

LEAD US NOT INTO TEMPTATION: STASH HOUSE STINGS AND THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

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ABSTRACT

Over the past two decades, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (“ATF”) has helped convict hundreds of individuals by enticing them to commit fictional crimes. These operations, known as “stash house stings,” involve the recruitment by undercover agents of suspects to rob a residential house containing large amounts of drugs and money. Every detail of the robbery, however, is a product of the government’s imagination – the stash house itself, the amount of drugs supposedly inside the house, the gang members guarding the house, and of course, the idea to commit the robbery. Although the ATF’s purported focus is on targeting dangerous criminals, in practice these stings often trap poor, minority, low-level offenders with no propensity to commit major drug offenses. Moreover, while the stash house stings draw close to entrapment, in most cases an entrapment defense is unavailable because courts consider willingness to commit the robbery as evidence of predisposition. In recent years, however, an alternative defense has begun to take hold. The “outrageous government conduct” defense is based upon the theory that, regardless of a defendant’s predisposition, certain law enforcement tactics are so inherently shocking that due process principles would bar the government from obtaining a conviction. The Supreme Court, despite its creation of the defense, has failed to establish a set of guidelines for lower courts to use in determining what conduct of law enforcement would be so “outrageous” as to warrant dismissal of an indictment. Accordingly, application of the defense in the lower courts has been unclear. In a series of recent cases arising out of ATF stash house sting indictments, the Ninth Circuit became the first appellate court in the country to specifically identify a set of factors to

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be used in evaluating a claim of outrageous government conduct. Utilizing these cases as an illustrative tool, this Note proposes an analysis of the outrageous government conduct defense based upon the Ninth Circuit's six-factor test and suggests that the Supreme Court grant certiorari to articulate an outrageous government conduct defense guided by these factors.

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INTRODUCTION

The stage was set. On February 5, 2013, Cedrick Hudson, Joseph Whitfield, and Antuan Dunlap sat in the break room of an empty Los Angeles warehouse waiting for their getaway car to arrive.¹ The car was going to take them to a residential drug stash house, where the three men, along with their ringleader, Dan Thompson, planned to steal at least twenty kilograms of cocaine from a group of armed, Mexican drug traffickers.² The men had never before engaged in a home invasion or drug stash house robbery, but Thompson—himself a drug courier who routinely picked up smaller amounts of cocaine from the stash house—described the heist as “a once in a lifetime type thing.”³ “[T]his is like *the one*,” he told them, “[y]ou know, the come up don’t come around that often . . .”⁴

The plan, coordinated by Thompson, was simple.⁵ He would already be inside the stash house before the robbery.⁶ Leaving the door unlocked, he would wait for Hudson, Whitfield, and Dunlap to bust inside, where they would tie up the guards, and Thompson, to make it look like he was also a victim.⁷ Thompson volunteered to procure both the getaway car and safehouse and told the men they could repackage the cocaine there before distributing it.⁸ The only thing that Hudson, Whitfield, and Dunlap would need to do was bring guns for themselves and for Thompson, who, unable to procure a firearm of his own, offered to pay Whitfield for one.⁹ As the crew prepared to leave, Thompson bragged that the cocaine was “pure[,] pure ass coca . . . this ain’t like no bullshit cocaine, this is like *cocaina*.”¹⁰ There was only one problem—it was all a lie.¹¹

There was no cocaine, no stash house, no Mexican drug traffickers, no armed guards, and Thompson was not a drug courier.¹² Indeed, Dan Thompson was an undercover agent with the Bureau of

1. United States v. Hudson, 3 F. Supp. 3d 772, 777 (C.D. Cal. 2014), *rev’d sub nom.* United States v. Dunlap, 593 F. App’x 619 (9th Cir. 2014).

2. *See id.* at 776–77.

3. *Id.*

4. *Id.* (emphasis added).

5. *See id.*

6. *Id.*

7. *Id.* at 776–77.

8. *See id.* at 776.

9. *See id.* at 776–77.

10. *Id.* at 777 (emphasis added).

11. *See id.* at 775.

12. *Id.*

Alcohol, Tobacco, Firearms, and Explosives (“ATF”).¹³ Special Agent Thompson left the break room, and Hudson, Whitfield, and Dunlap were all arrested.¹⁴ Later, the three men were indicted with a host of federal crimes, including conspiracy to possess cocaine with intent to distribute and using or possessing a firearm in furtherance of a drug-trafficking crime.¹⁵ If convicted, the men would face a minimum of fifteen to twenty years imprisonment—all for an imaginary crime that was dreamed up by government agents.¹⁶

Hudson, Whitfield, and Dunlap were arrested as part of what is commonly known as a stash house sting, an aggressive and controversial law enforcement technique invented by the ATF in an effort to crack down on drug robberies in residential neighborhoods.¹⁷ The ATF has a “standard playbook” for these stings, and “the facts between cases [across the country] are frequently nearly identical.”¹⁸ A typical sting begins in a bar in a “bad part of town,” where the ATF has instructed a confidential informant (“CI”) to “try and find some people that . . . are willing to go commit a home invasion.”¹⁹ When the CI finds a potential target, he brings in an undercover ATF agent posing as a “disgruntled drug courier to . . . pitch the idea of stealing a shipment [of cocaine] from his bosses.”²⁰ The potential score is almost always in excess of five kilograms—enough cocaine to sell for hundreds of thousands of dollars on the street, or to trigger a mandatory minimum of ten years in prison.²¹ When the target and his accomplices show up to commit the robbery, they are immedi-

13. *Id.*

14. *Id.* at 777.

15. *Id.*

16. *See id.* at 785.

17. *See* Victoria Kim, *Judges Question ATF Stings that Lure Suspects into Fictitious Stickups*, L.A. TIMES (Nov. 19, 2014, 4:45 PM), <http://www.latimes.com/local/crime/la-me-atf-stash-house-20141120-story.html#page=1> [hereinafter Kim, *Fictitious Stickups*]; Victoria Kim, *Appellate Judges Question ATF's Use of 'Reverse Stings' at Hearing*, L.A. TIMES (Nov. 20, 2014, 7:56 PM), <http://www.latimes.com/local/california/la-me-stash-house-stings-20141121-story.html> [hereinafter Kim, *Reverse Stings*]; Brad Heath, *ATF Uses Fake Drugs, Big Bucks to Snare Suspects*, USA TODAY (June 28, 2013, 11:26 AM), <http://www.usatoday.com/story/news/nation/2013/06/27/atf-stash-houses-sting-usa-today-investigation/2457109> [hereinafter Heath, *Big Bucks*]; *see also* United States v. Black, 733 F.3d 294, 297 n.1 (9th Cir. 2013) (referring to the operations as “reverse stings,” which occur when the government sets up a “fictitious crime” and arrests the criminals “as they begin to carry out what they believe is a real crime”).

18. United States v. Kindle, 698 F.3d 401, 404 (7th Cir. 2012); *see also* United States v. Lewis, 641 F.3d 773, 777 (7th Cir. 2011) (describing the sting operation as “a rather shopworn scenario”).

19. *See* Black, 733 F.3d at 299.

20. *See* Heath, *Big Bucks*, *supra* note 17; *Id.*

21. *See* Heath, *Big Bucks*, *supra* note 17; Black, 733 F.3d at 298; 21 U.S.C. § 841(b).

ately arrested and charged with conspiring to sell the non-existent cocaine.²²

Since 2003, the ATF has more than quadrupled the use of these controversial sting operations as part of a crime-fighting strategy meant to target armed and violent criminals.²³ Over 1,000 individuals have been prosecuted as a result of stash house stings, and operations have taken place in major metropolitan cities all across the United States.²⁴ Until recently, information about the stash house stings remained largely unknown to the general public.²⁵ However, the stash house stings began to receive national attention after *USA Today* published an in-depth report titled “ATF Uses Fake Drugs, Big Bucks to Snare Suspects” in June 2013.²⁶ The stings have since gained national coverage in both the *Los Angeles Times* and *The New York Times* in light of growing judicial criticism in federal district and appellate courts across the country.²⁷ Of particular concern to both the public and the judiciary is that despite the ATF’s purported focus on targeting dangerous criminals, in practice these stings often trap poor, minority, low-level offenders with no propensity to commit drug or gun offenses.²⁸ Moreover, while the stash house sting cases draw suspiciously close to entrapment, for most defend-

22. See Heath, *Big Bucks*, *supra* note 17.

23. See *id.*; Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014, 10:19 PM), <http://www.usatoday.com/story/news/nation/2014/07/20/atf-stash-house-stings-racial-profiling/12800195/> [hereinafter Heath, *Investigation*] (quoting Melvin King, ATF’s deputy assistant director for field operations: “We’re targeting the worst of the worst, and we’re looking for violent criminals that are using firearms in furtherance of other illegal activities.”).

24. See Brad Heath, *Judge: ATF Stings May Be Targeting Minorities*, USA TODAY (Aug. 1, 2013, 6:23 PM), <http://www.usatoday.com/story/news/nation/2013/08/01/atf-stash-house-robbery-discrimination/2608657/> [hereinafter Heath, *Targeting Minorities*]; Katharine Tinto, *Cover Story: Fighting the Stash House Sting*, 38 CHAMPION 16, 16 (2014).

25. See Heath, *Big Bucks*, *supra* note 17.

26. *Id.* For cases that have cited to Heath, *Big Bucks*, see, e.g., *United States v. Washington*, No. 13-171-2, 2014 U.S. Dist. LEXIS 88439 (E.D. Pa. June 30, 2014); *United States v. Whitfield*, No. 12-418-1, 2014 U.S. Dist. LEXIS 87589 (E.D. Pa. June 27, 2014); *United States v. Black*, 733 F.3d 294, 298 (9th Cir. 2013).

27. See Kim, *Fictitious Stickups*, *supra* note 17; Kim, *Reverse Stings*, *supra* note 17; Erik Eckholm, *More Judges Question Use of Fake Drugs in Sting Cases*, N.Y. TIMES (Nov. 20, 2014), http://www.nytimes.com/2014/11/21/us/lured-to-stings-by-fake-drugs-and-facing-jail-time-thats-all-too-real.html?_r=0.

28. See Heath, *Investigation*, *supra* note 23; Tinto, *supra* note 24, at 16; *United States v. Hudson*, 3 F. Supp. 3d 772, 786 (C.D. Cal. 2014), *rev’d sub nom.* *United States v. Dunlap*, 593 F. App’x. 619 (9th Cir. 2014) (“The Government asserts that it dreams up these stash-house robberies to catch people inclined to commit home invasions.”); *United States v. McLean*, No. 13-CR-00487, 2015 U.S. Dist. LEXIS 2971, at *2 (E.D. Pa. Jan. 12, 2015) (“ . . . I share the growing concern of many federal judges about the disproportionate impact of the ATF sting operations on minority defendants . . .”).

ants an entrapment defense is off the table because courts consider willingness to commit the robbery as evidence of predisposition.²⁹ When combined with other factors, such as mandatory sentencing statutes based on the quantity of drugs and the exceedingly high standard that governs constitutional challenges to prosecutorial discretion, these cases are extremely difficult to fight.³⁰

In recent years, however, a defense based on due process principles, known as the outrageous government conduct defense, has become an increasingly common method for criminal defendants to combat indictments arising out of stash house stings.³¹ Created by the Supreme Court in 1973, the theory behind the outrageous government conduct defense is that conduct by the government could be so inherently unreasonable and unfair that due process principles would bar the government from using the courts to obtain a conviction.³²

The problem with this defense, however, is that it is rarely accepted in court.³³ The Supreme Court has never affirmed the dismissal of an indictment based on a finding of outrageous government conduct, nor has the Court articulated a set of guidelines for lower courts to use in determining what government conduct would be sufficiently “outrageous” to successfully invoke the defense. Accordingly, the application of the law in the lower courts has been wholly inconsistent; some circuits reject the defense outright, other circuits recognize the defense but have failed to identify a case

29. See *Hudson*, 3 F. Supp. 3d at 780 (citing *United States v. McClelland*, 72 F.3d 717, 722 (9th Cir. 1995) (“If the defendant is found to be predisposed to commit a crime, an entrapment defense is unavailable regardless of the inducement.”)).

30. See *Tinto*, *supra* note 24, at 16; *McLean*, 2015 U.S. Dist. LEXIS 2971, at *2.

31. See *Tinto*, *supra* note 24, at 16–17. Although the outrageous government conduct defense is predominantly asserted in narcotics-related prosecutions, it has also been raised in the prosecution of other crimes where authorities primarily rely on undercover agents or informants to investigate. See Matthew V. Honeywell, Note, *What is Outrageous Government Conduct? The Washington State Supreme Court Knows It When It Sees It: State v. Lively*, 21 SEATTLE U. L. REV. 689, 696 (1998). Examples of such crimes include: prostitution, child pornography, insurance fraud, credit card fraud, counterfeiting, weapons transportation, transportation of illegal aliens, possession and transportation of stolen goods, bribery, corrupt influencing, witness tampering and official misconduct. *Id.*

32. See *United States v. Russell*, 411 U.S. 423, 431–32 (1973); Dana M. Todd, Note, *In Defense of the Outrageous Government Conduct Defense in the Federal Courts*, 84 KY. L.J. 415, 429–30 (Winter 1995/1996).

33. See *United States v. Larson*, No. 12-CR-00886-BLF-1, 2015 U.S. Dist. LEXIS 20770, at *13 (N.D. Cal. Feb. 19, 2015) (“Dismissing an indictment for outrageous government conduct, however, is ‘limited to extreme cases’ [and] . . . is an ‘extremely high standard.’”) (citing *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Black*, 733 F.3d 294, 302 (9th Cir. 2013)).

where it applies, and a third category of circuits accept the defense but in a severely limited number of cases.³⁴

The Ninth Circuit is the only circuit that has specifically identified a set of factors to be used in evaluating a claim of outrageous government conduct.³⁵ The court recently applied these six factors in support of the dismissal of Hudson, Whitfield, and Dunlap's indictment stemming from their participation in the stash house sting described above.³⁶ Importantly, the application of the Ninth Circuit's six-factor test in *United States v. Hudson* is one of two recent occasions in the Central District of California where the court has dismissed charges based on a finding of outrageous government conduct.³⁷ However, in a controversial move, the Ninth Circuit reversed the district court's holding in *Hudson* and remanded the case to a different judge.³⁸ Thus, in absence of any new developments in the other circuits to suggest the continued vitality of the outrageous government conduct defense, its future remains unclear.

Using the Ninth Circuit's recent line of stash house sting cases as a model, this Note proposes adopting the Ninth Circuit's six-factor analysis of the outrageous government conduct defense, guided by the specific social and policy considerations discussed in those cases. Part I of this Note describes the history, evolution, and creation of the outrageous government conduct defense in the United States Supreme Court.³⁹ Part II explores the subsequent development of the defense in the federal courts.⁴⁰ Part III provides an overview of the seminal Ninth Circuit stash house sting cases.⁴¹ Finally, Part IV discusses significant concerns with regard to the sting's design and execution and proposes adopting the Ninth Circuit's six-factor analysis of the outrageous government conduct defense.⁴²

34. See *infra* Part II.

35. See *United States v. Black*, 733 F.3d 294 (9th Cir. 2013), discussed *infra* Part II.C.

36. *United States v. Hudson*, 3 F. Supp. 3d 772 (C.D. Cal. 2014), *rev'd sub nom. United States v. Dunlap*, 593 F. App'x. 619, 620 (9th Cir. 2014).

37. *Id.*; *United States v. Roberts*, No. CR 13-00751-R-2, 3, 5, 2014 U.S. Dist. LEXIS 162656 (C.D. Cal. May 30, 2014).

38. See *Dunlap*, 593 F. App'x at 621-22.

39. See *infra* Part I.

40. See *infra* Part II.

41. See *infra* Part III.

42. See *infra* Part IV.

I. BACKGROUND: THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE

A. Entrapment and the Origins of the Due Process Defense

The origins of the outrageous government conduct defense⁴³ can be traced back to the creation of the entrapment defense in *Sorrells v. United States*.⁴⁴ In *Sorrells*, an undercover prohibition agent, posing as a visiting tourist and World War I veteran, convinced the defendant to purchase liquor for him in violation of federal prohibition.⁴⁵ The prohibition agent twice asked the defendant for liquor, and in both instances the defendant refused.⁴⁶ The agent persisted, however, and Sorrells ultimately sold him a half-gallon of whiskey for five dollars.⁴⁷ In a majority opinion written by Chief Justice Hughes, the Supreme Court reversed Sorrells's conviction, finding that the defendant lacked the predisposition to commit the alleged offense and that only after repeated requests by the prohibition agent did he violate federal law.⁴⁸

Under the majority's subjective construction of the entrapment defense, the focus is exclusively on the defendant's intent or predisposition to commit the crime.⁴⁹ However, in a concurring opinion, Justice Roberts rejected the majority's emphasis on the defendant's mental state.⁵⁰ Instead, he proposed a purely objective approach to entrapment that looks solely to the government's involvement in the

43. For the purposes of this Note, the terms "due process defense" and "outrageous government conduct defense" are used interchangeably.

44. 287 U.S. 435 (1932); see also Jason R. Schulze, Note, *United States v. Tucker: Can the Sixth Circuit Really Abolish the Outrageous Government Conduct Defense?*, 45 DEPAUL L. REV. 943, 945 (1996) ("Any study of 'outrageous government conduct' must begin with an examination of entrapment.").

45. *Sorrells*, 287 U.S. at 439.

46. *Id.*

47. *Id.*

48. *Id.* at 451-52. The majority opinion referred to the criminal act as a "creature of [the Government agent's] purpose" and concluded "that the agent lured defendant, otherwise innocent, to its commission by repeated and persistent solicitation in which he succeeded by taking advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War." *Id.* at 441. The majority continued, stating that in this scenario, "the controlling question [is] whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials. If that is the fact, common justice requires that the accused be permitted to prove it." *Id.* at 451.

49. See *id.*; see also Todd, *supra* note 32, at 421 ("Under the subjective approach, the government must show that a particular defendant was predisposed to commit the offense before, and independent of, the government's action. The defense exists to allow a defendant to avoid conviction when the defendant's original criminal intent was implanted by the government.").

50. *Sorrells*, 287 U.S. at 458-59 (Roberts, J. concurring).

creation and operation of the crime: “[C]ourts must be closed to the trial of a crime instigated by the government’s own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.”⁵¹ Thus, according to the concurrence, a defendant’s predisposition to commit the crime is irrelevant in an entrapment inquiry.⁵²

Twenty-six years later, the Supreme Court affirmed the *Sorrells* majority in *Sherman v. United States*.⁵³ Sherman met a government informant at a doctor’s office, where they were both allegedly seeking treatment for drug addiction.⁵⁴ Over the course of several meetings, the informant asked Sherman if he knew of a good source to obtain narcotics, to which Sherman repeatedly replied that he did not.⁵⁵ Like the prohibition agent in *Sorells*, the government informant persisted, claiming that he was not responding to treatment and was in severe pain.⁵⁶ Predicated on the man’s alleged suffering, Sherman obtained narcotics for him on several occasions and was ultimately arrested.⁵⁷ In overturning Sherman’s conviction, the Court offered this now-famous articulation of the subjective entrapment standard: “To determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal.”⁵⁸ Thus, the Supreme Court expressly rejected the language of Justice Roberts’s concurrence in *Sorrells* and reaffirmed that a defendant’s predisposition to commit the crime is the sole determination in an entrapment inquiry.⁵⁹

Four justices, led by Justice Frankfurter, concurred in the result but urged the court to adopt an objective theory of entrapment.⁶⁰ The concurring justices asserted that a test that looks to the defendant’s predisposition rather than the egregious conduct of the police obfuscates the underlying principles of the entrapment defense: “No matter what the defendant’s past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of

51. *Id.* at 459.

52. *Id.*

53. 356 U.S. 369 (1958).

54. *Id.* at 371.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 372.

59. *Id.* at 376–78.

60. *Id.* at 378–85 (Frankfurter, J., concurring).

society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."⁶¹ Thus, the objective theory of entrapment stands for the proposition that when the government's conduct unfairly induces a person to commit a criminal act, the defendant must not be prosecuted.⁶²

The Supreme Court majorities in *Sorrells* and *Sherman* created a valuable defense for criminal defendants who could prove that the government initiated and encouraged them to commit a crime, so long as the defendant was not predisposed to commit the crime prior to the government's involvement.⁶³ However, the concurrences of Justices Roberts and Frankfurter suggested an alternative, objective approach to entrapment that ignores the defendant's mental state and focuses instead on the tactics employed by law enforcement officers to obtain the conviction.⁶⁴ According to Justice Frankfurter, "the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them."⁶⁵ This concept is closely related to, and perhaps born out of, the Fifth Amendment's guarantee of due process.⁶⁶

The Supreme Court first recognized that government misconduct in investigating crime could give rise to a due process violation in *Rochin v. California*.⁶⁷ There, law enforcement officials entered the defendant's home without a warrant, predicated on information that he had been selling narcotics.⁶⁸ The officers forced their way into the defendant's room, where they witnessed him suddenly put two capsules in his mouth.⁶⁹ A struggle ensued as the officers attempted to forcibly extract the capsules, and when that proved unsuccessful, they took him to the hospital, pumped his stomach against his will,

61. *Id.* at 382-83.

62. See Schulze, *supra* note 44, at 949.

63. See *Sorrells v. United States*, 287 U.S. 435, 451-52 (1932); *Sherman*, 356 U.S. at 376-78.

64. See *Sorrells*, 287 U.S. at 458-59 (Roberts, J., concurring); *Sherman*, 356 U.S. at 383-84.

65. *Sherman*, 356 U.S. at 380 (Frankfurter, J., concurring).

66. Due process has been defined as a "constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or are 'implicit in the concept of ordered liberty.'" *Rochin v. California*, 342 U.S. 165, 169 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

67. 342 U.S. 165 (1952).

68. *Id.* at 166.

69. *Id.*

and determined that the recovered capsules contained morphine.⁷⁰ The Supreme Court unanimously held that Rochin's conviction was "obtained by methods that offend the Due Process Clause," and thus, could not be affirmed.⁷¹ Reasoning that the officers' conduct "shocks the conscience,"⁷² the Court firmly asserted that "[d]ue process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.'"⁷³ The Court was careful to narrow its holding to the officers' specific conduct in this case.⁷⁴ However, with the due process concepts illustrated in *Rochin* and two competing theories of entrapment serving as the background, the Supreme Court was poised to consider the possibility of recognizing a defense based solely on the government's conduct.

B. Birth of the Outrageous Government Conduct Defense

Scholars and courts often cite *United States v. Russell*⁷⁵ as the first case to articulate the outrageous government conduct defense.⁷⁶ In *Russell*, an undercover government agent supplied the defendant with an essential chemical ingredient for the manufacturing of methamphetamine and then purchased one-half of the final product from him for sixty dollars.⁷⁷ The defendant asked the Court to reconsider the subjective theory of entrapment set forth in the majority opinions in *Sorrells* and *Sherman*, arguing that here, the government was so involved in the manufacture of methamphetamine that his prosecution violates the fundamental principles of due process, notwithstanding his predisposition to commit the crime.⁷⁸ Writing for the majority, then-Justice Rehnquist rejected the defendant's ar-

70. *Id.*

71. *Id.* at 174.

72. *Id.* at 172.

73. *Id.* at 173 (quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936)).

74. *See id.* at 174 ("In deciding this case we do not heedlessly bring into question decisions in many States dealing with essentially different, even if related, problems.").

75. 411 U.S. 423 (1973).

76. *See* Conrad F. Meis, Comment, *United States v. Tucker: The Illegitimate Death of the Outrageous Government Conduct Defense?*, 80 IOWA L. REV. 955, 960 (1995); Schulze, *supra* note 44, at 950; Stephen A. Miller, Comment, *The Case for Preserving the Outrageous Government Conduct Defense*, 91 NW. U. L. REV. 305, 314 (1996); Honeywell, *supra* note 31, at 694; *see also* *United States v. Tucker*, 28 F.3d 1420, 1423 (6th Cir. 1994) ("*Russell* has been cited more than two hundred times as authority for a defense based on an objective assessment of the government's conduct.").

77. *Russell*, 411 U.S. at 425-26.

78. *Id.* at 430.

gument, holding that the agent did not violate his due process rights because the defendant himself could have acquired the essential ingredient, which was difficult but not impossible to obtain.⁷⁹

The majority opinion explicitly rejected the objective theory of entrapment advanced decades earlier by Justices Roberts and Frankfurter, confirming once and for all that the “principle element in the defense of entrapment [is] the defendant’s predisposition to commit the crime.”⁸⁰ However, rather than completely eliminating the possibility of a due process defense, Justice Rehnquist stated:

While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that ‘fundamental fairness, shocking to the universal sense of justice,’ mandated by the Due Process Clause of the Fifth Amendment.⁸¹

Thus, as scholars have noted, “with this somewhat cryptic statement, the outrageous government conduct defense was born.”⁸²

Three years later, Justice Rehnquist tried to disclaim his “we may some day” language from *Russell* in a plurality opinion in *Hampton v. United States*.⁸³ In *Hampton*, the defendant was convicted of selling heroin that was both supplied and later purchased by undercover government agents.⁸⁴ The defendant conceded his predisposition to commit the crime, and hence, the defense of entrapment was unavailable to him.⁸⁵ Writing for three members of the Court,⁸⁶ Justice Rehnquist upheld Hampton’s conviction and expressed the view that due process could never be violated where the defendant possessed the predisposition to commit the crime.⁸⁷

79. *Id.* at 431.

80. *Id.* at 433.

81. *Id.* at 431–32.

82. Miller, *supra* note 76, at 314.

83. 425 U.S. 484 (1976) (plurality opinion).

84. *Id.* at 485.

85. *Id.* at 490.

86. Chief Justice Burger and Justice White joined Justice Rehnquist’s opinion. Justice Stevens did not participate in the decision.

87. *Hampton*, 425 U.S. at 490. *But see* Miller, *supra* note 76, at 315 (arguing that Justice Rehnquist’s suggestion that the outrageous government conduct defense only applies when the defendant lacks predisposition is illogical because a defendant who lacks predisposition

However, Rehnquist's attempt to destroy the doctrine he created in *Russell* failed to capture a majority of the Court.⁸⁸ Justices Powell and Blackmun concurred with the plurality's judgment that the government's conduct did not violate Hampton's due process rights in this instance, but refused to join the plurality's repudiation of the outrageous government conduct defense.⁸⁹ Justices Brennan, Stewart, and Marshall dissented, arguing that Hampton's conviction should be overturned and joining the concurring justices in recognizing the availability of a due process defense in instances of particularly egregious government conduct.⁹⁰ Justice Brennan further noted: "That the accused is 'predisposed' cannot possibly justify the action of government officials in purposefully creating the crime."⁹¹ Thus, a majority of five Justices of the Court expressed their support for the continued viability of the outrageous government conduct defense for criminal defendants in state and federal courts. "While the Court's likely motive in granting certiorari in *Hampton* was to clarify its position in *Russell*, the fractured opinion simply created confusion" in the lower federal courts.⁹² This confusion is exemplified by the lower courts' varying applications of the outrageous government conduct defense in the years following *Hampton*.

II. DEVELOPMENT IN THE FEDERAL COURTS

Despite the creation of the outrageous government conduct defense in *Russell* and its subsequent endorsement in *Hampton*, the Supreme Court has yet to affirm the dismissal of an indictment based on a finding of outrageous government conduct. In addition, the Court has failed to articulate a set of guidelines for lower courts to use in determining what kind of government conduct would be sufficiently "outrageous" to invoke the defense. The Court has simply stated that government conduct is outrageous when it violates "fundamental fairness" and "shock[s] the universal sense of justice

could prevail on an entrapment defense, and thus, would not need to resort to the outrageous government conduct defense).

88. *Hampton*, 425 U.S. at 491.

89. *Id.* at 493-95 (Powell, J., concurring) ("I am unwilling to conclude that an analysis other than one limited to predisposition would never be appropriate under due process principles. . . . I therefore am unwilling to join the plurality in concluding that, no matter what the circumstances, neither due process principles nor our supervisory power could support a bar to conviction in any case where the Government is able to prove predisposition.").

90. *Id.* at 497 (Brennan, J., dissenting).

91. *Id.* at 498-99.

92. Honeywell, *supra* note 31, at 695; *see also* Miller, *supra* note 76, at 315.

mandated by the Due Process Clause of the Fifth Amendment.”⁹³ Accordingly, the district and appellate courts’ application of the law has been wholly inconsistent. Several circuits have rejected the outrageous government conduct defense entirely.⁹⁴ Other circuits recognize the potential viability of the defense, but have set the bar for “outrageousness” so extraordinarily high that its successful invocation is impossible.⁹⁵ A third category of circuits has accepted the defense in a limited number of cases—*e.g.*, the Third Circuit in 1978, but never again, and the Ninth Circuit, but only at the district court level.⁹⁶

A. Rejection of the Defense: The Sixth and Seventh Circuits

Both the Sixth and Seventh Circuits have expressly rejected the outrageous government conduct defense.⁹⁷ In *United States v. Tucker*, the Sixth Circuit reversed the dismissal of a defendant’s indictment, which resulted from a reverse sting operation initiated by the United States Department of Agriculture.⁹⁸ The stings were designed to catch individuals that had been abusing the food stamp system.⁹⁹ An undercover agent hired by the Department contacted Tucker, a friend of the agent’s, to see if Tucker was interested in purchasing food stamps from her.¹⁰⁰ Tucker resisted at first, but ultimately agreed to buy the stamps in light of her friend’s alleged financial

93. *United States v. Russell*, 411 U.S. 423, 432 (1973) (internal quotation marks omitted).

94. *See United States v. Tucker*, 28 F.3d 1420, 1424 (6th Cir. 1994); *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995).

95. *See United States v. Guzman*, 282 F.3d 56, 59 (1st Cir. 2002); *United States v. Al Kassar*, 660 F.3d 108, 121 (2d Cir. 2011); *United States v. Hasan*, 718 F.3d 338, 343 (4th Cir. 2013); *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003); *United States v. Boone*, 437 F.3d 829, 841 (8th Cir. 2006); *United States v. Augustin*, 661 F.3d 1105, 1122–23 (11th Cir. 2011); *United States v. Hsia*, 81 F. Supp. 2d 7, 19 (D.D.C. 2000); *see also United States v. Dyke*, 718 F.3d 1282, 1287 (10th Cir. 2013) (noting that the Tenth Circuit recognizes the doctrine but has yet to apply it; referring to the Tenth Circuit as part of the “never-say-never camp”).

96. *See United States v. Twigg*, 588 F.2d 373, 380–81 (3d Cir. 1978); *United States v. Roberts*, No. 13-00751-R-2, 3, 5 2014 U.S. Dist. LEXIS 162656, at *18 (C.D. Cal. May 30, 2014). *See also United States v. Hudson*, 3 F. Supp. 3d 772, 620–21 (C.D. Cal. 2014), *rev’d sub nom. United States v. Dunlap*, 593 F. App’x 619 (9th Cir. 2014) (dismissing an indictment for outrageous government conduct); *United States v. Dunlap*, 593 F. App’x 619, 779–87 (9th Cir. 2014) (reversing *Hudson* and reassigning the case to a different judge).

97. *See Tucker*, 28 F.3d at 1424; *Boyd*, 55 F.3d at 241.

98. *Tucker*, 28 F.3d at 1421.

99. *Id.*

100. *Id.* The undercover agent worked on “commission,” and was permitted to keep half of the money she collected from these food stamp sales. *Id.*

distress and ill health.¹⁰¹ Tucker was later arrested for food stamp trafficking.¹⁰²

After engaging in a lengthy analysis of the history of the outrageous government conduct defense, the court concluded there was no substantial authority to support its existence.¹⁰³ First, the court rejected Rehnquist's language from *Russell* suggesting that the door had been left open to a due process defense as non-binding dicta.¹⁰⁴ The court then noted that within the Sixth Circuit, the defense had been rejected "on the facts" in more than two-dozen cases.¹⁰⁵ Thus, after concluding there was no binding authority from either the Supreme Court or the Sixth Circuit, the court concluded that the outrageous government conduct defense "simply does not exist" in the circuit.¹⁰⁶

The *Tucker* Court's opinion relied on three bases in reaching its holding. First, government inducement, even if labeled "outrageous," does not violate due process.¹⁰⁷ The court reasoned that because the "basis for the entrapment defense lies in congressional intent," and not in the Due Process Clause, "if Congress were to reject entrapment as a defense, even defendants who were induced to commit a crime and who were *not* predisposed could be convicted without violating due process."¹⁰⁸ Thus, if due process would not be "offended by convicting those who were *not* predisposed . . . it is not offended by convicting those who *are* predisposed."¹⁰⁹ Second, the trial court "lacks the authority to dismiss an indictment for government misconduct" unless an independent constitutional right has been violated.¹¹⁰ Because the Supreme Court rejected an objective test for entrapment (in other words, the outrageous government conduct defense), no constitutional right of the defendant was vio-

101. *Id.*

102. *Id.*

103. *Id.* at 1422-25.

104. *Id.* at 1423.

105. *Id.* at 1424.

106. *Id.* at 1426-27.

107. *Id.* at 1427.

108. *Id.* (emphasis in original).

109. *Id.* (emphasis in original). *But see* Schulze, *supra* note 44, at 977 (arguing that the court's reasoning in this hypothetical is flawed because the court cloaks its disagreement with the due process defense in a "complex and improper hypothetical problem" framed to "sound like a logical inconsistency").

110. *Tucker*, 28 F.3d at 1427.

lated.¹¹¹ Finally, the court stated, continued recognition of the defense violates the constitutional separation of powers.¹¹²

The following year, the Seventh Circuit issued its own death knell for the outrageous government conduct defense in *United States v. Boyd*.¹¹³ In *Boyd*, defendants were leaders of a Chicago street gang who were convicted of a variety of serious federal crimes.¹¹⁴ At trial, the government's case relied considerably on the testimony of six former gang leaders.¹¹⁵ Defendants moved for a new trial, alleging that the government allowed two of the gang leaders to perjure themselves at trial and withheld critical evidence from the defense concerning illegal drug use of the six gang leader witnesses.¹¹⁶ In reversing the district court's decision granting defendants' motion, the court rejected the "intimations that 'outrageous governmental misconduct' is an independent ground for ordering a new trial in a federal criminal case."¹¹⁷ The court described the outrageous government defense as "[s]tillborn . . . for it never had any life; and it certainly has no support in the decisions of this court."¹¹⁸ The court then held conclusively that "the doctrine does not exist in this circuit."¹¹⁹ Today, the Seventh Circuit still refuses to recognize the out-

111. *Id.* at 1427-28.

112. *Id.* at 1428.

[T]he Legislative Branch has implicitly curbed the Executive Branch by intending, as an implied part of each criminal statute, that no conviction may be had against one who was induced by the government to commit a crime unless the government proves, beyond a reasonable doubt, that the defendant was predisposed to commit that crime. (citation omitted). Thus, a defendant's subjective predisposition marks the point at which society's interest in preventing governmental overreaching is outweighed by society's interest in punishing those who commit crimes, not the objective character of the government's conduct. . . . The mere invocation of the phrase "due process" does not give the courts license to conduct its own "oversight" of police practices.

Id. (emphasis in original).

113. 55 F.3d 239, 241 (7th Cir. 1995).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*; see also Schulze, *supra* note 44, at 983-84 (distinguishing the Seventh Circuit's abolition of the outrageous government conduct defense by noting that "[w]here the Sixth Circuit had spent an entire case . . . analyzing why its holding was to abolish the outrageous government conduct defense, the Seventh Circuit reached the same conclusion in 95 words" and without even referring to *Tucker*).

rageous government conduct defense despite its recognition in eleven other circuits.¹²⁰

B. The “Never Say Never” Camp: Recognition of the Defense

Unlike the Sixth and Seventh Circuits, most circuits recognize the outrageous government conduct defense but have yet to find a case where it applies. In absence of a defined set of criteria for determining when government conduct violates “fundamental fairness” or “shock[s] the universal sense of justice,” many courts have interpreted the *Russell* and *Hampton* Supreme Court decisions to impose a heavy, if not impossible, burden on defendants seeking to raise the defense.¹²¹

The First Circuit reserves the defense for “the most appalling and egregious situations.”¹²² In *United States v. Santana*, the First Circuit stated that it might find outrageous government conduct in “cases where law enforcement personnel become so overinvolved in a felonious venture that they can fairly be said either to have ‘created’ the crime or to have ‘coerced’ the defendant’s participation in it.”¹²³ The *Santana* court noted, however, that in practice, courts have invariably “rejected [the defense’s] application with almost monotonous regularity.”¹²⁴

Likewise, the Second Circuit requires a finding of “coercion, intimidation, or physical force” to support a defense theory of outrageous government conduct.¹²⁵ The government’s actions must offend “common notions of fairness and decency” and “reach a demonstrable level of outrageousness before it could bar conviction.”¹²⁶ For instance, “feigned friendship, cash inducement, . . . coaching in how to commit the crime,” and “creat[ing] the opportunity to commit the offense” do not qualify as outrageous conduct.¹²⁷

In the Fourth Circuit, the outrageous government conduct defense “survives in theory, but is highly circumscribed.”¹²⁸ Here, govern-

120. See, e.g., *United States v. Gibb*, No. 13-CR-30170-DRH-1, 2014 U.S. Dist. LEXIS 171504, at *11-12 (S.D. Ill. Dec. 11, 2014).

121. See, e.g., *United States v. Al Kassar*, 660 F.3d 108, 121 (2d Cir. 2011).

122. *United States v. Guzman*, 282 F.3d 56, 59 (1st Cir. 2002).

123. *United States v. Santana*, 6 F.3d 1, 5 (1st Cir. 1993) (citing *United States v. Mosley*, 965 F.2d 906, 911-12 (10th Cir. 1992)).

124. *Id.* at 4.

125. *Al Kassar*, 660 F.3d at 121.

126. *Id.*

127. *Id.*

128. *United States v. Hasan*, 718 F.3d 338, 343 (4th Cir. 2013).

ment conduct must be “shocking” or “offensive to traditional notions of fundamental fairness” to satisfy the burden of proving sufficiently outrageous behavior that offends due process.¹²⁹ As the court observed in *United States v. Hasan*, “this [c]ourt has never held in a specific case that the government has violated the defendant’s due process rights through outrageous conduct.”¹³⁰

The Fifth, Eighth, and Eleventh Circuits have all set a similarly high bar for outrageous government conduct and have yet to find a single case where the defense applies.¹³¹

The Tenth Circuit acts as somewhat of an outlier with regard to its analysis of the outrageous government conduct defense. Like its sister circuits, the Tenth Circuit recognizes the doctrine but has yet to apply it.¹³² Moreover, the burden of establishing the defense is similar to that of the First and Second Circuits: the defendant must prove either “(1) excessive government involvement in the creation of the crime, or (2) significant governmental coercion to induce the crime.”¹³³ However, unlike its sister circuits, the Tenth Circuit offers a loose set of guiding principles for analyzing a claim of outrageous government conduct.¹³⁴ First, the government cannot “engineer and direct the criminal enterprise from start to finish,” but, by contrast, is free “to infiltrate an ongoing criminal enterprise” or “induce a suspect to repeat, continue, or expand criminal activity.”¹³⁵ The government can also suggest new illegal activity and even provide the necessary supplies and expertise to facilitate it.¹³⁶ Second, the government can take into consideration the past and current criminal activities of the defendant: “[b]ecause the inquiry . . . turns in part on the connection between the crime prosecuted and the defend-

129. *Id.* (citation omitted).

130. *Id.*

131. See *United States v. Gutierrez*, 343 F.3d 415, 421 (5th Cir. 2003) (“Defendant claiming outrageous government conduct bears ‘an extremely high burden of proof,’ and must demonstrate, in light of the totality of the circumstances, both substantial government involvement in the offense and a passive role by the defendant.” (citation omitted)); *United States v. Boone*, 437 F.3d 829, 841 (8th Cir. 2006) (“Outrageous government conduct that shocks the conscience can require dismissal of a criminal charge, but only if it falls within the ‘narrow band’ of the ‘most intolerable government conduct.’” (citations omitted)); *United States v. Augustin*, 661 F.3d 1105, 1123 (11th Cir. 2011) (“We reiterate that the defense of outrageous government conduct can be successfully invoked only in ‘the rarest and most outrageous [cases].’” (citation omitted)).

132. See *United States v. Dyke*, 718 F.3d 1282, 1287 (10th Cir. 2013).

133. *Id.* at 1288 (quoting *United States v. Pedraza*, 27 F.3d 1515, 1521 (10th Cir. 1994)).

134. *Id.* at 1288–89.

135. *Id.* at 1288 (internal quotation marks omitted) (citing *United States v. Mosley*, 965 F.2d 906, 911 (10th Cir. 1992)).

136. *Id.*

ant's *prior conduct*, more aggressive law enforcement techniques are permissible against those who already have a history of engaging in related crimes"¹³⁷ Thus, although the Tenth Circuit remains in the "never say never camp" with approximately six other circuits, it at least provides more of a framework of analysis for the outrageous government conduct defense than the Supreme Court did in *Russell* and *Hampton*.¹³⁸ Noticeably absent from the Tenth Circuit's analysis, however, is an articulable set of factors that lower courts can use in analyzing a defendant's claim of outrageous government conduct.

C. Questionable Acceptance of the Defense: The Third and Ninth Circuits

Since the Supreme Court's decision in *Hampton*, the Third Circuit is the only appellate court to uphold the application of the outrageous government conduct defense, as seen in its divided opinion in *United States v. Twigg*.¹³⁹ In *Twigg*, two defendants were convicted of illegally manufacturing methamphetamine.¹⁴⁰ Despite having no prior involvement in illicit drug activity, an undercover informant under the direction of the Drug Enforcement Administration (DEA) approached the defendants to discuss setting up a drug laboratory.¹⁴¹ The government paid for and supplied all of the necessary chemicals and equipment and provided the defendants with a warehouse in which to produce the drugs.¹⁴² The government informant completely managed the production of the drugs.¹⁴³ The defendants' involvement, on the other hand, was generally limited to running errands for groceries and coffee.¹⁴⁴ In reversing the defendants' conviction, the Third Circuit held that "fundamental fairness" is violated when the government embeds the criminal design in the defendant's mind and provides him with the essential supplies and technical expertise to effectuate the crime, effectively "generat[ing] new crimes . . . merely for the sake of pressing criminal charges against him."¹⁴⁵

137. *Id.* (emphasis in original) (internal quotation marks omitted).

138. *See id.* at 1287.

139. 588 F.2d 373 (3d Cir. 1978).

140. *Id.* at 375.

141. *Id.*

142. *Id.* at 375-76.

143. *Id.* at 376.

144. *Id.*

145. *Id.* at 381.

The dissent, however, found the level of government involvement here to be less offensive than that in *Hampton*.¹⁴⁶ For example, whereas the majority found it outrageous that the government supplied the defendants with a remote farmhouse laboratory to manufacture the drugs, the dissent saw this act as a necessary safety precaution to avoid possible danger to the public.¹⁴⁷ Thus, *Twigg* illustrates a significant problem in the circuit courts' varying approaches to outrageous government conduct analysis: What might be shocking to a judge may not be shocking to law enforcement, and similarly, "what is shocking to one judge may not be shocking to another."¹⁴⁸

The Third Circuit has yet to dismiss another indictment on grounds of outrageous government conduct. Indeed, in the aftermath of *Twigg*, the circuit has expressed skepticism with the defense's continuing validity.¹⁴⁹ Nonetheless, *Twigg* has yet to be overruled and remains "the touchstone for analysis" within the Third Circuit.¹⁵⁰ While the *Twigg* court ultimately determined that the government's conduct violated due process, it did not create a specific framework to analyze future claims of outrageous government conduct. Recently, in *United States v. McLean*, the Eastern District of Pennsylvania distilled four factors from *Twigg* and its progeny to be used in analyzing a defendant's outrageous government conduct challenge to an indictment stemming from an arrest in an ATF stash house sting.¹⁵¹ The factors are: (1) whether the government was infiltrating an already-existing criminal enterprise; (2) the fleeting nature or elusiveness of the crime; (3) whether the crime was instigated or

146. *Id.* at 385–86 (Adams, J., dissenting).

147. *Id.* at 386 (Adams, J., dissenting).

148. See Schulze, *supra* note 44, at 959–60 (citing *United States v. Miller*, 891 F.2d 1265, 1273 (7th Cir. 1989) (Easterbrook, J., concurring) (explaining how some sting operations do not trouble him, but "other judges are offended by immorality (such as sponsoring an informant's use of sexual favors as currency) or by acts that endanger informants (such as supplying them with drugs for personal use) but not by [a] traditional sting").

149. See *United States v. Jannotti*, 673 F.2d 578, 610 n.17 (3d Cir. 1982) (where the court sat *en banc*, three of the judges not only distinguished *Twigg*, but also stated that they would directly overrule it); *United States v. Nolan-Cooper*, 155 F.3d 221, 230 (3d Cir. 1998) (noting that the outrageous government conduct defense in the Third Circuit is "hanging by a thread"); *United States v. Pitt*, 193 F.3d 751, 761 n.11 (3d Cir. 1999) (the court collected previous decisions within the circuit dealing with outrageous government conduct and noted that, taken together, they call *Twigg* into doubt).

150. *United States v. McLean*, No. 13-CR-00487, 2015 U.S. Dist. LEXIS 2971, at *19 (E.D. Pa. Jan. 12, 2015).

151. *Id.* at *22.

originated by the government; and (4) the role of the defendant in planning the crime and bringing it to fruition.¹⁵²

In *McLean*, the court held that the government's conduct was not sufficiently outrageous to warrant dismissal of the defendant's indictment.¹⁵³ Nonetheless, the court's articulation of a makeshift factorial test in its analysis of an outrageous government conduct claim sets distinguishable precedent and may serve to eliminate inconsistent application of the law within the Eastern District of Pennsylvania. However, the *McLean* court recognized in its analysis the "seeming vagueness" of the Third Circuit's outrageous government conduct standard, going so far as to question whether the dismissal of an indictment based on outrageous government conduct will ever be supported within the circuit—"Indeed, it seems as though the factual circumstances that warrant such a dismissal must be virtually identical to those found in *Twigg* itself. . . . the absence of even one factor will be fatal in some cases."¹⁵⁴ Even so, until the *McLean* factors are affirmed or announced by the Third Circuit, the lower courts are left with *Twigg*, which as discussed, is of questionable validity.

The Ninth Circuit is the only circuit that has specifically identified a set of factors to be used in evaluating a claim of outrageous government conduct.¹⁵⁵ In *United States v. Black*, which will be discussed in more detail below, the Ninth Circuit identified six factors from previous outrageous government conduct cases as relevant in evaluating whether the government's conduct should bar a conviction:

- (1) known criminal characteristics of the defendants;
- (2) individualized suspicion of the defendants;
- (3) the government's role in creating the crime of conviction;
- (4) the government's encouragement of the defendants to commit the offense conduct;
- (5) the nature of the government's participation in the offense conduct; and
- (6) the nature of the crime being pursued and necessity for the actions taken in light of the nature of the criminal enterprise at issue.¹⁵⁶

In addition to the above factors, the court relied on circuit precedent to establish a series of ground rules that provide guidance in assessing the reasonableness of law enforcement tactics.¹⁵⁷ For exam-

152. *Id.* at *22–30.

153. *Id.* at *43–44.

154. *Id.* at *21, *40.

155. See *United States v. Black*, 733 F.3d 294 (9th Cir. 2013).

156. *Id.* at 303.

157. *Id.* at 302.

ple, "it is outrageous for government agents to engineer and direct a criminal enterprise from start to finish," or for the government to use "excessive physical or mental coercion" to convince an individual to commit a crime.¹⁵⁸ Moreover, the government cannot "generat[e] . . . new crimes merely for the sake of pressing criminal charges."¹⁵⁹ It is not outrageous, however, for the government "to infiltrate a criminal organization[,]. . . approach individuals who are already involved in or contemplating a criminal act, or . . . provide necessary items to a conspiracy."¹⁶⁰

Unsurprisingly, application of the *Black* factors has been inconsistent. As previously discussed, the outrageous government conduct defense has become an increasingly common method for criminal defendants to combat indictments arising out of the ATF's stash house sting operations.¹⁶¹ Notably, in 2014 the Central District of California dismissed stash house sting indictments in two cases, *Hudson* and *Roberts*, on the grounds that the ATF's scheme was considered outrageous government conduct.¹⁶² Both cases followed circuit precedent in applying the *Black* factors.¹⁶³ However, despite nearly identical circumstances, *Hudson* was subsequently reversed and remanded by the Ninth Circuit and assigned to a different judge.¹⁶⁴ Accordingly, the next section will present a summary of *Black*, *Hudson*, and *Roberts*.

III. THE ATF STASH HOUSE STINGS: SEMINAL NINTH CIRCUIT CASES

A. *United States v. Black*

The investigation and arrest of the defendants in *United States v. Black* began in Phoenix, Arizona with a confidential government in-

158. *Id.* (citing *United States v. Williams*, 547 F.3d 1187, 1199 (9th Cir. 2008) (internal quotation marks omitted); *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995)).

159. *Id.* (citing *United States v. Emmert*, 829 F.2d 805, 812 (9th Cir. 1987)).

160. *Id.* at 303 (citing *United States v. So*, 755 F.2d 1350, 1353 (9th Cir. 1985)).

161. *See supra* p. 106.

162. *United States v. Roberts*, No. CR 13-00751-R-2, 3, 5, 2014 U.S. Dist. LEXIS 162656 (C.D. Cal. May 30, 2014); *United States v. Hudson*, 3 F. Supp. 3d 772 (C.D. Cal. 2014), *rev'd sub nom.* *United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014).

163. *Roberts*, 2014 U.S. Dist. LEXIS 162656, at *8; *Hudson*, 3 F. Supp. 3d at 778.

164. *United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014).

formant (“CI”) and Agent Richard Zayas, an undercover ATF agent.¹⁶⁵ Zayas instructed the CI to find people who might be interested in committing a home invasion and then arrange a meeting between the individuals and Zayas.¹⁶⁶ The CI was not instructed to look for individuals already involved in ongoing criminal operations; instead, he simply targeted bars in “bad” parts of town.¹⁶⁷ In July 2009, the CI went to a bar in Glendale, Arizona, where he was introduced to Shavor Simpson.¹⁶⁸ The CI asked Simpson if he would be “interested in putting a crew together” to rob a drug stash house.¹⁶⁹ Simpson agreed, and the CI set up the meeting with Zayas.¹⁷⁰ At the meeting, Zayas explained that he was a cocaine courier who transported drugs for a group of Mexican drug dealers.¹⁷¹ Unhappy with the pay he was receiving, he was interested in robbing the dealers as retribution.¹⁷² Zayas explained the details of the proposed heist, advising Simpson that there could be anywhere from 22 to 39 kilograms of cocaine in the house.¹⁷³ Simpson bragged to Zayas that he and his crew had done this type of robbery before and that his ‘boy’ had everything necessary to complete the robbery, including ski masks, gloves, and guns.¹⁷⁴ Later, at a second meeting with Zayas, Simpson brought along his “right hand soldier” Cordae Black, who offered to bring guns to the robbery after Zayas advised he did not have any.¹⁷⁵ At Zayas’s request, Simpson and Black recruited three more crew members to participate in the robbery.¹⁷⁶ On the day of the heist, Zayas directed the crew to a rented warehouse unit nearby where they were promptly arrested by federal agents.¹⁷⁷

After applying the six-factor test¹⁷⁸ relevant to an outrageous government conduct analysis, the Ninth Circuit held that the reverse sting employed here falls within the bounds of reasonable law en-

165. *United States v. Black*, 733 F.3d 294, 298–99 (9th Cir. 2013).

166. *Id.* at 299.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 300.

175. *Id.*

176. *Id.* at 314.

177. *Id.* at 301.

178. *See supra* pp. 121–22.

forcement.¹⁷⁹ Ultimately, the court's analysis turned on how once they were presented with the fictitious stash house robbery proposal, Simpson, Black, and their crew "readily and actively acted as willing participants with a professed ability to carry out a dangerous armed robbery."¹⁸⁰ Nonetheless, the court expressed strong concerns about the government's initiation of the sting.¹⁸¹ First, the majority took issue with "the fiction itself."¹⁸² The defendants may have actively participated in the armed robbery of the imaginary stash house, but they were "responding to the government's script."¹⁸³ An ATF agent "invented the scenario, including the need for weapons and for a crew, and the amount of cocaine involved."¹⁸⁴ Indeed, the court recognized that the only overt actions by the defendants involved arriving at a parking lot with loaded firearms and then driving to a warehouse where they were arrested.¹⁸⁵ Second, the majority took issue with the government's targeting of the defendants.¹⁸⁶ The ATF was neither infiltrating a suspected crew of stash house robbers nor targeting individuals known to have actually engaged in such criminal behavior.¹⁸⁷ Instead, the ATF found the defendants by "trolling for targets" in places defined only by poor economic and social conditions.¹⁸⁸ The court acknowledged the inherent risk in such generalized targeting, noting:

the government could create a criminal enterprise that would not have come into being but for the temptation of a big payday, a work of fiction spun out by government agents to persons vulnerable to such a ploy who would not otherwise have thought of doing such a robbery.¹⁸⁹

The court concluded that although the generalized targeting of the defendants was troubling, "it [was] counterbalanced by the defendants' enthusiastic readiness to participate in the stash house

179. *Black*, 733 F.3d at 302-03.

180. *Id.* at 302.

181. *Id.* at 302-03.

182. *Id.* at 312.

183. *Id.* at 303.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* (quoting *State v. Lively*, 921 P.2d 1035, 1046 (Wash. 1996)).

189. *Id.* (citing *United States v. Bogart*, 783 F.2d 1428, 1436 (9th Cir. 1986) ("Criminal sanction is not justified when the state manufactures crimes that would otherwise not occur. Punishing a defendant who commits a crime under such circumstances is not needed to deter misconduct; absent the government's involvement, no crime would have been committed.")).

robbery, by their representations that they had committed stash house robberies in the past, by their independent role in planning the crime and by the absence of government coercion or pressure.”¹⁹⁰ However, despite purporting that the six-factor test helped to focus the court’s analysis on “the totality of circumstances,” the majority in *Black* placed very little emphasis on the first two factors: the known criminal characteristics of the defendants and the individualized suspicion of the defendants.¹⁹¹ Instead, the court found its concerns of ATF’s blind targeting of defendants “mitigated to a large degree” by defendants’ boasting about having engaged in similar criminal activity in the past.¹⁹²

A dissent by Judge Jon T. Noonan strongly criticized the majority’s approval of the ATF’s use of fictitious stash house stings, calling them “a disreputable tactic” and referring to the United States government as “[t]he oppressor of its people.”¹⁹³ Noting that “the ATF wrote the script, cast the defendants as the actors, and directed the action to its denouement,” Judge Noonan concluded that it is not the function of our government to “invent a fiction in order to bait a trap for the innocent. . . .”¹⁹⁴ Several months later, a panel of Ninth Circuit judges voted to deny defendants’ petition for rehearing en banc.¹⁹⁵ Judge Reinhardt, joined by Chief Judge Kozinski, issued a scathing dissent deeply rooted in due process precedent, declaring, “[a]s we have long recognized . . . a conviction must fall where ‘the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.’”¹⁹⁶ Framing the issue in *Black* as “whether the government may target poor, minority neighborhoods and seek to tempt their residents to commit crimes that might well result in their escape from poverty,” Judge Reinhardt argued for the continued vitality of the outrageous government conduct defense in light of the ATF’s “profoundly disturbing use of government power.”¹⁹⁷

190. *Id.* at 305 n.8.

191. *See id.* at 303–05.

192. *Id.* at 307.

193. *Id.* at 317–18 (Noonan, J., dissenting) (citing *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., dissenting)).

194. *Id.* at 318.

195. *United States v. Black*, 750 F.3d 1053, 1054 (9th Cir. 2014).

196. *Id.* at 1055 (Reinhardt, J., dissenting) (quoting *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).

197. *Id.* at 1054; *see also infra* Part IV.A.

B. United States v. Hudson

Similar to *Black*, and as previously discussed *supra*, defendants Cedrick Hudson, Joseph Whitfield, and Antuan Dunlap were indicted on conspiracy and weapons charges following their arrest in a stash house sting operation conducted by Special Agent Dan Thompson of the ATF.¹⁹⁸ In an opinion by Judge Otis D. Wright, II of the District Court for the Central District of California, the court applied the six *Black* factors in analyzing the outrageousness of the government's conduct and concluded that the government's "extensive involvement in dreaming up this fanciful scheme—including the arbitrary amount of drugs and illusory need for weapons and extra associates—transcend[ed] the bounds of due process and render[ed] the Government's actions outrageous."¹⁹⁹ Importantly, the court held that all six of the *Black* factors weighed in favor of dismissing the indictment: the ATF (1) had no knowledge of the defendant's alleged criminal background before inventing the stash house scheme; (2) had no reason to suspect the defendants of being involved in stash house robberies; (3) manufactured the entire crime from start to finish; (4) used economic coercion to encourage the defendants to commit the crime; (5) provided a getaway van and safe house as well as assurances and suggestions over the course of a two-month period; and (6) had no real justification to launch the scheme in the first place.²⁰⁰

Eight months later, the Ninth Circuit reversed the district court's dismissal of Dunlap and Whitfield's indictment and ordered the case to be reassigned.²⁰¹ Concluding that the district court erred in holding that the government's conduct met the "extremely high standard" necessary to dismiss an indictment for outrageous government conduct, the Ninth Circuit analogized the facts in *Hudson* to those the court previously found acceptable in *Black*.²⁰² The court noted that the defendants planned nearly every detail of the robbery themselves, including the number of men in their crew, the weapons they would use, their manner of dress, and what they would do

198. See *supra* pp. 103–105; *United States v. Dunlap*, 593 F.App'x 619, 593 (9th Cir. 2014).

199. *United States v. Hudson*, 3 F. Supp. 3d 772, 778 (C.D. Cal. 2014), *rev'd sub nom.* *United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014).

200. See *id.* at 779–87.

201. *Dunlap*, 593 F. App'x at 620. The Ninth Circuit ordered reassignment because the district judge made statements during the defendant's bail hearing that suggested he had already decided he would impose a lenient sentence. *Id.* at 621.

202. *Id.* at 620–21 (citing *United States v. Black*, 733 F.3d at 302).

once inside the stash house.²⁰³ Although the court questioned the wisdom of the government's use of stash house sting operations, it quickly concluded that the sting here falls within the guidelines found acceptable in *Black*.²⁰⁴ Inexplicably, despite the court's pronouncement that it is bound by circuit precedent, the Ninth Circuit's concise opinion in *Dunlap* does not even mention the *Black* factors, let alone explain that it has considered them in reversing the lower court's decision.²⁰⁵

C. *United States v. Roberts*

Less than three months after Judge Wright dismissed the *Hudson* defendants' indictment (and about six months before the Ninth Circuit reversed that decision), Judge Manuel L. Real, also of the Central District of California, similarly dismissed the indictment of stash house sting defendants Arturo Cortez, Rene Flores, and Randy Garmon.²⁰⁶ Unsurprisingly, the facts of *Roberts* are nearly identical to those of *Hudson*. ATF Special Agent John Carr invented a drug stash house that contained 20–25 kilograms of cocaine and was guarded by two “older” men.²⁰⁷ Masquerading as a drug courier with financial troubles, Agent Carr planned to assemble a crew to rob the imaginary stash house.²⁰⁸ Just like in *Hudson*, Agent Carr would already be inside the house to let his “coconspirators” inside and would provide a vehicle for their escape.²⁰⁹ Using two paid confidential informants to blindly target individuals who might be interested in participating in the heist, the government ultimately recruited the defendants despite having no information about their criminal histories or any reason to suspect that they were engaged in criminal behavior.²¹⁰ Agent Carr encouraged the defendants to bring guns, and, at a warehouse he provided, insisted on running through

203. *Id.*

204. *Id.* at 621.

205. *See id.*

206. *See* *United States v. Roberts*, No. CR 13-00751-R-2, 3, 5, 2014 U.S. Dist. LEXIS 162656, at *18 (C.D. Cal. May 30, 2014); *see also* Brad Heath, *Serious Questions Surround ATF Stings*, USA TODAY (May 29, 2014, 11:53 PM), <http://www.usatoday.com/story/news/nation/2014/05/29/atf-stash-house-sting-backlash/9719403/> [hereinafter Heath, *Serious Questions*] (“Judge Real’s decision, which has gone largely unnoticed outside the federal courthouse in Los Angeles, was all the more unusual because it came months after the three men had pleaded guilty and without their lawyers having asked that the charges be dropped.”).

207. *Roberts*, 2014 U.S. Dist. LEXIS 162656, at *3.

208. *Id.* at *4.

209. *See id.*

210. *Id.* at *4–5.

a script to ensure a conspiracy had been hatched.²¹¹ Immediately after they went through Agent Carr's script, the defendants were arrested.²¹² The defendants never even knew the location of the purported stash house they were planning to rob.²¹³

Just like in *Hudson*, and for many of the same reasons, the court found that all six of the *Black* factors weighed in favor of dismissing the indictment on outrageous government conduct grounds.²¹⁴ Once again, the court found it significant that the government had no reason to suspect these defendants before targeting them.²¹⁵ They weren't violent "recidivist career criminals," as the government argued—indeed, defendant Cortez had three prior non-violent misdemeanor convictions, and, importantly, the government was not even aware of them until after he was arrested in the sting.²¹⁶ The court also considered Agent Carr's integral participation in the conspiracy, from his invention of the scheme to his encouragement of the defendants to bring weapons.²¹⁷ In finding that the sting employed here constituted outrageous government conduct, the court dismissed the indictment and ordered that all three defendants be set free.²¹⁸

IV. ANALYSIS

A. The Stash House Stings: "A Profoundly Disturbing Use of Government Power"

As the *Black* dissents and the district court opinions in *Hudson* and *Roberts* illuminate, the stash house stings as designed and executed represent a "profoundly disturbing use of government power" for a number of reasons that implicate "our most fundamental constitutional values."²¹⁹ First, in recruiting individuals to participate in the fictional robbery, the government is not required to target existing criminal enterprises or have prior suspicion of potential targets.²²⁰ Instead, the government places their paid confidential informants in

211. *Id.* at *5.

212. *Id.*

213. *Id.*

214. *Id.* at *8; *see supra* pp. 126–127.

215. *Id.*

216. *Id.* at *9–10.

217. *Id.* at *11–12.

218. *Id.* at *18; Heath, *Serious Questions*, *supra* note 206.

219. *United States v. Black*, 750 F.3d 1053, 1054 (9th Cir. 2014) (Reinhardt, J., dissenting).

220. *See United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013).

“‘bad’ part[s] of town in search of ‘bad’ guys,” and leaves the choice of targets entirely to the prejudices and intuitions of the CI, who may rely simply on a “hunch” that the target is up to no good.²²¹ Moreover, despite the ATF’s purported focus on removing serious criminals from the streets, in practice, these stings often trap low-level offenders with no propensity to commit drug offenses.²²² In many instances, the government only learns of the subject’s alleged criminal background because of the subject’s own false or exaggerated claims of past criminal experience—none of which is actually confirmed by the government during the operation.²²³ As the district court in *Hudson* explained, “[i]n a situation where an apparently experienced cocaine courier is boasting to some small-time crooks about the chance to hit the mother lode, it is only human nature that the individual is going to try to impress the courier with wild tales of past criminal conduct.”²²⁴ The government then uses this post hoc “knowledge” of the subject’s alleged criminal background to justify the sting operation from the very beginning.²²⁵

Second, the government retains full control over the amount of time its targets spend in prison because it can specify the amount of drugs involved in the fictional conspiracies.²²⁶ A common characteristic of stash house stings across the country is that the amount of the hypothetical cocaine to be stolen is always purported to exist in quantities exceeding five kilograms.²²⁷ This is no coincidence. A defendant convicted of possessing five or more kilograms of cocaine *automatically* faces a ten-year mandatory-minimum prison sentence.²²⁸ The government attempts to justify this practice as a means

221. *Black*, 750 F.3d at 1054 (Reinhardt, J., dissenting); *United States v. Hudson*, 3 F. Supp. 3d 772, 781 (C.D. Cal. 2014), *rev’d sub nom.* *United States v. Dunlap*, 593 F. App’x 619 (9th Cir. 2014); *see also* Todd, *supra* note 32, at 442 (“The government should not leave the choice of targets in the hands of confidential informants who act as agents in exchange for consideration, whether monetary or leniency in sentencing.”).

222. *See* sources cited *supra* note 28.

223. *Black*, 750 F.3d at 1055, 1059; *United States v. Kindle*, 698 F.3d 401, 414 (7th Cir. 2012) (Posner, J., dissenting).

224. *Hudson*, 3 F. Supp. 3d at 780.

225. *See id.*

226. *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013) (quoting *United States v. Briggs*, 623 F.3d 724, 729–30 (9th Cir. 2010) (“In fictional stash house operations like the one at issue here, the government has virtually *unfettered ability* to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant.”) (emphasis added)).

227. *See, e.g., Hudson*, 3 F. Supp. 3d at 775; *Black*, 733 F.3d at 299; *Kindle*, 698 F.3d at 404.

228. *Hudson*, 3 F. Supp. 3d at 785 (citing 21 U.S.C. § 841(b)(1)(A)). *See also* Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401, 1411–12 (2013) (“The creation of mandatory sentencing laws place[s] enormous additional power in the

of establishing the undercover agent's credibility as a purported drug courier.²²⁹ It then uses this fabricated amount of drugs to justify the lengthy prison sentence imposed on the defendant following conviction.²³⁰ However, as the district court in *Hudson* acknowledged, this circular rationalization destroys the proportionality between the defendant's sentence and his culpability, actions, and past criminal history.²³¹

ATF agents also retain control over other factors that generate additional prison time—for example, inventing armed guards for the imaginary stash house, thereby necessitating the need for subjects to bring weapons and body armor.²³² Thus, when the subject heeds the agent's encouragement and shows up to the heist with a gun, he faces an additional five years imprisonment for possessing a firearm in connection with a drug-trafficking offense.²³³ Such manipulation not only exposes defendants to additional charges, but also establishes their intent to commit the crime.²³⁴ Thus, the defendant often loses the ability to bring a claim of sentencing entrapment and may bear the full weight of their sentences under the applicable sentencing guidelines without room for downward departure.²³⁵

hands of the police - namely, the opportunity to make strategic decisions during an undercover operation that would, in many cases, mandate and dramatically increase a suspect's ultimate sentence.").

229. *Hudson*, 3 F. Supp. 3d at 785-86.

230. *Id.*

231. *Id.* at 786.

232. See *Tinto*, *supra* note 24, at 16.

233. See *United States v. Black*, 750 F.3d 1053, 1055 (9th Cir. 2014) (Reinhardt, J., dissenting); *Hudson*, 3 F. Supp. at 785 (citing 18 U.S.C. § 924(c)(1)(A) (2012)).

234. See *Tinto*, *supra* note 24, at 16.

235. *United States v. Black*, 733 F.3d 294, 310-11 (9th Cir. 2013).

Sentencing entrapment occurs when a defendant is predisposed to commit a lesser crime, but is entrapped by the government into committing a crime subject to more severe punishment." *United States v. Mejia*, 559 F.3d 1113, 1118 (9th Cir. 2009). . . . [A] defendant can show sentencing entrapment by demonstrating that he lacked predisposition — either through a lack of intent or a lack of capability — to conspire with others to take by force the amount of cocaine charged. See *United States v. Yuman-Hernandez*, 712 F.3d 471, 475 (9th Cir. 2013). . . . If the defendant succeeds, the district court may exclude from its drug quantity calculation the extra amount caused by the government's entrapment. See *United States v. Naranjo*, 52 F.3d 245, 250 (9th Cir. 1995). Sentencing entrapment thus permits a downward departure for purposes of calculating the base offense level under the Sentencing Guidelines; it also permits a court to sentence a defendant below the otherwise-applicable mandatory minimum where the newly calculated drug quantity falls below the amount triggering a mandatory minimum.

Id. at 310-11.

Third, the stash house stings disproportionately result in the conviction of minority defendants.²³⁶ An unofficial review by *USA TODAY* of court files from across the country revealed that approximately 90% of the individuals currently imprisoned as a result of an ATF stash house sting are either African-American or Hispanic.²³⁷ This is not surprising when the ATF sends its confidential informants to look for potential targets in “seedy, poverty-ridden areas” (i.e. minority neighborhoods)—an assignment that Judge Reinhardt of the Ninth Circuit described as “an open invitation to racial discrimination” given the absence of any effort by supervising agents to target known criminals.²³⁸ Moreover, despite judicial concerns about the impact these operations have on minorities, defendants are largely unsuccessful on claims of discriminatory enforcement in light of the Supreme Court’s landmark decision in *United States v. Armstrong*, which sets a rigorous standard for allowing discovery in support of a selective prosecution claim.²³⁹ Under *Armstrong*, a defendant is only entitled to discovery if he can make a threshold showing that the government declined to prosecute similarly situated suspects of other races.²⁴⁰ For a minority defendant, the task of finding similarly situated whites who were not targeted by the ATF for stash house stings is impossible without preliminary discovery, and even more so without information on how the ATF selects its targets. For example, in a stash house sting case from the Eastern District of Pennsylvania, five African-American defendants presented evidence demonstrating that, within the last five years, all twenty-four defendants prosecuted in such cases in the district were African-American.²⁴¹ Applying *Armstrong*, the court denied the defendants’ motions for a hearing and discovery on the issue of selective prosecution because they failed to meet the burden of identifying similarly situated individuals of other races who were treated differently.²⁴² The possibility that racial animosity might be a mo-

236. See *United States v. McLean*, No. 13-CR-00487, 2015 U.S. Dist. LEXIS 2971, at *4 (E.D. Pa. Jan. 12, 2015).

237. Heath, *Investigation*, *supra* note 23; see also *McLean*, 2015 U.S. Dist. LEXIS 2971, at *4 (expressing concern over the alarming results of the *USA TODAY* investigation).

238. *Hudson*, 3 F. Supp. 3d at 780; *Black*, 750 F.3d at 1055 (Reinhardt, J., dissenting).

239. See *United States v. Armstrong*, 517 U.S. 456, 468 (U.S. 1996). A selective prosecution claim asserts that the government has investigated and prosecuted a defendant on the basis of “race, religion, or other arbitrary classification” in violation of the Constitution. *Id.* at 464.

240. *Id.* at 469.

241. *United States v. Whitfield*, No. 12-418-1, 2014 U.S. Dist. LEXIS 87589, at *12 (E.D. Pa. June 27, 2014).

242. *Id.* at *36. For another case where a selective prosecution discovery motion was denied, see *United States v. Washington*, No. 13-171-2, 2014 U.S. Dist. LEXIS 88439, at *20 (E.D.

tivating factor behind any criminal prosecution should not be ignored, yet current precedent teaches that a strong showing of potential bias, on its own, rarely invites the court's scrutiny.²⁴³

Lastly, the stash house stings are a direct threat to socio-economic equality. The ATF sends its confidential informants to communities that are defined by poor economic and social conditions, tempting vulnerable individuals with the opportunity to earn an extraordinary amount of money through criminal activity.²⁴⁴ As Judge Reinhardt explains in his *Black* dissent:

At the right moment and when described in attractive enough terms, such offers may lead astray otherwise law abiding young men living in poverty, and motivate them to make false or exaggerated claims about their qualifications to serve as participants in the proposed venture These young men may yet become productive, successful members of society, or their lives may be forever changed for the worse should they succumb to the government's blandishments.²⁴⁵

In this era of "swiftly rising economic inequality and alarming levels of unemployment," it is important to view stash house sting operations as a threat to freedom and equality when they are aimed at "the poorest amongst us and backed by the promise of immediate wealth."²⁴⁶ Surely, when "the government targets minorities in poor neighborhoods with huge payouts in the hundreds of thousands of dollars, then seeks life sentences to those that fall into its web, [it] is so outrageous as to offend the basic sense of justice."²⁴⁷ Moreover, instead of dreaming up plots that encourage economically disadvantaged minorities to participate in "get rich quick" criminal schemes, perhaps the government could invest in positive social

Pa. June 30, 2014). Note, however, that in a number of cases in the Northern District of Illinois, the court has permitted discovery on the issue of racial profiling and selective enforcement in connection with the ATF's targeting of individuals for its stash house sting operations. *See, e.g.,* *United States v. Alexander*, No. 11-cr-148-1, 2013 U.S. Dist. LEXIS 172975, at *15 (N.D. Ill. Dec. 10, 2013); *United States v. Paxton*, No. 13-cr-103, 2014 U.S. Dist. LEXIS 56857, at *17 (N.D. Ill. Apr. 17, 2014); *United States v. Cousins*, No. 12-cr-865-1, 2014 U.S. Dist. LEXIS 142139, at *12 (N.D. Ill. Oct. 7, 2014); *United States v. Brown*, No. 12-cr-632, Doc. No. 153 (N.D. Ill. July 31, 2013).

243. *See Armstrong*, 517 U.S. at 476 (Stevens, J., dissenting).

244. *See United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013); *United States v. Black*, 750 F.3d 1053, 1056 (9th Cir. 2014) (Reinhardt, J., dissenting).

245. *Black*, 750 F.3d at 1056 (Reinhardt, J., dissenting).

246. *Id.* at 1056-57.

247. *United States v. Roberts*, No. CR 13-00751-R-2, 3, 5, 2014 U.S. Dist. LEXIS 162656, at *18 (C.D. Cal. May 30, 2014).

programs that help prevent crime, such as education, anti-drug, job-training, and housing services.²⁴⁸

The reasons set forth above highlight only *some* of the troubling aspects of the ATF's tactics. Despite these concerns, as well as increased media attention and public scrutiny, the stash house stings remain a viable and increasingly common law enforcement tactic due to their success.²⁴⁹ Undoubtedly, the stash house stings are a valid law enforcement mechanism when used to target existing criminal enterprises or remove demonstrably violent drug offenders from the streets. However, stash house stings violate due process when they are used to obtain felony convictions from otherwise law-abiding persons who are lured into fake criminal conspiracies orchestrated by their own government. Such stings underscore the continued vitality of the outrageous government conduct defense as a critical safeguard of the Constitution's due process guarantees.

B. Proposal: Six-Factor Test

This Note proposes an analysis of the outrageous government conduct defense based on the Ninth Circuit's six-part "totality of the circumstances" test and suggests that the Supreme Court grant certiorari to articulate an outrageous government conduct defense guided by these factors.²⁵⁰ In the alternative, the Ninth Circuit's test should be adopted by the other circuits.²⁵¹ The Ninth Circuit's six-factor test presents the most progressive analysis to date in determining whether the outrageous conduct of law enforcement should bar the government from obtaining a conviction. As the *Black* and

248. See *Black*, 750 F.3d at 1058.

249. See *United States v. McLean*, No. 13-CR-00487, 2015 U.S. Dist. LEXIS 2971, at *1-2 (E.D. Pa. Jan. 12, 2015).

250. See *Todd*, *supra* note 32, at 444 ("The Supreme Court would not need to rule against precedent . . . [b]ased on its holdings in *Rochin*, *Russell*, and *Hampton*, the door has been left open for a defense based on due process that would be available to defendants regardless of predisposition.").

251. Interestingly enough, this trend may already be under way. See, e.g., *United States v. Duckett*, No. PWG-13-626, 2015 U.S. Dist. LEXIS 10775, at *22-23 (D. Md. Jan. 29, 2015). In *Duckett*, defendants filed a motion to dismiss their ATF stash house sting indictment on outrageous government conduct grounds and urged the District Court of Maryland to consider their case according to the factors announced by the Ninth Circuit in *United States v. Black*. *Id.* at *22. The district court recognized that the *Black* factors have not been adopted by the Fourth Circuit, but "provide[] a useful framework for considering claims of government outrageousness, albeit one that ultimately is unavailing to [d]efendants." *Id.* at *22-23. Although the court ultimately relied on Fourth Circuit precedent in denying defendant's motion, *id.* at *12-20, it conducted a hypothetical analysis under the pretense that if the court were to consider this case in light of the *Black* factors, it would nevertheless find that most of the six factors weigh in favor of the government, *id.* at *22-28.

Hudson cases illustrate, however, this test can still lead to undesirable results. Thus, the *Black* dissents by Judges Noonan and Reinhardt provide the framework for the social and policy considerations that must be taken into account in an outrageous government conduct analysis. These considerations were best captured in the Central District of California's application of the *Black* factors in *Hudson* and *Roberts*. The following proposal will utilize the failings of the stash house stings as described in those opinions as an illustrative tool to further support the adoption of a formal outrageous government conduct test.

1. *The known criminal characteristics of the defendants*

The first step a court should take in assessing the outrageousness of the government's conduct is to consider "whether a defendant had a criminal background or propensity the government knew about" when the government initiated its operation.²⁵² This factor demands that the government target a preexisting criminal organization or have actual knowledge (or at least reasonable suspicion based on identifiable facts) that a suspect has previously engaged in criminal activity.²⁵³ By contrast, this factor will not be satisfied when the government "cast[s] a wide net, trawling for crooks . . . without an iota of suspicion that any particular person [has engaged in criminal activity] in the past."²⁵⁴

Moreover, at trial this factor must weigh in favor of the defendant when the government first becomes aware of the defendant's alleged criminal history after the government has enacted the scheme. As the stash house cases demonstrate, the prospect of making large amounts of money through criminal activity may motivate particularly vulnerable individuals to make false or exaggerated claims about prior criminal experience in order to prove their competence to participate in the proposed venture.²⁵⁵ The government cannot indiscriminately target low-level offenders and then "bootstrap [the] *post hoc* knowledge" of their exaggerated criminal history to justify the scheme from its inception.²⁵⁶ Judicial imposition of a require-

252. See *United States v. Black*, 733 F.3d 294, 304 (9th Cir. 2013).

253. See *United States v. Hudson*, 3 F. Supp. 3d 772, 780-81 (C.D. Cal. 2014), *rev'd sub nom. United States v. Dunlap*, 593 F. App'x 619 (9th Cir. 2014).

254. See *id.* at 780; see also *United States v. Luttrell*, 923 F.2d 764, 765 (9th Cir. 1991) (Pregerson, J., dissenting) ("[T]he police should not be allowed to hire informants simply to go out on fishing expeditions to find targets for undercover sting operations.").

255. See *supra* p. 129.

256. *Hudson*, 3 F. Supp. 3d at 780.

ment that demands actual knowledge or reasonable suspicion will act as a necessary precaution against “the danger of arbitrary enforcement” of our nation’s drug and gun laws and safeguard our right to be free from discriminatory law enforcement tactics under the Due Process Clause.²⁵⁷

2. Individualized suspicion of the defendants

Although closely related to the known criminal characteristics of the defendant, individualized suspicion focuses on the government’s evidence that the target is actually involved in the type of illegal conduct being investigated. When the government’s purported mission is to remove violent, “recidivist career criminals” from the streets, it cannot be allowed to aimlessly target individuals with only misdemeanor convictions on their record, or worse yet, no criminal record at all.²⁵⁸ Judge Reinhardt, in his dissent in *Black*, asks: “In this era of mass incarceration, in which we already lock up more of our population than any other nation on Earth . . . [d]o we really need to make felons out of those who are susceptible but have not yet committed serious offenses (and might not ever do so)?”²⁵⁹ Our society cannot tolerate the government encouraging individuals to engage in criminal conspiracies they would not have participated in otherwise.²⁶⁰ Accordingly, under this factor the ATF’s recruitment of individuals with no propensity to commit armed robbery or major drug offenses for participation in the home invasion of a drug stash house will contribute to a finding of outrageous government conduct.

3. The government’s role in creating the crime of conviction

Equally as important as the government’s basis in targeting a suspect, the government’s role in the creation of the crime must be considered in an outrageous government conduct analysis. The Supreme Court’s admonition on this point is unequivocal: “The function of law enforcement is the prevention of crime and the apprehension of criminals. *Manifestly, that function does not include*

257. See *United States v. Armstrong*, 517 U.S. 456, 483 (1996) (Stevens, J., dissenting); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

258. See *United States v. Roberts*, No. CR 13-00751-R, 2, 3, 5, 2014 U.S. Dist. LEXIS 162656, at *9-10 (C.D. Cal. May 30, 2014).

259. *United States v. Black*, 750 F.3d 1053, 1057-58 (9th Cir. 2014) (Reinhardt, J. dissenting).

260. See *Roberts*, 2014 U.S. Dist. LEXIS 162656, at *7.

the manufacturing of crime."²⁶¹ In *Black*, the majority placed particular emphasis on whether the government approached the defendant initially or whether the defendant approached the confidential informant, as well as whether the government proposed the criminal activity or simply attached itself to an existing criminal enterprise.²⁶² Certainly, when a defendant devises or is already involved in a criminal conspiracy and approaches an undercover agent for assistance, investigation is both appropriate and warranted. However, in stash house sting operations, the entire crime is a product of the government's imagination—the undercover agent's drug-courier persona, the stash house itself, the amount of drugs supposedly inside the stash house, the armed individuals supposedly guarding the stash house, the need for guns, and of course, the idea for the robbery.²⁶³ Plainly, this is the manufacture of crime.

The *Black* court counterbalanced these concerns by focusing on the defendants' willingness to participate in the robbery and their independent role in planning the crime once the government's bait was set.²⁶⁴ But this shift in focus toward the defendants' response to the ATF's script cannot mitigate the government's role in the crime's creation; with this argument, the government's conduct will always be justified so long as a defendant shows a willingness to carry out the plan.²⁶⁵ This is precisely what the outrageous government conduct defense aims to prevent. Thus, in assessing the government's role in the creation of the crime, it is erroneous to examine what the defendants did or did not do after the government created the scheme.

4. The government's encouragement of the defendants to commit the crime

Similarly, a court must also consider the extent to which the government encouraged the defendant to commit the crime of convic-

261. *Sherman v. United States*, 356 U.S. 369, 372 (1958) (emphasis added).

262. *United States v. Black*, 733 F.3d 294, 304 (9th Cir. 2013). The answers to these questions are often highly disputed in stash house sting cases, where none of the interactions between the defendants and the confidential informant during the initial point of contact before defendants meet the undercover ATF agent are recorded. *Id.* at 299 n.4. *See also* *United States v. McLean*, No. 13-CR-00487, 2015 U.S. Dist. LEXIS 2971, at *36 (E.D. Pa. Jan. 12, 2015) ("The encounter was not recorded, which is to be expected since the government asserts that the meeting was not planned, and a CI cannot be expected to wear a wire at all times.").

263. *See* *United States v. Hudson*, 3 F. Supp. 3d 772, 782 (C.D. Cal.), *rev'd sub nom.* *United States v. Dunlap*, 593 F. App'x. 619 (9th Cir. 2014).

264. *United States v. Black*, 733 F.3d 294, 305 n.8 (9th Cir. 2013).

265. *See id.* at 315 (Noonan, J., dissenting).

tion. A finding of either physical or mental coercion, intimidation, or physical force will unquestionably satisfy this factor.²⁶⁶ As the stash house stings demonstrate, however, the ATF uses economic coercion to tempt poverty-ridden individuals to commit crimes with promises of extraordinary financial rewards.²⁶⁷ A court considering an outrageous government conduct defense must recognize this conduct as government encouragement—especially when the government targets people who are poor and facing significant economic pressures.²⁶⁸ Thus, “while arm-twisting and extortionate threats would easily satisfy [this] factor, so too should the Government hitting individuals . . . where they are most vulnerable: their depressed economic circumstances.”²⁶⁹ Moreover, courts should examine other elements of the stash house sting operation to determine whether they are suggestive of extensive encouragement: *e.g.*, did the government suggest that the defendant bring a firearm, body armor, or explosives? Did the government provide a getaway car or safe house to make the robbery easier? Did the defendant attempt to withdraw at anytime? These questions will appropriately point the inquiry solely at the government’s encouragement of the defendant and avoid examination of the defendant’s responsive behavior.

5. *The nature of the government’s participation in the crime*

Courts should also consider the scope of the government’s participation in the crime—namely, the duration, nature, and necessity of the government’s actions that contributed toward the crime’s effectuation.²⁷⁰ *Duration* requires only a baseline inquiry into the length of the government’s involvement in the conspiracy, where long, drawn-out participation is of greater concern than short or intermittent involvement.²⁷¹ The *nature* of the government’s participation examines “whether the government acted as a partner in the criminal activity, or more as an observer of the defendant’s criminal conduct,” as well as the extent to which the government provided “weapons, plans, manpower, . . . or direction about how to perform the robbery,” or similar components such as a getaway van or safe

266. See *id.* at 302 (quoting *United States v. McClelland*, 72 F.3d 717, 721 (9th Cir. 1995)); see also *supra* p. 122.

267. See *supra* text accompanying notes 244–248.

268. *Id.*

269. *United States v. Hudson*, 3 F. Supp. 3d 772, 783 (C.D. Cal. 2014), *rev’d sub nom.* *United States v. Dunlap*, 593 F. App’x. 619 (9th Cir. 2014).

270. See *Black*, 733 F.3d at 308–309.

271. *Id.* at 308.

house.²⁷² Lastly, the *necessity* of the government's participation measures whether the defendant would have had the technical expertise and resources to commit the crime on his own without the government's involvement.²⁷³

In a typical stash house sting operation, an ATF agent not only provides the entire scheme and its "fictitious components," but also plays an active role as a conspirator by planning the robbery from beginning to end.²⁷⁴ The agent acts as both ringleader and mastermind behind the operation by controlling all of the details, such as planning what they will do once they enter the house, explaining how they will get away, and ensuring that the defendants would need to bring guns—" [t]he ATF [writes] the script, cast[s] the defendants as the actors, and direct[s] the action to its denouement."²⁷⁵ The nature of the government's participation in the crime can only be characterized as both essential and extensive; without the ATF, there would have been no crime at all. Accordingly, under these circumstances, the nature of the government's participation would tip the scale toward a finding of outrageous government conduct.

6. *The nature of the crime being pursued and necessity for the government's actions*

Finally, in evaluating whether government conduct is sufficiently outrageous to warrant the dismissal of an indictment, a court should consider "the need for the investigative technique that was used in light of the challenges of investigating and prosecuting the type of crime being investigated."²⁷⁶ Here, a court must examine not only "the nature of the crime," but also "the tools available to law enforcement agencies to combat it" and the associated costs and benefits to society.²⁷⁷ For a number of reasons, the ATF stash house sting operations are devoid of justification and completely unnecessary as a crime-fighting tool. First, even if the government *were* targeting potential stash house robbers, the government would not actually be

272. See *id.* at 308-09.

273. *Id.* at 309.

274. See *Hudson*, 3 F. Supp. 3d at 784; *United States v. Roberts*, No. CR 13-00751-R-2, 3, 5, 2014 U.S. Dist. LEXIS 162656, at *13-14 (C.D. Cal. May 30, 2014).

275. *Roberts*, 2014 U.S. Dist. LEXIS 162656, at *12, *14; *Black*, 733 F.3d at 318 (Noonan, J., dissenting).

276. *Black*, 733 F.3d at 309.

277. See *United States v. Twigg*, 588 F.2d 373, 378, n.6 (3d Cir. 1978); *Hudson*, 3 F. Supp. 3d at 786-87 (arguing that stash house cases cost federal taxpayers about \$430,000 per defendant).

making the country any safer, nor would it be removing any illegal drugs from the streets or reducing their sale.²⁷⁸ Indeed, as Judge Posner observed, the ATF's scheme actually has the opposite effect of benefiting real stash house operators:

The effect of a fictitious stash house sting, when the person stung is . . . a real stash house robber, is therefore to make stash houses more secure by reducing the likelihood of their being robbed. A sting both eliminates one potential stash house robber . . . and deters other criminals from joining stash house robberies, since they may turn out to be stings. The greater security that fictitious stash house stings confer on real stash houses—security obtained at no cost to the operators of stash houses—reduces their cost of self-protection The lower a business's costs, the lower the prices charged consumers, and so the greater the demand for illegal drugs and the more sales and consumption of them.²⁷⁹

Second, the drugs might be non-existent, the stash house a figment of the government's imagination, and the crime a fallacy, but the cost to federal taxpayers is staggeringly real.²⁸⁰ According to the Federal Bureau of Prisons, the average cost of incarceration for federal inmates in 2013 was \$29,291.25.²⁸¹ In stash house cases, the ATF usually seeks a minimum sentence of fifteen years.²⁸² Accordingly federal taxpayers pay approximately \$439,368.75 per defendant in incarceration costs for the prosecution of a crime that never actually happened. That number, of course, does not include the cost of the operation itself or the cost of prosecution, defense, and judicial resources.²⁸³ To the extent that these stings lead to the imprisonment of individuals who pose no *real* risk to society, we must question whether the costs associated with incarcerating them are justified.²⁸⁴

278. *Hudson*, 3 F. Supp. 3d at 786 ("But for the Government's action, the fake stash house would still be fake, the nonexistent drugs would still be nonexistent, and the fictional armed guards would still be fictional.").

279. *United States v. Kindle*, 698 F.3d 401, 416 (7th Cir. 2012) (Posner, J., dissenting).

280. *See Hudson*, 3 F. Supp. 3d at 787.

281. Annual Determination of Average Cost of Incarceration, 79 Fed. Reg. 26996 (May 12, 2014).

282. *United States v. Black*, 733 F.3d 294, 317 (9th Cir. 2013) (Noonan, J., dissenting) (citing Heath, *Big Bucks*, *supra* note 17).

283. *Hudson*, 3 F. Supp. 3d at 787.

284. *See id.*

CONCLUSION

The outrageous government conduct defense was created because Justice Rehnquist believed that law enforcement tactics might one day become so “shocking to the universal sense of justice” that due process principles would bar the government from obtaining a conviction, regardless of the defendant’s predisposition to commit the crime.²⁸⁵ Undoubtedly, the ATF’s stash house sting operations signal that this day has arrived. However, without a formal articulation of the outrageous government conduct defense by the Supreme Court, its application remains severely circumscribed in the lower courts. The six-factor test announced by the Ninth Circuit in *Black* represents the most progressive and holistic framework to date in analyzing whether the outrageous conduct of law enforcement should warrant dismissal of an indictment. As *Hudson* and *Roberts* demonstrate, the *Black* factors appropriately consider the social, political, racial, economic, and policy issues that the stash house stings bring into focus. Therefore, the Supreme Court should grant certiorari and announce a formalized outrageous government defense guided by the six-factor test articulated by the Ninth Circuit in *Black*. In the alternative, the other circuits should consider adopting the Ninth Circuit’s test. A formal articulation of the outrageous government conduct defense will signal once and for all that the government’s willingness to infringe upon our constitutional values of equality and fairness will not be tolerated.

285. *United States v. Russell*, 411 U.S. 423, 431–33 (1973).