UNDER SEAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	**No. 12-CR-887**
v.	)	**Chief Judge Rubén Castillo**
	)	
	)	
ANTONIO WILLIAMS, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS
FOR RACIALLY SELECTIVE LAW ENFORCEMENT (CORRECTED)

TABLE OF AUTHORITIES

Cases

Other Authorities

TABLE OF CONTENTS

Defendant JOHN T. HUMMONS, by STEVEN SALTZMAN and the University of Chicago Law School's Federal Criminal Justice Clinic and its attorneys, ALISON SIEGLER and JUDITH P. MILLER, respectfully submits this MOTION TO DISMISS FOR RACIALLY SELECTIVE LAW ENFORCEMENT. If the Court requires additional information, defendants request an evidentiary hearing. Mr. Hummons submits this motion on behalf of himself and his co-defendant, Antonio Williams ("defendants"). In support, defendants state as follows:

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. Brown*, 12-CR-632, Dkt. 399 (N.D. Ill. July 27, 2015); *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). 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. *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 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 the two *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 discretion, targeting defendants of color. Moreover, defendants provide direct evidence that, in some cases—including this one—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 including the day of arrest. It uses that control to select each individual defendant. ATF agents

[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 Order 3250.1B" is Supp. Appx B; the "Zayas Training" is Supp. Appx C; and the "ATF Order 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 the next footnote.

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. Each of the 24 cases charged from 2006–2013 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.

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 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.[2]

[2] 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 this Court'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.

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. They began training agents and prosecutors around the country in the national program. *See* ATF Manual at 3; Bayless Aff. at 3. The ATF has used this national program in the Northern District of Illinois since at least 2006.

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); 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).[3]

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'

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).

[3] 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.

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 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. Zayas Training at 12. Once the supervisor

approves, the ATF swoops in and arrests everyone present.[4]

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, "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. It is during the meetings that agents identify the Operation's targets, shape the robbery plan, and encourage the early targets to recruit more people, with guns. *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); 3250.1B.12.f(1) (requiring ATF to attempt to identify all targets before

[4] 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).

arrest); 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 three in-person meetings with targets before the day of arrest). For example, 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 3250.1B12.b(1); (2) all "[t]argets must be currently involved in criminal activity," ATF O 3250.1B.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 26); (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.12d(2) (same); ATF Manual at 13 (meetings); ATF O 3250.1B.12.f(2) (same); Zayas Training at 26 (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, as discussed below. 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* at 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.[5] *See* Report at 15. The 94 targets comprised 8 White people, 12 Hispanic people, and 74 Black people, in two distinct time periods. *Id*.

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. In fact, all variations of all tests show a less than 5% likelihood of the ATF selecting so many Black defendants by chance. That is, all of Professor Fagan's results are statistically significant for Black defendants at the 5% level or less. See Report at 30, 31, 33, 35.[6]

---

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

[6] 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 less than a 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 less than a 1 in 20 chance that so many non-White or Black people would be selected; a p-value less than .1 or 10% creates less than a 1 in 10 chance. In social science, a p-value below .01 or .05 means that there is "statistical significance," and social scientists will then reject the possibility that the two groups are being treated equally. Here, given that the p-value is below .05 for all tests, social scientists would conclude that the ATF did not treat White and Black individuals equally. As a legal matter, the significance level of 5% is not required to show

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 less than a 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.

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

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

In the *Williams* case, the ATF targeted who turned out to be three Black defendants. This case did not begin as a stash house robbery investigation. Instead, it started when an out-of-town Black confidential informant, who had arrived in Chicago less than one month earlier, was strolling down 63rd and King Drive in an overwhelmingly Black neighborhood when he saw

---

discrimination. *See generally Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362–63 (7th Cir. 2001). *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 362–63 (7th Cir. 2001).

someone selling marijuana. *Williams*, 12-CR-887, Dkt. 135-3, Ex. C; *id.* Dkt. 147-1, Ex. A (Nov. 12, 2014). He waved around a wad of big dollar bills and bought some marijuana from a man on that corner. The next day the CI bought marijuana from the same man, this time at the corner of 65th and King Drive. The CI laid out the phony stash house story for that corner salesman—he proposed they rob a man who was coming from California with marijuana and 8-10 kilos of cocaine. It would be a life-changing opportunity, the CI said. *Id*.

The CI persisted for the next few days and finally the man from the street corner, Antonio Williams, agreed to meet with the CI's people, even though Williams reiterated that he did not deal with cocaine. *Id*. Williams, the CI, and the Undercover Agent (UCA) first met on November 7, 2012. The next day Williams, "Rio," and "Chuck" (all Black men) again met with the UCA and CI. Rio made clear he did not want to be involved in the robbery but would buy some of the kilos of cocaine; Chuck also said he was not going to do a robbery. Finally, on November 12, the UCA, Williams, Howard Lee, Mario Brown, and John Hummons (who was not identified by name) met one last time.

The ATF's eagerness to set up this ever-changing and unknown collection of Black men exemplified its mishandling of its internal procedural requirements. First, the ATF failed to ensure that each of the defendants was currently criminally active. *Contra* ATF O 3250.1B.12.b(2) ("Targets must be currently involved in criminal activity."). Second, the three targets who showed up on the day of the arrest barely managed to obtain one firearm among them, further undermining any possibility that they might be a real stash house robbery crew. *Compare* Complaint, *United States v. Williams*, 12-CR-887, Dkt. 1 at 18 (N.D. Ill. Nov. 15, 2012) *with* Zayas Training at 5 (targets should "[h]ave the ability to commit a home invasion by . . . having possession of, or access to, firearms"). Finally, the ATF's Takedown Memo failed to

identify two of the participants. *Williams* Takedown Memo, Supp. Appx E-18. *Contra* ATF O 3250.1B.12.g ("The [takedown] memorandum shall contain . . . complete identification and criminal history of all known suspects"). The ATF did not meet with Mr. Hummons or Mr. Lee until two days before the arrest, and never actually identified them until after their arrest. *Williams* Complaint at 13. *Contra* 3250.1B.12.f.(1); Zayas Training at 11 ("[A]dditional meetings will be conducted in an attempt to identify other members."). Thus, by the day of arrest the ATF had identified only one of the actual three targets who fell for the undercover agent's story: Antonio Williams, a street-level marijuana dealer.

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 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. Accordingly, 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 defendants to provide evidence that "similarly situated defendants of other races could have been prosecuted, but were not.").

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

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).[7]

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

[7] 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.

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).

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

The 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 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.[8]

The Similarly Situated Comparison Group: To determine the contours of the comparison

[8] 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 this Court to deny that request. Mar. 25, 2015 Hearing Tr. 7:7–10, *Williams*, 12-CR-887, Dkt. 212 (May 15, 2015).

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;[9] and (2) were convicted of those offenses in the same geographic area and during the same time period in which the stash house cases arose.[10] 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 and Seventh Circuit's discriminatory effect standard. Defendants illustrate the comparative evidence visually:[11]

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

[10] 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 MSA 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).

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

FIGURE 1: Stash House Cases— Comparative Evidence	
Defendant Group	Comparison Group
94 Stash House defendants **Geographic Area →** 8 counties in IL **Time period →** 2006-2013 **Racial Composition →** 78.7% Black **Likelihood Racial Composition Result of Chance → 0%**	**292,442 people who met ATF's targeting criteria** **Geographic Area →** 8 counties in IL **Time period →** 2000-2013 **Racial Composition →** 55.4% Black

FIGURE 2: *Armstrong*— NO Comparative Evidence	
Defendant Group	Comparison Group
Defendants in federal crack cocaine cases **Geographic Area →** Los Angeles **Time period →** 1991 **Racial Composition →** 100% Black **Likelihood Racial Composition Result of Chance → ?**	**NONE PRESENTED**

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 demonstrated the racial composition of the defendant group (people prosecuted for dealing crack cocaine), *Armstrong*, 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 suffers from none of these problems.[12]

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

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

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 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.[13]

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

The next three increasingly rigorous statistical tests 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 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

[13] 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 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.

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 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." *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.* at 266 (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 (finding evidence of intentional selective enforcement in regression analyses that show "consistent racial disparities . . . that are not attributable to . . . race-neutral factors" to 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. General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976).[14] 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 (people eligible for grand jury service) 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.

[14] 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).

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); *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 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 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 farther, 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 also 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 statistically 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.[15] 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:[16]

- 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. In addition to the ATF's written materials, discussed in detail above, the government repeatedly 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. Times, Nov. 20, 2014 (quoting Ginger L. Colbrun, ATF Spokeswoman).[17]

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

[16] 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.

[17] *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 ("The A.T.F. said the sting operations had put more than 1,000 'violent, hardened

- 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 Argument, 14-1124, Dkt. 39, 40 at 11:49 (7th Cir. 2014).[18] 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 provide strong evidence of discriminatory

---

criminals' in prison over the past decade.").

[18] 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).

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 (vs. White) significantly increased a person's odds of being selected, over and above any effect of the 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 claim that it is 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. 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 effect and discriminatory intent 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 effect and discriminatory intent, 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 would be the gold standard for demonstrating that discriminatory intent *caused* a racially disparate outcome.[19] 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 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

[19] *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.

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 these confounding variables, and does so in a way more analogous to an experiment than Tests 1 or 2.[20] Report at 27–29. The Propensity 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

[20] 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.

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 (i.e., are 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 two non-ATF cases of real stash house robbery groups in this district, and both have a racial composition that is strikingly different from the racial composition of the ATF's targets. *See United States v. Rodriguez*, 09-CR-332 (N.D. Ill.); *People v. Panozzo*, *et al.*, 14CR-14577 (Cir. Ct. of Cook County).[21]

In the first of these cases, 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, ¶6, 8–12, 28–32; *id.*, Dkt. 126-2, Count 1, ¶1-10; *id.* Dkt. 1524 at pp. 1–4. The members of the crew who were charged were seven Hispanic people, two White people, and two Black people.

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* Complaint for Search Warrants regarding Panozzo Koroluk Crew (July 17, 2014), *reprinted as Exhibit to* Under Seal Reply Memorandum, *Williams*, 12-CR-887, Dkt. 135-4. This crew was connected to the Chicago Outfit

[21] There appears to be a third case involving White stash house robbers—the case against Officer Stan Kogut, a White man and one of the agents in this case. *See* Complaint, *United States v. Vaughan*, 14-CR-639, Dkt. 1 at 2–3, 6–7 (N.D. Ill. Nov. 4, 2014). Defendants have not yet been able to determine the race of Kogut's co-conspirators. The Kogut/Vaughan case is discussed at greater length *infra* at Argument Part III.D.

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 two real stash house cases were 12% Black and 59% 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 two cases (neither 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*, 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).[22] As this Court 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 and procedural safeguards 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.").

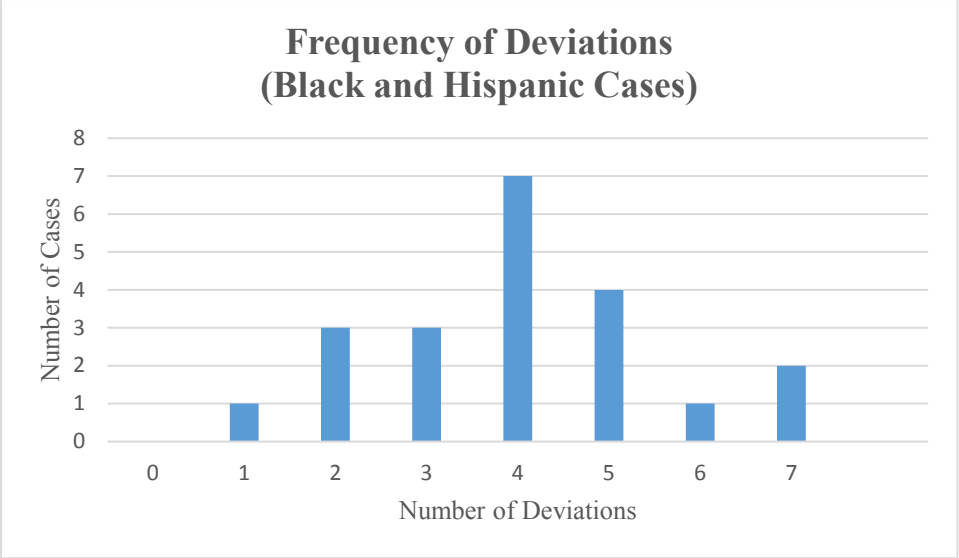
In this district, the ATF abandoned those safeguards for non-White targets while adhering closely to them for White targets. Defendants compared the 24 ATF stash house cases in this district to the ATF's substantive aims and procedural meeting and identification requirements.

---

[22] *See also Navajo Nation v. State of 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).").

As detailed below, defendants found that, for the three mostly White cases, the ATF rarely deviated from its internal requirements. *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.*[23]

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 four times per case, with two to seven deviations overall. From 2011 to 2013, the ATF did not

[23] 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.

charge *any* mostly White cases. Instead, it charged Black and Hispanic cases, and deviated from them four times per case.[24]

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 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) [25]
    - 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)

[24] 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.

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

- 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: 1 (33% 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 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").[26]

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.[27] In cases involving mostly 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

[26] 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.

[27] 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*, 3-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).

> 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 confidential informant. 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).[28] 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 is evidence of racially discriminatory intent by the ATF and its agents.

[28] The target identification requirements in the Zayas Training largely parallel the criminal history requirements in 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.

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.b(1).

The ATF targeted groups with one or zero identified violent offenders in at least nine cases involving exclusively Black defendants, one case involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[29] 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 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

[29] 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. The case with mostly Hispanic defendants in which only one defendant known before the arrest day could have been identified as a violent offender is *United States v. Davila*, 12-CR-713 (Feinerman, J.) (two Hispanic defendants, one Black defendant).

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.[30] In *United States v. Paxton*, for example, there was no evidence of current criminal activity for two of the four Black defendants known to the ATF before the arrest. For a third, Randy Walker, any such evidence was dated and minimal at best: His only police contact had been four years earlier, when he was arrested, but not convicted, for criminal trespass. Likewise, in *United States v. DeJesus*, a case involving exclusively Hispanic defendants, there was no evidence of current criminal activity for two of the three defendants known to the ATF before the day of the arrest. The most recent conviction for the third, Jesus Corona, dated all the way back to 1999. Likewise, Ceferino Malave's most recent conviction was in 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,

[30] 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; *United States v. 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).

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.[31] In *United States v. Davis,* for example, Paul Davis's only prior convictions were for drug offenses. 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 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* at 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

[31] 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.

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.[32] *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 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 at least four conversations, over more than two months, where the targets repeatedly complained that they were unable to find firearms. *DeJesus* Takedown Memo, Supp. Appx E-13. At one point, 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

[32] 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; *Williams* Complaint at 17-18. 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).

United States v. Farella, for example, the three defendants brought four firearms among them.[33] 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 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: 1 (33% 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)

[33] "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.

    - 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)[34]

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 memorandum: "(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).

[34] 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 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).

The ATF departed from its identification and documentation requirement in eleven cases involving exclusively Black defendants, one case involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[35] 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 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

[35] 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; *United States v. Hall*, 08-CR-386; and *Tanner*, 07-CR-707. The case with mostly Hispanic defendants in which a Takedown Memo was completed but did not identify all known suspects was *Elias*, 13-CR-476.

at 11.[36]

The ATF departed from this requirement in fourteen cases involving exclusively Black defendants, two case involving mostly Hispanic defendants, and zero cases involving mostly White defendants.[37] 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 Salvador Elias told him that he would probably bring additional crew members, including two 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 other than the drivers. *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 defendants of color, 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

[36] 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.

[37] 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.

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.[38] 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 actually told the agents he would recruit three to six other participants. *Davis* Complaint at 8. Although the agent asked to meet them, he never followed up to schedule a meeting at which every suspect was present. *Id*. at 14, 17.

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

[38] 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).

with the targets in five cases involving exclusively Black defendants and one case involving mostly White defendants.[39]

3. In Cases Involving People of Color, the ATF's Departures Reinforced Each Other.

Although each individual deviation may seem minor in isolation, a disturbing pattern emerges when examining the ATF's 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 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. This initial departure 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

In many cases involving defendants of color, the ATF's early decisions to disregard its internal requirements had a cumulative effect, resulting in more total departures. In the *Alexander* case, for example, 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. In the *Brown* case, the ATF began the case with a target who flat out said

[39] 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).

from the start that he was not a stash house robber. 12CR632&12CR887/00695. Perhaps as a consequence of that initial misstep, the ATF ended up arresting both a total stranger (Christopher Davis) and someone whose only conviction resulted in probation for possessing marijuana (Alfred Washington). And in *Williams*, given the haphazard decision to target a street-corner marijuana salesman, it is no surprise that the targets had great difficulty finding a firearm. *See Williams*, 12-CR-887, Dkt. 135-3, Ex. C; *id.* Dkt. 147-1, Ex. A (Nov. 12, 2014). These cases stand in stark contrast to the three cases involving mostly White defendants, in which the ATF guaranteed that they fit the procedural and substantive 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 three cases where they made such statements. In *Williams*, all three defendants were African-American, as were all five defendants in *Paxton* and all five defendants in *Brown*. *See* Report at 12–13. (Karceski was also the undercover 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.[40] The three agents used the same 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 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

[40] 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.").

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.[41]

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.

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

[41] 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.

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 these three cases—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.[42] 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:

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

[42] 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.

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.[43]

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.

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, Texas, 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

[43] 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.

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: September 23, 2016

Respectfully submitted,

By: *Alison Siegler*
ALISON SIEGLER
Attorney for John Hummons

By: *Judith P. Miller*
JUDITH P. MILLER
Attorney for John Hummons

By: *Steven Saltzman*
STEVEN SALTZMAN
Attorney for John Hummons

Written With:
ERICA ZUNKEL, Associate Director, Federal Criminal Justice Clinic
Jamie Luguri (Univ. of Chicago Law School Class of 2019)
Roisin Duffy-Gideon, Isabella Nascimento (Univ. of Chicago Law School Class of 2018)
Amanda Mayo (Univ. of Chicago Law School Class of 2017)
Grace Goodblatt, Hayden Miller, Caitlin Purvin-Dunn, William Snyderwine, Marlow Svatek (Univ. of Chicago Law School Class of 2016)

ALISON SIEGLER
JUDITH P. MILLER
ERICA ZUNKEL
Federal Criminal Justice Clinic
University of Chicago Law School
6020 S. University Avenue
Chicago, IL 60637
(773) 834-1680; (773) 834-1598

STEVEN SALTZMAN
200 S. Michigan, Suite 201
Chicago, IL 60604
(312) 427-4500

Dated: September 23, 2016

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 TO DISMISS FOR RACIALLY SELECTIVE LAW ENFORCEMENT (CORRECTED)

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 September 23, 2016, to counsel/parties that are non-ECF filers.

By: */s/ Judith P. Miller*

JUDITH P. MILLER
Assistant Clinical Professor of Law
University of Chicago Law School
6020 S. University Avenue
Chicago, Illinois 60637
(773) 834-1598
jpmiller@uchicago.edu