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I. FACTS

In April 1992, Christopher Armstrong, Aaron Hampton, Freddie Mack, and Robert Rozelle ,respondents, were indicted in the Federal District Court for the Central District of California for conspiring to possess with intent to distribute and conspiring to distribute over fifty grams of cocaine base (commonly known as "crack) in violation of 21 U.S.C. §§841 and 846.[1] The charges against respondents resulted from the infiltration of a suspected crack ring by members of the Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) and California Police Department, Narcotics Division.[2]

In response to the indictment, respondents filed a motion for discovery or, in the alternative, for dismissal of the indictment on the ground that they were selected for federal prosecution because they were black.[3] Respondents supported the motion with an affidavit from a paralegal specialist employed with the Office of the Federal Public Defender.[4] The affidavit alleged that in every 21 U.S.C. §§ 841 and 846 case closed by that office in 1991, the defendant had been black.[5] The government opposed the motion, claiming that no evidence or allegation existed of the government's acting unfairly or failing to prosecute similarly situated non-black defendants.[6] The district court rejected the government's argument and granted respondents' motion. It ordered the government to

> (1) provide a list of all cases from the last three years in which the Government charged both cocaine and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify what levels of law enforcement were involved in the investigation of those cases; (4) explain its criteria for deciding to prosecute those defendants.[7]

The government moved for reconsideration of the discovery order.[8] Accompanying the motion were affidavits and other evidence explaining why the gonvernment had chosen to prosecute respondents.[9] In the affidavits, federal and local agents participating in the case stated in affidavits that race had played no role in their investigation.[10] In addition, an assistant United States attorney affirmed that the decision to prosecute respondents met the general criteria for prosecution:

> [T]here was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring . . . the overall evidence in the case was extremely strong including several audio and video tapes of defendants . . . and several of the defendants had criminal histories including narcotics and firearms violations.[11]

The government also submitted sections of a published 1989 Drug Enforcement Administration report which stated that the manufacture and distribution of cocaine base (crack) is controlled by Jamaican, Haitian, and Black Street gangs.[12]

In response to the government's motion for reconsideration, respondents' attorney, acting as a witness, submitted an affidavit alleging that an intake coordinator at a drug treatment center reported an equal number of caucasians and minorities using and dealing crack.[13] The respondents also submitted an affidavit from a criminal defense attorney who stated that in his experience, many non-black defendants charged with possession of crack were prosecuted in state court, while black crack defendants were prosecuted in federal court.[14] Sentencing in the federal system is harsher than most state systems be-

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[1] *United States v. Armstrong,* 116 S. Ct. 1480, 1483 (1996).
[2] *Armstrong,* 116 S. Ct. at 1483.
[3] 116 S. Ct. at 1483.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 1484.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] J. Featherly & Hill, Crack Cocaine Overview 1989.
[13] *Armstrong,* 116 S. Ct. at 1484.
[14] 116 S. Ct. at 1484.

cause of sentencing guidelines, mandatory minimum sentencing, and the absence of parole. The criminal defense attorney further stated that federal crack defendants, who were almost always black, were punished far more severely than federal powder cocaine defendants, who were mostly non-black.[15]

The district court denied the government's motion for reconsideration.[16] When the government indicated it would not comply with the court's discovery order, the court dismissed the case.[17] On appeal, a divided three-judge panel of the Ninth Circuit Court of Appeals reversed the district court.[18] The court of appeals held that the "defendants must provide a colorable basis for believing that others similarly situated have not been prosecuted" in order to obtain discovery on a selective-prosecution claim.[19] The court relied on the reasoning in *United States v. Bourgeois*.[20] In *Bourgeois*, federal and local law enforcement agents arrested more than 100 gang members in South Central Los Angeles as a part of operation "Streetsweep."[21] The government prosecuted ten arrestees, including defendant Bourgeois, for federal firearm violations.[22] All ten persons were black men. Defendant Bourgeois claimed that the decision to prosecute him was unconstitutionally based on race and sought discovery of government documents about operation "Streetsweep."[23] The United States Ninth Circuit Court of Appeals held that the threshold necessary to obtain discovery in selective prosecution should not be so high as to require establishing a prima facie case.[24] Instead, a defendant had only to present specific facts which established a colorable basis for the existence of discriminatory effect.[25] The Ninth Circuit denied Bourgeois' discovery motion. It found that he failed to establish a colorable basis of discriminatory effect because he failed to show that similarly situated non-blacks had not been prosecuted.[26]

The Ninth Circuit voted to rehear the case en banc.[27] The en banc panel affirmed the district court, holding that the defendant was not required to demonstrate the government's failure to prosecute similarly situated persons.[28] The United States Supreme Court granted certiorari to determine the appropriate standard for granting discovery in a selective-prosecution claim.

II. HOLDING

The Court held that Federal Rule of Criminal Procedure 16(a)(1)(c) authorized defendants to examine government documents material to the preparation of their defense against the government's case-in-chief.[29] However, Rule 16 did not permit examination of government documents that were material to the preparation of selective-prosecution claims.[30] To obtain discovery in a selective-prosecution claim, respondents must provide some evidence that tends to show discriminatory effect and discriminatory intent.[31] In order to show discriminatory effect, respondents had to prove that similarly situated defendants of other races could have been prosecuted but were not.[32] Justices Souter, Ginsburg, and Breyer concurred with the majority opinion.[33]

III. ANALYSIS/ APPLICATION

A. FEDERAL RULE OF CRIMINAL PROCEDURE 16

Federal Rule of Criminal Procedure 16 governs discovery in criminal cases. In pertinent part, Federal Rule of Criminal Procedure 16(a)(1)(c) reads:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within

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[15] *Id.* (citing Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, Los Angeles Times, Nov. 23, 1992, at 1).

[16] *Id.*

[17] *Id.*

[18] *See United States v. Armstrong*, 21 F.3d 1431, 1438 (1994) [hereinafter *Armstrong I*].

[19] *Armstrong I*, 21 F.3d at 1436 (citing *United States v. Wayte*, 710 F.2d 1385, 1387 (9th Cir. 1983)).

[20] *United States v. Bourgeois*, 964 F.2d 935 (9th Cir. 1992).

[21] 964 F.2d at 936.

[22] *Id.*

[23] *Id.* at 937.

[24] *Id.* at 939.

[25] *Id.* at 938 (citing *United States v. Balk*, 706 F.2d 1056, 1060 (9th Cir. 1983)).

[26] *Id.* at 941.

[27] *United States v. Armstrong*, 48 F.3d 1508 (1995) [hereinafter *Armstrong* II].

[28] *Armstrong II*, 48 F.3d at 1516.

[29] *Armstrong*, 116 S. Ct. at 1485.

[30] 116 S. Ct. at 1485.

[31] *Id.* at 1488.

[32] *Id.*

[33] This case comment does not discuss the opinions of Justices Souter and Ginsburg. Justice Breyer concurred

> the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

Respondents contended that Rule 16(a)(1)(c) granted them discovery of documents which discussed the government's prosecution strategy for cocaine cases because these documents were material to respondents' selective-prosecution claims.[34] Rule 16 allows discovery of documents, "material to the preparation of defendant's defense," not to the preparation of related claims.[35] However, respondents offered their selective-prosecution claim as a defense.[36] The court rejected respondents' argument because the "defendant's defense" language of Rule 16 refers to a defendant's affirmative response to the government's case-in-chief.[37] The court stated:

> While it might be argued that as a general matter, the concept of a "defense" includes any claim that is a "sword", challenging the prosecution's conduct of the case, the term may encompass only the narrower class of "shield" claims, which refute the government's arguments that the defendant committed the crime charged. Rule 16(a)(1)(c) tends to support the "shield- only" reading.[38]

The court also relied on the language of Rule 16(a)(2) which exempts government work product or documents made in connection with the investigation of the case from inspection by the defense.[39] The court stated that respondents' construction of "defense" would allow all defendants to examine government work product. Such a construction, it found, was implausible.[40]

B. STANDARD FOR GRANTING DISCOVERY IN A SELECTIVE-PROSECUTION CLAIM

The Attorney General and United States attorneys have broad discretion to enforce the nation's criminal laws.[41] They are constitutionally and statutorily responsible for prosecuting all offenses against the United States.[42] So long as there is probable cause to believe that an accused has committed an offense, the decision whether or not to prosecute and what charge to bring before a Grand Jury generally rests with the prosecutor.[43] However, a prosecutor's discretion is subject to the constitutional constraints imposed by the equal protection component of the

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in the majority opinion but wrote separately because of his view that Federal Rule of Criminal Procedure 16 does not limit a defendant's discovery rights to documents related to the government's case-in-chief. *Armstrong*, 116 S. Ct. at 1489. He stated that a defendant's defense can take many forms, only one of which is a response to the case-in-chief. 116 S. Ct. at 1490. Defendant's defense can also include an affirmative defense, an unrelated claim of constitutional right, or a rebuttal which anticipates a government rebuttal. *Id.* Justice Breyer also stated that the discovery sought by Armstrong did not fall under the privilege protecting work product. *Id.* at 1491. However, he agreed with the denial of discovery because defendants did not satisfy the materiality requirement of Rule 16. *Id.*

[34] *Armstrong*, 116 S. Ct. at 1485.

[35] 116 S. Ct. at 1485.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *See Wayte v. United States*, 470 U.S. 598 (1985). Petitioner in *Wayte* wrote several letters to government officials stating that he had not registered with Selective Service and did not intend to do so. *Wayte*, 470 U.S. at 601. His letter was added to a file of others who had informed the government of their unwillingness to register with Selective Service. 470 U.S. at 601. The government adopted a "passive enforcement" policy under which it would prosecute only persons named in the file. *Id.* After several attempts to register these young men, the United States attorneys began indicting them for failing to register with Selective Service. *Id.* at 603. Petitioner moved for dismissal of the indictment for selective prosecution. *Id.* at 604. He claimed that he and others in the Selective Service file were vocal opponents of Selective Service and were being singled out for asserting their First Amendment rights. *Id.* The Court upheld the court of appeals' denial of the motion stating, "In our criminal justice system, the government retains broad discretion as to whom to prosecute." *Id.* at 607.

[42] *See* U.S. Const. art. II, § 3 ([The President] shall take care that the laws be faithfully executed). *See also* 28 U.S.C. §516 ("the conduct of litigation in which the United States . . . is a party . . . is reserved to officers of the Department of Justice under the direction of the Attorney General; 28 U.S.C. §547(1) ("except as provided by law, each United States Attorney within his district shall . . . prosecute for all offenses against the United States").

[43] *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Respondent Hayes was indicted on charges of uttering a forged instrument in amount of $88.30. *Id.* at 358. Prosecutor offered to recommend sentence of five years if Hayes would plead guilty. *Id.* If he pled not guilty, the

Fifth Amendment Due Process Clause.[44] Thus, the decision whether to prosecute may not be based on an impermissible standard such as race, religion, or other arbitrary classification.[45] In *Yick Wo v. Hopkins*,[46] the court stated, " a defendant may demonstrate that the administration of a criminal law is directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law."[47] In order to dispel the presumption that a prosecutor has not violated the equal protection clause, a criminal defendant must present "clear evidence" to the contrary.[48]

A selective prosecution claim asks a court to exercise judicial power over the executive branch. The United States Supreme Court expressed its hesitancy to examine the decision whether to prosecute in *Wayte v. United States*, noting that a prosecutor's broad discretion makes it ill suited to judicial review.[49] Examining questions about the prosecution's general deterrence value, the government's enforcement priorities, and a case's relationship to the government's overall enforcement plan is not the kind of inquiry that courts are competent to undertake.[50] Furthermore, examining the basis of prosecutorial delays in criminal proceedings, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and it may undermine prosecutorial effectiveness by revealing the government's enforcement policy.[51]

Because the process of discovery diverts government resources from a case and could reveal the prosecution's strategy, the showing necessary to obtain discovery in a selective prosecution claim is a demanding one. A claimant must put forth some evidence that tends to show (1) that the prosecutorial policy had a discriminatory effect and (2) that it was motivated by a discriminatory purpose.[52] To establish racially discriminatory effect, the claimant must show that similarly situated individuals of a different race were not prosecuted.[53] In *Armstrong II*,[54] the Ninth Circuit erroneously held that a defendant may establish discriminatory effect without evidence that the government failed to prosecute similarly situated persons of other races.[55] The court of appeals reached its conclusion based on the presumption that people of all races commit every type of crime and that one category of crime is not exclusive to any particular racial group.[56] The United States Supreme Court opposed this proposition with recent statistics of the United States Sentencing Commission. Those statistics showed that

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prosecutor would seek an indictment under the Habitual Criminal Act. *Id.* Under the Act, Hayes would be subject to a mandatory sentence of life imprisonment. *Id.* at 359. Hayes pled not guilty. *Id.* Hayes objected that his indictment under the Act violated the Due Process Clause of the Fourteenth Amendment. The Court held that the prosecutor's conduct was not unconstitutional. *Id.* at 365.

[44] *See United States v. Batchelder*, 442 U.S. 114, 125 (1979).

[45] *See Oyler v. Boles*, 368 U.S. 448 (1962). Petitioner Oyler was convicted of second degree murder which carried a penalty of five to eighteen years. *Oyler*, 368 U.S. at 449. The Court determined that he had thrice been convicted of crimes, and it sentenced him to life imprisonment under the West Virginia habitual criminal statute. 368 U.S. at 450. Oyler then filed petition for writ of habeas corpus alleging that the statute had been applied only to a minority of persons, in violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Court found no constitutional violation because the petitioner did not allege that the statute was deliberately applied according to an unjustifiable standard such as race or religion. *Id.* at 455.

[46] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[47] *Yick Wo*, 118 U.S. at 373.

[48] *See United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926) (holding that the presumption of regularity supports official acts of public officers, and, in absence of clear evidence to contrary, a court will presume that they have properly discharged their official duties).

[49] *Wayte*, 470 U.S. at 598.

[50] 470 U.S at 607.

[51] *Id.*

[52] *Oyler v. Boyles*, 368 U.S. 448, 456 (1962).

[53] *See Ah Sin v. Wittman*, 198 U.S. 500 (1905) (holding ordinance unconstitutional because the petitioner failed to allege that the conditions and practices to which ordinance was directed did not exist exclusively among the Chinese and that the ordinance was not enforced against some non-Chinese offenders). Petitioner in *Ah Sin* sought a writ of habeas corpus seeking discharge from imprisonment. *Ah Sin*. 198 U.S. at 503. He was imprisoned under a San Francisco ordinance prohibiting persons from setting up gambling tables in rooms barricaded to stop police from entering. 198 U.S. at 505. The petition alleged that the ordinance violated the Fourteenth Amendment of the Constitution because it deprived plaintiff of equal protection. *Id.* at 506. Specifically, petitioner alleged that the ordinance was enforced exclusively against persons of Chinese heritage. *Id.*

[54] *Armstrong II*, 48 F.3d 1508.

[55] *Armstrong*, 116 S. Ct. at 1488.

[56] 116 S. Ct. at 1488.

90 percent of the persons sentenced in 1994 for crack cocaine trafficking were black.[57] The statistics also showed that 93.4 percent of convicted LSD dealers were white.[58] The court of appeals also based its conclusion on concerns about the evidentiary obstacles defendants face in a selective prosecution claim.[59] The court noted the notorious difficulty of proving race discrimination,[60] stating that

> [t]he broad discretion that prosecutors possess over charging decisions means that they alone will often possess the only information that would demonstrate such discrimination. As a result, the data necessary to a showing of selective prosecution are far less accessible to the defendants that to the government.[61]

The Court disagreed with this rationale. It explained that if a selective prosecution claim were well founded, a defendant should be able to prove, without difficulty, that similarly situated non-black defendants were treated differently.[62] The Court concluded that requiring a threshold showing of different treatment of similarly situated persons adequately balances the government's interest in vigorous prosecution and the defendant's interest in avoiding selective prosecution.[63]

C. DISSENT

Justice Stevens dissented from the majority opinion. He stated that the possibility of political or racial animosity infecting a decision to institute criminal proceedings cannot be ignored.[64] For that reason, the prosecutor's broad discretion should not be completely unbridled.[65] Even if respondents failed to carry their burden of showing that similarly situated persons were not prosecuted, the district court did not abuse its discretion in ordering discovery.[66] The district court should have been able to take judicial notice of the government's acting unfairly and demand information from their files to support or refute respondents' selective prosecution claim.[67] The Anti Drug Abuse Act of 1986[68] and subsequent legislation established extremely high penalties for the possession and distribution of crack cocaine.[69] In addition, the state law criminal justice system involved the absence of mandatory minimums, the existence of parole, and lower baseline penalties. Hence, punishment under federal law far more severe then under state law.[70] Although 65 percent of crack users are white, they represent only 4 percent of federal offenders.[71] Black defendants comprised 88 percent of federal crack offenders.[72] During the first eighteen months that the Federal Sentencing Guidelines were in force, blacks received sentences 40 percent longer than whites.[73] These figures showed the heightened danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement.[74]

IV. CONCLUSION

The United StatesSupreme Court reversed the judgment of the court of appeals on the ground that respondents did not put forth some evidence tending to show the existence of the essential elements of a selective prosecution claim. Specifically, they failed to identify individuals who were not black, could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This "similarly situated" requirement is harsh. In *Armstrong II*,[75] the Ninth Circuit Court of Appeals favored a more relaxed standard of granting discovery in selective prosecution claims. The court focused on the evidentiary problems that defendants face when trying to prove a colorable basis for selective prosecution.[76] Recent United States Supreme Court cases indicate a trend toward abolishing programs specifically intended to benefit minorities.[77] This trend suggests that the mentality of America is becoming increasingly unsympathetic to

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[57] United States Sentencing Commission 1994 Annual Report 107 (Table 45)

[58] *Id.* at 41 (Table 13).

[59] *Armstrong*, 116 S. Ct. at 1489.

[60] *Armstrong II*, 48 F.3d at 1514.

[61] *Id.* (citing *Wayte v. United States*, 470 U.S. 598 (1985)).

[62] *Armstrong*, 116 S. Ct. at 1489.

[63] 116 S. Ct. at 1489.

[64] *Id.* at 1492.

[65] *Id.*

[66] *Id.* at 1494.

[67] *Id.*

[68] 21 U.S.C. § 841 (1994).

[69] *Armstrong*, 116 S. Ct. at 1492.

[70] 116 S. Ct. at 1493.

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.* at 1494.

[75] *Armstrong II*, 48 F.3d 1508 (9th Cir. 1995).

[76] 48 F.3d at 1514.

[77] *See Adarand Constructors v. Pena*, 115 S. Ct. 2097 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995).

minorities. The Court and the media reflect a general belief that discrimination has been eradicated and that persons who alleges that they have been subjected to discriminatory treatment are paranoid. The new "color blind" view of America will make it more difficult to convince the courts that racial discrimination is still present in the American criminal justice system. Hence, requiring a defendant to show that similarly situated defendants were not prosecuted will prevent any defendant from bringing a sucessful discrimination claim against the government.

Summary and Analysis Prepared by:

James M. Williams