v. Tankey, et a.	06 CR 50074	Joaquin J. Tankey	Black
			James T. King	Black
			Demarlon J Lewis	Black

Discovery Opinions & Orders

Alison Siegler, Univ. of Chicago Law School

Order Granting Selective Enforcement Discovery in San Francisco: *United States v. Mumphrey*, 2016 WL 3548365 (N.D. Cal. June 30, 2016)

Alison Siegler, Univ. of Chicago Law School

2016 WL 3548365
Only the Westlaw citation is currently available.
United States District Court,
N.D. California.

United States of America, Plaintiff,
v.
Matthew Mumphrey, et al., Defendants.

Case No. 14-cr-00643-EMC-1
|
Signed 06/30/2016

Synopsis

Background: In a collection of cases, a group of African American criminal defendants being prosecuted for relatively low level drug trafficking contended their arrests and prosecution were based on racially selective actions taken by local and federal law enforcement. Defendants moved to compel discovery.

Holdings: The District Court, Edward M. Chen, J., held that:

[1] as a matter of first impression, dismissal of criminal proceedings is a proper remedy for selective enforcement;

[2] evidence established discriminatory effect of city drug bust program, as required to establish entitlement to discovery;

[3] evidence gave rise to an inference of discriminatory intent in conducting program, as required to establish entitlement to discovery;

[4] evidence did not give rise to an inference of discriminatory intent required to warrant African American defendants' entitlement to discovery on claim of selective prosecution.

Motion granted in part and denied in part.

Attorneys and Law Firms

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ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL

EDWARD M. CHEN, United States District Judge

***1** In this collection of cases, a group of individuals, all of whom are African American and all who are being prosecuted for relatively low level drug trafficking in the Tenderloin under a program entitled Operation Safe Schools ("OSS") (collectively, "Defendants"), contend their arrests and prosecution were based on racially selective actions taken by local and federal law enforcement. The issue currently before the Court is not whether racially selective actions were in fact taken, but whether Defendants are entitled to discovery to substantiate their claims of selective enforcement and prosecution.

After reviewing extensive briefing, the Court concludes that the record presented by the parties in connection with this motion contains substantial evidence suggestive of racially selective enforcement by the San Francisco Police Department ("SFPD") and other federal law enforcement in connection with the conduct of OSS; that evidence is countered by a conspicuously meager rebuttal by the government. Accordingly, the Court concludes Defendants have made sufficient showing entitling them to discovery with respect to the claim of selective enforcement. However, the Court holds that, at least at this juncture, Defendants are not entitled to discovery with respect to their claim of selective prosecution. Defendants' motion to compel discovery is thus **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

The above-referenced cases arise in the context of Operation Safe Schools ("OSS"). OSS was a program jointly undertaken by the U.S. Attorney's Office ("USAO"), the Drug Enforcement Administration ("DEA"), and the San Francisco Police Department ("SFPD").[1] *See United States v. Anthony*, No. CR–15–0005 EMC (Docket No. 11–2) (Phillips (FPD) Decl., Ex. C) (USAO press release, dated 12/9/2013) (USA Haag stating that she has " 'directed my office to work with the DEA and the [SFPD] to aggressively prosecute drug trafficking in areas around Tenderloin schools' "). The purpose of OSS "was to aggressively prosecute drug dealers around schools and playgrounds in the Tenderloin district." Docket No. 51–5 (Hasib (USAO) Decl. ¶ 3).

[1] According to Defendants, at least 46 law enforcement officers were involved in OSS, 34 being SFPD officers, 1 a Daly City officer, 10 DEA officers, and 1 a U.S. Marshal assigned to the DEA. *See* Mot. at 10. Defendants also claim that at least some of the SFPD officers were cross-designated as federal agents. *See* Mot. at 11. The government does not contest these claims. *See also United States v. Anthony*, No. CR–15–0005 EMC (Docket No. 11–1) (Sommerfeld (FPD) Decl., Att. A) (bar graph showing law enforcement officers involved and number of OSS cases each officer worked on); *United States v. Anthony*, No. CR–15–0005 EMC (Docket No. 42–1) (Nocetti (SFPD) Decl. ¶ 1) (testifying that he has been with the SFPD since 1991 and was assigned to serve as a Task Force Officer with DEA from 2000 until December 2013).

Two "sweeps" were done pursuant to OSS: one in late 2013 (August to November) and a second in late 2014 (October to December). *See* Defs.' Ex. 3 (Cruz-Laucirica (FPD) Decl., Att. A) (spreadsheet of OSS cases). For the first sweep, 20 "buy/walk" operations were conducted. Fourteen out of the 20 individuals were prosecuted. *See* Docket No. 146–3 (Dorais (DEA) Decl. ¶ 4). For the second sweep, 23 operations were conducted, and all 23 individuals were prosecuted. *See* Docket No. 146–3 (Atakora (DEA) Decl. ¶ 1). Altogether (*i.e.*, for both sweeps), 37 individuals were prosecuted, more specifically, for violations of 21 U.S.C. §§ 841 and 860.[2] All 37 individuals are African American.

[2] *See* 21 U.S.C. § 841(a)(1) (providing that "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); *id.* § 860(a) (providing that "[a]ny person who violates [§ 841(a)(1)] by distributing, possessing with intent to distribute, or manufacturing a controlled substance in or on, or within one thousand feet of, the real property comprising a public or private elementary, vocational, or secondary school or a public or private college, junior college, or university, or a playground, or housing facility owned by a public housing authority, or within 100 feet of a public or private youth center, public swimming pool, or video arcade facility, is...subject to [certain enhanced punishment]").

***2** Currently pending before the Court is a joint motion filed by 12 of the individuals who were targeted, arrested, and prosecuted pursuant to OSS. For convenience, these individuals shall hereinafter be referred to collectively as "Defendants." Defendants seek leave to serve discovery related to two different, but related theories: (1) that law enforcement targeted persons for arrest based on their race (*i.e.*, selective enforcement) and (2) that the prosecutors prosecuted the persons based on their race

(*i.e.*, selective prosecution). As indicated by the above, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' motion to compel.

II. *ARMSTRONG*

The parties agree that *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), provides the governing standard for Defendants' selective prosecution claim. As for the selective enforcement claim, the parties also agree that *Armstrong* provides at least some general guidance, although Defendants assert that *Armstrong* is not completely controlling given that some of its analysis was specific to the role of a prosecutor which is distinct from the role of law enforcement. Given the significance of *Armstrong*, the Court provides a brief synopsis as to the holding therein.

In *Armstrong*, the defendants were indicted on drug and firearm offenses. They alleged that they were selected for prosecution because of their race (African American) and thus moved for discovery or for dismissal of the indictment. *See id.* at 458–59, 116 S.Ct. 1480.

> In support of their motion, [the defendants] offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the [defendants]. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 [*i.e.,* drug] cases closed by the office during 1991 [*i.e.*, the year before the defendants were indicted], the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

Id. at 459, 116 S.Ct. 1480.

The district court ordered the government to provide discovery. Subsequently, the government moved for reconsideration of the discovery order and submitted evidence for the court's consideration, including (1) affidavits from the federal and local agents participating in the case, which stated that "race played no role in their investigation"; (2) an affidavit from an AUSA who stated that the decision to prosecute met the general criteria for prosecution because, of, *e.g.*, the amount of cocaine base involved, the criminal histories of the defendants, the strength of the evidence, etc.; and (3) sections of a DEA report which concluded that " 'large-scale, interstate tracking networks controlled by Jamaicans, Haitians, and Black street gangs dominate the manufacture and distribution of crack.' " *Id.* at 460, 116 S.Ct. 1480.

In turn, the defendants provided additional information to the district court, including (1) an affidavit from one of defense counsel, stating that "an intake coordinator at a drug treatment center had told her that there are 'an equal number of Caucasian users and dealers to minority users and dealers' "; (2) an affidavit from another criminal defense attorney, stating that "in his experience many nonblacks are prosecuted in state court for crack offenses"; and (3) a newspaper article "reporting that federal 'crack criminals...are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black.' " *Id.* at 460–61, 116 S.Ct. 1480.

The district court denied the government's motion for reconsideration and then, when the government stated it would not comply with the discovery order, dismissed the case.[3] *See id.* at 461, 116 S.Ct. 1480.

[3] In a footnote, the Supreme Court noted that it had "never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race." *Armstrong*, 517 U.S. at 461 n. 2, 116 S.Ct. 1480.

***3** The specific issue as presented to the Supreme Court was what showing was necessary "for a defendant to be entitled to *discovery* on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race." *Id.* at 458, 116 S.Ct. 1480 (emphasis added). However, before addressing this issue, the Supreme Court

addressed the requirements for a selective prosecution claim. The Court explained first that there is a presumption that the prosecuting attorney has properly discharged his or her official duties and not violated equal protection. This presumption arises from the broad discretion a prosecutor is given in enforcing the criminal laws. *See id.* at 464–65, 116 S.Ct. 1480 (noting, *e.g.*, that, "[i]n the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion' "). "[T]o dispel that presumption..., a criminal defendant must present 'clear evidence to the contrary.' " *Id.* at 465, 116 S.Ct. 1480. More specifically, the defendant must present clear evidence of discriminatory effect and discriminatory purpose. *See id.*

"Having reviewed the requirements to prove a selective-prosecution claim, [the Court] turn[ed] to the showing necessary to obtain discovery in support of such a claim." *Id.* at 468, 116 S.Ct. 1480. According to the Court, "[t]he justifications for a rigorous standard for the elements of a selective prosecution claim...require a correspondingly rigorous standard for discovery in aid of such a claim," especially as discovery "will divert prosecutors' resources" and "may disclose the Government's prosecutorial strategy." *Id.* It distilled the showing required for discovery as follows: there must be " '*some evidence* tending to show the existence of the essential elements of the [selective prosecution] defense,' discriminatory effect and discriminatory intent." *Id.* (emphasis added).

For purposes of the case at hand, the Supreme Court only had to consider "what evidence constitutes 'some evidence tending to show the existence' of the discriminatory effect element." *Id.* at 469, 116 S.Ct. 1480. "The Court of Appeals [had] held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant." *Id.* The Supreme Court concluded that the appellate court was "mistaken in this view." *Id.* It held that there must be "some evidence that similarly situated defendants of other races could have been prosecuted, but were not," *i.e.*, "some evidence of differential treatment of similarly situated members of other races or protected classes." *Id* at 469–70, 116 S.Ct. 1480.

The Supreme Court indicated that a similarly situated requirement was necessary in part because one could not assume, as the appellate court did below, that " 'people of *all* races commit *all* types of crimes"—*i.e.*, as opposed to "the premise that any type of crime is the exclusive province of any particular racial or ethnic group.' " *Id.* (emphasis added). The Court noted that not only was there no authority cited for the appellate court's assumption but also that assumption "seems contradicted by the most recent statistics of the United States Sentencing Commission," which showed, *e.g.*, that "[m]ore than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, 93.4% of convicted LSD dealers were white, and 91% of those convicted for pornography or prostitution were white." *Id.*[4]

[4] The Court did not address the question-begging nature of these statistics; it is possible that these statistics on conviction and sentencing themselves reflect bias patterns of enforcement and prosecution, not simply the pattern of actual law violations. *See*, *e.g.*, Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing & Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L.J. 2 (2013).

In response to the concern that the similarly situated requirement would pose an evidentiary obstacle to a defendant, the Supreme Court stated as follows:

> In the present case, if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than respondents. For example, respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court.

***4** *Id.* at 470, 116 S.Ct. 1480.[5]

[5] Even though the Supreme Court made reference to whether federal law enforcement *knew* of similarly situated persons being prosecuted in state court, that would seem to be more an issue with respect to discriminatory *intent* rather than discriminatory *effect. Cf. United States v. Tuitt*, 68 F.Supp.2d 4, 10 (D.Mass.1999) (noting that "the Supreme Court's actual analysis of the evidence offered in *Armstrong*...in some ways appears to conflate the elements of effect and intent").

Ultimately, the Supreme Court held that, in the case under consideration, the defendants had not satisfied the requirement of "some evidence" of discriminatory effect. Defendants' "study" (*i.e.*, that, in every one of the 24 § 841 or § 846 cases closed by the FPD during 1991, the defendant was black)

> failed to identify individuals who were not black and could have been prosecuted for the offenses for which responds were charged, but were not so prosecuted....The newspaper article, which discussed the discriminatory effect of the federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. [The] affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence.

Id.

After *Armstrong*, the Supreme Court issued another opinion on selective prosecution. *See United States v. Bass*, 536 U.S. 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002) (per curiam). The opinion—very brief—addressed a contention made by a defendant that the government had decided to seek the death penalty against him because of his race. The defendant sought dismissal based on this claim or, in the alternative, discovery about the government's capital charging practices. *See id.* at 862–63, 122 S.Ct. 2389. The Supreme Court concluded that the defendant had failed to "make a 'credible showing' that 'similarly situated individuals of a different race were not [charged],' " as required to demonstrate discriminatory effect. *Id.* at 863, 122 S.Ct. 2389.

> The Sixth Circuit concluded that respondent had made such a showing based on nationwide statistics demonstrating that "the United States charges blacks with a death-eligible offense more than twice as often as it charges white" and that the United States enters into plea bargains more frequently with whites than it does with blacks. Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*....

Id. at 863–64, 122 S.Ct. 2389 (emphasis added).[6]

[6] Although the *Armstrong* and *Bass* Courts focused on similarly situated as part of the discriminatory effect analysis, evidence of differential treatment is also probative of discriminatory intent. *See United States v. Smith*, 231 F.3d 800, 809 (11th Cir.2000) ("recogniz [ing] that the nature of the two prongs of a selective prosecution showing are such that they will often overlap to some extent"); *cf. Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir.2013) (indicating that, in a civil case where discrimination is alleged, preferential treatment of a similarly situated person can be evidence of discriminatory intent).

***5** In the instant case, both parties agree that *Armstrong* provides the general framework for both selective prosecution and selective enforcement claims—*i.e.*, there must be both a discriminatory effect and a discriminatory purpose. *See, e.g.*, *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir.2002) (noting that defendant was "complain[ing] not of selective prosecution, but of racial profiling [by the DEA], a selective law enforcement tactic[,] [b]ut the same analysis governs both types of claims: a defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that *Armstrong* outlines for selective prosecution claims"). Defendants, argue, however, that the specific discriminatory effect analysis in *Armstrong* applies only to selective prosecution claims, and not selective enforcement claims, because the analysis was targeted to the special role that a prosecutor has. Defendants point out that, in *United States v. Davis*, 793 F.3d 712 (7th Cir.2015) (en banc), the Seventh Circuit, sitting en banc, acknowledged the distinction between selective enforcement and selective prosecution and found the rationale of *Armstrong* does not apply with full force where prosecutorial discretion is not involved.

In *Davis*, there were seven African American defendants who were charged "with several federal offenses arising from a plan to rob a stash house, where the defendants believed they would find drugs and money." *Davis*, 793 F.3d at 714. The defendants argued that "the prosecutor, the FBI, and the ATF engaged in racial discrimination" by proceeding against them. *Id.* In support of their claim of discrimination, the defendants informed the district court that, "since 2006[,] the United States Attorney for the Northern District of Illinois has prosecuted 20 stash-house stings, and that of the defendants in these cases 75 were black and 19 white." *Id.* at 715 (adding that "13 of the 19 white defendants were Hispanic"). The district court permitted discovery because " 'the overwhelming majority of the defendants named [were] individuals of color." *Id.* at 719.

The Seventh Circuit disagreed with the district court, stating that its decision was

> inconsistent with *Armstrong*. The record in *Armstrong* showed that *every* defendant in *every* crack-cocaine prosecution filed by a particular United States Attorney's office and assigned to the public defender was black. If, as the Supreme Court held, that evidence did not justify discovery into the way the prosecutor selected cases, then proof that in the Northern District of Illinois three-quarters of the defendants in stash-house cases have been black does not suffice.

Id. at 719–20.

But the Seventh Circuit then went on to note that the matter before it was not "that simple" because *Armstrong* was a pure selective prosecution case. *Id.* at 720.

> The Supreme Court [noted] that federal prosecutors deserve a strong presumption of honest and constitutional behavior, which cannot be overcome simply by a racial disproportion in the outcome, for disparate impact differs from discriminatory intent. The Justices also noted that there are good reasons why the Judicial Branch should not attempt to supervise how the Executive Branch exercises prosecutorial discretion. In order to give a measure of protection (and confidentiality) to the Executive Branch's deliberative processes, which are covered by strong privileges, the Court in *Armstrong* insisted that the defendant produce evidence that persons of a different race, but otherwise comparable in criminal behavior, were presented to the United States Attorney for prosecution, but that prosecution was declined.

Id.

The Seventh Circuit then noted that the case before it was not really a selective prosecution case but rather a selective enforcement case—"the defendant's principal targets are the ATF and the FBI." *Id.* But

> [a]gents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior. Unlike prosecutors, agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause. Before holding hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done. In sum, the sort of considerations that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.

***6** *Id.* at 720–21. *But see United States v. Alcaraz–Arellano*, 441 F.3d 1252, 1264 (10th Cir.2006) (stating that "[s]imilar caution is required in reviewing a claim of selective law enforcement").

Although the Court agrees with the reasoning in *Davis*, it need not resolve this issue whether *Armstrong* applies with full force to claims of selective enforcement. The Court finds that, even assuming it does, Defendants have satisfied *Armstrong* in respect to their claim of selective enforcement.

III. RECORD EVIDENCE

Both parties have provided evidence in conjunction with the pending motion. The primary evidence is briefly outlined below.

A. Defendants' Evidence

• The fact that all 37 OSS defendants are African American.

• Charging data (between January 1, 2013, and February 28, 2015) from the San Francisco Superior Court, more specifically, with respect to drug-trafficking crimes in the Tenderloin. *See* Mot. at 20. The data reflected that 61.4% of those arrested and charged were African American, 24.7% were Latino, and 10.7% were white. *See* Mot. at 21; *see also* 2d Phillips (FPD) Decl., Ex. M (Beckett Rpt. at 7). Defendants' expert, Dr. Beckett, concluded that, based on a comparison of the charging data to the OSS results (where all persons charged were African American), there was a Z score of 4.75. A Z score of 4.75 is highly significant. *See* Amram (FPD) Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248-49). As Defendants explain, and the government does not dispute, a Z score is used to measure the statistical significance of an observed difference. "Z scores with an absolute value of 2 or more are considered statistically significant, meaning that the observed difference is very unlikely to be the result of chance." Mot. at 14 n.24.

• A survey administered to active drug users accessing services at the Tenderloin Needle Exchange site of the San Francisco AIDS Foundation's Needle Exchange Program. The survey commenced in August 2015, *see* Defs.' Ex. 41 (2d Phillips Decl., Ex. M) (Beckett Expert Report at 5), and was conducted on seven consecutive weeks.[7] *See* Mot. at 14. "In the survey, respondents were asked to recall up to six recent drug transactions that took place in the Tenderloin neighborhood and to identify the race/ethnicity of the person from whom they obtained the drugs." Mot. at 14. The data from the survey reflected as follows: 56% of the Tenderloin drug transactions involved African American drug sellers; 20% involved Latino drug sellers; and 16.8% involved white drug sellers. *See* Mot. at 14. Similar to above Defendants' expert, Dr. Beckett, concluded that, based on a comparison of the survey results to

the OSS results, there was a Z score of 5.23. *See* Amram (FPD) Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248-49).

• Declarations from six persons who work in the Tenderloin. *See* Defs.' Ex. 25 (Martinez Decl.); Defs.' Ex. 26 (Sandoval Decl.); Defs.' Ex. 27 (Brown Decl.); Defs.' Ex. 28 (Allen Decl.); Defs.' Ex. 32 (Harkin Decl.); Defs.' Ex. 36 (Leslie Decl.). The declarations generally indicate that there is a significant presence of non-African American drug dealers in the Tenderloin, particularly in certain locations within the Tenderloin. *See, e.g.*, Defs.' Ex. 32 (Harkin Decl. ¶ 6) (Program Manager for GLIDE Health Services HIV and Hepatitis C programs, stating that "I have found that drug dealers of the same ethnic group tend to work the same areas of the Tenderloin[;] [f]or example, most recently, Leavenworth has Honduran and Mexican drug dealers, Golden Gate Avenue has Whites and African Americans above Jones Street and just African Americans at Jones Street and below, and Hyde Street has Mexicans regularly dealing drugs there").

***7** • SFPD incident reports, some of which indicate SFPD "awareness of the presence, behavior, and specific geographic locations frequented by Hispanic/Latino dealers" in the Tenderloin. Mot. at 22 (giving six incident reports as examples). *See, e.g.*, Koeninger (FPD) Decl., Att. D at Ex. 00773 (SFPD incident report, dated April 2013 and authored by Officer G. Darcy) (stating that "I have participated in hundreds of buys busts and surveillance in this area" and that "I know that many of the drug dealers in the Hyde Street area are of Honduran descent"); Koeninger (FPD) Decl., Att. D at Ex. 00736 (SFPD incident report, dated April 2015 and authored by Officer D. Casey) (stating that, "[b]ased off prior arrests and contacts, I know that the corner of Eddy Street and Hyde Street is primarily controlled by Honduran national drug dealers").

• Evidence related to approximately sixty non-African American drug dealers who Defendants claim are similarly situated to Defendants. *See* Mot. at 24 *et seq.* (identifying approximately forty such drug dealers); Reply at 14 *et seq.* (adding more comparators). Like Defendants, these sixty or so persons were arrested for committing drug-trafficking crimes in the Tenderloin within the OSS timeframe but, unlike Defendants, were not federally charged under OSS. Some of the OSS officers were involved with the arrests of some of these individuals. *See* Reply at 37-38. *See, e.g.*, Koeninger (FPD) Decl., Att. A at Ex. 226-3) (SFPD incident report for Doe 6) (reflecting that the following OSS officers were involved in the arrest of Doe 6: Officers MacDonald (involved in 21 OSS cases), Lee (involved in 21 OSS cases), Daggs (involved in 23 OSS cases), Solorzano (involved in 13 OSS cases), Payne (involved in 9 OSS cases), and Hagan (involved in 11 OSS cases)).

• Video from one of the OSS cases (*United States v. McNeal*, No. CR–15–0028 EMC) showing that one officer says, "Fucking BMs" (*i.e.*, black males) and another officer says, "Shh, hey, I'm rolling." *See* Defs.' Ex. 5 (1st Phillips (FPD) Decl. ¶¶ 3, 5). The officer who made the first statement was involved in a total of 18 OSS cases; the officer who made the second statement was involved in a total of 11 OSS cases.

• Video from one of the OSS cases (now resolved) (*United States v. Roberts*, No. CR–13–0760 CRB) where the undercover informant declines to buy drugs from an Asian woman and waits to buy drugs from the defendant, an African American woman. *See* Mot. at 60-61; *see also United States v. Anthony*, No. CR–15–0005 EMC (Docket No. 11–2) (Phillips (FPD) Decl., Ex. G) (video in *Roberts* case).

• The USAO's knowledge of problems with racism within the SFPD, at least prior to the second sweep in late 2014 (October to December). Defendants point to the fact that, in early 2014, the USAO indicted three SFPD officers for, *inter alia*, civil rights violations and, prior to trial in November 2014, racist texts were disclosed. (However, none of the officers appears to have been involved with OSS.)

• Declarations from approximately 20-25 OSS defendants (some of the defendants are moving parties, some are not) who describe how SFPD officers have treated African Americans, including but not limited to how they have paid more attention to African Americans than to persons of other races.

  ○ Some of the OSS defendants talk about negative

interactions with officers who were specifically involved with OSS—*e.g.*, (1) Shaughn Ryan (2 OSS cases), *see, e.g.*, Defs.' Ex. 7 (Nash Decl.); Defs.' Ex. 9 (McNeal Decl.); Defs.' Ex. 10 (Jones Decl.); Defs.' Ex. 14 (Rouse Decl.); Defs.' Ex. 18 (Williams Decl.); Defs.' Ex. 19 (Reed Decl.); Defs.' Ex. 20 (Adams Decl.); Defs.' Ex. 21 (Reddic Decl.); Defs.' Ex. 24 (Jules Decl.); Defs.' Ex. 29 (Johnson Decl.); Defs.' Ex. 30 (Cross Decl.); Defs.' Ex. 35 (Wallace Decl.); (2) Darren Nocetti (29 OSS cases), *see, e.g.*, Defs.' Ex. 8 (Mathews Decl.); Defs.' Ex. 37 (Mackey Decl.); (3) Ryan Crosby (11 OSS cases), *see, e.g.*, Defs.' Ex. 12 (Anthony Decl.); Defs.' Ex. 16 (White Decl.); (4) D. Goff (6 OSS cases), *see, e.g.*, Defs.' Ex. 19 (Reed Decl.); Defs.' Ex. 34 (Jackson Decl.); Defs.' Ex. 35 (Wallace Decl.); (5) Anthony Assaretto (8 OSS cases), *see, e.g.*, Defs.' Ex. 34 (Jackson Decl. ¶ 2); (6) Micah Hope (6 OSS cases), *see, e.g.*, Defs.' Ex. 20 (Adams Decl.); and (7) A. Scafani (14 OSS cases), *see, e.g.*, Defs.' Ex. 35 (Wallace Decl.). Some of these interactions, while negative, do not clearly involve race.

***8** ○ According to some of the defendants, some of the OSS officers (*e.g.*, Shaughn Ryan, Darren Nocetti, Anthony Assaretto, D. Goff, and A. Scafani) have expressly made racist statements or engaged in racist conduct. *See, e.g.*, Defs.' Ex. 7 (Nash Decl. ¶ 5) ("On other occasions, Officer Ryan has referred to African-American females as 'bitches' and has made comments that women who are confidential informants for him are 'bitches that work for me.' "); Defs. Ex. 9 (McNeal Decl. ¶ 5) ("Officer Ryan said a comment to me like, 'I just got married and you better be glad...or I'll take some black pussy."); Defs.' Ex. 21 (Reddic Decl. ¶ 4) ("On other occasions, Officer Ryan has referred to me as a 'bitch' or 'little black girl."); Defs.' Ex. 37 (Mackey Decl. ¶ 3) ("Shortly before my arrest in December, an SFPD officer I know as Darren yelled that I 'better get [my] black ass off the block."); Defs.' Ex. 34 (Jackson Decl. ¶ 2) ("On one occasion, I heard Officer Assaretto call an Africa[n]-American man 'nigger.' "); Defs.' Ex. 35 (Wallace Decl. ¶ 7) ("In 2014, I witnessed Officers Goff, Scafani and another [SFPD] Officer harass a small group of African-American teenagers. One of the officers told the group, 'Hands up, don't shoot.' The comment seemed to be intended to make fun of the Black Lives Matter movement.").

○ According to some of the female OSS defendants, some of the OSS officers have engaged in sexually inappropriate behavior with them. *See* Mot. at 63-67 (identifying Shaughn Ryan as a particular problem but also pointing to D. Goff and Ryan Crosby). While the incidents are clearly gender based, they are not always clearly race based.

7 The government attempts to equate the survey with anecdotal evidence, *see* Opp'n at 21, but that is not a fair criticism given the way that the survey was designed and conducted.

B. Government's Evidence

In its opposition, the government provided declarations from several USAO attorneys and two DEA agents (both supervisors). In these declarations, the attorneys and supervisors deny they considered race or directed anyone to consider race in their management of the OSS. Below is a summary of the evidence the government submitted in support of its position. The declarations submitted by the government have been categorized by sweep.

For the **first OSS sweep**:

• Katie Dorais, Special Agent of the DEA. *See* Pl.'s Ex. 3 (Dorais (DEA) Decl.). Ms. Dorais worked on the first sweep only. Her supervisor in the DEA assigned her as the lead investigator for OSS. According to Ms. Dorais, the investigation "focused on repeat offenders and/or known drug traffickers who were selling drugs near schools in the Tenderloin." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 2). Also according to Ms. Dorais, race was not a consideration: "At no time did I consider race during either phase of [OSS]. In addition, I was not instructed by an [AUSA] to consider race during the investigation [and] I did not direct any law enforcement officer to take race into consideration." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 3). "Between August of 2013 and December of 2013 [the investigatory] team conducted twenty buy/walk Operations." Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 4). Ms. Dorais does not explain whether she directly

supervised each team member in the field when the arrests were made or whether she delegated the arrest decision to other law enforcement officers, *e.g.*, other DEA officers or SFPD officers. Fourteen out of the 20 persons were arrested and indicted. The remaining 6 were not prosecuted because she and the supervising ASUA (see below) concluded that the evidence was not sufficient for prosecution—*i.e.*, the evidence was not strong enough. *See* Pl.'s Ex. 3 (Dorais (DEA) Decl. ¶ 4). Ms. Dorais does not explain why the evidence was not strong enough. In its brief, however, the government indicates that the evidence was not strong enough because "the videotape did not show the drug deal with sufficient clarity." Opp'n at 17 n.10; *see also* Pl.'s Ex. 2 (Supp. Hasib (USAO) Decl. ¶ 4). The Court does not have any information about the race of the 6 persons who were not prosecuted.

***9** • Waqar Hasib, AUSA in the USAO. There are technically two declarations from Mr. Hasib, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Hasib (USAO) Decl.); Pl.'s Ex. 2 (Supp. Hasib (USAO) Decl.). OSS was Mr. Hasib's idea. *See* Pl.'s Ex. 1 (Hasib (USAO) ¶ 3). According to Mr. Hasib, the purpose of OSS "was to aggressively prosecute drug dealers around schools and playgrounds in the Tenderloin district." Pl.'s Ex. 1 (Hasib (USAO) Decl. ¶ 3). It appears that Ms. Hasib was the attorney who primarily authorized prosecutions in the first sweep cases.[8] *See* Pl.'s Ex. 1 (Hasib (USAO) Decl. ¶ 4). (The government did not submit any declarations from the line AUSAs who recommended prosecution to Mr. Hasib.) Mr. Hasib authorized the prosecutions based on the sufficiency of the evidence (each case included a videotaped drug deal) and did not consider race. *See* Pl.'s Ex. 2 (Supp. Hasib (USAO) Decl. ¶ 2). "Indeed, in the large majority of these cases, [he] was entirely unaware of any particular individual's race when [he] authorized presentation to the grand jury." Pl.'s Ex. 1 (Hasib (USAO) Decl. ¶ 4). Mr. Hasib did consider the individual's criminal history prior to authorizing indictment because OSS was intended to "target recidivist, repeat offenders who were selling drugs near schools." Pl.'s Ex. 1 (Hasib (USAO) Decl. ¶ 6). Mr. Hasib did decline to authorize prosecution on some of the first sweep cases and typically did so "because the video recording did not clearly identify the individual who sold drugs." Pl.'s Ex. 2 (Supp. Hasib (USAO) Decl. ¶ 4).

For the **second sweep**:

• Charles Atakora, Special Agent of the DEA. Mr. Atakora appears to have worked on the second sweep cases only. He was assigned to OSS by his supervisor as the Case Agent. He "coordinated the investigations, collected evidence and presented twenty[-]three cases to the [USAO]. The [USAO] then presented the evidence to the grand jury which resulted in twenty[-]three indictments." Pl.'s Ex. 3 (Atakora (DEA) Decl. ¶ 1). According to Mr. Atakora, the investigation focused on "repeat offenders, prior arrestees, and/or known narcotic dealers in the Tenderloin...that were conducting narcotic transactions near schools." Pl.'s Ex. 3 (Atakora Decl. (DEA) Decl. ¶ 2). Also according to Mr. Atakora, he "did not consider race during the investigative process, and [he is] not aware of any investigator or prosecutor considering race during [OSS]." Pl.'s Ex. 3 (Atakora Decl. (DEA) Decl. ¶ 2). Like Ms. Dorais, Mr. Atakora does not explain whether he directly supervised each team member in the field when the arrests were made or whether he delegated the arrest decision to other law enforcement officers, *e.g.*, other DEA officers or SFPD officers.

• Sarah Hawkins, AUSA in the USAO. There are technically two declarations from Ms. Hawkins, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Hawkins (USAO) Decl.); Pl.'s Ex. 2 (Supp. Hawkins (USAO) Decl.). Ms. Hawkins worked only on second sweep cases. More specifically, she worked on cases involving 12 out of the 23 persons implicated in the second sweep. *See* Pl.'s Ex. 1 (Hawkins (USAO) Decl. ¶¶ 2-3). Ms. Hawkins recommended prosecutions for these 12 people. (She did not have the authority to commence prosecutions.) *See* Pl.'s Ex. 1 (Hawkins (USAO) Decl. ¶¶ 1-3). For each of the cases, she was "provided an account of the individual's conduct memorialized in a [DEA] Form 6, surveillance video of drug buys taken by the [SFPD], and the criminal history of the defendant." Pl.'s Ex. 1 (Hawkins (USAO) Decl. ¶ 5); *see also* Pls.' Ex. 2 (Supp. Hawkins (USAO) Decl. ¶ 2). She recommended prosecutions based on the sufficiency of the evidence and did not consider race. *See* Pl.'s Ex. 1 (Hawkins (USAO) Decl. ¶¶ 4-5). She worked on her OSS cases independent of the other line AUSA (*i.e.*, Mr. Farnham). *See* Pl.'s Ex. 1 (Hawkins (USAO) Decl. ¶ 10).

• Lloyd Farnham, AUSA in the USAO. There are technically two declarations from Mr. Farnham, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Farnham (USAO) Decl.); Pl.'s Ex. 2 (Supp. Farnham (USAO) Decl.). Like Ms. Hawkins, Mr. Farnham worked only on second sweep cases. More specifically, he worked on cases involving 11 out of the 23 persons implicated in the second sweep. *See* Pl.'s Ex. 1 (Farnham (USAO) Decl. ¶¶ 2-3). Mr. Farnham recommended prosecutions for these 11 people. (He did not have the authority to commence prosecutions.) *See* Pl.'s Ex. 1 (Farnham (USAO) Decl. ¶¶ 1-3). For each of the cases, he was "provided an account of the individual's conduct memorialized in a [DEA] Form 6, surveillance video of drug buys taken by the [SFPD], and the criminal history of the defendant." Pl.'s Ex. 1 (Farnham (USAO) Decl. ¶ 5); *see also* Pls.' Ex. 2 (Supp. Farnham (USAO) Decl. ¶ 2). He recommended prosecutions based on the sufficiency of the evidence and did not consider race. *See* Pl.'s Ex. 1 (Farnham (USAO) Decl. ¶¶ 4-5). He worked on his OSS cases independent of the other line AUSA (*i.e.*, Ms. Hawkins). *See* Pl.'s Ex. 1 (Farnham (USAO) Decl. ¶ 10).

***10** • Kevin Barry, AUSA in the USAO. There are technically two declarations from Mr. Barry, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Barry (USAO) Decl.); Pl.'s Ex. 2 (Supp. Barry (USAO) Decl.). Mr. Barry worked only on second sweep cases. More specifically, Mr. Barry approved the recommendation of prosecution for 7 out of the 23 people captured in the second sweep. *See* Pl.'s Ex. 1 (Barry (USAO) Decl. ¶¶ 2-3). Mr. Barry authorized the prosecutions based on the sufficiency of the evidence and did not consider race. In fact, he was "unaware of any individual's race at the time [he] authorized prosecution to the grand jury, and [he] remained unaware of their race at the time the grand jury returned the indictments." Pl.'s Ex. 1 (Barry (USAO) Decl. ¶ 5). Mr. Barry did consider the individual's criminal history prior to authorizing an indictment because OSS was "targeted [at] persistent, recidivist, and repeat offenders selling drugs near schools in the Tenderloin." Pl.'s Ex. 1 (Barry (USAO) Decl. ¶ 7). Three of the 7 persons whom Mr. Barry authorized for prosecution were career offenders, and another 2 were likely classified as Category III. *See* Pl.'s Ex. 1 (Barry (USAO) Decl. ¶ 7).

• Daniel Kaleba, AUSA in the USAO. There are technically two declarations from Mr. Kaleba, one being submitted as a part of this motion and one that was submitted earlier in the proceedings in conjunction with a different motion. *See* Pl.'s Ex. 1 (Kaleba (ASAO) Decl.); Pl.'s Ex. 2 (Supp. Kaleba (USAO) Decl.). Mr. Kaleba worked only on second sweep cases. More specifically, Mr. Kaleba approved the recommendation of prosecution for 16 out of the 23 people captured in the second sweep. *See* Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶¶ 2-3). Mr. Kaleba authorized the prosecutions based on the sufficiency of the evidence and did not consider race. In fact, he was "unaware of any individual's race at the time [he] authorized prosecution to the grand jury, and [he] remained unaware at the time the grand jury returned its indictments." Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 5). Mr. Kaleba did consider the individual's criminal history prior to authorizing an indictment because OSS was "targeted [at] persistent, recidivist, and repeat offenders selling drugs near schools in the Tenderloin." Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 6). Nine of the 16 persons whom Mr. Kaleba authorized for prosecution were career offenders. *See* Pl.'s Ex. 1 (Kaleba (USAO) Decl. ¶ 6).

[8] Another AUSA, Matthew McCarthy, seems to have authorized prosecution on a handful of OSS cases. *See* Pl.'s Ex. 2 (McCarthy (USAO) Decl. ¶ 2). Like Mr. Hasib, Mr. McCarthy states that race was not a consideration in his decision to commence prosecution. *See* Pl.'s Ex. 2 (McCarthy (USAO) Decl. ¶ 3) ("AUSA Hasib's prosecution memoranda did not mention the race of the proposed defendants, and I did not review video or photographs of those defendants.").

Surprisingly, the government has *not* provided *any* declarations from SFPD officers or any nonsupervisory DEA agents about the actual operation of OSS. *As a result, the Court has no information on the critical question as to how the targeting and arrests of the OSS defendants operated in the field.* While there is evidence that high-level supervisors did not direct officers in the

field to target suspects on the basis of race, the government offers no explanation as to how the highly improbable outcome that all 37 suspects were African Americans occurred, even though it appears from the record that African Americans constitute roughly 60%, not 100%, of drug trafficking in the Tenderloin. The government presented no evidence of how suspects for OSS "buys" were selected.

At the hearing, the government suggested for the first time that, as OSS operated in the Tenderloin, certain corners of the area were targeted first, which explained why all the OSS defendants are all African American—*i.e.*, those corners of the Tenderloin are dominated by African American drug dealers as opposed to, *e.g.*, Hispanic drug dealers. But the government never presented to the Court any *evidence* supporting this claim. Moreover, that representation, even if true, is problematic; it does not address who made the decision as to which corners should first be targeted and *why* only corners dominated by African American were targeted. Nor does the representation address Defendants' evidence showing racial patterns are not so clear as the government contends. For instance, non-African Americans were, in fact, arrested for drug offenses (by the SFPD) all over the Tenderloin –even on corners that purportedly had predominantly African American drug dealers; yet, no non-African American drug dealers in those areas was ever arrested and prosecuted for a federal crime under OSS. *See* Sommerfeld (FPD) Decl. ¶ 9 & Att. C (map showing location of Tenderloin arrests with respect to San Francisco Superior Court charging data).

***11** The fact that the government failed to present any evidence as to how OSS suspects were selected for "buys" and arrested for OSS prosecution—despite Defendants' substantial evidence suggesting race-based enforcement—is puzzling. At the hearing, the government stated that the lack of any evidence from the SFPD was because the SFPD refused to cooperate or provide assistance. This is surprising given that SFPD officers appear routinely in federal prosecution for *e.g.*, drug offenses, including prosecution arising out of OSS specifically. Obtaining SFPD cooperation in prosecutions where the SFPD has been involved in investigations and arrests has never been a problem to this Court's knowledge. It is also questionable why the government could have not compelled at least some of the SFPD officers to cooperate since some were also cross-designated as federal agents. Furthermore, the government failed to explain why it did not secure any declarations from nonsupervisory DEA agents who were familiar with the operation in the field. Although the government indicated, at the hearing, that one of the supervisory DEA agents did actually participate in the targeting and/or arrest of some of the OSS defendants, his declaration is, notably, lacking in any detail about how the targeting and arrests actually operated in the field (*e.g.*, how were the targeting decisions made?).

As a consequence, Defendants' evidence of selective enforcement is left largely unrebutted.

IV. SELECTIVE ENFORCEMENT

As stated above, Defendants seek discovery on two different theories: (1) selective enforcement and (2) selective prosecution. The Court addresses the selective enforcement theory first.

A. Dismissal as a Remedy for Selective Enforcement

[1]As an initial matter, the government argues that Defendants' motion to compel discovery on the selective enforcement theory should be denied outright because dismissal is not a remedy where a criminal defendant raises a claim of selective enforcement. The Court does not find the government's position persuasive.

First, the Court takes note that the government does not challenge dismissal as an available remedy for a selective prosecution claim—only as a remedy for a selective enforcement claim.[9] But racial discrimination in enforcement of criminal laws is constitutionally as injurious as racial discrimination in prosecution. It is difficult to discern why selective prosecution warrants dismissal, but selective enforcement (upon which prosecution is necessarily predicated) would not. Racially selective action by law enforcement inflicts harm whether it is perpetrated by law enforcement in the streets or by a prosecutor in an office—both inflict substantial injury on the victim and society: in addition to violating the victim's rights to equality and liberty, such discriminatory conduct impugns the integrity of the criminal justice system and compromises public confidence therein. As the Tenth Circuit explained in *Alcaraz–Arellano*, " '[r]acially selective law enforcement violates this nation's constitutional values at the most fundamental level;

indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment.' " *Id.* at 1263. The Seventh and Tenth Circuits have likewise held that dismissal of criminal proceedings is a proper remedy for selective enforcement. *See Davis*, 793 F.3d at 712 (en banc) (addressing a motion to dismiss based on selective enforcement); *Alcaraz–Arellano*, 441 F.3d at 1252 (same).

[9] As noted above, in *Armstrong*, the Supreme Court stated in a footnote that it had "never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of *prosecution* on the basis of his race." *Armstrong*, 517 U.S. at 461 n. 2, 116 S.Ct. 1480 (emphasis added). Notwithstanding this statement, the government does not dispute that dismissal is in fact a remedy for a claim of selective prosecution. Indeed, that the remedy of dismissal is proper is supported by *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), which is discussed *infra.* Furthermore, circuit courts that have acknowledged that dismissal is a remedy for a selective prosecution claim, *see, e.g.*, *In re Aiken County*, 725 F.3d 255, 264 n. 7 (D.C.Cir.2013) (stating that, "[i]f the Executive selectively prosecutes based on impermissible considerations, the equal protection remedy is to dismiss the prosecution"); *United States v. Vazquez*, 145 F.3d 74, 82 n. 6 (2d Cir.1998) (stating that "[s]elective prosecution claims usually come up in litigation as affirmative defenses to prosecution, and the remedy is generally dismissal of the suit that was selectively prosecuted"); *Feder v. Village of Shiloh*, No. 97–1101, 1997 U.S. App. LEXIS 19190, at *5 n. 3 (7th Cir. July 22, 1997) (acknowledging the *Armstrong* footnote but adding that the remedy of dismissal "seems to be implicit in other decisions of the Supreme Court, and this court implicitly has accepted that as the correct remedy"), and the government does not point to any authority to the contrary.

***12** At the hearing, the government suggested that dismissal as a remedy for selective enforcement would be unfair to prosecutors who did not engage in discrimination. This argument is flawed. It ignores the fact that, in cases of selective enforcement, even if the prosecutors did not discriminate, law enforcement did, and thus there has still been a constitutional injury suffered by the victim of discrimination. The focus of the Fourteenth Amendment is not so much what is fair to prosecutors, but what is fair for the victims of discrimination.

Second, as amicus ACLU points out in its brief, in *Yick Wo*, the Supreme Court found dismissal an appropriate remedy for selective enforcement. In *Yick Wo*, the petitioners were Chinese persons who were arrested and ultimately imprisoned for violating local ordinances regarding laundry establishments. Each ordinance provided that it was unlawful for persons to operate laundry establishments in wooden buildings without first getting the consent of the board of supervisors. *See Yick Wo*, 118 U.S. at 368, 6 S.Ct. 1064. The consent of the supervisors was not given to the petitioners and some 200 other Chinese persons while some 80 non-Chinese persons were "permitted to carry on the same business under similar conditions." *Id.* at 374, 6 S.Ct. 1064. The petitioners argued that their imprisonment was a violation of the Equal Protection Clause (*i.e.*, based on race). The Supreme Court agreed, holding that the administration of the ordinances was

> directed so exclusively against a particular class of persons [*i.e.*, Chinese persons] as to warrant and require the conclusion, that, whatever may have been the intent

> of the ordinances as adopted, they are *applied by the public authorities charged with their administration*, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws....Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as to practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373–74, 6 S.Ct. 1064 (emphasis added). The administration of the ordinances was within the province of the board of supervisors, not the local prosecutor. *See id.* at 374, 6 S.Ct. 1064 (stating that "[n]o reason whatever, except the will of the supervisors, is assigned why [the petitioners] should not be permitted to carry on, in the accustomed manner, their harmless and useful occupation, on which they depend for a livelihood"). Thus, although the discrimination at issue in *Yick Wo* was a form of selective enforcement rather than selective prosecution, the Supreme Court ordered that the petitioners be discharged as a remedy for the equal protection violation—a remedy that is akin to a dismissal.

Third, while the government argues that in, *United States v. Gomez–Lopez*, 62 F.3d 304 (9th Cir.1995) (a pre-*Armstrong* case), the Ninth Circuit held that selective enforcement is not a ground for dismissal (in the absence of a prosecutor's knowledge of law enforcement officers' targeting decisions), *see* Opp'n at 3-6, *Gomez–Lopez* is inapposite. In *Gomez–Lopez*, the defendant brought a claim for selective prosecution, not selective enforcement. The main holding of the case was that circuit-wide discovery was not permissible when all evidence pointed to decision-making being made at the local level. *See, e.g.*, 306-07 (stating that "the question in this case is whether the district court abused its discretion in ordering circuit-wide discovery without any indication that decision-making occurred at the circuit level"; adding that "[t]here is no evidence that the decision to prosecute [the defendant] was made by anyone other than the USAO for the Central District").

***13** The government protests still that *Gomez–Lopez* weighs in its favor based on the following language from the opinion:

> We held in *United States v. Erne*, 576 F.2d 212 (9th Cir.1979), that the proper focus in discriminatory prosecution cases is on the ultimate decision-maker. In *Erne*, we considered whether an evidentiary hearing was required on allegations that an Internal Revenue Service officer who referred Erne for prosecution impermissibly discriminated on the basis of Erne's exercise of his First Amendment rights. Because the revenue officer's recommendation for prosecution went through several internal reviews, and the United States Attorney ultimately decided whether to initiate criminal proceedings, we held that "even if [the revenue officer's] initial role in referring the matter for prosecution involved an improper discriminatory motive, it would be insufficient to taint the entire administrative process."
>
> Likewise in *United States v. Greene*, 698 F.2d 1364 (9th Cir.1983), the defendant pursued a claim of selective prosecution based on a showing that an IRS agent referred Greene for prosecution because of an impermissible motive. Again, we held that even if the agent's role in referring the matter for prosecution involved an improper discriminatory motive, it would be insufficient because "the ultimate decision to prosecute is several steps removed from the revenue officer."

Gomez–Lopez, 62 F.3d at 306. However, this language simply indicates that a selective prosecution claim should focus on the acts of the prosecutor. It does not foreclose a selective enforcement claim.

Finally, while there is authority to support the government's position—most notably, the Sixth Circuit's decision in *United States v. Nichols*, 512 F.3d 789 (6th Cir.2008)[10]—that authority is distinguishable and in any event not binding precedent on this Court. In *Nichols*, the defendant claimed that a police officer's decision to run a warrant check on him was based on his race, thus violating the Equal Protection Clause. *See id.* It appears that the only remedy sought by the defendant was exclusion—*i.e.*, suppression of evidence found by the police during a subsequent search of a vehicle that he was

inside. The Sixth Circuit held that exclusion was not a remedy available for an equal protection violation. The Sixth Circuit also held that, in lieu of exclusion as a remedy, a person whose rights were allegedly violated could bring a civil lawsuit. *See id.* at 794–95. The relevant portion from *Nichols* is as follows:

> While we, of course, agree with the general proposition that selective enforcement of the law based on a suspect's race may violate the Fourteenth Amendment, we do not agree that the proper remedy for such violations is necessarily suppression of evidence otherwise lawfully obtained. The exclusionary rule is typically applied as a remedy for Fourth Amendment violations, which Amendment does not apply to pre-contact investigatory steps like that presented here (the decision to run a warrant check). *See* [*United States v.*] *Avery*, 137 F.3d [343] at 353 [(6th Cir.1997)] ("[A]n officer's actions during the pre-contact stage cannot give rise to Fourth Amendment constitutional concerns because the citizen has not yet been 'seized.' "). Even if the Fourth Amendment were implicated, any challenge to a search or seizure based on legitimate probable cause, but in which it is alleged the officer's subjective motive was discriminatory, is doomed to fail. *See Whren* [*v. United States*], 517 U.S. [806] at 813, 116 S.Ct. 1769 [135 L.Ed.2d 89 (1996)] (unanimously rejecting such a challenge and holding that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"). Though the Court left open the door to equal protection challenges in the same context, it gave no hint as to what the appropriate remedy would be. *See ibid.* Since we know from *Whren* that the evidence against Nichols would not be suppressed under the Fourth Amendment (even if the officers were improperly motivated by race), we are reluctant to graft that Amendment's traditional remedy into the equal protection context. Indeed, we are aware of no court that has ever applied the exclusionary rule for a violation of the Fourteenth Amendment's Equal Protection Clause and we decline Nichols's invitation to do so here. Rather, we believe the proper remedy for any alleged violation is a 42 U.S.C. § 1983 action against the offending officers. *See, e.g.*, *Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523 (6th Cir.2002) (rejecting officer's qualified immunity defense and affirming partial summary judgment in favor of Hispanic motorists who brought equal protection challenge under § 1983).

***14** *Id.* at 794.

10 *See also United States v. Williams*, 431 F.3d 296, 299 (8th Cir.2005) (stating that, even if there were a due process violation based on racial profiling, "it is uncertain that dismissal is an appropriate remedy").

The Sixth Circuit's holding in *Nichols* is not persuasive. First, *Nichols* did not address the remedy of dismissal; but to the extent one could infer from *Nichols* that dismissal of an indictment, like exclusion, would not be an appropriate remedy for selective enforcement, such a result cannot be squared with *Yick Wo*, where as noted above, the Supreme Court ordered the remedy of discharge; notably, the fact that a § 1983 civil lawsuit was theoretically available was not a factor.[11]

11 Section 1983 was enacted prior to *Yick Wo*. *See Filarsky v. Delia*, —— U.S. ——, 132 S.Ct. 1657, 1658, 182 L.Ed.2d 662 (2012) (noting that § 1983 was enacted in 1871).

Furthermore, in *Nichols*, the Sixth Circuit's decision was based on its reluctance to graft the remedy exclusion on to the Fourteenth Amendment because of that remedy's traditional association with the Fourth Amendment. Apart from the fact that the Fourteenth Amendment is a different constitutional source providing for different protections than the Fourth Amendment,[12] in *Nichols*, "there was no intrusion at all on Nichols's personal liberties by the initial actions of the officer [—] [t]here was no search, no seizure." *Id.* at 795. Under those circumstances, the Court appeared to view exclusion is an extreme remedy. Here, in contrast, Defendants were subject to seizure and then referred to federal authority for prosecution for charges which entailed an enhanced mandatory minimum sentence.[13] Unlike *Nichols*, the selective enforcement here did operate to inflict a substantial intrusion upon Defendants' personal liberties.

12 It could also be argued that violation of the Fourteenth

Amendment as a result of racially selective law enforcement is by definition more likely to be a systemic practice than an unlawful search.

13 In most cases, the quantity of drugs charged was small, but because the sales occurred within 1,000 feet of a school, charges if proven carried an enhanced sentence under 21 U.S.C. § 860. *See* 21 U.S.C. § 860(a) (providing that a violator is "subject to (1) twice the maximum punishment authorized by section 401(b) [21 U.S.C. § 841(b)], and (2) at least twice any term of supervised release authorized by section 401(b) for a first offense"). This enhancement applied even if the amount sold was only a fraction of a gram of crack cocaine, as occurred in OSS.

Moreover, while the Sixth Circuit grounded its analysis in terms of deterrence as the focus of the exclusionary rule,[14] the remedy for a Fourteenth Amendment violation encompasses more than deterrence. *Cf. Alcaraz–Arellano*, 441 F.3d at 1263 (stating that " '[r]acially selective law enforcement violates this nation's constitutional values at the most fundamental level; indeed, unequal application of criminal law to white and black persons was one of the central evils addressed by the framers of the Fourteenth Amendment' "). While dismissal of charges brought about as a result of a constitutional violation may serve in part as a deterrent to race-based law enforcement, it is also designed in part to redress that violation. *Cf. Davis v. United States*, 564 U.S. 229, 236–37, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) (stating that the exclusionary rule is a judicially created remedy the only purpose of which "is to deter future Fourth Amendment violations"; exclusion is not even "designed to '*redress*' the injury occasioned by an unconstitutional search") (emphasis added). It puts the victim where he or she could have been but for racially selective conduct of law enforcement.

14 *See Lingo v. City of Salem*, No. 14–35344, —— F.3d ——, 2016 WL 3525209 (9th Cir. June 27, 2016) (emphasizing deterrence rationale for exclusionary rule).

***15** *Nichols*' s assumption that a Fourteenth Amendment violation can adequately be addressed through a civil lawsuit is questionable. It is not clear a civil remedy for selective enforcement leading to a prosecution is available, particularly if the defendant is convicted. *See Heck v. Humphrey*, 512 U.S. 477, 487, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (stating that, if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated"); *Young v. City of Peoria*, No. 12–cv–1086, 2012 WL 5305336, at *5, 2012 U.S. Dist. LEXIS 153861, at *10 n. 5 (C.D.Cal. June 29, 2012) (noting that "Young may not be able to bring a § 1983 claim for damages from an unlawful state conviction without first having the conviction overturned in some manner [under *Heck*]" and that "Young's selective prosecution claim, if successful, would necessarily mean that his conviction was unlawful").

Accordingly, the Court concludes, consistent with the holdings of the Seventh and Tenth Circuits, that dismissal of an indictment is a proper remedy for a selective enforcement claim if proven. Having so held, the Court must next address whether there is some evidence of discriminatory effect and then some evidence of discriminatory intent sufficient to warrant discovery.

B. Selective Enforcement—Discriminatory Effect

1. Similarly Situated Evidence Requirement

As an initial matter, the Court addresses Defendants' contention that discriminatory effect for selective enforcement purposes can be established based simply on the fact that all 37 OSS defendants are African American—*i.e.*, there is no need to do the *Armstrong* similarly situated analysis. This is the approach that the Seventh Circuit adopted in *Davis* (discussed above).

[2]As noted above, *Davis* held that, as a general matter, in a selective enforcement case, a defendant need not

necessarily provide some evidence as to preferential treatment of similarly situated persons outside the protected class in order to obtain discovery. Rather, the defendant can simply rely on statistics showing, *e.g.*, that a significant majority of persons targeted by law enforcement is made up of members of a protected class.[15] Under *Davis*, Defendants have established some evidence of discriminatory effect because all 37 of those targeted and arrested under the OSS program for whom the Court has information are all African American.[16] Defendants have submitted undisputable evidence that these numbers are highly significant as a statistical matter. The Court agrees with the approach in *Davis* and thus finds the statistical showing made by Defendants herein establishes discriminatory effect of selective enforcement.

15 At least one circuit court seems to have disagreed with the holding in *Davis* (although, admittedly, the case was decided before *Davis*). *See Alcaraz–Arellano*, 441 F.3d at 1264 (stating that "[s]imilar caution is required in reviewing a claim of selective law enforcement").

16 As noted above, 6 out of the 43 persons arrested under OSS were ultimately not prosecuted. There is no evidence as to what the racial identities of those 6 persons are.

2. Similarly Situated Evidence

***16** [3]Assuming, however, a statistical showing alone is not sufficient to show discriminatory effect under *Armstrong*, and that the similarly situated requirement must be shown even in a selective enforcement (as opposed to selective prosecution) case, Defendants have satisfied that requirement. Defendants have shown some evidence that "similarly situated individuals of a different race were not [targeted]" by law enforcement. *Armstrong*, 517 U.S. at 465, 116 S.Ct. 1480.

To be sure, there is a threshold question of what the *Armstrong* Court meant by "similarly situated." In their motion, Defendants have provided examples of how various circuit courts have defined the term. *See* Mot. at 72-75. *See, e.g.*, *United States v. Lewis*, 517 F.3d 20, 25 (1st Cir.2008) (stating that "[a] similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced"); *United States v. Olvis*, 97 F.3d 739, 744 (4th Cir.1996) (stating that "defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them"). The Ninth Circuit has not defined "similarly situated" since *Armstrong* was decided. However, in a pre-*Armstrong* decision, the Ninth Circuit noted as follows:

> The goal of identifying a similarly situated class of law breakers is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group. The control group and defendant are the same *in all relevant respects*, except that defendant was, for instance, exercising his first amendment rights. If all other things are equal, the prosecution of only those persons exercising their constitutional rights gives rise to an inference of discrimination. But where the comparison group has less in common with defendant, then factors other than the protected expression may very well play a part in the prosecution.

United States v. Aguilar, 883 F.2d 662, 706 (9th Cir.1989) (emphasis added), *superseded by statute on other grounds as stated in United States v. Gonzalez-Torres*, 273 F.3d 1181, 1187 (9th Cir. 2001).

This approach makes sense and it consistent with how the term "similarly situated" is understood in civil discrimination cases. *See United States v. Brantley*, 803 F.3d 1265, 1271–72 (11th Cir.2015) (in a selective prosecution case, noting that, "[i]n a different context—when a Title VII plaintiff complains she was treated differently than a similarly situated co-worker—we have required the plaintiff and the

employee to be similarly situated 'in all relevant respects' " in order "to prevent courts from second-guessing a reasonable decision by the employer"; "[t]he same considerations apply in a challenge based upon selective prosecution"—*i.e.*, "a court is not free to second-guess the prosecutor's exercise of a charging discretion").

But, importantly, there is no magic formula for determining who is similarly situated. "Different factors will be relevant for different types of inquiries—it would be imprudent to turn a common-sense inquiry into a complicated legal one." *Chavez v. Ill. St. Police*, 251 F.3d 612, 635 (7th Cir.2001) (§ 1983 selective enforcement case). A court should take "care [ ] not to define the [similarly situated] requirement too narrowly." *Id.* Here, similarly situated should include consideration of the goals of the program. As discussed below, even under the government's purported criteria for prosecution under OSS (*e.g.*, history of drug dealing, strength of the evidence), Defendants have demonstrated there were similarly situated non-African Americans who were not arrested and subject to prosecution under OSS.

***17** Defendants' evidence on this point includes:

- 100% of the OSS defendants are African American, which contrasts with the San Francisco Superior Court charging data obtained by Defendants (61.4% of those arrested and charged for drug-trafficking crimes in the Tenderloin were African American, **24.7% were Latino, and 10.7% were white**) and the survey information obtained by Defendants (56% of the Tenderloin drug transactions involved African American drug sellers, **20% involved Latino drug sellers, and 16.8% involved white drug sellers**). *See* Mot. at 14, 21, 76; *cf. Armstrong*, 517 U.S. at 470, 116 S.Ct. 1480 (noting that "respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court").

- The San Francisco Superior Court charging data includes **hundreds of cases involving non-African Americans** that could have been charged with a violation of § 860 specifically because "[a]lmost every area of the Tenderloin falls within 1,000 feet of a playground or educational institutional." Mot. at 76.

- Defendants have identified approximately **sixty specific instances in which non-African American drug dealers** were arrested for committing drug-trafficking crimes in the Tenderloin in recent years but were not federally charged under OSS.

- Video from one of the OSS cases (now resolved) (*United States v. Roberts*, No. CR-13-0760 CRB) where the undercover informant **declines to buy drugs from an Asian woman and waits to buy drugs from the defendant, an African American woman**. *See* Mot. at 60-61; *see also United States v. Anthony*, No. CR-15-0005 EMC (Docket No. 11-2) (Phillips (FPD) Decl., Ex. G) (video in *Roberts* case).

The Court agrees with Defendants that this is enough to satisfy the similarly situated evidence requirement for discovery purposes. The evidence shows there are substantial numbers (and a substantial proportion) of drug dealers in the Tenderloin who are *not* African American; yet they were not stopped or arrested under OSS. Defendants have proffered specific examples of similar situated non-African Americans not arrested and charged in OSS.

In its papers, the government protests that nonetheless the similarly situated requirement has not been met. For example, the government asserts that the OSS cases are different from the comparator cases cited by Defendants because the OSS cases had strong evidence—*i.e.*, the drug transactions were videotaped. *See* Opp'n at 17 (stating that "the defendants do not cite to a videotaped drug sale in any of the 42 John and Jane Doe cases set forth in their motion for discovery"). But as Defendants point out, that fact should have no impact on their selective enforcement theory. The question for selective enforcement is whether law enforcement was improperly targeting African Americans in the first place. That law enforcement, *after* making the targeting decision, videotaped the transaction is irrelevant to the initial selection of the target. *See* Mot. at 87. Videotape evidence simply begs the question of *whom* was targeted for an OSS "buy" in the first place.

***18** The government also challenges Defendants' similarly situated evidence on the ground that the examples cited by Defendants did not involve " 'the same basic crime' " being committed " 'in substantially the same manner.' " Opp'n at 18-19 (quoting *Smith*, 231 F.3d at 810 (Eleventh Circuit decision)).[17] But there should be no real dispute here that the same basic crime was involved—drug trafficking in the Tenderloin and near a school.

17 In *Smith*, the Eleventh Circuit stated:

> [W]e define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant—so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan—and against whom the evidence was as strong or stronger than that against the defendant.

Smith, 231 F.3d at 810.

The government's real beef, therefore, seems to be about how the crimes were committed. More specifically, for the non-OSS examples provided by Defendants, not all crimes involved hand-to-hand drug deals. For example, some Does were investigated based on informant tips; searches were executed in other Doe cases. *See* Opp'n at 18-20. But the government does not seem to dispute at least some of the non-OSS cases did involve hand-to-hand drug deals. Indeed, Defendants provided additional examples in their reply brief that involved such deals. One similarly situated example is arguably all Defendants need to show discriminatory effect. *See United States v. Alabi*, 597 Fed.Appx. 991, 996 (10th Cir.2015) (stating that "[w]e have recognized three possible methods of providing discriminatory effect in a selective-enforcement case: statistical evidence; *the identification of a similarly situated individual who could have been, but was not, stopped or arrested*; and, in certain circumstances, anecdotal evidence establishing an officer's pattern of similarly discriminatory behavior") (emphasis added). Moreover, even for the non-OSS examples that did not involve hand-to-hand deals, the question is whether that difference was material for the similarly situated analysis. Why did the manner of sales make a difference from the viewpoint of the objective of the OSS program? *Cf. Lewis*, 517 F.3d at 25 ("The focus of an inquiring court must be on factors that are at least arguably material to the decision as to whether or not to prosecute. Material prosecutorial factors are those that are relevant—that is, that have some meaningful relationship either to the charges at issue or to the accused—and that might be considered by a reasonable prosecutor."). The government has failed to provide an explanation as to how those differences were material. Indeed, as Defendants argue, because the OSS defendants were charged with violating § 841(a), *i.e.*, possession with mere intent to distribute, it should not matter whether there was a hand-to-hand deal. *See* Reply at 39-41 (also arguing that the government has improperly focused on how the officers investigated or discovered the crime).

Finally, the government suggests that any discriminatory effects are exaggerated because Defendants are assuming that "[OSS] selected 37 individuals for prosecution on 37 independent occasions," but that was not in fact the case: "[T]he [OSS] arrests were concentrated in a relatively small number of areas on a limited number of days....[T]here was clear temporal and geographic clustering, which undermines the assumption of independence across the 37 arrests." Opp'n at 26. But Defendants' expert addresses this in her supplemental report.

> ***19** In any given data set, some arrests are potentially "clustered" by time and space. For example, arrests involving parties involved in the same criminal event are not temporally or spatially independent of each other. Yet this fact has not prevented well-respected, peer-reviewed social science journals from publishing research that uses the Z-score test to assess the likelihood that any racial disparities between the arrested population and other benchmarks are the result of chance.

Amram (FPD) Reply Decl., Att. A (Supp. Beckett Rpt. at Ex. 05248). The government did not provide any expert report in support of its position.

Furthermore, the government's claim of temporal and geographic clustering appears overstated. For the first OSS sweep, 14 OSS defendants were arrested on 8

different days in 10 different locations; for the second OSS sweep, 23 defendants were arrested on 8 different days in 10 different locations. *See* Cruz-Laucirica (FPD) Decl., Att. A (chart providing, *inter alia*, dates and locations of arrests). As reflected by maps prepared by Defendants, some of the locations are in relatively close proximity to one another but a fair number of the locations are also dispersed in different parts of the Tenderloin. *See* Sommerfeld (FPD) Decl., Atts. E-F (maps showing locations of arrests). This is not a situation where, *e.g.*, a majority of the arrests took place in just a few locations within the Tenderloin. In any event, the government failed to produce *any* evidence as to how any clustering could have resulted in 37 out of 37 defendants being African American.

Accordingly, even if there were a similarly situated requirement for discriminatory effect in a selective enforcement case, the Court concludes that Defendants have made the required showing of some evidence in support.

C. Selective Enforcement—Discriminatory Intent

[4]Regarding discriminatory intent, the Ninth Circuit has noted that " '[a]wareness of consequences' is not the same as intent to discriminate. The kind of intent to be proved is that the government undertook a particular course of action 'at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.' " *United States v. Turner*, 104 F.3d 1180, 1184 (9th Cir.1997); *see also Wayte v. United States*, 470 U.S. 598, 610, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985) (stating that "[d]iscriminatory purpose...implies more than...intent as awareness of consequences") (internal quotation marks omitted). Of course, discriminatory intent in the instant case is somewhat of a complicated matter—both for purposes of selective enforcement and selective prosecution—because the Court is being asked to consider the discriminatory intent of many different individuals. But notwithstanding this difficulty, the Court concludes that Defendants have adequately shown some evidence of discriminatory intent, in particular, within the SFPD.

[5]As an initial matter, the fact that 100% of all the OSS defendants are African American is probative of discriminatory intent, particularly when the relevant population is not 100% African American. *See* Mot. at 82 (arguing that "[t]he statistical disparity present here is so dramatic that it alone should suffice for making a prima facie case of discriminatory intent"); *Belmontes v. Brown*, 414 F.3d 1094, 1127 (9th Cir.2005) (stating that habeas petitioner's statistics "may support a prima facie showing of unlawful charging discrimination" because they focused on the decisionmaker at the local level), *rev'd on other grounds by Ayers v. Belmontes*, 549 U.S. 7, 127 S.Ct. 469, 166 L.Ed.2d 334 (2006); *Tuitt*, 68 F.Supp.2d at 10 (in making an *Armstrong* evaluation, stating that "[a] discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose"; citing, *inter alia*, *Yick Wo*). As Defendants argue, this is comparable to the "inexorable zero" in the civil employment context. *See Woodson v. Pfizer*, 34 Fed.Appx. 490, 493 (7th Cir.2002) (stating that, "[u]nder the 'inexorable zero' test, we held that when an employer with a statistically large enough workforce employs no African Americans, we can infer that the employer intentionally discriminates against African Americans in its hiring decisions"); *NAACP v. Town of E. Haven*, 70 F.3d 219, 225 (2d Cir.1995) (stating that "evidence that an employer in an area with a sizeable black population has never hired a single black employee..., by itself, supports an inference of discrimination"; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n. 23, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) (stating that a "company's inability to rebut the inference of discrimination came not from a misuse of statistics but from 'the inexorable zero' "). *But see Chavez*, 251 F.3d at 647–48 (Seventh Circuit decision noting that "[o]nly in 'rare cases [has] a statistical pattern of discriminatory impact demonstrated a constitutional violation [*e.g.*, jury venire]' "; also stating that, "in his context, statistics may not be the sole proof of a constitutional violation and neither Chavez nor Lee have presented sufficient non-statistical evidence to demonstrate discriminatory intent"); *cf. Olvis*, 97 F.3d at 745–46 (stating that, "in cases involving discretionary judgments 'essential to the criminal justice process,' statistical evidence of racial disparity is insufficient to infer that *prosecutors* in a particular case acted with a discriminatory purpose") (emphasis added).

***20** Moreover, aside from the inexorable zero, Defendants have offered additional evidence of discriminatory intent. For example:

- Evidence that the SFPD generally was "aware[ ] of the presence, behavior, and specific geographic locations frequented by Hispanic/Latino dealers" in the Tenderloin, as reflected in several SFPD incident

reports. Mot. at 22 (giving six SFPD incident reports as examples).

• Evidence that some of the SFPD officers who were a part of OSS knew about the existence of non-African American drug dealers in the Tenderloin, as they were personally involved with the arrests of more than 30 non-African American comparators identified in Defendants' opening and reply briefs. *See* Reply at 37-38.

Evidence of such knowledge combined with the failure to arrest any non-African American drug dealers as part of OSS gives rise to an inference of discrimination.

Finally, there is further evidence of discriminatory intent based on (1) the OSS case where a SFPD officer made the "fucking BMs" comment; (2) the OSS case where an informant avoided a non-African American drug dealer and waited instead for an African American drug dealer; and (3) race-based comments or conduct by at least some of the SFPD officers who worked on OSS, albeit in non-OSS situations (with many of these officers working on multiple OSS cases).

The totality of the above evidence constitutes some evidence of discriminatory intent.

Contrary to what the government suggests, the declarations from the supervisory DEA agents and the federal prosecutors do not dispel the inference of discriminatory intent. Notably, as previously noted, the supervisory DEA agents do not describe how targeting decisions were actually made in the field, and there are no declarations from any "line" DEA agents or any SFPD officer. Furthermore, just because a supervisory DEA agent was not aware of any racism, *see* Opp'n at 12, is hardly enough to say that there was no race-based selectivity by officers in the field.

D. Summary

For the foregoing reasons, the Court concludes that dismissal is a remedy for a selective enforcement claim and that Defendants have submitted sufficient evidence of both discriminatory effect and discriminatory intent such that they are entitled to discovery in support of their selective enforcement claim.

V. SELECTIVE PROSECUTION

A. Selective Prosecution

While there is some evidence of discriminatory effect and discriminatory intent in selective enforcement, the evidence as to selective prosecution is more complicated.

The government points out that *Armstrong* assumed there has to be a selection in order for there to be a selective prosecution case. This position has merit. *See Armstrong*, 517 U.S. at 469, 116 S.Ct. 1480 (stating that "selective prosecution implies that a selection has taken place") (internal quotation marks omitted). Thus, as to the claim of selective prosecution, the focus should be on whether the prosecutors who made the charging decisions (in contrast to police officers in the field) engaged in race-based selectivity in deciding whether to prosecute Defendants.

[6]In this case, the record does not establish that federal prosecutors who made prosecutorial decisions were aware (either individually or collectively) of similarly situated non-African Americans that could have been presented for prosecution but were not. The only evidence on this point is the declarations of prosecutors that they had no such awareness. To be sure, this fact may inform discriminatory intent more so than discriminatory effect; the effect prong arguably should be measured by the pool of potential defendants known to all in the law enforcement chain, not just those presented to prosecutors.[18] *See Armstrong*, 517 U.S. at 470, 116 S.Ct. 1480 (stating that "respondents could have investigated whether similarly situated persons of other races were prosecuted by the State of California *and were known to federal law enforcement officers*, but were not prosecuted in federal court") (emphasis added). Regardless, the lack of knowledge and hence race-based selection by prosecutors is critical to the equal protection claim of selective prosecution.

[18] The government contends that the similarly situated evidence provided by Defendants is not a proper comparator because the OSS cases had strong evidence—*i.e.*, videotape—to support prosecution and there is no indication that the non-OSS cases had such videotape evidence. However, Defendants

> have made a fair case that the videotape evidence is not as strong as the government asserts. *See, e.g.*, Piper (FPD) Reply ¶ 3 (stating that, in 11 OSS cases, after viewing the body-camera video evidence, she was not able "to see any money and/or substance exchanged between a defendant and an alleged purchaser"; that, in 6 OSS cases, after viewing the rooftop/building surveillance video, she was not able "to see actual substance allegedly exchanged between individuals on the street"; and that, in 3 OSS cases, after viewing the rooftop/building surveillance video, she was not able "to clearly see the interaction due to blurred image, camera zoom, or lack of lighting"). Moreover, the government fails to address the fact that non-OSS cases often had strong evidence in other forms such as the sale of drugs to an undercover officer. *See* Reply at 35.

***21** As to discriminatory intent, Defendants argue that at the very least, the prosecutors knew at some point that all those prosecuted under the OSS were African American, and that this should satisfy *Armstrong*. However, " '[a]wareness of consequences' is not the same as intent to discriminate. The kind of intent to be proved is that the government undertook a particular course of action 'at least in part "because of," not merely "in spite of" its adverse effects upon an identifiable group.' " *Turner*, 104 F.3d at 1184; *see also Wayte*, 470 U.S. at 610, 105 S.Ct. 1524 (stating that "[d]iscriminatory purpose...implies more than...intent as awareness of consequences") (internal quotation marks omitted).

Defendants have offered several theories regarding discriminatory intent:

> (1) Discriminatory intent can be inferred from the inexorable zero (*i.e.*, that none of the defendants prosecuted pursuant to OSS are not African American);
>
> (2) Discriminatory intent can be inferred because not all OSS defendants met the charging criteria (*e.g.*, not all OSS defendants had a high-level criminal history);
>
> (3) Discriminatory intent can be inferred because the prosecutors did not in place any policy to ensure against SFPD discriminatory animus; and

But these theories are problematic, whether taken individually or collectively. For example, the inexorable zero theory while viable in some contexts of discrimination jurisprudence, has yet to be applied to selective prosecution claims. *See Olvis*, 97 F.3d at 745–46 (stating that, "in cases involving discretionary judgments 'essential to the criminal justice process,' statistical evidence of racial disparity is insufficient to infer that prosecutors in a particular case acted with a discriminatory purpose"; adding that, "[b]y ruling that defendants can meet these demanding burdens by presenting a study of the type they presented in this case [*i.e.*, that more than 90% of those who had been tried since 1992 for crack cocaine offenses in certain divisions are black] and thereby shifting to the government the onus of dispelling a presumption of discrimination would open virtually every prosecution to a claim for selective prosecution"). At the very least, the Court in *Armstrong* did not recognize its application in this context.

Defendants' assertion that discriminatory intent can be inferred because not all OSS defendants met the charging criteria (*e.g.*, not all OSS defendants were persistent, recidivist, and repeat offenders) is problematic given that they have identified only about 1/4 of the OSS defendants who did not meet the charging criteria.[19] *See* Mot. at 84-85 (identifying 9 OSS defendants). This factual showing is not compelling evidence of discriminatory intent.

[19] The government quibbles that a person with high-level criminal history is not the same thing as a repeat offender, *see* Opp'n at 32, but that seems to be elevating form over substance.

Defendants contend that discriminatory intent can be inferred because the prosecutors did not put in place any policy to ensure against SFPD discriminatory animus. *See, e.g.*, Mot. at 90. This fact perhaps establishes negligence in management or maybe even deliberate indifference to the disparate consequences of its

prosecutorial decisions.[20] But this would not establish the requisite intentionality currently required under *Armstrong* to support a claim of selective prosecution. Defendants cite *Wayte* to support their argument, but the language they cite is from the *dissent*. *See* Reply at 41 n.27 (noting that opening brief failed to identify language from *Wayte* as coming from the dissent). More specifically, Justice Marshall, in dissenting, stated that, to make out a prima facie case of selective prosecution, a person must show (1) "that he is a member of a recognizable, distinct class"; (2) "that a disproportionate number of this case was selected for investigation and possible prosecution"; and (3) "*that this selection procedure was subject to abuse* or otherwise not neutral." *Wayte*, 470 U.S. at 626, 105 S.Ct. 1524 (Marshall, J. dissenting) (emphasis added). Justice Marshall, in turn, cited *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), for this proposition, but *Castaneda* is arguably distinguishable because it was a case involving an equal protection claim in a very specific context—*i.e.*, the grand jury context. *See id.* at 494, 97 S.Ct. 1272; *see also Batson v. Kentucky*, 476 U.S. 79, 95, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (stating that, "[i]n cases involving the venire, this Court has found a prima facie case [of discrimination] on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing 'the opportunity for discrimination' "; adding that "[t]his combination of factors raises the necessary inference of purposeful discrimination because the Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse"). No court, however, has applied *Castaneda* or *Batson* to the specific context of *Armstrong*.

[20] Defendants have a fair argument for deliberate indifference, especially by the time of the 2014 sweep because, by that time, the prosecutors should have known because, "[o]nce the first fourteen people were arrested and arraigned in the 2013 sweep, the government must have been aware that they all appeared to be Black." Mot. at 89. The statements of the individual prosecutors that they were unaware of any pattern developing in the OSS prosecutions raises troubling questions. One would hope and expect the U.S. Attorney's Office would have a systematic way of overseeing and discerning patterns of potential bias in respect to its prosecutorial decisions, and not have to await a defense motion before becoming aware of such pattern (as was represented at the hearing).

***22** The Court therefore cannot say at this juncture that there is some evidence showing that the prosecutors selected the OSS for defendants because of their race. This conclusion is consistent with the Ninth Circuit's decision in *Turner*, 104 F.3d at 1180.

In *Turner*, the defendants—five African American men—asserted that "they had been selected for prosecution on crack cocaine charges on racial grounds." *Id.* at 1181. The defendants sought discovery on their selective prosecution claim. "In support of their motions, they submitted an affidavit of a paralegal in the Federal Public Defender's Office for the Central District of California stating that an inspection of closed cases of crack cocaine prosecutions defended by that public defender in 1991, 1992, and 1993 showed 47 African Americans, 5 Latino, and no white defendants had been charged with crack offenses." *Id.* at 1182. The defendants also submitted newspapers articles and a NPR report "commenting on 'the racial divide' in crack cocaine prosecutions" and a study showing that "3% of 8,250 persons charged with the sale of crack by the Los Angeles District Attorney to be Anglo, 53% to be African American, 43% to be Latino, and 1% to be 'other,' " while "[t]he comparable federal breakdown of 43 persons similarly charged was 0% Anglo, 83% African American, 16% Latino, and 0% Other."[21] *Id.*

[21] The Ninth Circuit concluded that the defendants had failed to provide some evidence of discriminatory effect because the study was "based on a statistically unimpressive number of federal defendants" and failed to show that the small number of white persons who

> had been prosecuted in state court were similarly situated. *Turner*, 104 F.3d at 1885.

In turn, the government submitted affidavits from both FBI agents and prosecutors. One of the FBI agents explained, *inter alia*, that "much of the violent crime committed by street gangs...was connected to illegal drug trafficking," particularly with respect to cocaine base, with the Bloods and the Crips being the most notorious of those gangs. *Id.* at 1182–83. " '[E]nforcement of the federal laws regarding crack cocaine was one weapon in addressing the problem of gang-related violent crimes....' " *Id.* at 1183. The prosecutors all stated that "race and ethnicity had not influenced their decisions to prosecute." *Id.* The government also provided a copy of the USAO's written prosecutive guidelines regarding drug offenses and an updated report of the ethnic composition of its crack cocaine prosecutions in Los Angeles—out of 149 defendants, 109 were African American, 28 were Hispanic, 8 were Asian, 1 was white, and 3 were unclassified. *See id.* at 1183–34.

With respect to the issue of discriminatory intent, the Ninth Circuit held that there was not enough to show that the defendants had been targeted based on their race. The government had provided a race neutral basis for the prosecution: Gangs were being targeted, not African Americans, and "the distribution of cocaine by gang members inclined to violence makes the distribution more heinous and more dangerous than the single sale of cocaine by individuals." *Id.* at 1185. The court added:

> The [defendants] have offered no evidence whatsoever of a intent on the part of the prosecutors to prosecute them on account of their race, and the prosecutors and the FBI investigators have under oath denied such motivation. No reason was given by the district court to doubt the 'background presumption] that United States Attorneys are properly discharging their duties, no reason given to doubt the integrity of prosecutors and investigators whose honesty, good faith, and absence of racial bias are unimpaired by anything in evidence before the court. The district court seems to have neither given credence to the affidavits that the government placed before it nor explained why the affidavits were not credible.

***23** *Id.*

Here, as in *Turner*, Defendants have not presented reason to doubt the veracity of the government's declarations or the presumption of regularity that applies to prosecutors.[22] Should such evidence arise, however, this issue may be revisited. At this juncture, the Court shall not permit discovery on Defendants' selective prosecution claim.

[22] As noted above, in the first OSS sweep, the U.S. Attorney's Office decided not to prosecute 6 of the 20 arrestees. At this juncture, there is no evidence, for instance, that all 6 (in contrast to the 14 who were prosecuted) were non-African Americans.

In so ruling, the Court acknowledges Defendants' alternative theory that discriminatory intent can be inferred because the discriminatory intent of the law enforcement officers can be, in essence, attributed to the prosecutors because the prosecutors essentially delegated the decisionmaking to law enforcement officers. *See United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir.1996) (in discussing vindictive prosecution claim, stating that, "to connect the animus of a referring agency to a federal prosecutor, a defendant must establish that the agency in some way prevailed upon the prosecutor in making the decision to seek an indictment"). While this may be a viable theory, in the instant case, there is insufficient evidence to support the theory. Notably, for the first sweep, 6 out of the 20 persons presented to prosecution by law enforcement were not prosecuted. This is strong evidence that independent prosecutorial judgment was exercised. For the second sweep, it is true that all 23 persons presented were actually prosecuted. But here the line AUSA declarations (from Ms. Hawkins and Mr. Farnham, who each worked independently from one another) indicate that independent prosecutorial judgment was exercised—*i.e.*, this was not just rubber stamping of law enforcement decisions. *Cf. Beck v. City of Upland*, 527 F.3d 853, 862 (9th Cir.2008) (noting that "[a] prosecutor's independent judgment may break the chain of causation between the unconstitutional actions of other officials and the harm suffered by a constitutional tort plaintiff[;] [p]ut in traditional tort terms, the prosecutor's independent decision can be a superseding or intervening cause of a constitutional tort plaintiff's injury, precluding suit against the officials who made an arrest or procured a prosecution").

The request for discovery into selective prosecution is therefore denied without prejudice to a further and future showing should additional evidence be revealed which meets the *Armstrong* standard.

VI. DISCOVERY

For the reasons stated above, the Court shall permit discovery on the selective enforcement theory, but not the selective prosecution theory. In so ruling, however, the Court does not automatically authorize the breadth of the discovery sought by Defendants. Rather, the Court directs the parties to meet and confer and agree upon a more measured, perhaps phased, approach. *See*, *e.g.*, *Davis*, 793 F.3d at 722–23.

***24** The parties shall report within two (2) weeks from the date of this order to this Court by joint letter whether they can agree on a discovery plan. If not, the parties shall set forth their respective positions in said letter. A Status Conference shall be scheduled for 2:30 p.m., July 20, 2016.

This order disposes of Docket No. 119.

IT IS SO ORDERED.

All Citations

--- F.Supp.3d ----, 2016 WL 3548365

Order Granting Selective Enforcement Discovery re ATF operation in New Mexico: *United States v. Casanova*, 16-CR-02917-JAP (D.N.M. June 12, 2017)

Alison Siegler, Univ. of Chicago Law School

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

v. **No. CR 16-2917 JAP**

YUSEF CASANOVA,

Defendant.

ORDER GRANTING DISCOVERY

In DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF INFORMATION (Doc. No. 29) (Motion), Defendant asks the Court to order discovery in support of his selective enforcement claim. The Motion is fully briefed. *See* UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF INFORMATION (Doc. No. 31); DEFENDANT'S REPLY TO THE GOVERNMENT'S RESPONSE TO THE MOTION TO COMPEL DISCLOSURE OF INFORMATION (Doc. No. 41).

As a result of an investigative operation conducted by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), Defendant was arrested and charged with distribution of methamphetamine, felon in possession of a firearm and ammunition, and felon in possession of an unregistered firearm. He alleges that he was unfairly targeted because he is African-American. To prove a claim of selective enforcement, Defendant will be required to show that the investigation "had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Armstrong*, 517 U.S. 456, 465 (1996). At the discovery stage, Defendant must provide "some evidence tending to show the existence of the essential elements

of the defense, discriminatory effect and discriminatory intent." *Id.* at 468. Meeting this threshold requires "a credible showing of different treatment of similarly situated persons" which must include "some evidence that similarly situated defendants of other races could have been [arrested], but were not." *Id.* at 469–70; *see United States v. James*, 257 F.3d 1173, 1179 (10th Cir. 2001).

Individuals are similarly situated when there are no legitimate distinguishing factors that could justify a difference in the enforcement decisions. *United States v. DeChristopher*, 695 F.3d 1082, 1097 (10th Cir. 2012). Defendant "may satisfy the 'credible showing' requirement by identifying a similarly-situated individual or through the use of statistical evidence." *James*, 257 F.3d at 1179. "Statistical evidence can be used to show both discriminatory effect and discriminatory purpose." *Blackwell v. Strain*, 496 F. App'x 836, 840 (10th Cir. 2012). But "proffered statistics must address the critical issue of whether [the] particular group was treated differently than a similarly-situated group." *United States v. Alabi*, 597 F. App'x 991, 996 (10th Cir. 2015). "[S]tatistical evidence in selective-enforcement cases must include (1) reliable demographic information, (2) some manner of determining whether the data represents similarly situated individuals, and (3) information about the actual rate of occurrence of the suspected crime across relevant racial groups." *Alabi*, 597 F. App'x at 997.

Defendant has presented statistical evidence demonstrating that twenty-six percent of the defendants arrested as result of this ATF operation were African-Americans, although African-Americans represent only 3.4 percent of the population in Albuquerque and, in the District of New Mexico, generally comprise approximately 5.4 percent of the defendants in drug cases and 5.9 percent of the defendants in firearms cases. Additionally, Defendant notes that his methamphetamine supplier, who is white, was allowed to leave the scene of the crime, whereas

Defendant was arrested. Defendant asserts that ATF's failure to arrest the white supplier demonstrates differential treatment of similarly-situated persons. Defendant further alleges that ATF's focus on neighborhoods with a predominantly minority population, use of primarily African-American confidential informants (CIs), and targeting of African-American neighborhood contacts together support an inference of discriminatory intent.

At the April 5, 2017 hearing on the Motion, the United States presented testimony from the investigative agent in Defendant's case. The United States does not dispute the statistical disparities, but asserts that targets were chosen based solely on their criminal history. It argues similarly that the areas encompassed by the operation were chosen based on their number of repeat offenders and high crime rates, not on their minority populations. It denies any discriminatory intent in the selection of its CIs. Defendant has not provided evidence that the use of African-American CIs was specifically intended to implicate African-American individuals in crime, but he asserts that it was "virtually guaranteed" to do so because the CIS would tend to approach people of their own racial and ethnic backgrounds. The ATF agent conceded knowledge of theories of implicit bias, but denied any such bias within ATF. However, the ATF agent testified that no precautionary measures were taken to avoid bias in targeting contacts and CIs were given no training other than on the use of their phones. The agent explained that the supplier was not arrested and charged because ATF was unable to identify him. The supplier arrived at the transaction as a passenger in a vehicle, and although ATF obtained the license plate of the car, the picture of the registered owner did not match the appearance of the supplier. But the agent admitted that ATF did not attempt to identify the supplier by contacting the registered owner of the car in which the supplier arrived or by subpoenaing Defendant's phone records to

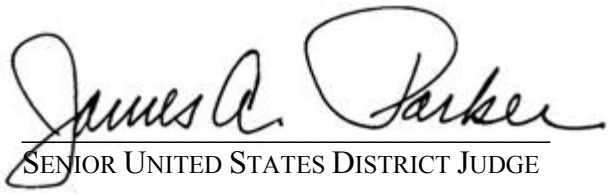
find a phone number for the supplier, even though a phone number database was ATF's usual method of identifying prospective targets.

Defendant need not establish a prima facie case to establish his entitlement to discovery. *James*, 257 F.3d at 1178. The Court finds that the statistical evidence provided by Defendant constitutes reliable demographic information demonstrating that the operation resulted in a much higher percentage of African-American defendants than the usual rate of occurrence, in the District of New Mexico, of drug and firearm arrests among that group. The Court further finds that the methods used by ATF in conducting this operation were likely to lead to a higher percentage of minority defendants, but that ATF declined to make use of any policies or training designed to counteract that effect. Finally, the Court finds that ATF did not pursue all reasonable avenues in its attempts to identify the white supplier of the methamphetamine for which Defendant was arrested. Consequently, the Court concludes that Defendant has presented "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent," *Armstrong*, 517 U.S. at 468, and is entitled to discovery. However, the Court also finds that the scope of Defendant's request is broader than necessary, and will limit the information that must be disclosed unless the parties are able to reach agreement on the appropriate scope.

IT IS THEREFORE ORDERED that:

(1) DEFENDANT'S MOTION TO COMPEL DISCLOSURE OF INFORMATION (Doc. No. 29) is GRANTED as to some discovery requests.

(2) The parties are directed to discuss which discovery items may be disclosed by agreement, and are to report to the Court by June 20, 2017 if disputes remain.



SENIOR UNITED STATES DISTRICT JUDGE

Seventh Circuit's en banc opinion in *United States v. Davis*, 766 F.3d 722 (7th Cir. 2015)—see Part III

Alison Siegler, Univ. of Chicago Law School

United States v. Davis

United States Court of Appeals for the Seventh Circuit

June 3, 2015, Argued; July 13, 2015, Decided

No. 14-1124

Reporter
793 F.3d 712; 2015 U.S. App. LEXIS 12054

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. PAUL DAVIS, JR., et al., Defendants-Appellees.

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 13 CR 63 — John W. Darrah, Judge.
United States v. Davis, 766 F.3d 722, 2014 U.S. App. LEXIS 17361 (7th Cir. Ill., 2014)

Core Terms

indictment, district court, discovery order, appeals, discovery, dismissal of the indictment, cases, orders, prosecuted, stash, authorizes, invited, targeted, refuse to comply, non-final, color, court of appeals, district judge, interlocutory appeal, interlocutory order, national origin, decisions, ancestry, requires, genuine, phony, appellate jurisdiction, appellate review, final decision, selective

Case Summary

Overview
HOLDINGS: [1]-In appealing, the government relied on the Criminal Appeals Act, *18 U.S.C.S. § 3731*, which did not have a finality requirement as did *28 U.S.C.S. § 1291*; [2]-The court had jurisdiction to decide whether the indictment was properly dismissed, which depended on whether the discovery order was itself proper; [3]-The discovery order was vastly overbroad; [4]-A good deal of the discovery it required was blocked by the Armstrong decision and some discovery was blocked by executive privilege independent of the Armstrong decision; [5]-Some of the discovery asked for information that was outside the scope of the Armstrong decision, the executive privilege, and the deliberative-process privilege; [6]-Instead of starting with a blunderbuss order, the district court should have proceeded in measured steps; [7]-The order was an abuse of discretion.

Outcome
The judgment was reversed, and the case was remanded.

Counsel: For United States of America, Plaintiff - Appellant: Debra Riggs Bonamici, Attorney, Bolling W. Haxall, Attorney, Meghan Morrissey Stack, Attorney, Office of The United States Attorney, Chicago, IL.

For Paul Davis, Jr., Defendant - Appellee: Carol A. Brook, Attorney, William H. Theis, Attorney, Office of The Federal Defender Program, Chicago, IL.

For Alfred Withers, Defendant - Appellee: John M. Beal, Attorney, John M. Beal, Attorney at Law, Chicago, IL.

For Julius Morris, Defendant - Appellee: Jack P. Rimland, Attorney, Jack P. Rimland & Associates, Chicago, IL.

For Jayvon Byrd, Defendant - Appellee: Matthew J. Madden, Attorney, Chicago, IL; Alison Marlowe Siegler, Attorney, Mandel Legal Aid Clinic, Chicago, IL.

For Vernon Smith, Defendant - Appellee: Ralph E. Meczyk, Attorney, Meczyk Goldberg, Chicago, IL.

For Corey Barbee, Defendant - Appellee: Damon M. Cheronis, Attorney, Law Offices of Damon M. Cheronis, Chicago, IL.

For Dante Jeffries, Defendant - Appellee: Eugene O'Malley, Attorney, Chicago, IL; Joshua Sachs, Attorney, Law Office of Joshua Sachs **[**2]** & Associates, Evanston, IL.

Judges: Before WOOD, Chief Judge, and BAUER, POSNER, FLAUM, EASTERBROOK, KANNE, ROVNER, WILLIAMS, SYKES, and HAMILTON, Circuit Judges. ROVNER, Circuit Judge, with whom HAMILTON, Circuit Judge, joins, dissenting.

Opinion by: EASTERBROOK

Opinion

[*714] EASTERBROOK, *Circuit Judge*. The United States

has appealed from a district court's order dismissing an indictment, but without prejudice to a new indictment (should one be returned within the statute of limitations). The district judge took this step to permit appellate review of his discovery order, with which the prosecutor had declined to comply. Once the indictment had been dismissed, the Solicitor General authorized an appeal under the Criminal Appeals Act, *18 U.S.C. §3731*. But a panel of this court dismissed the appeal for lack of jurisdiction, *766 F.3d 722 (7th Cir. 2014)*, ruling that the Act authorizes appeal only if the dismissal of an indictment would be final within the meaning of *28 U.S.C. §1291*. The possibility of reindictment and recurrence of the discovery dispute made this dismissal non-final, the panel held. We granted the United States' petition for rehearing en banc.

I

The indictment charges Paul Davis and six confederates—Alfred Withers, Julius Morris, Jayvon Byrd, Vernon Smith, Corey **[**3]** Barbee, and Dante Jeffries—with several federal offenses arising from a plan to rob a stash house, where the defendants believed they would find drugs and money. We need not set out the plan's details or the precise statutes involved, because proceedings on the merits of the charges never got under way in the district court. What matters now is that the stash house the defendants thought they would rob did not exist. They were caught in a sting.

According to the prosecutor, Davis repeatedly approached someone he thought to be a potential partner in crime and asked whether he knew of any opportunities to conduct robberies. Davis did not know that his interlocutor was cooperating with the FBI. Acting on the informant's reports, agents bought drugs from Davis three times; this gave some credibility to the informant's report that Davis was interested in robbing stash houses to get drugs to sell. The FBI passed the information to the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), which sent an undercover agent to conduct a sting. Posing as a disgruntled drug courier, the agent told Davis about an opportunity to rob a stash house, supposedly containing 50 kilograms of cocaine. **[**4]** Davis recruited assistants (the other six defendants). They discussed the possibility of killing the stash houses' guards and the undercover agent too in order to eliminate witnesses and avoid sharing the loot. When arrested at the assembly point for the planned robbery, three of the seven defendants carried firearms.

They maintain that the prosecutor, the FBI, and the ATF engaged in racial discrimination, in violation of the *Due Process Clause*'s equal-protection component. The **[*715]** defendants told the district court that since 2006 the United States Attorney for the Northern District of Illinois has prosecuted 20 stash-house stings, and that of the defendants in these cases 75 were black and 19 white. According to defendants, 13 of the 19 white defendants were Hispanic. All seven defendants in this prosecution are black. Defendants asserted that these figures "present a picture of stark discriminatory practices by the ATF and FBI who target, through the use of informants and undercover agents, select persons to present with the opportunity to commit a hypothetical ... lucrative crime."

Defendants asked the judge to direct the prosecutor to provide extensive information about who is prosecuted, how they (and **[**5]** others) were selected for attention by the FBI and ATF, and how the United States Attorney's office makes decisions after receiving reports from investigators. The prosecutor opposed this motion, contending that *United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)*, forbids discovery into prosecutorial selectivity unless the defense first shows that similarly situated persons have not been prosecuted. The defense's data about who had been prosecuted did not include any information about who could have been prosecuted, but was not.

The district court entered a discovery order substantially as the defense had proposed it, writing in a short explanation that "the prosecution in this District has brought at least twenty purported phony stash house cases, with the overwhelming majority of the defendants named being individuals of color. In light of this information, it is necessary to permit Defendants discovery on the following issues ... ." The district court did not identify any similarly situated person who had not been prosecuted or explain why *Armstrong* allows a court to compel disclosures by the prosecutor in the absence of that information.

Coupled with the breadth of the discovery order (which we discuss in Part III of this opinion), **[**6]** this led the United States to decline to comply. The Criminal Appeals Act does not authorize appeals from discovery orders, but it does authorize appeals from orders dismissing indictments. The district judge agreed to facilitate appellate review by dismissing the indictment without prejudice, and the United States appealed. That brings us to the jurisdictional question.

II

If this were a civil case, and a complaint had been dismissed without prejudice in an attempt to permit immediate review of a discovery order, an appeal would not be possible. See, e.g., *Doctor's Associates, Inc. v. Duree, 375 F.3d 618 (7th Cir. 2004)* (dismissing an appeal where the parties reserved the right to reactivate the litigation later); *Furnace v. Board of Trustees, 218 F.3d 666 (7th Cir. 2000)* (same). For *28 U.S.C. §1291*, which governs most civil appeals, requires a "final

decision," and to be final the dismissal of a complaint generally must be with prejudice. Some statutes, such as 28 U.S.C. §1292, authorize interlocutory appeals; so do some rules, such as Fed. R. Civ. P. 23(f); but in the main a final decision is essential—and the Supreme Court insists that the exceptions to the final-decision rule be applied sparingly, to avoid dragging litigation out. See, e.g., Mohawk Industries, Inc. v. Carpenter, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009). The Justices have said that this is likewise true for appeals by defendants in pending criminal cases, which **[**7]** also are covered by §1291. See, e.g., Flanagan v. United States, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984). Compare Abney v. United States, **[*716]** 431 U.S. 651, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977), with United States v. MacDonald, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978).

But the United States relies on the Criminal Appeals Act, 18 U.S.C. §3731, which applies exclusively to the prosecutor's appeals in criminal cases. This statute provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the *double jeopardy clause of the United States Constitution* prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court **[**8]** of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

Defendants maintain, and the panel held, that the first clause of §3731's first paragraph, referring to "a decision, judgment, or order of a district court dismissing an indictment", covers only the sort of dismissal that would be "final" for the purpose of an appeal under §1291.

The rest of §3731 provides context for evaluating this position—as does a comparison with §1291, which permits appeals from "final" decisions. The word "final" does not appear in §3731, nor does any similar word.

Context begins with the first paragraph of §3731, which after mentioning an indictment or information adds "or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof". An order setting a case for a new trial is not a final decision. Nor is an order **[**9]** setting one count for a new trial, or a "part" of one count for a new trial. And if we read the "count" language as modifying both indictments and new trials—so that we get "dismissing an indictment or information ... as to any one or more counts"—again §3731 ¶1 authorizes appeals from non-final decisions, for in ordinary civil litigation a decision dismissing one count of a complaint cannot be appealed unless the requirements of Fed. R. Civ. P. 54(b) are met.

Paragraph 2 of §3731 authorizes appeals from orders suppressing or excluding evidence, or ordering the return of property (though the rest of the case continues). Orders excluding evidence and disposing of some property while the litigation continues are not final decisions under §1291.

The third paragraph continues the pattern by authorizing an appeal from an order granting a person's release on bail **[*717]** (while the case proceeds), or denying a motion to modify conditions of release, or to revoke release on bail. None of these orders is a final decision that ends the litigation and leaves nothing but execution of the judgment, the standard definition of "final" under §1291. See, e.g., Gelboim v. Bank of America Corp., 135 S. Ct. 897, 902, 190 L. Ed. 2d 789 (2015); Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 89 L. Ed. 911 (1945).

It seems apt to say that all of §3731 is an exception to the final decision rule. And so the **[**10]** Supreme Court has described it. In the course of distinguishing appeals under §1291 from those under §3731, the Court called §3731 "a statutory exception to the final judgment rule". Flanagan, 465 U.S. at 265 n.3. If finality were essential then, when responding to the holding of United States v. Sanges, 144 U.S. 310, 12 S. Ct. 609, 36 L. Ed. 445 (1892), that the United States needs express authority to appeal, Congress could have amended §1291 so that a prosecutor, like other litigants, may

use it plus interlocutory appeals by permission under §1292(b). (Defendant and prosecutor alike also could use 18 U.S.C. §3742, which authorizes appeals of sentences in criminal cases.) Instead Congress created a separate Criminal Appeals Act and has amended it over the years to include the many categories of non-final orders that we have mentioned. United States v. Wilson, 420 U.S. 332, 336-39, 95 S. Ct. 1013, 43 L. Ed. 2d 232 (1973), traces this history.

Defendants want us to hold that the first clause of §3731 ¶1 *alone* has an atextual finality requirement, which not only would divorce orders dismissing indictments from every other kind of order under §3731 but also would create the anomaly that a dismissal of one count would be immediately appealable (though non-final in civil practice) while the dismissal of all counts would not be appealable. Neither the text nor the structure of §3731 permits such an approach.

Section 3731 authorizes interlocutory **[**11]** appeals in part because the Double Jeopardy Clause of the Fifth Amendment creates special obstacles for a prosecutor who contends that a district court's order is erroneous. The Supreme Court stressed in decisions such as *Mohawk Industries* that, if a district court errs, an appeal from the final decision usually allows the mistake to be corrected, if necessary by holding a new trial. But errors in favor of the defense in a criminal prosecution may lead to acquittal, and the prosecution cannot appeal from a mid-trial acquittal by the judge, or an end-of-trial acquittal by the jury, no matter how erroneous the ruling that led to this outcome—even though in parallel civil litigation the losing litigant would have a full appellate remedy. See, e.g., Fong Foo v. United States, 369 U.S. 141, 82 S. Ct. 671, 7 L. Ed. 2d 629 (1962); Sanabria v. United States, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978). That's why §3731 departs from §1291 and why it is inappropriate to read into §3731 a "finality" requirement that it lacks (but §1291 contains).

Congress has not taken the final-decision rule as far as it might go. The books are full of exceptions thought helpful to facilitate accurate or prompt decision. We have mentioned §1292, which permits appeals from orders granting, denying, or modifying injunctions (interlocutory or final) plus orders certified by district judges and accepted by courts of appeals. Another **[**12]** statute, 28 U.S.C. §1453(c), permits immediate appellate review of orders remanding suits that had been removed on the authority of the Class Action Fairness Act. And §1447(d) permits appeals of remands in civil-rights cases or those removed by federal officers. Rule 23(f) permits **[*718]** appeals from orders certifying or declining to certify class actions. Section 3731 is just another in the complement of exceptions to §1291's final decision rule.

Even if we were disposed to fight against the language of §3731 (which lacks the word "final"), and its structure, and its objective of accommodating the prosecution's need to obtain appellate review in a way consistent with the Double Jeopardy Clause, we would still respect the Supreme Court's description of §3731 as "remov[ing] all statutory barriers to Government appeals". Wilson, 420 U.S. at 337. Ditto, United States v. Martin Linen Supply Co., 430 U.S. 564, 568, 577, 97 S. Ct. 1349, 51 L. Ed. 2d 642 (1977). Perhaps this is an overstatement; after all, §3731 contains a list of appealable orders, which does not include discovery orders. That's why the prosecutor asked the district court to choose a remedy on the statutory list. But the minimum meaning of the statement in Wilson is that *if* the district court enters a listed order, there are no *further* barriers to appeal. A final-decision rule imported from §1291 would be such a further barrier.

Because discovery orders are **[**13]** not on the §3731 list, appellate review depended on the district court's cooperation. The judge chose a response that was listed; if the judge had decided to exclude vital evidence as a sanction for the prosecutor's stance, that too would have authorized an appeal. It is hard to see why this appeal should be foreclosed because the judge chose what seemed to be the cleanest way to proceed. But if in the future a district judge believes than an interlocutory appeal would be unduly disruptive, the court has only to avoid issuing one of the sorts of orders that fall within the scope of §3731. The prosecutor cannot dismiss an indictment on his own but requires the court's approval. Fed. R. Crim. P. 48(a). (The prosecutor may of course decline to proceed with a case, whether or not a judge dismisses the indictment, but a prosecutor can't appeal from his own decision.) If the judge chooses a response not on the §3731 list, then to obtain review the prosecutor would need to meet the stringent requirements of a writ of mandamus, a discretionary remedy limited to the clearest errors and usurpations of power.

Although, as we have mentioned, *Wilson* may be thought to slight the fact that §3731 contains a specific list of appealable orders, **[**14]** the Justices themselves seem willing to take the language of *Wilson* and *Flanagan* at face value.

United States v. Bass, 536 U.S. 862, 122 S. Ct. 2389, 153 L. Ed. 2d 769 (2002), offers an illustration. In the wake of *Armstrong*, which held that discovery relating to a claim of selective prosecution depends on proof that eligible persons of a different race have not been prosecuted, a defendant contended that the Attorney General took race into account when deciding when to authorize a prosecutor to seek capital punishment. The defense offered the same sort of evidence that had been deemed inadequate in *Armstrong:* that black defendants were charged with capital crimes out of proportion to the general population. The district court ordered discovery into the exercise of prosecutorial discretion and, when the

United States declined to provide the information, dismissed the prosecutor's notice of intent to seek the death penalty. The United States appealed, the court of appeals affirmed, and the Supreme Court summarily reversed, holding the discovery order incompatible with *Armstrong*. Yet the district court's order dismissing the notice of intent to seek the death penalty not only was interlocutory (the criminal prosecution remained pending) but also is not on the list **[**15]** in §3731. Still, the court of appeals and the Supreme Court did not see a **[*719]** jurisdictional problem. We recognize that an opinion disregarding an issue, even a jurisdictional one, does not establish a holding. See, e.g., *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 91-92, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)*. But the Court may have let the issue pass precisely because it sees no need to retreat from the statements made about §3731 in *Flanagan, Wilson*, and *Martin Linen*.

Other courts of appeals take the Justices at their word. Several have entertained appeals from orders dismissing indictments without prejudice. See, e.g., *United States v. Lester, 992 F.2d 174, 176 (8th Cir. 1993)*, and *United States v. Woodruff, 50 F.3d 673, 675 (9th Cir. 1995)*. As far as we know, no court of appeals has added a finality requirement to §3731 ¶1 and thus forbidden the appeal from an order dismissing an indictment without prejudice—or for that matter required "finality" for the appeal of *any* order covered by §3731.

Defendants insist that *United States v. Clay, 481 F.2d 133 (7th Cir. 1973)* (Stevens, J.), commits this court to a different path. Yet in *Clay* the court held that §3731 *allows* an appeal from an order dismissing an indictment without prejudice. Along the way, *Clay* remarked that, despite the district court's choice of label, the order was "final" in the sense that the dispute would not recur. Defendants read that as a holding that if a dispute can recur—as this discovery dispute **[**16]** could recur if another grand jury returned another indictment—then an appeal is forbidden. This reads too much into *Clay*. Saying "if conclusive, then appealable" (as *Clay* did) differs from saying "*only* if conclusive, then appealable." *Clay* did not have a non-final order and could not announce a holding about that subject—nor did it purport to do so.

But suppose this is wrong and *Clay* did think that finality is essential. Since then, the Supreme Court has said repeatedly that barriers (other than the *Double Jeopardy Clause*) not stated in §3731 itself do not foreclose appeals. *Section 3731* does not contain a final-decision rule. The language in *Clay*, though not its holding, has been overtaken by developments in the Supreme Court, and this court, sitting en banc in 2015, is not bound by what one panel believed about §3731 in 1973.

We hold that §3731 authorizes an appeal when a district court dismisses an indictment, or a count of an indictment, or a part of a count of an indictment, without prejudice to the possibility of a successive indictment containing the same charge. The court therefore has jurisdiction to decide whether the indictment was properly dismissed, which depends on whether the discovery order was itself proper. (*Armstrong* ***[**17]*** reached the Supreme Court in the same way, as the United States used the dismissal of an indictment to present a question about the propriety of a discovery order.)

III

Before entering the discovery order, the district court said only that "the prosecution in this District has brought at least twenty purported phony stash house cases, with the overwhelming majority of the defendants named being individuals of color. In light of this information, it is necessary to permit Defendants discovery" about prosecutorial practices and criteria. That decision is inconsistent with *Armstrong*. The record in *Armstrong* showed that *every* defendant in *every* crack-cocaine prosecution filed by a particular United States Attorney's office and assigned to the public defender was black. If, as the Supreme Court held, that evidence did not justify discovery into the way the prosecutor selected cases, then proof that in the Northern District of Illinois three-quarters of **[*720]** the defendants in stash-house cases have been black does not suffice.

The United States believes that we should stop here and reverse. But things are not that simple. *Armstrong* was about prosecutorial discretion. The defendants assumed that **[**18]** state and federal law-enforcement agents arrested all those they found dealing in crack cocaine, and they suspected that the federal prosecutor was charging the black suspects while letting the white suspects go. The Supreme Court replied that federal prosecutors deserve a strong presumption of honest and constitutional behavior, which cannot be overcome simply by a racial disproportion in the outcome, for disparate impact differs from discriminatory intent. See *Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 99 S. Ct. 2282, 60 L. Ed. 2d 870 (1979)*. The Justices also noted that there are good reasons why the Judicial Branch should not attempt to supervise how the Executive Branch exercises prosecutorial discretion. In order to give a measure of protection (and confidentiality) to the Executive Branch's deliberative processes, which are covered by strong privileges, see *Cheney v. United States District Court, 542 U.S. 367, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004)*; *In re United States, 503 F.3d 638 (7th Cir. 2007)*; *In re United States, 398 F.3d 615 (7th Cir. 2005)*; *United States v. Zingsheim, 384 F.3d 867 (7th Cir. 2004)*, the Court in *Armstrong* insisted that the defendant produce evidence

that persons of a different race, but otherwise comparable in criminal behavior, were presented to the United States Attorney for prosecution, but that prosecution was declined. *Bass* held the same about the selection of capital prosecutions, and for the same reasons.

To the extent that Davis and the other six defendants want information **[**19]** about how the United States Attorney has exercised prosecutorial discretion, *Armstrong* is an insuperable obstacle (at least on this record). But the defendants' principal targets are the ATF and the FBI. They maintain that these agencies offer lucrative-seeming opportunities to black and Hispanic suspects, yet not to those similarly situated in criminal background and interests but of other ethnicity. If the agencies do that, they have violated the Constitution—and the fact that the United States Attorney may have prosecuted every case the agencies presented, or chosen 25% of them in a race-blind lottery, would not matter, since the constitutional problem would have preceded the prosecutor's role and could not be eliminated by the fact that things didn't get worse at a later step. Cf. *Connecticut v. Teal, 457 U.S. 440, 102 S. Ct. 2525, 73 L. Ed. 2d 130 (1982)* (rejecting a "bottom-line defense" in an employment-discrimination suit).

Agents of the ATF and FBI are not protected by a powerful privilege or covered by a presumption of constitutional behavior. Unlike prosecutors, agents regularly testify in criminal cases, and their credibility may be relentlessly attacked by defense counsel. They also may have to testify in pretrial proceedings, such as hearings **[**20]** on motions to suppress evidence, and again their honesty is open to challenge. Statements that agents make in affidavits for search or arrest warrants may be contested, and the court may need their testimony to decide whether if shorn of untruthful statements the affidavits would have established probable cause. See *Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)*. Agents may be personally liable for withholding evidence from prosecutors and thus causing violations of the constitutional requirement that defendants have access to material, exculpatory evidence. See, e.g., *Armstrong v. Daily, 786 F.3d 529 (7th Cir. 2015)*; *Newsome v. McCabe, 256 F.3d 747, 752 (7th Cir. 2001)*. Before holding **[*721]** hearings (or civil trials) district judges regularly, and properly, allow discovery into nonprivileged aspects of what agents have said or done. In sum, the sort of considerations that led to the outcome in *Armstrong* do not apply to a contention that agents of the FBI or ATF engaged in racial discrimination when selecting targets for sting operations, or when deciding which suspects to refer for prosecution.

How does the district court's order hold up by these standards? Here is its full text, which requires the United States to produce:

> (1) A list by case name and number of each phony stash house rip off case brought by the U.S. Attorney's Office **[**21]** for the Northern District of Illinois in which ATF alone or in conjunction with the FBI was the federal investigatory agency from 2006 to the present. With respect to each case, the Government shall provide the race of each defendant investigated and prosecuted.
>
> (2) For each case identified in response to (1) above, a statement regarding prior criminal contact that the federal agency responsible for the investigation had with each defendant prior to initiating the operation. If all such information for a particular case is contained in the criminal complaint, a reference to the complaint is sufficient.
>
> (3) The statutory or regulatory authority for the ATF and the FBI to instigate and/or pursue phony staff [sic] house ripoff cases involving illegal drugs or any decision by any federal agency, the Justice Department or the White House to authorize ATF and the FBI to pursue such cases in the Northern District of Illinois.
>
> (4) All national and Chicago Field Office ATF and FBI manuals, circulars, field notes, correspondence or any other material which discuss phony stash house ripoffs, including protocols and/or directions to agents and to confidential informants regarding how to conduct such **[**22]** operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that the targets do not seek to quit or leave before an arrest can be made and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry or national origin.
>
> (5) All documents that contain information on how supervisors and managers of the Chicago area ATF and FBI were to ensure and/or did ensure or check that its agents did not target persons on the basis of their race, color, ancestry, or national origin for the phony stash house ripoffs and what actions the Chicago area ATF and FBI supervisors and managers operating in the Northern District of Illinois took to determine whether agents were not targeting persons for such operations on the basis of their race, color, ancestry, or national origin.
>
> (6) The factual basis for the decision to pursue or initiate an investigation against each of the individuals listed as defendants in each case cited in Paragraph 7 of Defendants' Motion for Discovery and in response to each case produced pursuant to the request contained in

Paragraph (1) above.

(7) All documents containing instructions given **[**23]** during the tenure of Patrick Fitzgerald or Gary Shapiro as the U.S. Attorney for the Northern District of Illinois about the responsibilities of prosecutors to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois are not targeted due to their race, color, ancestry, or national origin. Specifically, materials that demonstrate that the individuals charged as defendants **[*722]** in phony stash house cases in which ATF alone or in conjunction with the FBI was the investigatory agency have not been targeted due to their race, color, ancestry, or national origin, and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendant's race, color, ancestry, or national origin.

(8) All documents that contain information about all actions taken during the tenure of Patrick Fitzgerald or Gary Shapiro as the U.S. Attorney for the Northern District of Illinois about the responsibilities of prosecutors to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry, or national origin and, specifically, **[**24]** that those persons who are defendants in phony stash house cases in which ATF alone or in conjunction with the FBI was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendant's race, color, ancestry, or national origin.

This order is vastly overbroad. A good deal of the discovery it requires is blocked by *Armstrong* (on the current record) because it concerns the exercise of prosecutorial discretion. Other discovery is blocked by executive privilege independent of *Armstrong;* a district court is not entitled to require "the White House" (which is to say, the President) to reveal confidential orders given to criminal investigators. But some of the discovery asks for information from supervisors or case agents of the FBI and ATF, and this is outside the scope of *Armstrong*, the executive privilege, and the deliberative-process privilege.

To say that some of the information is potentially discoverable is not to vindicate any part of this particular order, however. Consider ¶5, which requires the United States to produce "all documents" **[**25]** that contain any "information" about how the FBI and ATF manage stings (pejoratively called "phony stash house ripoffs"), plus all details concerning how these agencies curtail discrimination. This demands the disclosure of thousands (if not millions) of documents generated by hundreds (if not thousands) of law-enforcement personnel. It would bog down this case (and perhaps the agencies) for years.

Or consider ¶4, which requires the public disclosure of all criteria the agencies employ to decide when and how to conduct sting operations. Agencies understandably want to keep such information out of the hands of persons who could use it to reduce the chance that their own criminal conduct will come to light. For the same reason that the IRS does not want to reveal its audit criteria, the FBI and ATF do not want to reveal their investigative criteria. Perhaps the FBI and ATF might be able to improve the public's under-standing and acceptance of their selection criteria by releasing more information, but that's not a legal obligation.

Similar things could be said about other paragraphs, but the point has been made. This order is an abuse of discretion.

The racial disproportion in stash-house **[**26]** prosecutions remains troubling, however, and it is a legitimate reason for discovery provided that the district court does not transgress *Armstrong* or an applicable privilege.

Instead of starting with a blunderbuss order, a district court should proceed in measured steps. Logically the first question is whether there is any reason to believe that race played a role in the investigation of these seven defendants. The prosecutor says that it cannot have done, because Davis himself initiated matters by **[*723]** pestering the informant for robbery opportunities and then chose his own comrades. Still, it remains possible that the FBI and the ATF would not have pursued this investigation had Davis been white. Defendants contend that they have additional evidence (beyond that presented to the district court) that could support such a conclusion. The judge should receive this evidence and then decide whether to make limited inquiries, perhaps including affidavits or testimony of the case agents, to determine whether forbidden selectivity occurred or plausibly could have occurred. If not, there would not be a basis to attribute this prosecution to the defendants' race, and the district court could turn **[**27]** to the substance of the charges.

If the initial inquiry gives the judge reason to think that suspects of another race, and otherwise similarly situated, would not have been offered the opportunity for a stash-house robbery, it might be appropriate to require the FBI and ATF to disclose, in confidence, their criteria for stash-house stings. Analysis of the targeting criteria (and whether agents followed those rules in practice) could shed light on whether an initial suspicion of race discrimination in this case is

justified. Keeping that part of the investigation *in camera* would respect the legitimate interest of law enforcement in preventing suspects (and potential suspects) from learning how to avoid being investigated or prosecuted. If after that inquiry the judge continues to think that racial discrimination may have led to this prosecution, more information could be gathered.

We do not want to tie the judge's hands, but we do think it essential, lest this and other prosecutions be sidetracked (both defendants and the public have a right to speedy resolution of criminal cases), to start with limited inquiries that can be conducted in a few weeks, and to enlarge the probe only if evidence **[**28]** discovered in the initial phase justifies a wider discovery program. Only if information learned during these limited inquiries satisfies the *Armstrong* criteria may discovery be extended to the prosecutor's office, and even then the judge should ensure that required disclosures make no more inroads on prosecutorial discretion than are vital to ensuring vindication of the defendants' constitutional right to be free of race discrimination.

The judgment dismissing the indictment is reversed, and the case is remanded for proceedings consistent with this opinion.

Dissent by: ROVNER, HAMILTON

Dissent

ROVNER, *Circuit Judge*, with whom HAMILTON, *Circuit Judge*, joins, dissenting.

In a case charging the defendants with conspiring to rob a fictitious stash house, it is perhaps fitting that our appellate jurisdiction is premised on a fictitious sanction—a dismissal of the indictment that was proposed by the government, and granted by the district court, for the express and sole purpose of facilitating an appeal of a discovery order that the government opposed. The dismissal was non-binding, to boot, allowing the government to proceed with the prosecution regardless of what we might have to say about the merits of the **[**29]** discovery order. However far Congress may have meant to extend the limits of appellate jurisdiction when it re-wrote the Criminal Appeals Act in 1970, I am confident that this appeal lies beyond those bounds. For all of the prudential reasons that we do not permit civil litigants to manufacture appellate jurisdiction, we should not allow an appeal based on the sort of non-final dismissal that was fabricated here. I must therefore respectfully and regretfully part ways with my colleagues on the matter of our jurisdiction to hear this appeal.

[*724] Although the government is nominally appealing the order dismissing the indictment—an order that *18 U.S.C. § 3731* identifies as an appealable order—the government is not actually aggrieved by that dismissal. The government invited the district court to dismiss the indictment solely as a gateway to appellate review of another, interlocutory order—the discovery order—as to which *section 3731* does not otherwise permit an appeal. *See* R. 129 (government's position paper regarding appeal of selective prosecution discovery order). The district court, in turn, acceded to the government's declared intent to challenge the discovery order in this court and dismissed the indictment without **[**30]** prejudice in order to facilitate the appeal. The record leaves no doubt that this was the one and only reason for the dismissal:

> AUSA: Your Honor, ... [w]e would suggest to the Court that in light of our non-compliance with the Court's discovery order, we're willing to suggest—or, pardon me, to accept dismissal of the indictment as a sanction permitting the government to appeal.
>
> THE COURT: So if I don't dismiss it, you can never appeal my ruling, is that the idea?
>
> AUSA: I suppose that's correct, your Honor.
>
> THE COURT: That's a very attractive proposal.
>
> > That's a very interesting issue, and I think it is an issue that the Seventh Circuit should take a close look at, and I'm sure they will.
> >
> > And so the indictment is dismissed. ...

R. 144 at 4; *see also* R. 144 at 6 (court confirms, at government's request, that the dismissal is without prejudice).

As my colleagues in the majority recognize, this would not be tolerated in the civil context. *Ante* at 4-5. Indeed, we have repeatedly disapproved efforts by civil litigants to engineer appellate jurisdiction by inviting the district court to enter a dismissal order that has the veneer of appealability when, in fact, the dismissal is a sham intended to serve **[**31]** solely as the vehicle for what is otherwise an unauthorized interlocutory appeal. *See Sims v. EGA Prods., Inc., 475 F.3d 865, 867-68 (7th Cir. 2007)*; *ITOFCA, Inc. v. Mega Trans Logistics, Inc., 235 F.3d 360, 363-64 (7th Cir. 2000)*; *West v. Macht, 197 F.3d 1185, 1188-90 (7th Cir. 1999)*; *JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999)*; *Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435-36, 1437 (7th Cir. 1992)*; *see also Union Oil Co. of Cal. v. John Brown E&C, a Div. of John Brown, Inc., 121 F.3d 305, 308-11 (7th Cir. 1997)*. A civil plaintiff, for example, may be frustrated with an order that disposes of some counts

of his complaint but not others, *JTC Petroleum, 190 F.3d at 776-77*, or which prospectively limits his damages, *Union Oil, 121 F.3d at 306, 307*. Rather than awaiting a final judgment or seeking the court's leave to pursue an interlocutory appeal pursuant to *28 U.S.C. § 1292(b)*, the plaintiff instead asks the court to dismiss what remains of his complaint without prejudice, thereby terminating the litigation in the district court and producing a seemingly final order that would permit him to challenge on appeal any and all of the interlocutory orders preceding that order. *See Sims, 475 F.3d at 867-68*. Except that the judgment is not final, because it permits the plaintiff to refile the counts it has persuaded the court to dismiss without prejudice, even if he loses the appeal. *E.g., West, 197 F.3d at 1188*; *JTC Petroleum, 190 F.3d at 776*; *see also Union Oil, 121 F.3d at 307-08* (parties entered into settlement terminating litigation, contingent upon outcome of appeal). As such, the manufactured dismissal cannot serve as the gateway to **[*725]** review of what the plaintiff is really appealing—an interlocutory order.[1]

The importance of finality has been central to our decisions in these cases. *See ITOFCA, 235 F.3d at 363-64 & n.1*; *West, 197 F.3d at 1188-89*; *Union Oil, 121 F.3d at 310-11*; *Horwitz, 957 F.2d at 1435-36, 1437*. "Finality as a condition of review is an historic characteristic of federal appellate procedure." *Flanagan v. United States, 465 U.S. 259, 263, 104 S. Ct. 1051, 1053-54, 79 L. Ed. 2d 288 (1984)* (quoting *Cobbledick v. United States, 309 U.S. 323, 324, 60 S. Ct. 540, 541, 84 L. Ed. 783 (1940)*). Except where Congress has specifically authorized an interlocutory appeal, *see 28 U.S.C. § 1292(b)*, or where the order appealed from falls into the narrow category of collateral orders that are immediately appealable, *see Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S. Ct. 1221, 1225, 93 L. Ed. 1528 (1949)*, we generally insist that there be a truly final judgment before a disappointed party may appeal the otherwise interlocutory order that has aggrieved him. The requirement of finality serves a number of important prudential concerns:

> It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice. *Firestone Tire & Rubber Co. v. Risjord, supra*, 449 U.S. [368], at 374, 101 S. Ct. [669], at 673 [(1981)]. For these reasons, "[t]his Court has long held that the policy of Congress embodied in *[section 1291]* is inimical to piecemeal appellate **[**33]** review of trial court decisions which do not terminate the litigation. ... *United States v. Hollywood Motor Car Co., 458 U.S. 263, 265, 102 S. Ct. 3081, 3083, 73 L. Ed. 2d 754 (1982)*.

Flanagan, 465 U.S. at 263-64, 104 S. Ct. at 1054. *See also ITOFCA, 235 F.3d at 363-64 & n.1*; *West, 197 F.3d at 1189*; *Union Oil, 121 F.3d at 310*. The rationale underlying the final judgment rule is "especially compelling in the administration of criminal justice." *Flanagan, 465 U.S. at 264, 104 S. Ct. at 1054* (quoting *Cobbledick, 309 U.S. at 325, 60 S. Ct. at 541*); given that "the defendant is entitled to speedy resolution of the charges against him," *Will v. United States, 389 U.S. 90, 96, 88 S. Ct. 269, 274, 19 L. Ed. 2d 305 (1967)* (*citing DiBella v. United States, 369 U.S. 121, 126, 82 S. Ct. 654, 658, 7 L. Ed. 2d 614 (1962)*).

What the government has done in this case to produce an appealable order is precisely what we have deemed forbidden in the civil context. It has engineered a dismissal as the means of obtaining review of an otherwise interlocutory and unappealable discovery order. But the dismissal was not final, as it would have been if the district court had dismissed the indictment due to incurable pleading defect, or as a sanction for pretrial delay or some other fault that the government could not cure. *See, e.g.*, *United States v. Clay, 481 F.2d 133, 136 (7th Cir. 1973)* (indictment dismissed based on post-arrest delay in indicting defendant). Nominally, the dismissal was entered as a sanction for the government's announcement that it did not intend to comply with the court's discovery order, but only nominally. The dismissal was invited by the government as a means to appeal, and was granted by the district court in deference **[**34]** to that wish; there was never an independent assessment by the **[*726]** district court as to whether dismissal of the indictment was an appropriate sanction on the facts of the case. (If the court had truly intended the dismissal as a sanction, it would have dismissed the indictment with prejudice, as I discuss below.) But because the dismissal was without prejudice, the government retained the ability to re-indict the defendants regardless of what we held in this appeal. As it has turned out, the government has succeeded in its challenge to the discovery order; the dismissal of the indictment is thus being reversed, *ante* at 20, and on remand, the prosecution will pick up where it left off. But even if we had affirmed the discovery order (and hence the dismissal of the indictment), the government would have been free to return to the grand jury, obtain a second indictment on the same charges, and then comply with the discovery order if and when the court issued it in the new prosecution. Heads the government wins, tails the defendants

[1] *Cf. JTC Petroleum, 190 F.3d at 776-77* (finding appellate jurisdiction only after plaintiff agreed to treat **[**32]** dismissal of remaining counts as having been granted with prejudice).

lose.[2]

It is worthwhile to consider the multiple ways in which allowing an appeal based on the government's invited dismissal of the indictment without prejudice is contrary to the interests served by the finality requirement and grants to the government what amounts to an advisory opinion on the merits of its opposition to the district court's discovery order. Such consideration also demonstrates why conditioning this type of appeal on a final judgment—in other words, a dismissal of the indictment with prejudice—would accommodate the government's interests and at the same time protect the equally important interests of the defendants, the district court, and this court.

First and foremost, by permitting the government to invite dismissal of the indictment, we have allowed it to cut short the proceedings in the district court, and we cannot be sure that those proceedings **[**36]** necessarily would have resulted in dismissal of the indictment had they been permitted to run their course. Recall that the government suggested the dismissal as a "sanction" for its refusal to comply with the discovery order. R. 129 at 1-2 ¶¶ 4, 7; R. 144 at 4. But there was never any meaningful inquiry below into whether dismissal of the indictment actually was the appropriate sanction for the government's unwillingness to comply with the ordered discovery; the dismissal was asked for and granted solely in order to open the door to this appeal. R. 144 at 4. Had the government instead come into court and said, "Judge, we are unwilling to comply with your discovery order," period, the court necessarily would have had to commence an inquiry into an appropriate response.

And it is by no means certain that the government's opposition to the order necessarily would have led the court to dismiss the indictment. The government's wholesale refusal to comply with a court order is, safe to say, a rare occurrence. I cannot recall it ever happening in my courtroom in my eight years as a district judge. My first response to such a declaration, and I suspect the response of many, if not most judges, **[**37]** would be to explore why the government believed it could not comply with my order—not because I felt bullied by the government's resistance, but because the rarity of a refusal like this (by a party that shares the court's obligation to ensure a fair and just proceeding) merits **[*727]** thoughtful reconsideration. I might have asked whether there was something the government believed I had overlooked in entering the order; and given the opportunity to revisit the order, particularly if I were pointed to the differing results reached by other district judges, I might have reached a different conclusion. (Judge Darrah was among the first of his colleagues in the Northern District of Illinois to issue an order granting a defense request for discovery related to the question of selective prosecution in the stash house cases. By the time the government asked him to dismiss this case more than two months later, other judges had ordered much narrower discovery and had otherwise refused to authorize the broad discovery that he had ordered. *See* R. 143 at 6-7. Yet, the government did not ask Judge Darrah to reconsider his order in light of those rulings.) I might also have asked the government whether **[**38]** there was any portion of the order, or any aspect of the discovery sought by the defendants, that it would willingly comply with—we are told, after all, that the government has complied with the more modest discovery orders entered in other stash house cases; and I might have asked the parties to start with the agreed upon discovery and see what that produced before deciding whether and how to sanction the government for its opposition to the balance of my order. In short, I might have sought a middle ground between the parties—perhaps something not too different from the incremental approach to discovery that the majority has outlined today—that would have circumvented the impasse and permitted the case to move forward without the interruption that this appeal has occasioned. *Cf.* *In re Blodgett, 502 U.S. 236, 240, 112 S. Ct. 674, 676-77, 116 L. Ed. 2d 669 (1992)* (faulting government for not asking court of appeals to vacate or modify its order indefinitely staying prisoner's execution before seeking writ of mandamus from Supreme Court).

Even if the government had persisted in its refusal to comply with some or all aspects of my discovery order, I cannot say that I inevitably would have dismissed the indictment, the weightiest of the penalties available to me. *See* **[**39]** *Barnhill v. United States, 11 F.3d 1360, 1367-69 (7th Cir. 1993)* (variously describing entry of judgment, including dismissal with prejudice, as a "draconian," "severe," "harsh," "powerful," "serious," and "extreme" sanction for party's misconduct). Before taking that course, it would have been my obligation to consider not only the egregiousness of the government's non-compliance but the burden it inflicted on the defendants and the public's interest in seeing that those who have broken the law are brought to justice. *See id.* It is entirely possible that I might have chosen a different sanction, and one that might or might not have been immediately appealable, if it was appealable at all. *See, e.g., United States v. Moussaoui, 382 F.3d 453, 459-60 (4th Cir. 2004)* (after

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[2] *See* *ITOFCA, 235 F.3d at 364* (noting that dismissal of counterclaims without prejudice permitted defendant to re-file them at any time, and regardless of what transpired on appeal); **[**35]** *West, 197 F.3d at 1188* ("The practical effect of the dismissal [of claims on which plaintiff was granted *in forma pauperis* status] is that, if this maneuver is permitted, West may immediately appeal the district court's order insofar as it denied IFP status, and, if he loses the appeal, he may refile the claims on which he was granted IFP status.").

inviting briefing as to appropriate sanction for government's refusal to comply with order granting defendant access to enemy combatant witnesses, district court rejected parties' shared proposal to dismiss indictment, and instead dismissed death notice and foreclosed certain lines of evidence and argument to government).

Finally, assuming that I did decide to dismiss the indictment as a sanction, I surely would have done so with prejudice. Why, after all, would I leave the option of re-indictment open to the government if I believed that its **[**40]** refusal to comply with my order were serious enough to warrant dismissal of the case? Its sole effect would be to force the government to present its case to a grand jury for a second time, while changing nothing about the nature of **[*728]** the case, the relevance of the discovery I had ordered, or the reasons for the government's opposition to the discovery order. The second indictment would in all likelihood end up in my courtroom (*see* N.D. ILL. LOCAL RULE 40.3(b)(2) and N.D. ILL. LOCAL CRIM. RULE 1.2), and the parties and I would be back where we started. In short, dismissal without prejudice would resolve nothing. By contrast, dismissal of the indictment with prejudice would resolve the impasse, and that dismissal *would* be a genuinely final order that would permit the government to appeal.

Just as we cannot be sure that the district court inevitably would have dismissed the indictment, we cannot be sure that the government would have persisted in its blanket refusal to comply with any part of the court's discovery order had it been subject to a genuine sanctions inquiry by the district court. When the government suggested dismissal of the indictment without prejudice to the district judge, it was proposing a "sanction" that had **[**41]** a great deal of upside and very little downside for the government. It opened the door to an immediate appeal of the discovery order, and even if the appeal failed and we affirmed the order, all that the government had to do is re-indict the defendants in order to resurrect the prosecution. And that is a modest burden. Among other things, the government runs the show, its burden of proof is relatively low, and, especially in a sting, most of the evidence is in its hands. A grand jury's refusal to indict is, needless to say, itself a rare occurrence. The ham sandwich aphorism[3] is not too far from the truth. *See* Tyson v. Trigg, 50 F.3d 436, 441 (7th Cir. 1995) ("Instances in which grand juries refuse to return indictments at the behest of the prosecutor are almost as rare as hen's teeth."). By contrast, had the district court instead taken it upon itself to decide what sanction was appropriate for the government's refusal to comply with its discovery order, including potentially a contempt finding or dismissal of the indictment *with* prejudice, one wonders whether the government might have modified its position and agreed to supply at least some discovery to the defendants. It is one thing to submit oneself to a sanction of one's own **[**42]** design (and that serves one's own ends) and very much another thing to defy the district court and face uncertain, and potentially grave, consequences.

All of this shows why the dismissal in this case was a complete fiction as a sanction, and why we are potentially misallocating our time to an appeal that might have been obviated by further proceedings in the district court. In short, we have permitted the government and the district court to do exactly what we have forbidden in the civil context: collaborate to produce a sham judgment for the purpose of facilitating review of an otherwise unappealable, interlocutory order, when the finality typically required for such an appeal is entirely absent. *See* Horwitz v. Alloy Auto. Co., supra, 957 F.2d at 1435-36, 1437. And this is precisely why our opinion is advisory: we are presuming, without knowing, that the discovery order would have remained as broad as it is **[**43]** had the district judge been invited to reconsider the order rather than collaborating to manufacture appellate jurisdiction; we are presuming, without knowing, that the government would have persisted in refusing to comply with the discovery order had the choice of sanction been left up to the district judge; and we are presuming, without **[*729]** knowing, that the judge would have selected dismissal of the indictment as its sanction after a genuine inquiry.

Apart from authorizing an appeal that might be unnecessary, the court's jurisdictional determination is inconsistent in several other ways with the concerns animating the finality requirement.

First, in accepting an appeal based on the invited and non-final dismissal of the indictment, we are potentially interfering with the district court's management of the case by permitting the government to appeal a discretionary, pretrial discovery order that Congress has not identified as one of the interlocutory orders that may be appealed. *See* Flanagan, 465 U.S. at 263-64, 104 S. Ct. at 1054; ITOFCA, 235 F.3d at 364 n.1. Of course, Judge Darrah cannot be heard to complain on that point, given that he willingly entered the dismissal order that paved the way for this appeal. But he is only one of multiple judges in the Northern **[**44]** District of Illinois presiding over similar stash house prosecutions in which the defendants are pursuing claims of selective prosecution; and

[3] Thirty years ago, Solomon Wachtler, then Chief Judge of the New York Court of Appeals, famously remarked that prosecutors could convince a grand jury to "indict a ham sandwich" if that is what they wanted. *See* Marcia Kramer & Frank Lombardi, *New top state judge: Abolish grand juries & let us decide*, N.Y. Daily News, Jan. 31, 1985, at 3.

all of them will now be bound by the discovery framework this court has outlined. There is much to be said for the clarity that this court has brought to that issue. If I agreed that we had jurisdiction over this appeal, I might well be joining the court's opinion. But the danger in an appellate court reaching an issue prematurely or unnecessarily is that we might make a decision without the illumination that further development in the lower court would have given us, and in doing so hobble the district courts and ourselves with a rule that will not stand the test of time. That, by the way, is one advantage of mandamus, which permits us to intervene when truly necessary but restricts our role to policing the very outermost boundaries of the district court's authority, and reserves ample discretion to the trial judges to manage their cases as they see fit. Not incidentally, by accepting this appeal, we are circumventing the limits that mandamus would otherwise impose on disruptive appeals of this type. *See* Cheney v. U.S. Dist. Ct. for Dist. of Columbia, 542 U.S. 367, 380, 124 S. Ct. 2576, 2586, 159 L. Ed. 2d 459 (2004) ("[Mandamus] is a 'drastic and extraordinary' **[**45]** remedy 'reserved for really extraordinary cases.'") (quoting Ex Parte Fahey, 332 U.S. 258, 259-60, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041 (1947)).

Second, we are placing significant burdens on the defendants by allowing the government to interrupt the litigation in order to pursue the appeal of a non-dispositive order. *See* Flanagan, 465 U.S. at 264, 104 S. Ct. at 1054; ITOFCA, 235 F.3d at 364 n.1. Nominally, the indictment has been dismissed, but because the dismissal was without prejudice, the prosecution of the defendants likely would have resumed regardless of whether we affirmed or reversed the challenged discovery order. In the meantime, while the advancement toward trial has ceased, the defendants have remained under the cloud of unresolved charges.[4] The fact that they have had to post bond in order to secure their release while this appeal is pending is merely one illustration of that fact.[5]

[*730] Third, we have burdened the time and resources of first three and now ten judges of this court in order to resolve an issue that later events in the district court might have rendered moot, had we not permitted the government to engineer the dismissal of the indictment. *See* Union Oil, 121 F.3d at 309 ("[L]ike the parties, we too must be concerned with our resources."). In short, this appeal has all of the hallmarks of piecemeal appellate litigation that the Supreme Court has cautioned against. Flanagan, 465 U.S. at 263-64, 104 S. Ct. at 1053-54; *see also* ITOFCA, 235 F.3d at 364 n.1; West, 197 F.3d at 1189; Union Oil, 121 F.3d at 310.

My colleagues nonetheless hold that finality is not required when the government is appealing the dismissal of the indictment, reasoning that because each of the other orders that section 3731 authorizes the government to appeal (orders suppressing evidence, for example) is a non-final order, Congress must have intended to permit the appeal of any order dismissing an indictment, whether final or not. *Ante* at 8-9. The final judgment rule embodied in section 1291 thus can have no application to government appeals under section 3731, *ante* at 8-9, which is an interpretation that even the government has not urged upon us.

The argument is somewhat **[**47]** ahistorical, in that Congress originally permitted appeals *only* from certain orders dismissing an indictment (including dismissals based on defects in the statute underlying an indictment) or otherwise disposing of a case (including an order sustaining a plea in bar), and those orders were indisputably final. 34 Stat. 1246; *see* United States v. Wilson, 420 U.S. 332, 336-37, 95 S. Ct. 1013, 1018-19, 43 L. Ed. 2d 232 (1975) (discussing the original and successor versions of the Criminal Appeals Act). With the 1970 amendments to the Criminal Appeals Act, Congress surely did expand the range of dismissals that were appealable, but it is not obvious that it meant to expand that range so far as to include non-final dismissals, simply because it added other categories of interlocutory orders to the list of decisions that the government can appeal.

More to the point, what this reasoning misses, in my view, is the singular way in which finality concerns come into play when the order deemed appealable by section 3731 is being used as a gateway to review of another interlocutory order that section 3731 does *not* recognize as appealable. For all of the reasons that I have discussed, requiring that such a dismissal be genuine, *i.e.* final, ensures that appellate review of the order underlying the dismissal (here, the discovery **[**48]** order) is consistent with the longstanding prudential concerns underlying the finality rule. In other words, we would have a genuine sanction based on the government's genuine refusal to comply with the underlying order as to which review is sought. That is precisely the scenario that Congress had in mind when it enacted the 1970 amendments to the Criminal Appeals Act. Although the Act had been modified subsequent to its enactment, the statute in 1970 still authorized appeal from only a limited subset of orders dismissing indictments. *See* Wilson, 420 U.S. at 336-

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[4] I recognize that none of the defendants objected to the dismissal of the indictment, *see* R. 144 at 6-7, but then of course they might have anticipated, particularly in light of United States v. Clay, supra, 481 F.2d at 135-36, that we would not permit the appeal of a non-final dismissal of the indictment without prejudice. That, indeed, has been their position throughout the course of this appeal.

[5] For purposes of pretrial release, when the government takes an appeal pursuant to section 3731, 18 U.S.C. § 3143(c) requires the **[**46]** district court to treat the defendant as if the case were still active and apply the criteria set forth in 18 U.S.C. § 3142.

37, 95 S. Ct. at 1018-19; S. Rep. No. 91-1296, at 2, 5-6 (1970) (Report of Senate Judiciary Committee). While Congress was considering modifications to the statute, the Department of Justice pointed out that the statute as it had been interpreted did not permit the government to appeal dismissals based on grounds other than defects in the indictment or in the statute on which the indictment is based. *Id.* at 22 (Dep't of Justice Comments on S. 3132). Thus, for example, the government had no ability to appeal when the district court had dismissed the indictment as a sanction for the **[*731]** government's refusal to comply with a discovery order that it believed was unauthorized. "In view of **[**49]** the tendency of the courts to expand discovery rights, even beyond those recognized in the Federal Rules of Criminal Procedure, and a growing tendency by courts to dismiss indictments on such grounds, the Government will inevitably be severely handicapped by its inability to appeal such dismissals." *Id.* Congress, in turn, broadened the language of section 3731 specifically to accommodate that concern. *Id.* at 5 (Report of Senate Judiciary Committee). But nowhere in the legislative history is there any hint that Congress thought that discovery orders generally should be appealable and that the government should be free to invite a dismissal of the indictment without prejudice whenever it wished to seek interlocutory review of such orders. That would have represented a dramatic expansion of the government's appeal rights in and of itself, and an equally dramatic departure from finality principles; and yet nowhere in the history is there any recognition of the competing interests implicated by such a significant step nor any other hint that Congress understood the breadth of the appeal rights it would be granting to the government. There is every reason to think that what Congress meant to authorize when **[**50]** it broadened the relevant language of section 3731 was an appeal from a dismissal entered as a true sanction—that is, a dismissal that was considered, final, and thus dispositive of the case. Permitting an appeal in that instance would address the concern that the government had raised with Congress, while honoring the concerns underlying the finality rule and not granting the government a broad right to appeal discovery orders.

Wilson's extravagant language—that Congress, when it enacted the current Criminal Appeals Act, "intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit," 420 U.S. at 337, 95 S. Ct. at 1019—provides only tepid support for the notion that the final judgment rule embodied in section 1291 has no application to government appeals in criminal cases. We have previously cautioned that *Wilson*'s sweeping declaration cannot be taken literally. *See* United States v. Spilotro, 884 F.2d 1003, 1005-06 (7th Cir. 1989); United States v. Horak, 833 F.2d 1235, 1246-47 (7th Cir. 1987). *Wilson* dealt with a double jeopardy issue and had nothing whatever to say on the subject of invited dismissals and the final judgment rule. Given the prominent role that the latter rule has long played in criminal as well as civil appeals, *see* Flanagan, 465 U.S. at 264-65, 104 S. Ct. at 1054-55, I would have expected a clearer signal from Congress that it was jettisoning **[**51]** the finality rule and granting the government a license no other party enjoys—the ability to invite a dismissal and use that as the gateway to appeal an interlocutory order that is otherwise not appealable, all the while reserving the right to proceed with the case even if it loses the appeal.

Likewise, *Flanagan*'s observation that section 3731 is "a statutory exception to the final judgment rule," 465 U.S. at 265 n.3, 104 S. Ct. at 1055 n.3, quoted *ante* at 7, was actually addressed to the statute's specific and separate provision permitting appeals from orders suppressing or excluding evidence. The Court was not referring to the entire statute, or to the provision authorizing appeals from an order dismissing an indictment in particular.

Certainly it is true that the Double Jeopardy Clause imposes significant constraints on the government's ability to take an appeal, *ante* at 8; *see* Wilson, 420 U.S. at 352, 95 S. Ct. at 1026, but requiring that a dismissal of an indictment be final before it may be appealed would in no way jeopardize the government's ability to exercise **[*732]** its appellate rights. If the district court decided, after an independent inquiry, that dismissal of the indictment was the appropriate sanction for the government's refusal to comply with the court's discovery order—in which case, as discussed, **[**52]** the court would undoubtedly dismiss the indictment *with* prejudice—then the government would have a truly final order to appeal. Likewise, if the government were so certain of its position that it was willing to invite the dismissal of the indictment with prejudice, it could take that course (presuming the district court were amenable), eliminate the need for a sanctions inquiry, and still have a final order of dismissal to appeal. Its willingness to accept such a disposition would be confirmation that the challenged discovery order is, from its point of view, dispositive of the case. Finally, to the extent the government believes that a discovery order is truly beyond the bounds of reason, it always has the option of seeking a writ of mandamus. *See, e.g.,* Spilotro, 884 F.2d at 1006-1007. In any of these three scenarios, we would have either a genuinely final judgment to review or a claim that the discovery order was so beyond the district court's authority to impose as to warrant interlocutory intervention.

My colleagues do recognize one meaningful limitation on the government's power to take an immediate appeal of an order with which it does not wish to comply by inviting a dismissal

of the indictment without prejudice: **[**53]** the district court's discretion to decline the invitation. *Ante* at 9-10. The government conceded at argument that the district court has this power, and rightly so. In the face of the government's unwillingness to comply with the court's order, a judge surely is not bound to accept a sanction of the government's choosing.

But our recognition that the district court has the discretion to accept or reject an invitation to dismiss the indictment, and thus to open or close the door to an appeal of an order that is otherwise not appealable under the terms of *section 3731*, more than anything else makes clear that we have created a right of appeal that Congress itself has not authorized. What we are saying, in effect, is that if the government wishes to take an appeal of an interlocutory order (like a discovery order), it may do so if it is willing to accept a temporary dismissal of the indictment *and* the district court, in the exercise of its discretion, is willing to go along and dismiss the indictment without prejudice in order to make the appeal possible. In everything but name, this is the criminal equivalent of the discretionary, interlocutory appeal that *28 U.S.C. § 1292(b)* authorizes in civil cases. Whatever the **[**54]** merits of such an appeal might be, suffice it to say that Congress has not authorized it. *See, e.g., United States v. White, 743 F.2d 488, 493 (7th Cir. 1984)*. (If Congress had authorized it, we no doubt would have been given the same discretion we possess in the civil context not to permit the appeal. Ironically, that is the one point that distinguishes this type of interlocutory appeal from one taken under *section 1292(b)*: so long as the district court in the exercise of its discretion allows the appeal by dismissing the indictment, we have no choice *but* to accept the appeal.)

The finding of jurisdiction in this case is also inconsistent with the spirit, if not the letter, of our prior decision in *United States v. Clay, supra, 481 F.2d at 135-36 (Stevens, J.)*. The district court in that case had dismissed the indictment based on the government's eight-month delay in indicting the defendant after he was arrested. On the government's appeal of that ruling, this court explained that although the district court's order was properly understood as a dismissal without prejudice, "[o]ur construction of the order **[*733]** does not foreclose appealability." *Id. at 135*. Preindictment delay was not a flaw that the government could fix by seeking another indictment from the grand jury: the damage had already been done, and consequently a second **[**55]** indictment would meet the same fate as the first. *Id. at 136*. The dismissal was, in other words, final and therefore appealable. *Id.*

My colleagues pooh-pooh the notion that *Clay* demands finality, *ante* at 11-12, but I have a hard time reading *Clay* otherwise. It is true that the dismissal order in that case was final, and so, strictly speaking, the court did not have to consider whether a non-final order of dismissal would have been appealable. But the significance of finality to the court's finding of appellate jurisdiction is hard to miss. Why else would the court have gone out of its way to observe that, although the court's dismissal of the indictment was properly construed as having been without prejudice, "[that] construction ... does not foreclose appealability," *id. at 135*, and then devote several paragraphs to explaining why the order was appealable precisely because it was final, *id. at 135-36*? Under *Clay*'s straightforward reasoning, the dismissal of the indictment in this case simply is not final and appealable.

The Supreme Court's decisions in *United States v. Armstrong, 517 U.S. 456, 116 S. Ct. 1480, 134 L. Ed. 2d 687 (1996)*, and *United States v. Bass, 536 U.S. 862, 122 S. Ct. 2389, 153 L. Ed. 2d 769 (2002)* (per curiam), by contrast, are utterly silent on the subject of appellate jurisdiction. Certainly it is safe to say that jurisdiction in both cases was **[**56]** assumed, *see ante* at 10-11, but we are obliged to honor the Court's express directive not to read jurisdictional holdings into precedents that do not address jurisdiction. *See Lewis v. Casey, 518 U.S. 343, 352 n.2, 116 S. Ct. 2174, 2180 n.2, 135 L. Ed. 2d 606 (1996)* (collecting cases).

Moreover, there are reasons to think that the dismissal orders at issue in both *Bass* and *Armstrong* were, in contrast to the order at issue here, final. In *Bass*, the district court had dismissed the government's notice of intent to seek the death penalty as a sanction for the government's refusal to comply with the district court's discovery order. The Sixth Circuit treated the dismissal of the death notice as a partial dismissal of the indictment, which of course *section 3731* expressly recognizes as an appealable order. *United States v. Bass, 266 F.3d 532, 535-36 (6th Cir. 2001)* ; *see also United States v. Moussaoui, supra, 382 F.3d at 463* (likewise treating dismissal of death notice as an appealable order and collecting cases). And because the dismissal of the death notice was a genuine sanction that the government could not avoid or undo except by obtaining reversal of the discovery order, the Sixth Circuit expressly labeled the dismissal "a *final*, appealable order under *18 U.S.C. § 3731*." *266 F.3d at 535* (emphasis mine). As for *Armstrong*, the Ninth Circuit's opinion, although it did not expressly engage in a discussion of finality in the **[**57]** same sense we are discussing it here (the court instead was addressing the fact that dismissal of the indictment had been stayed pending appeal), had the following to say on the matter of its jurisdiction:

> [T]he appeal is properly before us only because the government knowingly accepted the consequence of opting for an immediate appeal rather than complying

> with the discovery order. That consequence is that, if we affirm, the dismissal of the indictments must now be implemented unless the order dismissing them is further stayed pending review by the Supreme Court. It is too late for the government to change its mind and comply with the discovery order. Were that not the rule, we would simply be permitting appeals of discovery orders **[*734]** under the guise of dismissal orders that were either only tentative or were never intended to take effect. In either case, we would not have jurisdiction over the appeals under *§ 3731*.

48 F.3d 1508, 1510 (9th Cir. 1995) (en banc). This discussion reads very much as if the Ninth Circuit did not believe the option was open to the government, as it was here, to re-indict the defendants and belatedly comply with the district court's order in the event the government lost the appeal. Perhaps that reads too **[**58]** much into the court's language. But so long as we are talking about why the Supreme Court "may have let the issue [of jurisdiction] pass" in silence, *ante* at 11, it is worth pointing out that the Court in *Armstrong* may have thought the dismissal order was a genuinely final order.

For these and all of the other reasons set forth in the panel's opinion, *766 F.3d 722*, I respectfully dissent from the court's holding that we have jurisdiction over the government's appeal in this case.

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Summary of Orders Granting Selective Enforcement Discovery in Stash House Cases in Chicago

Alison Siegler, Univ. of Chicago Law School

Orders Granting Selective Enforcement Discovery in Stash House Cases in Chicago

- **SUMMARY:** Discovery granted in 7 cases pending in NDIL before 2015 (see below)

- **(1) *United States v. Williams*, 12-CR-887 (N.D. Ill.) (Castillo, C.J.)**
  - Selective enforcement discovery motions granted, requiring production of ATF "Manual" and various ATF reports. (Discovery under protective order.)
  - Relevant orders: Docket Entry (DE) 69–70, 87–88, 100, 140–141, 163–154, 191.

- **(2) *United States v. Brown et al.*, 12-CR-632 (N.D. Ill.) (Castillo, C.J.)**
  - Informally consolidated with *Williams*. Same status as *Williams*.
  - Relevant discovery orders: DE 152–153, 171–172, 190, 260–261, 291–292, 329.

- **(3) *United States v. Alexander, et al.*, 11-CR-148 (N.D. Ill.) (St. Eve, J.)**
  - Discovery motion granted in part and denied in part. ATF Manual disclosed to the same extent as in *Brown* and *Williams* cases (DE 219; DEs 169–171); selections from ATF stash house-specific memorandum also ordered disclosed (DE 243).

- **(4) *United States v. Cousins, et al.*, 12-CR-865 (N.D. Ill.) (Feinerman, J.)**
  - Sections from ATF manual ordered disclosed. [DE 125]

- **(5) *United States v. Elias, et al.*, 13-CR-476 (N.D. Ill.) (Leinenweber, J.)**
  - Selective enforcement discovery granted to same extent as *Brown* & *Williams*.
  - Discovery ordered DE 189; oral opinion as to why, Tr. at DE 202; also DE 272

- **(6) *United States v. Jackson, et al.*, 13-CR-636 (N.D. Ill.) (Durkin, J.)**
  - Selective enforcement discovery motion granted in part, denied in part. Appears to have been granted to same extent as *Brown* and *Williams*. DE 58; DE 114.

- **(7) *United States v. Paxton*, 13-CR-103 (N.D. Ill.) (Gettleman, J.)**
  - Court ordered selective enforcement discovery disclosed in written opinion, *United States v. Paxton*, 2014 WL 1648746 (N.D. Ill. April 17, 2014); extent of disclosure unclear from record. DE 139.

United States v. Paxton, 2014 WL 1648746 (N.D. Ill. April 17, 2014)

Alison Siegler, Univ. of Chicago Law School

2014 WL 1648746
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

United States of America, Plaintiff,
v.
Cornelius Paxton, Randy Walker, Randy Paxton, Adonis Berry, and Matthew Webster, Defendants.

No. 13 CR 103 | Signed April 17, 2014

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MEMORANDUM OPINION AND ORDER

Robert W. Gettleman, Judge

***1** Defendant Cornelius Paxton has filed a motion for discovery related to the policies and practices of the government and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") in pursuing so-called "phony stash house" cases.[1] Co-defendants Randy Walker, Randy Paxton, Adonis Berry, and Matthew Webster join his motion. For the reasons stated below, the court grants defendants' motion for discovery.

BACKGROUND

On February 28, 2013, a grand jury returned a six-count indictment charging Cornelius Paxton and his four co-defendants with conspiring and attempting to knowingly and intentionally possess five kilograms or more of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), 846; interference with commerce by use of threats, in violation of the Hobbs Act, 18 U.S.C. § 1951(a), and 18 U.S.C. § 2; and knowingly possessing a firearm in furtherance of a drug trafficking crime and a crime of violence, in violation of 21 U.S.C. § 846, 18 U.S.C. § 1951(a), and 18 U.S.C. § 924(c)(1)(A), (2). Randy Paxton was also charged with possession of a firearm after having been previously convicted of a crime punishable by a term of imprisonment exceeding one year, in violation of 18 U.S.C. §§ 922(g) and 924(e)(1).

Defendants were arrested by ATF agents on January 30, 2013, as part of an alleged phony stash house robbery sting operation. The details of these operations are well-known to the courts in this district. In general, an ATF informant or undercover agent poses as an individual with knowledge of the location of a drug stash house. The undercover then offers a defendant the opportunity to rob that stash house,[2] which is usually described as holding a mandatory minimum-triggering quantity of drugs, cash and, potentially, firearms. The undercover then encourages the defendant to recruit friends to assist in the robbery and often suggests that the group bring multiple firearms. Once plans are made and the individuals set off to rob the fictitious stash house, the ATF swoops in and arrests the defendants.

Defendants seek discovery to support anticipated claims of racial profiling in the investigation and prosecution of stash house robbery cases. The government opposes defendants' request. To obtain such discovery, *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), and its progeny require a defendant to make a preliminary showing of discriminatory effect and discriminatory intent. Defendants offer statistics regarding the racial makeup of the defendants prosecuted in this district for stash house robberies to meet this "some evidence" standard. According to defendants, in the seventeen cases filed since 2006, 42 of the 57 defendants are African–American, 8 are Latino, and 7 are white. In the cases filed since 2011, defendants allege that 19 of the 26 defendants are African–American, 7 are Latino, and none are white.

***2** Defendants argue that this statistical information, in the context of phony stash house sting operations, meets the *Armstrong* standard, and request the following discovery:

> a) A list by case name, number, and the race of each defendant of all phony stash house ripoff cases brought by the U.S. Attorney's Office for the Northern District of Illinois in which ATF was the federal investigatory agency from 2006 to the present [ ].[3]
>
> b) For each such case listed in response to a, a statement of prior criminal contact that the federal agency responsible for the investigation had with each

defendant prior to initiating the phony stash house ripoff sting (if all such information for a particular case is contained in the criminal complaint, a reference to the complaint would be a sufficient response).

c) The statutory or regulatory authority for ATF to be instigating and/or pursuing phony staff [sic] house ripoff cases involving illegal drugs (i.e. heroin, cocaine, crack, ecstasy, methamphetamine, etc) or any decision by any federal agency, the Justice Department or the White House to authorize ATF to pursue such cases in the Northern District of Illinois.

d) All national and Chicago Field Office ATF manuals, circulars, field notes, correspondence or any other material which discuss "stings", "reverse stings", "phony stash house ripoffs" or entrapment operations, including protocols and/or directions to agents and to confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that the targets do not seek to quit or leave before an arrest can be made and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry or national origin.

e) All documents that contain information on how supervisors and managers of the Chicago area ATF were to ensure and/or did ensure or check to decide that its agents were not targeting persons on the basis of their race, color, ancestry or national origin for these phony stash house ripoffs and what actions the Chicago area ATF (i.e. operating in the Northern District of Illinois) supervisors and managers took to determine whether agents were not targeting persons for such operations on the basis of their race, color, ancestry or national origin.

f) The number of confidential informants that the Chicago area ATF has used each year from 2006 to the present and the number of those confidential informants who had access to non-African American or persons of non-African descent who could be targeted for a phony stash house ripoff.

g) The factual basis in each case cited in [the list of cases provided by defendants] and cases produced in response to above and cases [the government produces in response to part a] regarding decisions made to pursue or initiate an investigation against any of the individuals listed as defendants in these cases.

h) All documents containing instructions given during the time Patrick Fitzgerald or Gary Shapiro have been the U.S. Attorney for the Northern District of Illinois about the responsibilities of AUSA's [sic] to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry or national origin and specifically that those persons who are defendants in phony stash house cases in which ATF was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendant's race, color, ancestry, or national origin.

***3** i) All documents that contain information about all actions taken during the time Patrick Fitzgerald or Gary Shapiro has been the U.S. Attorney for the Northern District of Illinois about the responsibilities of AUSA's [sic] to ensure and/or check to determine that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry or national origin and specifically that those persons who are defendants in phony stash house cases in which ATF was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendants' race, color, ancestry or national origin.

DISCUSSION

Defendants seek discovery regarding the ATF's investigation of phony stash house robberies and the government's subsequent prosecution of these inchoate crimes. The only question before the court is whether defendants have successfully tendered "some evidence" tending to show that the government and its agents have acted with discriminatory effect and intent, as required by *Armstrong*.[4] The court therefore makes no comment about the propriety of these kinds of sting operations, or about the merits of defendants' selective prosecution claim.

As the government points out, "[t]he presumption of regularity supports" the government's prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480, 1486, 134 L.Ed.2d 687 (1996) (internal quotations and citation omitted). Prosecutorial discretion, however, is constrained by the Constitution. Under the equal protection component of the Due Process Clause of the Fifth Amendment, the government may not base prosecutorial

decisions on "an unjustifiable standard such as race, religion, or other arbitrary classification,"*Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962).

Armstrong set forth the criteria for obtaining discovery on selective prosecutions claims. In that case, African–American defendants alleged that they were being targeted for federal prosecution for crimes involving crack cocaine, and therefore being exposed to higher statutory and Guideline sentences, instead of being prosecuted in the state system, where the penalties were less severe. In support of their claim, the defendants submitted an affidavit from a paralegal at the Office of the Federal Public Defender that stated that in every one of the 24 crack cocaine cases closed by the office during 1991, the defendant was African–American. The Supreme Court ruled that this statistical showing did not meet the "some evidence" threshold and reversed the district court's order granting discovery. The Court held that in order for a defendant to meet the "some evidence" standard under the discriminatory effect prong, the defendant must demonstrate that similarly situated individuals could have been prosecuted for the same crime but were not so charged. Although the Court recognized the burden this standard placed on defendants, it explicitly noted that "[t]he similarly situated requirement does not make a selective-prosecution claim impossible to prove." *Armstrong,* 517 U.S. at 466. The Court suggested that the defendants "could have investigated whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers, but were not prosecuted in federal court." *Id.* at 470.[5]

***4** The government argues that defendants have failed to identify similarly situated individuals of a different race who were not prosecuted, and faults the defense's assertion that the entire adult white population of the Northern District of Illinois is the appropriate comparison group. The government also argues that the defense's statistics are not compelling because non-African-American defendants were charged in roughly thirty percent of the stash-house cases identified. In response, the defense argues that *Armstrong* is distinguishable for two reasons. First, the defense notes that no identifiable comparison group exists in phony stash house cases where the government targets the individuals to charge. Second, in *Armstrong,* the government provided the selection criteria to the defense in response to the selective prosecution charge, which allowed the defense the opportunity to attempt to identify similarly situated individuals. In the instant case, the government has refused to provide any guidance as to selection criteria.

The court agrees that *Armstrong* presents a significant challenge for defendants, but one that the Seventh Circuit has addressed to accommodate selective enforcement and racial profiling claims. Inherent in the *Armstrong* framework is the assumption that there is a defined class of individuals to whom defendants may compare themselves. As the *Armstrong* court observed, in selective prosecution claims, there should exist records of individuals who were charged and then subsequently treated in a different manner than the defendant. In selective enforcement cases, however, identifying the class of individuals is a much more burdensome endeavor, and one that may prove insurmountable. In *Chavez v. Illinois State Police,* 251 F.3d 612, 640 (7th Cir.2001), the Seventh Circuit pointed out the differences between selective prosecution and selective enforcement cases, noting the difficulties defendants in racial profiling actions face. The court observed that "in a meritorious selective prosecution claim, a criminal defendant would be able to name others arrested for the same offense who were not prosecuted by the arresting law enforcement agency; conversely, plaintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped." *Id.*[6] The court therefore concluded that "[w]hile it is true that statistics alone rarely state a violation of equal protection ... they can be sufficient to establish discriminatory effect." *Id.*

The Seventh Circuit subsequently noted that, in some cases, statistics alone may be sufficient to meet the "some evidence" standard for the discriminatory effect prong. *United States v. Barlow,* 310 F.3d 1007, 1011 (7th Cir.2002) ("[A]lthough statistics alone rarely establish an equal protection violation, they may be sufficient to establish the discriminatory effect prong of the *Armstrong* test.") (internal quotations and citation omitted). The court warned, however, that "such statistics must be relevant and reliable." *Id.* In *Barlow,* the defendants attempted to conduct a study to ascertain the enforcement practices of Drug Enforcement Administration agents. The study relied on incidents where other law enforcement officers approached African–American individuals, and the court therefore found the study irrelevant to the question of the practices of the DEA. The Seventh Circuit also found the methodology of the survey to be flawed.

***5** In the instant case, there is no defined pool of individuals who are charged and subsequently prosecuted differently to whom defendants may compare themselves.

It also appears impossible that defendants would be able to conduct some sort of test operation alluded to in *Chavez* to determine the practices of the ATF; to produce an analogous situation, the defense would have to encourage Caucasian individuals to identify and approach undercover ATF agents or confidential informants, or somehow gain knowledge of Caucasian individuals who the ATF was already attempting to target. Because the analogous crime of "phony stash house ripoffs" is wholly dependant on the involvement of the ATF, defendants cannot generate information about similarly situated Caucasian individuals.[7] Defendants are therefore left with the methods described in *Chavez* and *Barlow;* they must provide "relevant and reliable" statistical evidence of discriminatory effect.

The court finds that defendants have proffered statistics sufficient to meet the "some evidence" requirement under Seventh Circuit precedent. Unlike the statistics offered in *Barlow,* defendants have provided statistics relevant to the issue of selective enforcement by the ATF. All of the cases identified by defendants have involved undercover operations by ATF agents in circumstances largely similar to the instant case. Further, the statistics appear to be reliable because they are corroborated, in part, by the lists of cases provided by the government, and there is no assertion that the information collected by defendants as to race is inaccurate.[8] Under the unique circumstances of this case, the court finds that defendants have produced evidence sufficient to meet the *Armstrong* standard for discriminatory effect.

Additionally, the court notes that in at least one other case in this district, *U.S. v. Brown,* 12–CR–0632 (N.D. Ill. filed Sept. 13, 2012), the government appears to have complied with the district court's order to produce some of the same discovery materials sought in the instant case, although those materials are subject to a protective order. In *Armstrong,* the court noted that:

> "[i]f discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."

517 U.S. at 468. Because the government has presumably already assembled some of the documents, the costs of producing such discovery in the instant case are somewhat mitigated.

The court also finds that defendants have made a preliminary showing of discriminatory intent. The defense has demonstrated that no white defendants have been indicted for phony stash house cases since 2009, despite the diverse makeup of the Northern District of Illinois. Because "the inexorable zero" may be evidence of discriminatory intent, *Yick Wo v. Hopkins,* 118 U.S. 356, 373–74 (1886), the court finds that defendants have produced "some evidence" tending to show discriminatory intent.

***6** The court finds that defendants have met their burden under *Armstrong* and its progeny, and grants defendants' motion for discovery. Although defendants have made a sufficient showing to entitle them to discovery, the court finds the scope of defendants' request to be broader than necessary. The parties are directed to meet and confer regarding which items on the list may be disclosed by agreement, and to report to the court on May 14, 2014, at 1:30 p.m.

All Citations

Not Reported in F.Supp.2d, 2014 WL 1648746

Footnotes

1 Defendants refer to these cases as “phony stash house ripoff cases.”

2 In the instant case, the government claims that Cornelius Paxton approached the confidential informant about potential opportunities for robberies. Neither side argues that this allegation alters the *Armstrong* analysis discussed below.

3 The court notes that the government has already provided to the court and defense counsel a list of currently pending stash house cases in the district.

4 Defendants’ racial profiling claim is essentially a selective enforcement claim, instead of a selective prosecution claim. The two claims are, however, analyzed under the same standard. *United States v. Barlow,* 310 F.3d 1007, 1010 (7th Cir.2002) (“[A] defendant seeking discovery on a selective enforcement claim must meet the same ‘ordinary equal protection standards’ that *Armstrong* outlines for selective prosecution claims.”).

5 *See* also, *id.* at 476 (Breyer, J., concurring) (“Were the selective prosecution defense valid in this case—*i.e.,* were there clear evidence, that the Federal Government’s prosecutorial policy had a discriminatory effect and ... was motivated by a discriminatory purpose, it should have been fairly easy for the defendants to find, not only instances in which the Federal Government prosecuted African–Americans, but also some instances in which the Federal Government did not prosecute similarly situated caucasians. The defendants’ failure to do so, for the reasons the Court sets forth, amounts to a failure to make the necessary threshold showing in respect to materiality.”) (internal quotations and citations omitted).

6 *Chavez* involved a civil rights racial profiling claim, and the Seventh Circuit explicitly distinguished *Armstrong* both because it was a criminal case and because it involved selective prosecution instead of selective enforcement. Yet, the *Chavez* court explicitly noted that the case before it implicated police conduct and not prosecutorial decision-making, and that this fact was the specific basis for distinguishing *Armstrong. Id.* Because the instant case likewise involves law enforcement conduct, and not prosecutorial discretion, the court finds the Seventh Circuit’s reasoning applicable.

7 The court also notes that, absent selection criteria similar to what the government provided in *Armstrong,* defendants may be unable to identify who any “similarly situated” individuals are.

8 The court takes notice of the fact that defense counsel in these cases are largely Federal Defenders and members of the Criminal Justice Act Panel, and as a result, there is significant overlap between defense counsel in the instant case and defense counsel in the other stash house cases cited in defendants’ brief. According to the brief, defense counsel have, in consultation, identified both the cases with similar fact patterns and the race of the defendants in those cases.

United States v. Brown et al., 12-CR-632 (N.D. Ill.): DE 153 (7/31/13); DE171 (11/8/13); DE 261 (10/3/14)

Alison Siegler, Univ. of Chicago Law School

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12 CR 632
	)	
Abraham Brown, et al.,	)	
	)	
Defendants.	)	

ORDER

This Court is mindful of the limited nature of judicial review of executive department decisions. The Court is also aware that history has shown a continuing difficult intersection between the issue of race and the enforcement of our nation's criminal laws. With these two abiding principles in mind, after careful review of the parties' briefs, this Court has concluded that it must grant the defendants' motion for discovery on the sensitive issue of potential racial profiling and selective prosecution.

The Court concludes that the defendants have made a strong showing of potential bias in the history of the prosecution of so called "phony drug stash house rip off cases." Unlike the typical historical, alleged violation of federal law, these unique cases are generated by the targeted use of confidential information to create potential robberies of phony drug stash houses.

The defendants' motion has specifically identified 17 phony stash house rip off cases, including this one that the U.S. Attorney's Office has prosecuted since 2006. The defendants' data shows that the overwhelming targets of these investigations were African Americans. In fact, since 2011, 19 African Americans and 7 Latino defendants have been charged in these cases. According to the defense, none of the defendants during this time period, were non-

minorities. The Court finds this showing is substantial enough to require the government to provide discovery to the defense on the following three limited subjects:

1. A list by case name, number and race of each defendant of all phony stash house rip off cases brought by the U.S. Attorney's Office in this district form 2006 to the present.

2. All documents containing instructions given from 2006 to the present by any supervisors employed by the U.S. Attorney for the Northern District of Illinois about the responsibilities of AUSA's to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry or national origin and specifically that those persons who are defendants in phony stash house cases in which Bureau of Alcohol, Tobacco and Firearms ("ATF") was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendants' race, color, ancestry or national origin.

3. Any document prepared by the ATF which summarizes how to investigate and prosecute phony stash house rip off cases, including any guidelines for selecting appropriate targets for these cases including but not limited to the Home Invasion Operations Bulletin referenced in USA Today.

Any documents responsive to this order should be provided to defense counsel, subject to any appropriate protective order, on or before August 23, 2013.

Chief United States District Judge

July 31, 2013

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 12 CR 632
	)	
Abraham Brown, et al.,	)	
	)	
Defendants.	)	

ORDER

This Court today primarily denied the government's motion for reconsideration of its limited discovery order of July 31, 2013. The only portion of the government's motion that was granted was its request to fully comply with this Court's July 31, 2013 Order by providing all further discovery materials for this Court's *in camera* review.

The Court today concludes that the defendants have made an even stronger showing of potential bias in the history of the prosecution of so-called "phony drug stash house rip off cases" since the July 31, 2013 Order by showing that additional phony drug stash house cases targeted Latino defendants. (*See* Defs.' Revised Ex. A, Race of Stash House Defendants from 2006 to Present As Provided by Government and Corrected by Defense Counsel.)

Defendants' revised Exhibit A shows that the Bureau of Alcohol, Tobacco, and Firearms ("ATF") brought 25 "phony stash house rip off cases." Eighteen of the 25 cases solely targeted African American defendants. The total of 25 cases resulted in the indictment of 77 African American defendants, 13 Latino defendants, and only six non-minority defendants.

This Court fundamentally disagrees with the government's assertion that *United States v. Armstrong*, 517 U.S. 454 (1996), provides an absolute shield from defendants' discovery requests under the unique circumstances presented by this case. *Armstrong* dealt with historical violations of the law. These unique cases are generated by the targeted use of confidential information to create potential robbery scenarios of phony drug stash houses. Under this Court's

best application of the *Armstrong* factors in this unique situation, the Court again strongly concludes that Defendants have met their preliminary burden to sustain this Court's limited discovery orders.

The government asserts that it has fully complied with the first two prongs of this Court's July 31, 2013 Order and has offered, which this Court has allowed, to fully comply with the Court's third and final prong by making an *in camera* submission to this Court. Defendants have filed a motion to compel full adherence to this Court's prior order, which was granted today. The government must produce all documents which will bring it fully in compliance with this Court's July 31, 2013 Order in its *in camera* submission, which is due on December 16, 2013.

Additionally, this Court will require the government to produce all racial and ethnic data which relates to the use of confidential informants by the ATF from 2006 to the present. This Court has supplemented its prior Order because it has concluded that such information is necessary to make a full determination of discriminatory intent in this case.

Any information supplied by the government to this Court for its *in camera* review will not be disclosed to the defense without prior written notice and a fair opportunity to object being provided to the government.

A further status hearing in this case will be held on December 18, 2013 at 10:00 a.m.

ENTERED:

Rubén Castillo
Chief United States District Judge

November 8, 2013

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	**No. 12 CR 632**
v.	)	
	)	**Chief Judge Rubén Castillo**
ABRAHAM BROWN, *et al.*,	)	

UNITED STATES OF AMERICA	)	
	)	**No. 12 CR 887**
v.	)	
	)	**Chief Judge Rubén Castillo**
ANTONIO WILLIAMS, *et al.*,	)	

ORDER

These are two of the so-called "phony drug stash house rip off cases." (*United States v. Brown, et al.,* 12 C 632 ("*Brown*"), R. 171, Order at 1; *United States v. Williams, et al.*, 12 C 887 ("*Williams*"), R. 70, Order at 1.) For reasons previously outlined, this Court ordered the government to turn over certain discovery to Defendants in these cases relevant to a potential selective enforcement defense. (*Brown,* R. 153, Order at 2; *Williams*, R. 70 at 2.) Defendants[1] now move for additional discovery related to this issue, including information pertaining to the confidential informants ("CIs") used in the stings. (*Brown*, R. 217, Defs.' Mot. for Disc.; *Williams*, R. 113, Defs.' Mot. for Disc.) They further move to modify the protective orders previously entered to permit counsel to share certain documents with counsel in other pending stash house cases, and to permit Defendants to view a document previously designated as

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[1] The defendants in *United States v. Brown*, 12 CR 632, are Abraham Brown, Kenneth Taylor, Alfred Washington, and Christopher Davis. A fifth defendant, Dwaine Jones, has pled guilty to two counts of the Indictment. (*Brown*, R. 116, Plea Agreement.) The defendants in *United States v. Williams*, 12 CR 887, are Antonio Williams and John T. Hummons. A third defendant, Howard Lee, has a change-of-plea hearing scheduled on December 3, 2014. (*Williams*, R. 139, Min. Entry.) All defendants other than Jones and Lee have joined in the present motions, and they are referred to collectively herein as "Defendants."

attorneys' eyes only. (*Brown*, R. 218, Defs.' Mot. to Adopt Mot. to Modify Protective Order; *Williams*, R. 115, Defs.' Mot. to Modify Protective Order.) For the reasons stated below, the motions are granted in part and denied in part.

I. Defendants' Motions for Additional Discovery

As has been outlined in this and other cases, since 2006, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") Chicago District Office has engaged in undercover sting operations involving robberies of non-existent drug "stash houses." *See generally United States v. Corson*, 579 F.3d 804, 806-07 (7th Cir. 2009); *see also United States v. Lewis*, 641 F.3d 773, 777 (7th Cir. 2011) (describing phony stash-house case as "what's fast becoming a rather shopworn scenario in this court"). As a result of these stings, a host of defendants in this District have been convicted of "conspiring to distribute cocaine that did not actually exist—cocaine they planned to liberate from a fictional stash house guarded by members of an imaginary Mexican cartel."[2] *Lewis*, 641 F.3d at 777. The U.S. Court of Appeals for the Seventh Circuit has characterized the stings as "a bit tawdry," because they appeared to be "directed at unsophisticated, and perhaps desperate, defendants who easily snap at the bait put out for them by [ATF agents]." *Id.*

After an initial showing that those being prosecuted were predominately minorities, this Court ordered the U.S. Attorney's Office to provide the following discovery to Defendants: 1) a list by case name, number, and race of each defendant in all phony stash house rip-off cases brought by the U.S. Attorney's Office from 2006 to the present; 2) all documents containing instructions given from 2006 to the present by any supervisors employed by the U.S. Attorney's

[2] The Seventh Circuit has found sufficient evidence to support a conspiracy conviction in such cases: "Though it might seem odd, the fact that the stash house, the drugs—and indeed the whole plot—was fake is irrelevant. . . . The crime of conspiracy is the agreement itself." *Corson*, 579 F.3d at 810.

Office about the responsibilities of Assistant U.S. Attorneys to ensure that defendants are not targeted due to their race, color, ancestry, or national origin; and 3) ATF instructions summarizing how to investigate and prosecute phony stash house ripoff cases, including any guidelines for selecting appropriate targets for those cases. (*Brown*, R. 153, Order at 1-2; *Williams*, R. 70, Order at 2.) The Court subsequently ordered additional information regarding the racial makeup of the confidential informants used in the ATF's phony sting operations. (*See Brown*, R. 171, Order at 2.) It is now known that since 2010, there have been 60 defendants charged in phony stash house cases in this District. (*Brown*, R. 217, Defs.' Mot. at 2.) Of these, 48 were African-American, 11 were Latino, and only one was white. (*Id.*) Based on this and other information, Defendants request further discovery, which they wish to use in connection with a potential defense based on selective enforcement, outrageous conduct, or entrapment. (*Id.*; *Williams,* R. 113, Defs.' Mot. at 2.) The government objects to these requests. (*Brown*, R. 233, Govt.'s Resp.; *Williams*, R. 124, Govt.'s Resp.)

A. Applicable Standards

The Attorney General retains "broad discretion" to enforce and prosecute violations of federal criminal law. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Accordingly, a "presumption of regularity" attaches to prosecutorial decisions, and "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *Id.* In the usual case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* Further, the federal judiciary does not have "a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *United States v. Russell*, 411 U.S. 423, 435

(1973). Rather, "[t]he execution of the federal laws under our Constitution is confided primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations." *Id.*

One such constraint is imposed by the equal protection component of the Due Process Clause of the Fifth Amendment. *Armstrong*, 517 U.S. at 464. Under this clause, the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* To establish an equal protection violation, the defendant must demonstrate that the administration of a criminal law is "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law." *Id.* at 464-65. The defendant must come forward with "clear evidence" showing that the prosecutorial decision "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Id.* at 465. This high standard stems from a desire to avoid unnecessary interference in the functions of the Executive Branch: "Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Id.*

In light of these concerns, the standard for obtaining discovery in connection with a selective prosecution claim "should itself be a significant barrier to the litigation of insubstantial claims." *Id.* at 463-64. To obtain discovery, the defendant must make a "credible showing of different treatment of similarly situated persons." *Id.* at 470; *see also U.S. v. Davis,* No. 14-1124, ---F.3d---, 2014 WL 4402121, at *2 (7th Cir. Sept. 8, 2014) ("to establish entitlement to discovery on selective prosecution, defendant must produce some credible evidence that

similarly situated defendants of other races could have been prosecuted but were not"); *United States v. Hayes*, 236 F.3d 891, 895 (7th Cir. 2001) ("[I]n order to obtain discovery on such a claim, a defendant must at least produce some evidence that similarly-situated defendants of other races could have been prosecuted but were not.").

Although *Armstrong* dealt with a selective prosecution claim, a defendant seeking discovery on a selective enforcement claim must make the showing *Armstrong* requires. *See United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("[T]he same analysis governs both types of claims: a defendant seeking discovery on a selective enforcement claim must meet the same ordinary equal protection standards that *Armstrong* outlines for selective prosecution claims."). Put simply, a defendant asserting selective enforcement must show that "a law or regulation was enforced against him, but not against similarly situated individuals of other races." *Id.* The defendant can satisfy the discriminatory intent prong by coming forward with evidence showing that the government had an "actual or *de facto*" policy "encouraging racial-profiling." *Id.* at 1012.

Yet, as this Court has previously noted, it is far from clear that the *Armstrong* standard, which dealt with historical crimes, applies to the prospective crime situation. For example, in *Chavez v. Illinois State Police*, 251 F.3d 612, 640 (7th Cir. 2001),[3] which pertained to racial-profiling in traffic stops, the Seventh Circuit noted the unique difficulties faced by a party seeking to assert a claim of selective enforcement. The Seventh Circuit observed that "[i]n a meritorious selective prosecution claim, a criminal defendant would be able to name others arrested for the same offense who were not prosecuted by the arresting law enforcement

[3] Although *Chavez* was a civil case, the Court finds the Seventh Circuit's thorough discussion of *Armstrong* instructive.

agency." *Id.* On the other hand, "plaintiffs who allege that they were stopped due to racial profiling would not, barring some type of test operation, be able to provide the names of other similarly situated motorists who were not stopped." *Id.* Indeed, as another Judge presiding over a phony stash house case in this District observed, it would be next to impossible for the defendants in such cases to conduct the type of test operation referenced in *Chavez*. *United States v. Paxton*, No. 13 CR 103, 2014 WL 1648746, at *5 (N.D. Ill. Apr. 17, 2014) (Gettleman, J.). As the Court observed:

> [T]o produce an analogous situation, the defense would have to encourage Caucasian individuals to identify and approach undercover ATF agents or confidential informants, or somehow gain knowledge of Caucasian individuals who the ATF was already attempting to target. Because the analogous crime of "phony stash house ripoffs" is wholly dependent on the involvement of the ATF, defendants cannot generate information about similarly situated Caucasian individuals.

Id.

B. Defendants' Evidence of Selective Enforcement

With these principles in mind, the Court considers the evidence submitted by the Defendants. As described above, the Defendants have come forward with troubling statistics regarding the racial breakdown of defendants in phony stash house cases brought in this District.[4] (*See Brown*, R. 217, Defs.' Mot. at 2.) They have also submitted information pertaining to a nationwide study showing that of 635 defendants arrested in phony stash house

[4] In a phony stash house case recently considered by the Seventh Circuit, defense counsel amassed similar information, showing that in the three years prior to the indictment in that case, 45 of the defendants charged in phony stash house cases were African-American, 14 were Latino, and just one was white. *Davis*, 2014 WL 4402121, at *2. Similarly, in *Paxton*, the defendants offered proof that in stash house cases filed in this District since 2011, 19 of the defendants were African-American, 7 were Latino, and none were white. *Paxton*, 2014 WL 1648746, at *1. Information submitted by the government *in camera* in this case further reflects that the majority of the confidential informants used in these cases were also African-American and Latino.

stings during the past decade, 579 (or 91 percent) were minorities. (*Brown*, R. 244-1, Defs.' Reply, Ex. A.) The Court is cognizant that raw statistics, even those showing a nationwide pattern of discriminatory impact, may not be sufficient to warrant discovery. *United States v. Bass*, 536 U.S. 862, 863-64 (2002) (per curiam); *Barlow*, 310 F.3d at 1011. Under *Armstrong*, the ultimate inquiry is whether the defendant has made a "credible showing" that "similarly situated individuals of a different race were not prosecuted." *Armstrong*, 517 U.S. at 465.

Upon careful review of the parties' submissions, the Court concludes that Defendants have satisfied that standard here. In addition to the statistical information discussed above, Defendants have submitted evidence pertaining to a "crew" of mostly white individuals located within the Northern District of Illinois who were allegedly committing stash house robberies during the same general time period as the stings conducted in these cases. (*Brown*, R. 244-2, Defs.' Reply, Ex. B; *Williams*, R. 135-4, Defs.' Reply, Ex. D.) These individuals were investigated and arrested by state law enforcement, but not by the ATF. In addition, Defendants have submitted data reflecting that while many the ATF's phony stash house stings were conducted in predominately minority areas of the city, there are other areas of the city with significant non-minority populations and high violent crime statistics. (*Williams,* R. 135-5, Defs.' Reply, Ex. E.) This information indicates that further discovery is needed to determine how the ATF identified potential targets for the stings, including how the CIs were instructed to recruit participants. The Court finds this information particularly valuable given that the initial contacts between the CIs and Defendants occurred during unrecorded conversations; without any recordings it is unknown precisely what was said by whom regarding Defendants' alleged desire to participate in a robbery, a key issue in these cases. (*See Brown*, R. 217, Defs.' Mot. at 5 & n.4.)

C. The Confidential Informants

Disclosure of information pertaining to the CIs triggers a separate set of concerns, as the government possesses a "limited privilege to withhold the identity of a confidential informant." *United States v. McDowell*, 687 F.3d 904, 911 (7th Cir. 2012). "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement." *Roviaro v. United States*, 353 U.S. 53, 59 (1957). This privilege must give way, however, if the defendant establishes that the disclosure of information pertaining to the informant "is relevant and helpful to his defense or is essential to a fair determination of a cause."[5] *McDowell*, 687 F.3d at 911. The role of the informant is a key factor in determining when the identity of the informant must be disclosed. *Id.* The case law describes two types of informants: a "mere tipster—someone whose only role was to provide the police with the relevant information that served as the foundation for obtaining a search warrant," and a "transactional witness who participated in the crime charged against the defendant or witnessed the event in question." *Id.* For informants who performed a transactional role in an investigation, the argument for requiring disclosure is stronger. *Id.*

Here, the government argues that the CIs were mere tipsters, and thus no discovery should be permitted. (*Brown*, R. 233, Govt.'s Resp. at 5-7; *Williams*, R. 124, Govt.'s Resp. at 5-6.) The Court disagrees. In *Brown*, the Court is cognizant that unlike some of the other phony stash house cases, this one arose in the midst of a months-long firearms investigation. (*Brown*, R. 1, Compl. at 3-4.) During the investigation, Defendant Jones allegedly sold several firearms

[5] It is worth noting that Defendants do not seek the identity of the CIs at this stage, but rather more limited information pertaining to their involvement and communications with the ATF as is relevant to these cases. As the U.S. Supreme Court noted, "where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged." *Roviaro*, 353 U.S. at 60.

to the CI, and in the course of one of their conversations, allegedly asked the CI if he knew of any places to rob. (*Id.* at 4.) In *Williams*, the sting began when Defendant Williams allegedly approached the CI and asked him if he knew of any places to rob. (*Williams*, R. 1, Compl. at 6.) Defendant Williams vigorously contests this version of events, claiming instead that the CI (whom he had only met a day or two earlier) presented *him* with the idea of committing the robbery and badgered him to participate even after he initially declined. (*Williams*, R. 135-3, Defs.' Reply, Ex. C.)

Regardless of the manner in which Defendants first came to the attention of the ATF, it is apparent that the CIs played a key role in both sting operations, serving as a point of contact between Defendants and the undercover agents, and participating in meetings in which the robberies were planned. (*Brown*, R. 1, Compl. at 3-10; *Williams*, R. 1, Compl. at 6-14.) Like the informant in *McDowell*, the CIs helped federal law enforcement agents "set up the sting that led to [Defendants'] arrest," and they thus have "little in common with the 'concerned citizens' who report suspected drug crimes in their neighborhoods and require confidentiality." *McDowell*, 687 F.3d at 911. Because the CIs were more akin to transactional witnesses, this weighs in favor of permitting additional discovery.

The Court also must consider the reasons why Defendants wish to obtain additional information pertaining to the CIs. *Id.* at 911-12. It can be discerned from the defense filings that they seek this information in order to pursue a potential defense based on entrapment, outrageous government conduct, and/or selective enforcement, any of which may be viable given the facts of these cases. *See, e.g.*, *Russell*, 411 U.S. at 432 ("[W]e 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 processes to obtain a

conviction[.]"); *United States v. McGill*, 754 F.3d 452, 459-60 (7th Cir. 2014) (reversing conviction based on district court's refusal to permit entrapment defense, given government agent's exploitation of a susceptible defendant); *United States v. Kindle*, 698 F.3d 401, 414-15 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part) (criticizing fictitious stash house stings as a "disreputable tactic," and concluding that entrapment defense should have been available to defendant in stash house case, where the confidential informant "kept badgering" him to participate even after he declined), *reh'g en banc granted, opinion vacated*, No. 11-2439 (7th Cir. Jan. 16, 2013); *United States v. Dawson*, 425 F.3d 389, 399 (7th Cir. 2005) (Williams, J., dissenting) (commenting that although the Seventh Circuit has not adopted an outrageous conduct defense, "I am confident that another opportunity to revisit that doctrine will not be long off"); *United States v. Hudson*, No. 13 CR 126, ---F. Supp.2d---, 2014 WL 960860, at *1 (C.D. Cal. 2014) (criticizing ATF for "ensnaring chronically unemployed individuals from poverty-ridden areas" in their stings, and dismissing indictment in phony stash house case based on outrageous government conduct defense).

D. Permitted Discovery

Based on these considerations, the Court finds some additional discovery warranted. Nevertheless, the Court is cognizant of the admonition in *Amstrong* regarding the burdens of ordering discovery in such cases:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

Armstrong, 517 U.S. at 468.

Given this admonition, and in light of the sensitive nature of the information being sought, the Court finds some of Defendants' requests overbroad. A significant failure by the agents to follow protocols in connection with the stings could suggest an improper purpose in targeting Defendants. *See Hudson*, 2014 WL 960860, at *6-7; *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The specific sequence of events leading up [to] the challenged decision also may shed some light on the decisionmaker's purposes. . . . Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role."). However, as the government points out, one of the ATF policies at issue did not exist until after the events giving rise to these two cases. (*See Brown*, R. 233, Govt.'s Resp. at 3-4.) The Court disagrees with the government's argument that this document is wholly irrelevant, as it summarizes the history, development, and mission of the ATF's sting operations. (*See id.*) Nevertheless, in the Court's view, evidence that the agents failed to follow protocols not yet in existence (and of which they were unaware) would not tend to show that they acted improperly or with a discriminatory purpose. Further, the Court agrees with the government that the defense already has the bulk of the information needed to pursue an argument that protocols were not followed. The protocols have been disclosed, and counsel can explore with their own clients whether the circumstances described were met with respect to the stings conducted here. The Court is permitting only limited additional discovery on this issue as outlined below. In addition, as to *Brown*, the Court has considered Defendants' arguments, as well as the timeline of events counsel compiled from this and other stash house cases. (*Brown*, R. 244, Defs.' Reply, Ex. C.) The Court concludes that the *Brown* Defendants have failed to demonstrate an entitlement to information about the "expedited" stings being conducted by ATF in Fall 2012; there is no indication that the sting was part of that expedited operation, as it

occurred during a three-week period in July and August 2012 following a months-long firearm investigation. (*See Brown*, R. 1, Compl. at 3-17.)

After careful consideration, the Court will allow discovery in *Brown* related to the following matters:

1. Whether the ATF agents made an attempt to verify the confidential informant's claim that Defendant Jones told the confidential informant that he and others were looking for a location where drugs were stored to conduct a robbery;

2. What, if anything, the confidential informant was told about the criteria being used to target individuals for participation in the sting;

3. What training, if any, the confidential informant was given regarding the information he should seek and what he should convey to a potential target;

4. What, if anything, the confidential informant was told regarding what he should say to a potential target who indicated that he wanted to commit a robbery;

5. Information regarding why the confidential informant was de-activated as an informant; and

6. Any report or other document authored by an ATF employee pertaining to the investigation in this case and describing or detailing a lack of compliance with ATF protocols in effect at the time of the investigation.

In *Williams*, it appears that the sting—which spanned a roughly one-week period in November 2012—may have been part of the expedited sting operations conducted by the ATF in Fall 2012. (*See Williams*, R. 1, Compl. at 6-18.) The Court will permit certain limited discovery

on that issue.[6] The Court finds the extent of the information sought by the Defendants overly broad, given the significant discretion afforded to the government in its law enforcement activities, but will allow discovery in *Williams* on the following issues:

1. How long the confidential informant was in Chicago before meeting Defendant Williams, and whether the two had any prior communications known to the ATF;

2. Whether the ATF made an attempt to verify the confidential informant's statement that Defendant Williams told him he had committed recent robberies and wanted to commit another one;

3. What training, if any, the confidential informant was given regarding the information he should seek and what he should convey to a potential target;

4. Information regarding why the confidential informant used in this case was deactivated as an informant;

5. Information regarding whether ATF informants or agents attempted to target any non-minorities during the Fall 2012 expedited sting operations; and

6. Any report or other document authored by an ATF employee pertaining to the investigation in this case and describing or detailing a lack of compliance with ATF protocols in effect at the time of the investigation.

The government is ordered to provide a copy of all responsive documents to the Court for an *in camera* review, along with any proposed redactions, on or before October 14, 2014.

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[6] Related to this issue, the Defendants sought information regarding when the out-of-town agents involved in *Williams* made travel arrangements to come to Chicago to participate in Defendants' arrests, but the government has voluntarily provided this information. (*See Williams,* R. 135-2, Defs.' Reply, Ex. B.)

II. Modification of the Protective Order

In their remaining motions, Defendants seek modification of the protective orders entered in this case. (*Brown,* R. 218, Defs.' Mot. to Adopt Mot. to Modify Protective Order; *Williams,* R. 115, Defs.' Mot. to Modify Protective Order.) First, they seek to modify the orders to permit counsel to share certain discovery responses with attorneys in other pending stash house cases. (*Williams*, R. 115, Defs.' Mot. at 3.) Upon consideration of the parties' submissions, the Court declines to grant such relief. Absent an agreement by the government, the Court finds it most appropriate that the Judge presiding over each case make an individualized determination whether such information is appropriately disclosed under *Armstrong*.

Defendants also request permission for counsel to show Defendants one of the previously produced documents, which, due to the fact that it contains sensitive law enforcement information, was designated as attorneys' eyes only. (*Williams*, R. 115, Defs.' Mot. at 2.) The document at issue is an ATF policy which contains no fact-specific information pertaining to these cases. (*See id.*) Counsel does not clearly explain why there is a need for Defendants to personally review this document, nor can the Court discern one. Given the need to avoid unnecessary intrusion into the government's law enforcement activities, *see Armstrong*, 517 U.S. at 465, the Court does not find a sufficiently strong reason to permit disclosure of this document beyond the attorneys. Nevertheless, the Court does not view the protective orders as precluding counsel from discussing the policy with their clients to the extent it may be relevant to a potential defense. (*See Brown*, R. 204, Protective Order, ¶ 8 (providing that documents designated attorneys' eyes may be "reviewed" only by counsel); *Williams*, R. 107, Protective Order, ¶ 8 (same).)

Finally, Defendants seek clarification regarding how the produced materials should be submitted to the Court in connection with a potential motion to dismiss. (*Williams*, R. 115, Defs.' Mot. at 4.) This request appears somewhat premature, given that discovery is still underway and it is not yet clear how, if at all, Defendants will need to use any of these materials in support of a motion filed with the Court. Nevertheless, counsel are directed to meet and confer regarding the proper manner for submitting these documents to the Court should it become necessary to do so, bearing in mind that "[w]hat happens in the halls of government is presumptively open to public scrutiny." *In Re Matter of Krynicki*, 983 F.2d 74, 75 (7th Cir. 1992).

CONCLUSION

For these reasons, Defendants' motions (R. 113, 115, 217, 218) are GRANTED in part and DENIED in part. The government is ORDERED to submit its discovery responses as outlined herein for an *in camera* review on or before October 14, 2014.

ENTERED:

Chief Judge Rubén Castillo
United States District Court

Dated: October 3, 2014

United States v. Alexander, et al., 11-CR-148 (N.D. Ill.): *United States v. Alexander*, 2013 WL 6491476 (N.D. Ill. Dec. 10, 2013); DE 171 (12/10/13); DE 243 (2/10/15)

Alison Siegler, Univ. of Chicago Law School

2013 WL 6491476
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern Division.

United States of America,
v.
William Alexander

No. 11 CR 148–1 | December 10, 2013

Attorneys and Law Firms

Peter S. Salib, AUSA, United States Attorney's Office, Chicago, IL, for United States of America.

Janis D. Roberts, Durkin & Roberts, Chicago, IL, for William Alexander.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

***1** Before the Court is Defendant William Alexander's Motion for Discovery on Racial Profiling. (R. 118, Mot.) The Court denies Alexander's motion to a large extent, but grants limited discovery, as explained below, of the Bureau of Alcohol, Tobacco, Firearms and Explosives' ("ATF") manual regarding the identification of targets in its stash-house robbery sting operations.[1]

BACKGROUND

On March 22, 2011, the grand jury returned a four-count indictment charging Alexander and his two co-defendants with conspiring and attempting to knowingly and intentionally possess five kilograms or more of cocaine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846, and knowingly possessing a firearm in furtherance of a drug trafficking crime in violation of 21 U.S.C. § 846 and 18 U.S.C. § 924(c)(1)(A), (2). (R. 16, Indictment at 1–3.) Special agents with the ATF arrested Alexander and his co-defendants on February 23, 2011 as part of a stash-house robbery sting operation. The stash house at issue was not real, and the individuals with whom Alexander and his co-defendants agreed to commit the robbery were undercover ATF agents.

In the present motion, Alexander seeks discovery regarding alleged racial profiling in the investigation and prosecution of the ATF's stash-house robbery sting operations. (Mot. at 9–12.) In support of his motion, Alexander provides the racial makeup of defendants from 17 stash-house robbery sting cases brought in the Northern District of Illinois since 2006. (*Id.* at 4–6.) Alexander claims that 42 of the 57 defendants in those cases are African American, 8 are Latino, and 7 are white. (*Id.* at 6.) Alexander further claims that in the 7 cases brought since 2011, 19 of the 26 defendants are African American, 7 are Latino, and none are white. (*Id.*) Alexander asserts that these statistics establish that the ATF field office in Chicago and the U.S. Attorney's Office for the Northern District of Illinois target minorities in conducting and prosecuting stash-house robbery stings, like the one that led to Alexander and his co-defendants' arrest. (*Id.* at 1.)

Alexander argues that the Court should authorize discovery related to his purported defenses of selective prosecution and selective enforcement under *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), or Federal Rule of Criminal Procedure 16. (*Id.* at 7–8.) Specifically, Alexander requests discovery of the following seven categories of information or documents:

> a) [A] list by case name, number, and the race of each defendant of all phony stash house ripoff cases brought by the U.S. Attorney's Office for the Northern District of Illinois in which ATF was the federal investigatory agency from 2006 to the present.
>
> ***2** b) For each such case listed in response: a statement of prior criminal contact that the federal agency responsible for the investigation had with each defendant prior to initiating the phony stash house ripoff sting (if all such information for a particular case is contained in the criminal complaint, a reference to the complaint would be a sufficient response).
>
> c) [T]he statutory or regulatory authority for ATF to

be instigating and/or pursuing phony staff [sic] house ripoff cases involving illegal drugs instead of guns. Any any [sic] decision by any federal agency, the Justice Department or the White House to authorize ATF to pursue drug cases in the Northern District of Illinois.

d) All national and Chicago Field Office ATF manuals [including The Home Invasion Operations Bulletin 1st edition and The ATF Manual Order], circulars, field notes, correspondence or other material which discus "stings," "reverse stings," "phony stash house ripoffs" or entrapment operations, including protocols and/or directions to agents and to confidential informants regarding how to conduct such operations, how to determine which persons to pursue as potential targets or ultimate defendants, how to ensure that the targets do not seek to quit or leave before an arrest can be made and how to ensure that agents are not targeting persons for such operations on the basis of their race, color, ancestry or national origin.

e) All documents that contain information on how supervisors and managers of the Chicago area ATF were to ensure that its agents were not targeting persons on the basis of their race, color, ancestry or national origin for these phony stash house ripoffs and what actions the Chicago area ATF (i.e. operating in the Northern District of Illinois) supervisors and managers took to determine whether agents were not targeting persons for such operations on the basis of their race, color, ancestry or national origin.

f) All documents which discuss "predication" for stash house stings. "Predication" is used here with the meaning it has in political corruption cases—that is establishing a good faith basis that a subject is already corrupt before the government tries to corrupt him.

g) All documents containing instructions given during the time Patrick Fitzgerald or Gary Shapiro have been the U.S. Attorney for the Northern District of Illinois about the responsibilities of AUSA's [sic] to ensure that defendants in cases brought by the Office of the U.S. Attorney for the Northern District of Illinois have not been targeted due to their race, color, ancestry or national origin and specifically that those persons who are defendants in phony stash house cases in which ATF was the investigatory agency have not been targeted due to their race, color, ancestry or national origin and that such prosecutions have not been brought with any discriminatory intent on the basis of the defendant's race, color, ancestry, or national origin.

(*Id.* at 9–12.)

LEGAL STANDARD

I. *United States v. Armstrong*

The Supreme Court considered the showing that a defendant must make to obtain discovery on a selective prosecution claim in *United States v. Armstrong,* 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). As the Supreme Court explained in *Armstrong,* the Attorney General and United States Attorneys, as delegates of the President, retain "broad discretion" to enforce federal criminal laws, and "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties." *Id.* at 464 (internal quotations and citations omitted). In the ordinary case, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Id.* (quoting *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)).

***3** A prosecutor's discretion, however, must yield to constitutional constraints, including the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* (citing *Bolling v. Sharpe,* 347 U.S. 497, 500, 74 S.Ct. 693, 98 L.Ed. 884 (1954)). Thus, a prosecutor must not base a decision whether to prosecute on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* (quoting *Oyler v. Boles,* 368 U.S. 448, 456, 82 S.Ct. 501, 506, 7 L.Ed.2d 446 (1962)). To overcome the presumption that a prosecutor has not violated equal protection, a criminal defendant must present "clear evidence to the contrary." *Id.* at 465 (citation omitted). Specifically, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.' " *Id.* To establish discriminatory effect in a race case, the defendant must show that "similarly situated individuals of a different race were not prosecuted." *Id.*

Furthermore, due to the onerous nature of discovery on selective prosecution claims, the Supreme Court held that the "justifications for a rigorous standard for the elements of a selective-prosecution claim ... require a correspondingly rigorous standard for discovery in aid of such a claim." *Id.* at 468. Therefore, to obtain discovery on a selective prosecution claim, a criminal defendant must show "some evidence of both discriminatory effect and discriminatory intent." *United States v. Bass*, 536 U.S. 862, 862, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002) (citing *Armstrong*, 517 U.S. at 465). Under *Armstrong*, the defendant's showing must include "evidence that similarly situated defendants of other races could have been prosecuted, but were not...." *Armstrong*, 517 U.S. at 469. The Supreme Court decided that this threshold "adequately balances the Government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution." *Id.* at 470.

Although *Armstrong* dealt only with a selective prosecution claim, a defendant seeking discovery on a selective enforcement claim also must make the showing *Armstrong* requires. *United States v. Barlow*, 310 F.3d 1007, 1010 (7th Cir. 2002) ("[T]he same analysis governs both [selective prosecution and selective enforcement] claims: a defendant seeking discovery on a selective enforcement claim must meet the same 'ordinary equal protection standards' that *Armstrong* outlines for selective prosecution claims."(citations omitted)). Thus, to establish discriminatory effect with respect to a selective enforcement claim, "an African American claimant must demonstrate that a law or regulation was enforced against him, but not against similarly situated individuals of other races." *Id.* (citing *Armstrong*, 517 U.S. at 465).

II. Federal Rule of Criminal Procedure 16

Federal Rule of Criminal Procedure 16(a)(1)(E) states:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and: (i) the item is material to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant.

Fed. R. Crim. P. 16(a)(1)(E). A defendant must make "at least a *prima facie* showing of materiality" to obtain discovery under Rule 16(a)(1)(e)(E)(i). *See United States v. Caputo*, 373 F.Supp.2d 789, 793–94 (N.D. Ill. 2005).

In *Armstrong*, the Supreme Court considered whether a criminal defendant may obtain discovery on a claim of selective prosecution under Rule 16(a)(1)(E), which, at the time, fell under Rule 16(a)(1)(C). *See Armstrong*, 517 U.S. at 462–63. The Supreme Court held that he or she cannot: "Rule 16(a)(1)(C) authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case in chief, but not to the preparation of selective-prosecution claims." *Id.* The Court, therefore, denies Alexander's request for discovery on racial profiling insofar as Alexander bases his request on Rule 16.

ANALYSIS

I. Alexander Fails to Meet the *Armstrong* Standard for Discovery on His Selective Prosecution or Enforcement Claims

***4** As explained above, to obtain discovery on his purported defenses of selective prosecution and selective enforcement, Alexander must show "some evidence of both discriminatory effect and discriminatory intent." *Bass*, 536 U.S. at 862 (citing *Armstrong*, 517 U.S. at 465); *Barlow*, 310 F.3d at 1010 (applying *Armstrong* to selective enforcement claims). The only evidence Alexander presents of discriminatory effect or discriminatory intent is the racial makeup of defendants from 17 stash-house robbery sting cases brought in the Northern District of Illinois since 2006. This evidence fails to fulfill either prong of the *Armstrong* test.

A. Discriminatory Effect

With respect to the discriminatory effect prong, Alexander's evidence fails to show that "similarly situated defendants of other races could have been

prosecuted [or arrested], but were not...." *Armstrong,* 517 U.S. at 469. In *Armstrong,* the criminal defendant attempted to show discriminatory effect through an affidavit of a paralegal in the Office of the Federal Public Defender alleging that all defendants in similar cases that the public defender's office closed in 1991 were African American. *Seeid.* at 459. The paralegal attached to the affidavit a "study" listing the 24 defendants, their race, the charges brought against them, and the status of each case. *Id.* The Supreme Court held that this "study" did not constitute evidence of discriminatory effect because it "failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted." *Id.* at 470.

In *Chavez v. Illinois State Police,* 251 F.3d 612 (7th Cir. 2001), the Seventh Circuit clarified that *Armstrong* did not entirely foreclose the use of statistics to show discriminatory effect. *Id.* at 638 ("While few opinions directly acknowledge that statistics may be used to prove discriminatory effect, the Court repeatedly relied on statistics to do just that."). The Seventh Circuit reaffirmed, however, that "[t]he statistics proffered must address the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Id.*"[R]aw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants.*" *Bass,* 536 U.S. at 862; *see alsoBarlow,* 310 F.3d at 1009–10 ("Dr. Lamberth's data tells us nothing about the behavior of the white travelers in Union Station; we therefore have no basis for concluding that any of these white travelers [that law enforcement did not stop] were similarly situated to Barlow."); *United States v. Hayes,* 236 F.3d 891, 895–96 (7th Cir. 2001) ("Hayes has failed to identify a single defendant of another race who met the guidelines of Operation Triggerlock but was not federally prosecuted....").

Alexander's analysis of the 17 cases he studied shows that approximately 75% of the defendants prosecuted in those cases are African American. The data he offers, however, says nothing about whether the ATF or the United States Attorney chose not to conduct or prosecute stash-house robbery sting cases for similarly situated individuals of another race. The Supreme Court and the Seventh Circuit have repeatedly found that this type of evidence fails to fulfill the discriminatory effect prong of the *Armstrong* test. *SeeArmstrong,* 517 U.S. at 465; *Bass,* 536 U.S. at 862; *Barlow,* 310 F.3d at 1009–10; *Hayes,* 236 F.3d at 895–96.

Moreover, the Court rejects Alexander's argument that because ATF agents control who they approach about a phony stash-house robbery, "the pool of similarly situated whites [in this case] is the entire adult white population of the Northern District of Illinois." (*See* R. 119, Def. Mem. at 5.) There is no support in the case law for such a broad interpretation of who constitutes a "similarly situated" individual. Indeed, the Seventh Circuit's analyses in *Barlow* and *Hayes*—and common sense—counsel against such a broad interpretation. In *Barlow,* two undercover DEA agents questioned and searched two African American individuals in Union Station. *See* 310 F.3d at 1009–10. The Seventh Circuit identified the group of similarly situated individuals as "whites engaging in the same behavior as Barlow—*i.e.,* looking nervously over their shoulders"—not as all white individuals in Union Station. *Seeid.* at 1012. Similarly in *Hayes,* which dealt with alleged racial profiling in federal enforcement of firearms offenses, the Seventh Circuit identified "similarly situated" individuals as "persons of another race *who fell within the Operation Triggerlock guidelines* [who] were not federally prosecuted." *See* 236 F.3d at 895–96 (emphasis added). Thus, here, Alexander must show that the ATF chose not to conduct stash-house robbery sting operations to ensnare members of another race who fell within the ATF's guidelines regarding who those operations may target. Alexander has failed to do so.

***5** The Court, though, is sympathetic to Alexander's argument that "[i]t is difficult to identify similarly situated whites who have not been targeted absent information about what selection criteria the informants and [the] ATF have been using." (Def. Mem. at 5.) Therefore, the Court will allow limited discovery of the ATF's policies and procedures regarding the selection criteria for targets of phony stash-house robbery cases in place at the time of Alexander's arrest. The government has submitted *ex parte* a six-page excerpt of an ATF manual that includes some provisions related to the identification of targets for this type of sting operation. The Court reviewed the document *in camera* and has identified certain sections that the government should disclose to defense counsel, subject to the protective order entered in this case. The government shall provide a redacted copy of the document to defense counsel, consistent with the Court's directive, by December 12, 2013. The government shall redact all *but the following sections* of that document:

i. Section 12(a)(1) on pages A–30 to A–31;

ii. Section 12(b) and subsections (1)–(5) on pages A–31 to A–32; and

iii. Section 12(f)(1) on page A–34, except for the front half of the hyphenated word in the first and sixth lines of the subsection.

The Court denies the remainder of Alexander's discovery requests because he has failed to make a credible showing of discriminatory effect. *See, e.g.*,*Armstrong*, 517 U.S. at 465.

B. Discriminatory Intent

Alexander's motion for discovery on racial profiling also fails under the discriminatory intent prong of the *Armstrong* test. To establish discriminatory intent, Alexander must show that "the decisionmakers in [his] case acted with discriminatory purpose." *Chavez*, 251 F.3d at 645. " 'Discriminatory purpose' implies more than ... intent as awareness of consequences. It implies that the decisionmaker ... selected or reaffirmed a particular course of action at least in part 'because of' its adverse effects upon an identifiable group.' " *Id.* (citations omitted). In *Chavez*, the Seventh Circuit found that the statistics offered to show that officers intentionally discriminated against Hispanics in stopping and detaining motorists may not serve as the "sole proof" of discrimination. *Id.* at 647–48. Rather, a claimant must present "sufficient non-statistical evidence to demonstrate discriminatory intent." *Id.*

Alexander fails to meet this requirement. The only evidence Alexander offers to show discrimination is the analysis of the racial makeup of defendants in the 17 stash-house robbery cases he studied. (*See* Mot. at 4–6.) Under *Chavez*, even if this analysis sufficed as evidence of discriminatory effect—which, as explained above, it does not—it fails to show discriminatory intent.

Alexander argues that, in addition to the statistics he provided, he can prove discriminatory intent (1) by showing that the ATF or the U.S. Attorney's Office acted like "an ostrich burying its head in the sand to avoid seeing the obvious," (2) under a *Monell* theory, by showing "a widespread ATF practice condoned by the U.S. Att[orney's] Office to target persons of color, principally African Americans, as the prospective defendants in phony stash-house ripoff cases," or (3) by showing that "race was considered in making the decision to prosecute or recommend prosecution by ATF." (Def. Mem. at 5–7.) The Court disagrees. Alexander does not cite a single case in which a court allowed discovery on selective prosecution or selective enforcement claims based on a showing of alleged discriminatory intent under any of these theories.

Even if Alexander could rely on these theories to fulfill the discriminatory intent prong of the *Armstrong* test—a dubious premise considering the demanding standard the Supreme Court imposed in *Armstrong* as well as the policy considerations underlying that standard—Alexander fails to make a "credible showing" of discriminatory intent under any of his theories. The only evidence Alexander offers of ATF special agents or the U.S. Attorney intentionally shielding itself from knowledge of discrimination is that the ATF keeps no statistics about the race of defendants targeted in its stash-house robbery stings. (*See* Mot. at 5–6.) The ATF's failure to keep statistics on the race of defendants hardly suggests discriminatory intent. Alexander, moreover, offers no evidence to support his assertion that the ATF has a widespread practice of targeting minorities in its stash-house robbery stings or that the ATF or the U.S. Attorney considered Alexander's race in deciding to pursue this case. (*See id.* at 7.) Alexander, therefore, fails to provide evidence of discriminatory intent.

***6** Accordingly, the Court denies Alexander's request for discovery on racial profiling, with the limited exception noted in Part I.A, *supra*.[2]

II. The Court Rejects Alexander's Request for Discovery under *Brady v. Maryland*

Alexander argues that the Court should order the discovery he requests under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), "if race was considered in making the decision to prosecute or recommend prosecution by the ATF." (Def. Mem. at 7.) Under *Brady* and its progeny, the government has an affirmative duty "to disclose evidence materially favorable to the accused." *Bielanski v. County of Kane*, 550 F.3d 632, 643 (7th Cir. 2008) (quoting *Youngblood v. West Virginia*, 547 U.S. 867 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006)). This duty extends to exculpatory evidence as well as impeachment evidence. *Mosley v. City of Chicago*, 614 F.3d 391, 397 (7th Cir. 2010) (citing *Youngblood*, 547 U.S. at 869, 126 S.Ct. 2188, 165 L.Ed.2d 269). *Brady*, however, does not "entitle a criminal defendant to embark upon an unwarranted fishing expedition through government files, nor does it

mandate that a trial judge conduct an *in camera* inspection of the government's files in every case." *United States v. Phillips*, 854 F.2d 273, 278 (7th Cir. 1988); *United States v. Mitchell*, 178 F.3d 904, 908–09 (7th Cir. 1999). "Such matters are committed to the sound discretion of the trial judge." *Phillips*, 854 F.2d at 278.

Alexander has offered no evidence that the ATF or the government considered his race in deciding to investigate and prosecute this action. The Court, therefore, declines to order the discovery Alexander requests under *Brady*, especially where doing so would allow Alexander to "engage[ ] in the type of fishing expedition rejected by the Supreme Court" in *Armstrong*. See*Hayes*, 236 F.3d at 896; *see also, e.g.*,*United States v. Wolff*, No. 11–719(FSH), 2013 WL 646204, at *6–7 (D.N.J. Feb. 20, 2013) (denying discovery under *Brady* where the defendant's allegations regarding the materials sought "[did] not rise above the level of mere speculation about materials in the government's files" (quotations and citation omitted)); *United States v. Caputo*, 373 F.Supp.2d 789, 794–95 (N.D. Ill. 2005) (denying discovery under *Brady* because "it is unknown whether any of the requested documents contain exculpatory or impeachment evidence that is material to either the issue of guilt or punishment").

CONCLUSION

For the reasons explained above, the Court denies Alexander's motion for discovery on alleged racial profiling in large part. The Court, however, will allow limited discovery of portions of the ATF manual in place at the time of Alexander's arrest regarding the selection criteria for targets of phony stash-house robbery cases, which the government submitted to the Court *ex parte* for an *in camera* review. The government shall provide a copy of the document submitted to the Court (redacted per the Court's instructions in Part I.A., *supra*) to defense counsel, subject to the protective order in this case, by December 12, 2013.

All Citations

Not Reported in F.Supp.2d, 2013 WL 6491476

Footnotes

1 Defense counsel, who is counsel of record in *United States v. Brown,* already has some of the discovery Alexander seeks in this case, which the government filed in another case pending in the Northern District of Illinois. *See United States v. Brown,* No. 1:12–cr–00632, R. 154 at Ex. A–D.

2 Additionally, some of the categories of information or documents Alexander requests have no relevance to his claim of racial profiling. The Court denies Alexander's request for documents in categories (c) and (f) for this additional reason.

End of Document

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
	)	No. 11 CR 148-1
v.	)	
	)	
	)	Judge Amy J. St. Eve
WILLIAM ALEXANDER	)	
	)	

ORDER

Defendant William Alexander's Corrected Second Motion for Additional Discovery [122] is denied in part and denied in part as moot.

STATEMENT

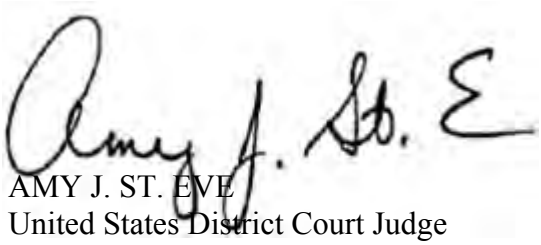
Defendant William Alexander has moved for discovery of the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") "play book" outlining the ATF's procedures for conducting phony stash-house robbery stings. (R. 122.) The Court denied Alexander's first motion for discovery of the ATF "play book" because there was no evidence that a physical "play book" actually existed and because Alexander failed to show that the "play book," if it did exist, was material to preparing his defense. (*See* R. 103.) The Court, however, instructed the government to submit a copy of the ATF "play book," if one existed, to the Court *ex parte* for an *in camera* review on or before April 1, 2013. (*Id.*) In response, the government submitted a six-page excerpt of the ATF manual in place at the time of the underlying investigation that covered ATF investigatory techniques for home invasion investigations.

Alexander renewed his motion for discovery of the ATF's "play book" on August 4, 2013. (R. 122.) In his renewed motion, Alexander argues the "play book" is material for three reasons. First, "[i]f the 'play book' directs sting cases at minority communities it would provide powerful evidence for the pending motion which alleges this case to be a part of [a] racially motivated program." (*Id.* at 4.) Second, "[i]f the 'play book' instructs agents to not record the initial approach to a subject[,] [it] would be impeachment material for Alexander who is planning an entrapment defense." (*Id.*) Third, "[i]f the 'play book' directs the agents to disregard that a subject is a manifest 'blowhard' who has zero ability to carry out a home invasion, the jury should know that." (*Id.*)

The Court has reviewed the ATF "play book" *in camera*, and as explained in its Memorandum Opinion and Order on Alexander's motion for discovery on racial profiling (*see* R. 170), it has identified certain sections of the "play book" that the government should disclose to defense counsel, subject to the protective order entered in this case. The Court has ordered the government to produce a redacted copy of that document, consistent with the Court's directive,

by December 12, 2013. (*Id.*) The Court, therefore, denies Alexander's Corrected Second Motion for Additional Discovery in part as moot. Additionally, after reviewing the ATF "play book" *in camera*, the Court has determined that the remainder of the document is not material to preparing Alexander's defense. *See* Fed. R. Crim. P. 16(a)(1)(E)(i). The Court, therefore, denies the rest of Alexander's Corrected Second Motion for Additional Discovery.

Date: December 10, 2013



AMY J. ST. EVE
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	No. 11 CR 148-1
v.	)	
	)	Hon. Amy J. St. Eve
	)	
WILLIAM ALEXANDER	)	

ORDER

The Court grants Defendant Alexander's motion to compel additional discovery relating to the government's confidential informant in part and denies it in part. The government must produce the discovery set forth in this Order by February 13, 2015.

STATEMENT

Before the Court is Defendant William Alexander's motion to compel additional discovery related to the government's confidential informant in this case. For the following reasons, the Court grants the motion in part and denies it in part.

BACKGROUND

On March 22, 2011, the grand jury returned a three-count indictment, charging Defendant William Alexander with conspiring and attempting to knowingly and intentionally possess five or more kilograms of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and § 846, and knowingly possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A). (R. 16, Indictment.) Special agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") arrested Alexander and his two co-defendants on February 23, 2011 as part of a sting operation involving a fake stash-house robbery. The stash house at issue was not real and the individuals with whom Defendant agreed to commit the robbery were undercover ATF agents.

The parties have been had multiple disputes over discovery pertaining to the Confidential Informant ("CI"). Defendant Alexander has previously represented that he came under the protection and influence of the CI, a fellow inmate, while serving time in DuPage County Jail. After Alexander and the CI were released from jail, the CI recruited Alexander to participate in the fake stash-house robbery by claiming that Alexander owed him for protecting Alexander in jail. The CI then allegedly promised Alexander that the robbery offered a large reward (30 kilograms of cocaine at approximately $22,000 per kilogram) with little risk. Alexander claims that although he resisted recruitment numerous times, the CI "eventually prevailed. For various

reasons, including Defendant's knowledge of the CI's identity, the Court previously ordered the government to turn over the CI's identify and some additional discover. (R. 222.)

In addition, the Court ordered the government to submit the following items in camera and ex parte for the Court's review: 1) a report of the ATF's efforts to locate the CI; 2) the agreement between the CI and the ATF; and 3) the "SRT Memorandum". Defendant seeks production of these documents. (R. 229.) The Court has reviewed them in camera and orders the government to turn over the agreement between the CI and the ATF and the portions of the SRT Memorandum identified below.

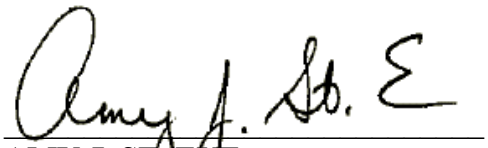
First, the government does not have to produce the summary documenting the ATF's efforts to locate the CI. After reviewing this document, the Court concludes that is it not relevant.

Second, the Court has reviewed the agreement between the CI and the ATF and orders the government to produce it to Defendant by February 13, 2015. It is relevant if the CI testifies and it may prove relevant to Defendant's entrapment defense. It may also be relevant to Defendant's cross examination of the case agent.

Finally, as to the SRT Memorandum, the Court orders the government to produce pages 1, 2 and part of page 3 (up through the "Undercover Scenario Prior to Arrest" section) by February 13, 2015. This Memorandum details a conversation the CI had with Defendant and several interactions the ATF case agent had with Defendant. The government contends that "there is no substantive difference in the content in the SRT Memorandum relating to the interaction between the case agent and the CI" from a three paragraph Report of Investigation the government previously provided to Defendant. The Court has reviewed the Report of Investigation and disagrees. Specifically, the SRT Memorandum contains the following relevant line that is missing from the Report of Investigation: "The CI informed ALEXANDER that he knew of someone needing a crew to commit an armed home invasion of a drug stash house."

In addition, the Report of Investigation contains details regarding the case agent's interactions and discussions with Defendant. It is unclear if the government has produced this information, including Defendant's statements to the case agent in his undercover capacity. This information is relevant to Defendant's entrapment defense. The "undercover scenario" may also prove relevant to Defendant's entrapment defense. As such, the Court orders the government to produce it. The government does not need to produce the remaining portion of the SRT Memorandum.

Dated: February 10, 2015



AMY J. ST. EVE
United States District Court Judge