

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 :
 UNITED STATES OF AMERICA :
 :
 - v. - :
 :
 JAMES CROMITIE, :
 a/k/a "Abdul Rahman," :
 a/k/a "Abdul Rehman," :
 DAVID WILLIAMS, :
 a/k/a "Daoud," :
 a/k/a "DL," :
 ONTA WILLIAMS, :
 a/k/a "Hamza," and :
 LAGUERRE PAYEN, :
 a/k/a "Amin," :
 a/k/a "Almondo," :
 :
 Defendants. :
 -----X

09 Cr. 558 (CM)

**GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' PRETRIAL MOTIONS** *-(UNAVAILABLE ON PAPER)
IN FULL*

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ARGUMENT

*** I. There Was No Government Misconduct, Much Less “Outrageous Misconduct”**

Defendant Onta Williams asks the Court to dismiss the Indictment because the Government violated the “fundamental fairness” and “universal principles of justice” embodied in the Due Process Clause “when it creates new crime for the sake of bringing charges against the person it has persuaded to participate in wrongdoing.” Onta Williams Mot at 1. Onta Williams argues that the Government – through “outrageous misconduct” – pressured, cajoled, and did everything they could to convince an otherwise “highly reluctant” Cromitie to commit the charged crimes. Onta Williams Mot. at 1-3, 22.

There is simply no legal support for the defendants’ argument that what occurred in the course of the investigation constitutes Government misconduct, let alone the type of misconduct that would require dismissal of the Indictment.

Neither the facts nor the law supports the defendants’ argument. As a preliminary matter, as the extensive factual discussion above at pp. 3-13 makes clear, the defendants’ portrayal of Cromitie seriously mischaracterizes the real James Cromitie and his interactions with the CI. More importantly, even if the defendants’ statement of facts was accurate, the Government’s conduct in this investigation was not only praiseworthy, but it does not even remotely approach the extremely high legal standard that constitutes “outrageous Government misconduct.”

A. Applicable Law

There is a well-established body of case law governing the interplay of the Fifth Amendment’s Due Process clause and undercover criminal investigations. Under that body of

case law, to show a Due Process violation, a defendant must show some “type of coercive action or outrageous violation of physical integrity or other egregious or outrageous government conduct.” United States v. Jackson, 345 F.3d 59, 67 (2d Cir. 2003). As the Second Circuit has explained, “We have rarely sustained due process claims concerning government investigative conduct, stressing that the conduct involved must be ‘most egregious’ . . . and ‘so repugnant and excessive’ as to shock the conscience.” United States v. Duggan, 743 F.2d 59, 84 (2d Cir. 1984). The Second Circuit has stated that “[t]he paradigm examples of conscience-shocking conduct are egregious invasions of individual rights ... [such as] breaking into suspect’s bedroom, forcibly attempting to pull capsules from his throat, and pumping his stomach without his consent.” United States v. Rahman, 189 F.3d 88, 131 (2d Cir. 1999). As the Court of Appeals has noted, “Especially in view of the courts’ well-established deference to the Government’s choice of investigative methods, the burden of establishing outrageous investigatory conduct is very heavy.” Id. The Second Circuit has emphasized that “Such a claim rarely succeeds.” United States v. LaPorta, 46 F.3d 152, 160 (2d Cir. 1994).

In the context of a sting operation, the Second Circuit’s decision in United States v. Chin is highly instructive for this case. 934 F.2d 393, 398 (2d Cir. 1991). In rejecting an entrapment defense in a child pornography case and affirming defendant’s conviction, the Court of Appeals explained:

whether investigative conduct violates a defendant’s right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law. Rather, the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it ‘shocks the conscience,’ regardless of the extent to which it led the defendant to commit his crime.

Chin, 934 F.2d at 398 (internal citation omitted).

Moreover, only in very rare cases where the allegations of government misconduct are shocking do the allegations “warrant a hearing so that the precise facts may be ascertained.” United States v. Cuervelo, 949 F.2d 559, 567 (2d Cir. 1991) (granting a hearing where the claim was that a federal agent engaged in outrageous conduct involving sexual relations with the defendant). The Second Circuit has made clear, however, that “nothing in Cuervelo requires a District Court to conduct a hearing every time a defendant alleges outrageous government conduct.” LaPorta, 46 F.3d at 160.

B. Discussion

Applying this precedent makes clear that the defendants’ allegations here are *not cognizable* under Second Circuit law. That is, the defendants in this case argue that the Government “overparticipated” in the crime, that the Government promised them a lot of money to commit the crime, that the Government “manufactured and facilitated” the crime, and that the “enterprise would have immediately collapsed if [the CI’s] guiding hand had been removed.” Onta Williams Mot at 24, 25, and 28.

These are precisely the type of allegations that the Second Circuit stated unequivocally cannot – as a matter of law – constitute outrageous government misconduct amounting to a Due Process violation. Chin, 934 F.2d at 398 (“whether investigative conduct violates a defendant’s right to due process cannot depend on the degree to which the governmental action was responsible for inducing the defendant to break the law. Rather, the existence of a due process violation must turn on whether the governmental conduct, standing alone, is so offensive that it ‘shocks the conscience,’ regardless of the extent to which it led the

defendant to commit his crime.”). The extraordinarily high burden for the defendants on this issue is highlighted by their own concession that “the Second Circuit has yet to be confronted with outrageous government misconduct sufficient to warrant dismissal of an indictment.” *Onta Williams Mot.* at 25.

In this case, the allegations of outrageous Government misconduct do not even remotely approach the threshold required to warrant dismissing the Indictment based on a supposed Due Process violation.

The Supreme Court’s decision in *Rochin v. California*, 342 U.S. 165 (1952), underscores just how conscience-shocking the Government’s conduct must be to constitute a Due Process violation. In *Rochin*, deputy sheriffs had some information that a suspect was selling narcotics, and entered the open door of his house and then forced open the door to Rochin’s room on the second floor. *Id.* at 166. The sheriffs then tried to forcibly extract capsules that the suspect had swallowed, but could not do so. Then, the sheriffs handcuffed the suspect, took him to the hospital, and one sheriff directed a doctor to force “an emetic solution through a tube into Rochin’s stomach against his will. This ‘stomach pumping’ produced vomiting.” *Id.* at 166. The vomited matter contained two capsules that proved to contain morphine. The Court reversed Rochin’s conviction, finding a violation of the Due Process Clause.

In the instant case, the defendants do not allege any “type of coercive action or outrageous violation of physical integrity or other egregious or outrageous government conduct” that is a prerequisite for such a claim. *Jackson*, 345 F.3d at 67. As the Second Circuit has explained, “Ordinarily such official misconduct must involve either coercion ... or violation of the defendant’s person,” as in *Rochin*. *United States v. Schmidt*, 105 F.3d 82, 91 (2d Cir. 1997)

(affirming defendant's conviction for a plan to murder two federal agents, solicitation to commit that crime, and attempted escape from custody). Clearly, neither coercion nor violation of Cromitie's or any other defendant's person is even alleged here. Thus, the defendants' claim has no traction.

Indeed, in Schmidt, the Second Circuit rejected this same type of Due Process claim even though it "recognize(d) the government's involvement in [the defendant's] plan was extensive." Schmidt, 105 F.3d at 92. The defendant argued that had the Government not launched its sting operation, she would have "simply remained in the mental observation unit" at Rikers Island. Rejecting that argument, the Second Circuit noted that "However, it is also possible that she would have eventually found an inmate willing to help her carry out" her crimes. The Second Circuit observed that, "While the government did far more here than simply follow up the defendant's proposed crime, ... there are occasions when the government is required to appear to participate in a criminal conspiracy in order to gather evidence of illegal conduct, ... or, as here, to prevent it." Id.

Accordingly, under Second Circuit law, the issue of whether the Government "overparticipated" in the charged crimes, which it did not, is not even legally cognizable as a basis for a claim of outrageous Government misconduct. Thus, no pretrial hearing is warranted, and this motion should be denied.⁵

⁵ Similarly, the defendants' claim that somehow the Government's "inaccurate" press release that allegedly harmed third parties constituted outrageous Government conduct has obviously never been recognized by the Second Circuit. Onta Williams Mot. at 33-36. So too, the notion that having the CI go with defendants Cromitie and David Williams when they bought a gun from a gang member and thus removed an additional gun from the streets (a gun that the FBI agents immediately rendered inoperable) does not "shock the conscience."