Journal of Criminal Law and Criminology

Volume 87
Issue 3 *Spring*

Article 10

Spring 1997

Goodbye to the Defense of Selective Prosecution

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0091-4169/96/8703-0932
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 87, No. 3
Printed in U.S.A.

GOODBYE TO THE DEFENSE OF SELECTIVE PROSECUTION

United States v. Armstrong, 116 S. Ct. 1480 (1996)

I. INTRODUCTION

In *United States v. Armstrong*,[1] the Supreme Court granted certiorari to determine the standard of proof for a defendant in a criminal prosecution to obtain discovery in a selective prosecution defense. The five African-American defendants in Armstrong were arrested in a multi-agency sting operation for selling cocaine base.[2] They alleged that they were targeted for federal prosecution because of their race,[3] and claimed that they were entitled to discovery from the Government because they met the threshold "colorable basis" standard.[4] The Supreme Court found that the Ninth Circuit Court of Appeals applied the wrong standard to the discovery motion by failing to require the defendants to prove that "others similarly situated" were not prosecuted.[5] Moreover, the Court found that selective prosecution defenses are different from other defenses bearing directly on the merits of the case-in-chief, and, therefore, discovery of selective prosecution claims is not covered by Federal Criminal Rule of Procedure 16.[6] The case was remanded for further proceedings.[7]

This note argues that the Supreme Court's decision in *United States v. Armstrong* imposes a barrier that is too high for almost any defendant alleging selective prosecution to obtain discovery, thus making the already difficult claim of race-based selective prosecution virtually impossible to prove. Additionally, this note argues that the Court should have adopted Justice Marshall's three-prong test from his dissent in *Wayte v. United States*,[8] which requires a defendant to meet a lower threshold to obtain discovery in a selective prosecution defense than to prove the claim on the merits at trial.

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1 116 S. Ct. 1480 (1996).
2 *Id.* at 1483.
3 *Id.*
4 *Id.* at 1488.
5 *Id.*
6 *Id.* at 1485-86.
7 *Id.* at 1489.
8 Wayte v. United States, 470 U.S. 598 (1985).

II. BACKGROUND

A selective prosecution defense arises when a prosecutor brings charges against a defendant deliberately motivated by constitutionally prohibited "standard[s] such as race, religion or other arbitrary classification."[9] The claim of selective prosecution is based upon Equal Protection considerations, in which 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."[10]

In general, selective prosecution claims can be divided into two subsets: those based on claims of racial discrimination; and those based on other constitutionally impermissible infringements, such as First Amendment violations,[11] prosecution of repeat offenders,[12] or cases involving alien defendants charged with reentering the United States after a prior deportation.[13] Moreover, a distinction must also be drawn between a selective prosecution claim based upon a civil suit for injunctive relief against the individual prosecutor[14] and that asserted as a defense to a criminal charge,[15] because there are different quantums of proof necessary to establish a viable claim.[16]

A. SELECTIVE PROSECUTION DEFENSES UNDER THE EQUAL PROTECTION COMPONENT OF THE FIFTH AND FOURTEENTH AMENDMENTS[17]

The first two selective prosecution cases the Supreme Court en-

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9 *Id.* at 608 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

10 *Armstrong*, 116 S. Ct. at 1486 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)).

11 *See, e.g.*, Wayte v. United States, 470 U.S. 598 (1985).

12 *See, e.g.*, Oyler v. Boyles, 368 U.S. 448 (1962).

13 *See, e.g.*, United States v. Al Jibori, 90 F.3d 22 (2d Cir. 1996).

14 *See, e.g.*, O'Shea v. Littleton, 414 U.S. 488, 493 (1979) (denying standing to civil rights plaintiffs who were black residents of a Chicago suburb alleging past selective prosecution because the plaintiffs failed to prove that they would be targets of discriminatory prosecution in the future). *See also* Phelps v. Hamilton, 934 F. Supp. 373 (D. Kan. 1996) (refusing to grant plaintiff standing to seek order enjoining district attorney from prosecuting plaintiff under Kansas criminal defamation statute).

15 *See, e.g.*, United States v. Armstrong, 116 S. Ct. 1480 (1996). *See also* P.S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293, 2300-03 (1993) (discussing the difference between civil suits for injunctive relief and claims raised as a defense in criminal actions and noting how neither remedy is usually successful).

16 *See generally* Angela Davis, *Tonry: Malign Neglect: Race, Crime and Punishment in America*, 94 MICH. L. REV. 1660, 1678-80 (1996) (book review).

17 The Fifth Amendment contains an equal protection component. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Additionally, the Supreme Court asserted that "[Our] approach to Fifth Amendment equal protection claims has . . . been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfield, 420 U.S. 636, 638 n.2 (1975), *quoted in* Wayte v. United States, 470 U.S. 598, 609 n.9 (1985).

countered involved challenges by Chinese citizens to local ordinances in San Francisco.[18] In *Yick Wo v. Hopkins*,[19] the Supreme Court found that San Francisco authorities selectively enforced zoning ordinances against resident Chinese, but almost never against whites.[20] Although facially neutral, the Court found that the San Francisco ordinances were enforced on a discriminatory basis, relying on the statistical disparity between Chinese and non-Chinese applicants for wooden laundry licenses.[21] The Court observed:

> [t]hough the law itself be fair on its face, and impartial in appliance, yet, if it is applied . . . with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.[22]

Twenty years later, the Supreme Court directly addressed a claim of selective prosecution in *Ah Sin v. Whitman*,[23] though the Court rejected the respondent's allegations.[24] Ah Sin, a Chinese citizen, petitioned a California state court for a writ of habeas corpus.[25] He alleged that a San Francisco county ordinance prohibiting persons from setting up gaming tables in rooms barricaded to stop police from entering violated the Equal Protection Clause because the ordinance was enforced exclusively against persons of Chinese ancestry.[26] The Court rejected this argument stating that "[t]here is no averment that the conditions and practices to which the ordinance was directed did not exist exclusively among the Chinese, or that there were other offenders against the ordinances than the Chinese, as to whom it was not enforced."[27] As a result, since *Ah Sin*, to prove an equal protection violation, those asserting selective prosecution claims must establish that others similarly situated were not prosecuted.[28]

In *Oyler v. Boyles*,[29] repeat offenders challenged a West Virginia state law that imposed a requisite duty on prosecutors to seek mandatory sentences.[30] The petitioners argued that the prosecutors'

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18 Ah Sin v. Whitman, 198 U.S. 500 (1905); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

19 118 U.S. 356 (1886).

20 *Id.* at 374.

21 The Court found that 200 Chinese persons were denied licenses, while 80 non-Chinese individuals were permitted to "carry on the same business under similar conditions." *Id.* at 374.

22 *Id.* at 373-74.

23 198 U.S. 500 (1905).

24 *Id.* at 507.

25 *Id.* 503-04.

26 *Id.* at 504.

27 *Id.* at 507.

28 *See, e.g.*, Wayte v. United States, 470 U.S. 598, 608-10 (1985).

29 368 U.S. 448 (1962).

30 *Id.* at 455.

action denied "equal protection to those persons against whom the heavier penalty is enforced."[31] Rejecting the petitioner's contentions as insufficient,[32] the Court stated that

> the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.[33]

Until *Armstrong, Wayte v. United States*[34] set forth the most recent iteration of the standards necessary to prove a selective prosecution claim.[35] In *Wayte*, the defendant was charged with knowingly and willfully failing to register for the draft with the Selective Service.[36] The defendant moved to dismiss the indictment on the ground that he was selectively prosecuted, since he and the other thirteen "vocal" opponents of the registration program were targeted out of an estimated 674,000 non-registrants.[37] Setting forth a two-prong test, the Court found that Wayte failed to prove that the government engaged in discriminatory treatment and that the government was motivated by discriminatory intent.[38] The Majority focused both on the treatment of the defendant as well as the motivation behind the prosecutor's decision to go forward with the charges.[39] Lower courts thereafter used this two-prong test.

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31 *Id.* at 451. Petitioners introduced evidence that 904 offenders "who were known offenders throughout the state of West Virginia" were not sentenced under the mandatory statutes and appended statistical date to support their contentions. *Id.* at 455. One petitioner also alleged that out of six men prosecuted under the West Virginia statute, he was the only one who was sentenced. *Id.* at 454-55.

32 Defendants in *Oyler* failed both to prove that prosecutors had knowledge of the defendants' prior offenses, and that the prosecutors were motivated by discriminatory motives. *Id.* at 456.

33 *Id.*

34 470 U.S. 598 (1985). *See also* Barry Lynn Creech, Note, *And Justice for All:* Wayte v. United States *and the Defense of Selective Prosecution*, 64 N.C.L. REV. 385 (1986).

35 The standards developed in *Wayte* closely followed those in *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974). In *Berrios*, the defendant was charged with holding union office within five years after a conviction for a felony for arson. *Id.* at 1209. Alleging a defense of selective prosecution for his "outspoken" support of Senator McGovern in the 1972 Presidential Race, the defendant moved to dismiss the charges after the Government failed to comply with an order requiring disclosure of a memorandum. *Id.* at 1209-10. The Second Circuit's requirement that the defendant provide "some evidence tending to show the existence of the essential elements of the defense" became an oft-quoted threshold of proof. *Id.* at 1211.

36 470 U.S. at 603-04.

37 *Id.* at 604.

38 *Id.* at 608-10.

39 *Id.*

B. OTHER RELATED EQUAL PROTECTION CASES

In *Batson v. Kentucky*,[40] the Court held that a defendant may establish a prima facie case of purposeful discrimination in selection of a jury solely on evidence concerning the prosecutor's exercise of peremptory challenges.[41] The defendant must prove that: (1) "he is a member of a cognizable racial group;"[42] (2) the prosecutor exercised peremptory challenges to remove members of the defendant's race from the venire;[43] and (3) considering all relevant circumstances[44] "[it raised] an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of the their race."[45] The Court held that once the defendant makes the relevant showing, the burden then shifts to the prosecution to explain adequately the racial exclusion.[46] Moreover, the prosecution must "articulate a neutral explanation related to the particular case to be tried."[47]

Castaneda v. Partida[48] addressed the question of an equal protection violation in grand jury selection.[49] The Mexican-American plaintiff in *Castaneda* alleged a denial of due process and equal protection because of gross underrepresentation of Mexican-Americans on the county grand jury that convicted him.[50] Writing for the Court, Justice Blackmun set forth a three-prong test for the party alleging the violation: (1) the party is a member of a group that "is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied;"[51] (2) the party must prove exclusion by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time;"[52] and (3) that this selection is subject to abuse.[53] This test establishes a prima facie case of discriminatory purpose, and the burden

40 476 U.S. 79 (1986) (overruling Swain v. Alabama, 380 U.S. 202 (1965)).

41 *Id.* at 89.

42 *Id.* at 96.

43 *Id.*

44 The Court suggested that relevant circumstances could be indicated in a "'pattern' of strikes against black jurors" or by a "prosecutor's questions and statement during voir dire." *Id.* at 97.

45 *Id.* at 96.

46 *Id.* at 97.

47 *Id.* at 98.

48 430 U.S. 482 (1977).

49 *Id.* at 483-84.

50 *Id.* at 485-86.

51 *Id.* at 494.

52 *Id.*

53 *Id.* The Court stated that "a selection process that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Id.*

then shifts to the state to rebut the case.[54] In applying the test, the Majority stated, "we prefer to look at all the facts that bear on the issue, such as the statistical disparities, the method of selection, and any other relevant testimony as to the manner in which the selection process was implemented."[55]

C. CRIMINAL AND CIVIL DISCOVERY OF DOCUMENTS HELD BY THE GOVERNMENT

1. Civil Rules 26(b) and 34

In the civil context, liberal discovery is the cornerstone of the notice pleading system envisioned by Judge Clark in establishing the Federal Rules of Civil Procedure.[56] Rule 26(b) governs the scope of discovery,[57] and Rule 34 controls the production of documents.[58] Rules 26(b) and 34 were designed to work closely together.[59] There are four requirements that a party seeking discovery must meet under Federal Rules of Civil Procedure 26 and 34: 1) the requested discovery must not be privileged;[60] 2) the requested discovery must be "relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party;"[61] 3) the requested discovery must be in the "possession, custody or control of the party upon whom the request is served;"[62] and 4) trial preparation materials are available only upon a showing "that the party seeking discovery has substantial need of the papers . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[63]

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54 *Castaneda*, 430 U.S. at 494-95.

55 *Id.* at 500-01. The Supreme Court accepted a showing that Mexican-Americans were underrepresented on the grand jury that had indicted the petitioner. Thus, while statistical analysis indicated that the overall Mexican-American population of the county was 79.1%, only 39% of persons summoned for grand jury service over an eleven-year period were Mexican-American. *Id.* at 487-88.

56 *See* Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986).

57 FED. R. CIV. P. 26.

58 FED. R. CIV. P. 34.

59 *Id. See* FED. R. CIV. P. 34 advisory committee's notes.

60 FED. R. CIV. P. 26(b)(1).

61 *Id.*

62 FED. R. CIV. P. 34.

63 FED. R. CIV. P. 26(b)(3).

2. *Criminal Rules 16(a)(1)(C) and (c)(2)*

a. History

Adopted eight years after the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure were modeled on the experience and decisions of the Federal Rules of Civil Procedure.[64] Rule 16 was amended in 1966, 1975, 1983, 1991 and 1993, each time increasing the access of both defendants and prosecutors to more documents or other items through discovery.[65]

Discovery under the federal criminal rules is substantially limited as compared to the civil rules,[66] and does not confer an automatic right of discovery and opening up of governmental files.[67] The judicial practice of providing a criminal defendant with access to documents dates back to Justice Marshall's decision in *United States v. Burr*,[68] upholding a subpoena duces tecum issued before Aaron Burr's indictment.[69]

When the original Rule 16 was promulgated in 1944, it was unclear under common law whether the right to discovery existed at all.[70] The original Rule was in effect from 1946 until 1966, and authorized only a very limited right of discovery.[71]

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64 MARK S. RHODES, 2 ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 16:2 (1985) [hereinafter ORFIELD'S FEDERAL CRIMINAL RULES].

65 As the House Committee on the Judiciary's Report on the 1975 Amendments to the Rules stated,

> The Committee believes that it is desirable to promote greater pretrial discovery . . . "[B]roader discovery by both the defense and the prosecution will contribute to the fair and efficient administration of criminal justice by aiding in informed plea negotiations, by minimizing the undesirable effect of surprise at trial, and by otherwise contributing to an accurate determination of the issue of guilt or innocence."

H.R. REP. NO. 94-247, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 674, 685 (quoting advisory committee note).

66 ORFIELD'S FEDERAL CRIMINAL RULES § 16:2.

67 *Id.* § 16:33. It is interesting to note that the 1975 Senate-House Conference Committee on proposed changes to the Rules rejected the House proposal that defined work product in accordance with Federal Rule of Civil Procedure 26(b)(3) ("the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents") and adopted the current language instead ("reports, memoranda, or other internal government documents").

68 25 F. Cas. 187 (1807). *See also* ORFIELD'S CRIMINAL RULES § 16:4.

69 25 F. Cas. at 191.

70 *See* 1944 advisory committee's comments to Rule 16 ("Whether under existing law discovery may be permitted in criminal cases is doubtful.").

71 The original rule read in part,

> Upon motion of a defendant at any time after the filing of the indictment or information the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

See C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE CRIMINAL § 251 (2d ed. 1982).

The 1966 amendment changed and substantially expanded the Rule.[72] The 1966 amendments required a defendant seeking discovery to prove "materiality to the preparation of his defense and that his request is reasonable."[73] Earlier versions of the Rule had permitted discovery of books, papers, documents or tangible objects only if they were obtained from or belonged to the defendant.[74] The 1966 Rule also provided the government with work product immunity—reports, memoranda and other internal government documents produced by government agents in connection with a criminal case were exempt from discovery.[75] At the time, the changes were vigorously debated.[76] As Justice Brennan noted, "few issues raise more sharply the basic ideological clash between opposed theories of criminal justice."[77]

b. The Modern Rule

Rule 16 was substantially revised in 1974 to "give greater discovery to both the prosecution and the defense."[78] The current Rule 16(a)(1)(C) provides in part:

> 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 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.[79]

The Advisory Committee stated that "[t]he rule is intended to prescribe the minimum amount of discovery to which the parties are entitled. It is not intended to limit the judge's discretion to order broader discovery in appropriate cases."[80] As revised, Rule 16(a)(1)(C) eliminated the materiality and reasonableness standards

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72 The 1966 Rule 16(b) read:

> Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places . . . which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable . . . [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made in connection with the investigation or prosecution of the case . . . .

73 Notes of Advisory Committee on 1966 Amendments.

74 WRIGHT, *supra* note 71, § 254.

75 *See* Notes of Advisory Committee on 1966 Amendments (citing examples of the legal literature spawned by the problems); *see also* WRIGHT, *supra* note 71, § 252.

76 WRIGHT, *supra* note 71, § 252.

77 William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?* WASH. U. L.Q. 279, 282 (1963).

78 The 1974 Amendments took effect on December 1, 1975.

79 FED R. CRIM. P. 16(a)(1)(C).

80 Notes of Advisory Committee on 1974 Amendments.

found in earlier versions of the rule.[81] Instead, disclosure was required if:

> (a) the defendant shows that the disclosure of the document or tangible object is material to the defense, (b) the government intends to use the document or tangible object in its presentation of its case in chief, or (c) the document or tangible object was obtained from or belongs to the defendant.[82]

Rule 16(a)(2) was also clarified to "make clear that the work product of the government attorney is protected."[83] Rule 16(a)(2) exempts from inspection by defendants "reports, memoranda, or other internal documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case,"[84] thereby limiting the scope of discovery.

3. Inherent Powers of the Court

Additionally, aside from the Federal Rules, courts are traditionally said to possess inherent powers of ordering discovery.[85] Thus, "to the extent that Rule 16 does not express a policy prohibiting discovery not explicitly authorized by the rules, the court is free, either by local rules or by adjudication, to permit discovery on the basis of inherent power."[86]

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81 The Advisory Committee noted that it may be difficult for a defendant to make a showing of materiality if he does not know what the evidence is. *Id.*

82 Advisory Committee Notes to 1975 Amendments. The reasonableness requirement of prior versions was eliminated in the revision. According to Professor Wright, "Discovery . . . which was discretionary prior to 1975 is now a matter of right if the conditions specified in [16(a)(2)] (c) are satisfied." WRIGHT, *supra* note 71, § 254.

83 Advisory Committee Notes to 1975 Amendments.

84 FED. R. CRIM. P. 16(a)(2).

85 ORFIELD'S FEDERAL CRIMINAL RULES § 16:51; WRIGHT, *supra* note 71, § 254. *See also* Wise v. Henkel, 220 U.S. 556 (1911).

86 ORFIELD'S FEDERAL CRIMINAL RULES § 16:51. *See also* FED. R. CRIM. P. 57(b) ("If no procedure is specifically provided by rule, the court may proceed in any lawful manner not inconsistent with the rules or any applicable statute"); ORFIELD'S FEDERAL CRIMINAL RULES § 16:54. Additionally, while mentioning the importance of *Brady v. Maryland*, 373 U.S. 83 (1963), the Advisory Committee has never codified the Brady Rule. *See* Notes of Advisory Committee on 1974 Amendments. In *Brady*, the Court held that the prosection's action in withholding a statement favorable to the defendant when that statement was requested in discovery violated the due process clause of the Fourteenth Amendment. 373 U.S. at 87. The Court explained that a

> prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice . . . .

Id. Other limitations, such as the Jencks Act, 18 U.S.C. § 3500, also operate independently of the Federal Rules.

4. *Justice Marshall's Dissent in Wayte v. United States*

Until *Armstrong*, Justice Marshall's dissent in *Wayte v. United States* was the only Supreme Court opinion that addressed the sufficiency of a showing to obtain discovery in a selective prosecution case.[87] All prior Supreme Court opinions concerned the claim of selective prosecution on the merits.[88]

Justice Marshall argued that *Wayte* was, "first and foremost a discovery dispute,"[89] since the case arose after procedural wrangling between the defendants and the prosecution. After an evidentiary hearing, the District Court for the Central District of California granted the petitioners' request for discovery on their defense of selective prosecution and directed the government to produce certain documents.[90] The government partially complied but refused to hand over the remaining documents, claiming executive privilege.[91] As a result, Justice Marshall stated that,

> Wayte need not have made out a full prima facie case in order to be entitled to discovery. A prima facie case, of course, is one that if unrebutted will lead to a finding of selective prosecution. It shifts to the Government the burden of rebutting the presumption of the unconstitutional action. But a defendant need not meet this high burden just to get discovery; the standard for discovery is merely nonfrivolousness.[92]

Adapting the three-prong test from *Castaneda v. Partida*,[93] Justice Marshall contrasted this "nonfrivolous" standard with a three part showing that the defendant should make for a successful prima facie case. He argued that the defendant must prove: (1) that he is a member of a recognizable, distinct class; (2) that a disproportionate number of this class was selected for investigation and possible prosecution; and (3) that this selection was subject to abuse or was a not neutral process.[94] Moreover, Justice Marshall believed that there should be a lower burden for discovery in selective prosecution claims because "most of the relevant proof . . . will normally be in the Government's hands."[95]

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87 470 U.S. 598, 621 (1985) (Marshall, J., dissenting). The majority did not address the discovery issue, claiming that it was not raised in the petition for certiorari, in the brief on the merits, or at oral argument. *Id.* at 606 n.5. *See also id.* at 621 n.1 (Marshall, J., dissenting).

88 The crucial distinction between proving a claim of selective prosecution on the merits and discovery of a claim is discussed at notes 235-42 *infra* and accompanying text.

89 470 U.S. at 621 (Marshall, J., dissenting).

90 *Id.* at 604.

91 *Id.*

92 *Id.* at 625 (Marshall, J., dissenting) (citations omitted).

93 430 U.S. 482, 490 (1977). *See supra* text accompanying notes 48-55.

94 470 U.S. at 626 (Marshall, J., dissenting).

95 *Id.* at 624 (Marshall, J., dissenting).

D. PROSECUTORIAL DISCRETION, MANDATORY MINIMUMS AND FEDERAL SENTENCING GUIDELINES

1. Caselaw

Tradition gives prosecutors almost unbridled discretion in deciding whom to charge, what the charge should be, and what plea bargain terms should be offered.[96] Little judicial oversight is permitted due to concerns regarding separation of powers,[97] high costs to the criminal justice system,[98] the guarantees of a speedy trial to the accused,[99] a potential a chilling effect on law enforcement,[100] as well as the inherent institutional expertise of prosecutors.[101] There is also a general presumption that the prosecution in a criminal case is undertaken by the prosecutor in good faith.[102]

In *Bordenkircher v. Hayes*,[103] the Supreme Court acknowledged the leeway that should be accorded to prosecutors.[104] The court stated that "so long as the prosector has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[105]

This broad deference to prosecutorial discretion was reaffirmed in *Wayte v. United States*, where the Majority declared that the factors behind whether to prosecute "are not readily susceptible to the kind of analysis the courts are competent to undertake."[106] The Court expressed concern regarding potentially negative impacts upon the judicial system, such as delay, chilling effect upon law enforcement and an undermining of prosecutorial effectiveness "by revealing the Government's enforcement policy."[107]

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96 For a more comprehensive discussion, see *Developments In the Law: Race and the Criminal Process, Race and the Prosecutor's Charging Decision*, 101 HARV. L. REV. 1520 (1988) [hereinafter *Developments*]. *See also* P.S. Kane, *supra* note 15.

97 Article II of the United States Constitution grants to the executive branch the power to "take care" that the laws are carried out. U.S. CONST. art. II, § 3.

98 *See generally* United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)).

99 FED. R. CRIM. P. 2.

100 *See generally Armstrong*, 116 S. Ct. at 1486.

101 *See generally* Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2061-66 (1996).

102 *See, e.g.*, United States v. Mezzanatto, 115 S. Ct. 797, 806 (1995) (rejecting defendants' contentions that prosecutors would abuse their plea bargaining power).

103 434 U.S. 357 (1978).

104 *Id.*

105 *Id.* at 364.

106 470 U.S. 598, 607 (1985).

107 *Id. See also* Town of Newton v. Rumery, 480 U.S. 386, 396 (1987) (holding that prosecutors, not the Court, should evaluate the strength of the case, the allocation of resources and enforcement priorities); *Id.* at 397 n.7 ("the complexity of pretrial decisions by prose-

2. *Implications for Defendants*

The Federal Sentencing Guidelines mandate a specific sentence when certain elements are present in a particular case, thereby removing almost all discretion from federal trial judges.[108] They also extend drug penalty levels above the mandatory minimums.[109] The guidelines are promulgated by the United States Sentencing Commission ("Commission"), which was established under the Sentencing Reform Act of 1984.[110] Under the statute, the Commission is permitted to submit changes in the guidelines to Congress.[111] The changes automatically take effect 180 days after the submission unless Congress blocks the changes.[112] In 1986 and 1988 Congress enacted mandatory minimums for crack cocaine offenses.

Because of the Federal Sentencing Guidelines and requisite mandatory minimums, the decision whether to prosecute in federal court or state court often means widely disparate prison terms for the defendant.[113] This disparity is particularly evident in cocaine cases,

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cutors suggests that judicial evaluation of those decisions should be especially deferential.").

108 18 U.S.C. §§ 3551 et. seq.; 28 U.S.C. §§ 991-98. The Commission's initial guidelines were submitted to Congress on April 13, 1987, and took effect on November 1, 1987. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the United States Sentencing Commission and the ability of the Commission to set guidelines. The Court found that the Commission did not violate the separation of powers and was not an improper delegation of legislative authority. *Id.* at 412.

109 18 U.S.C. §§ 3551 et. seq.; 28 U.S.C. §§ 991-98.

110 *Id.*

111 *Id.*

112 As promulgated, Congress established a disparity in penalties for crack and powder cocaine, which set out a 100 to 1 ratio. In early 1995, the United States Sentencing Commission recommended, 4-3, that the Sentencing Guidelines be changed to treat crack and powder cocaine alike for trafficking and for simple possession offenses. However, Congress passed legislation blocking the changes in the Guidelines and President Clinton signed into law a provision that retains the 100 to 1 ratio. *See* Act of Oct. 30, 1995, Pub. L. No. 104-38, 1995 U.S.C.C.A.N. (109 Stat.) 334 (to be codified at 28 U.S.C. 994 note); H.R. REP. No. 104-272, *reprinted in* 1995 U.S.C.C.A.N. 335.

113 *See* Brief for Respondents Shelton Martin et al. at 17, *Armstrong* (No. 95-157). The defendants delineate the substantial difference in state versus federal court sentencing for their charges:

Defendant	*California State Sentence*	*Federal Sentence*
Armstrong	3-9 years	55 years to life
Hampton	3-14 years	mandatory life sentence
Mack	3-5 years	10 years to life
Martin	3-10 years	35 years to life
Rozelle	3-13 years	45 years to life

Id. at 18. The defendants also claim that the disparity between federal and state sentencing is amplified by the fact that federal credit for "good time" is capped, while in the California state penal system it is offered at a 1:1 ratio. *Id.*

where there is a significant racial disparity in crack versus powder cocaine prosecution in recent years. The 1991 Household Survey indicated that of those reporting crack use in the past year, whites accounted for 52% of all powder cocaine users, blacks 38% and Hispanics 10%.[114] Yet, there is a much wider racial disparity in prosecution for crack offenses. According to the Commission, in 1993 blacks accounted for 88.3% of all defendants sentenced for federal crack cocaine offenses, while whites accounted for only 4.1%.[115]

III. Facts and Procedural History

From February through April 1992, a joint federal and state task force comprised of detectives from the Narcotics Division of the Inglewood, California Police Department and agents of the Bureau of Alcohol, Tobacco and Firearms (BATF) infiltrated a suspected cocaine base[116] distribution ring, using three confidential informants.[117] On seven occasions from February 13, 1992, to April 6, 1992, the informants purchased approximately 124.3 grams of cocaine base from defendants Christopher Lee Armstrong, Aaron Hampton, Freddie Mack, Sheldon Autwan Martin and Robert Rozelle.[118] The informants also witnessed the defendants "carrying firearms during the sales."[119]

On April 8, 1992, task force police executed search warrants on the hotel room in which the sales were transacted,[120] as well as on residences belonging to certain defendants.[121] The task force discovered an additional 9.29 grams of cocaine base and a loaded gun in the hotel room.[122] The task force also arrested Defendants Armstrong and Hampton in the hotel room.[123] Defendants Mack, Martin and Rozelle were later arrested pursuant to bench warrants.[124] As a result of the investigation, the task force seized a total of approximately 135

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114 Special Report to Congress: Cocaine and Federal Sentencing Policy, United States Sentencing Commission, xi (Feb. 1995)

115 *Id.* Under the Guidelines, from 1989 to 1990, black offenders generally received prison terms 41% longer on average than whites. *See* Douglas C. McDonald & Kenneth E. Carlson, U.S. Dep't of Justice, Sentencing in the Federal Courts: Does Race Matter? 1 (1993) (attributing the disparity to the difference in sentencing between crack cocaine and powder cocaine).

116 Cocaine base is commonly known as "crack" or "rock."

117 United States v. Armstrong, 116 S. Ct. 1480, 1483 (1996).

118 *Id.* at 1483.

119 *Id.*

120 *Id.* at 1483.

121 United States v. Armstrong, 21 F.3d 1431, 1432 (9th Cir. 1994), *rev'd en banc*, 48 F.3d 1508 (9th Cir. 1995).

122 *Id.* at 1432.

123 116 S. Ct. at 1483.

124 *Id.*

grams of cocaine base and multiple firearms.[125]

On April 21, 1992, a grand jury in the United States District Court for the Central District of California indicted defendants Armstrong, Hampton, Mack, Martin and Rozelle on charges of conspiring to possess with intent to distribute more than fifty grams of cocaine base in violation of 21 U.S.C. § 846.[126] Some of the defendants were also charged with selling cocaine base under 21 U.S.C. § 841(a)(1),[127] and four of the defendants were indicted for using firearms in connection with drug trafficking in violation of 18 U.S.C. § 924(c).[128] All five defendants are African-American.[129]

On July 20, 1992, defendant Martin filed a Motion for Discovery and/or Dismissal of Indictment for Selective Prosecution.[130] He alleged that the government prosecuted him on federal charges based on his race,[131] and sought discovery to obtain information he asserted would support that claim.[132] The other four defendants timely joined the motion, which was heard by the district court on September 8, 1992.[133]

In support of their motion, the defendants offered the affidavit of a "Paralegal Specialist" employed by the Office of the Federal Public Defender for the Central District of California.[134] The affidavit alleged that every one of the twenty-four cases closed[135] by the Federal Public Defender's Office for the Central District of California during 1991 under 21 U.S.C. §§ 841 and/or 846 involved an African-Ameri-

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125 *Id.*

126 *Id.* 21 U.S.C. § 846 reads: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

127 United States v. Armstrong, 48 F.3d 1508, 1510-11 (9th Cir. 1995) (en banc). 21 U.S.C. § 841(a) reads in part: "it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

128 *Armstrong*, 48 F.3d at 1511; *id.* at 1522 (Rymer, J., dissenting). 18 U.S.C. § 924(c) reads in part:

> Whoever—
> (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
> (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

129 *Armstrong*, 48 F.3d. at 1511.

130 *Id.*

131 United States v. Armstrong, 116 S. Ct. 1480, 1483 (1996).

132 Brief for the United States at 13, *Armstrong* (No. 95-157).

133 *Armstrong*, 48 F.3d at 1511.

134 *Armstrong*, 116 S. Ct. at 1483.

135 A case is closed when it is settled, dismissed or there is a conviction of the defendant.

can defendant.[136] The affidavit was accompanied by a study listing the twenty-four defendants, their race, whether they were prosecuted for dealing cocaine in addition to cocaine base, and the status of each case.[137]

The Government opposed the discovery motion, claiming that the decision whether to prosecute the defendants was made independent of race.[138] On September 8, 1992, the district court granted the discovery motion, finding that the defendants' showing was sufficient to justify discovery.[139] The district court ordered the Government to provide an explanation as to the number of cases at issue, the similarity of the charges and the fact that all defendants were of the same race.[140] Specifically, the order required the Government to: (1) provide a list of all cases from the previous three years in which the Government charged both cocaine base offenses and firearms offenses;[141] (2) identify the race of the defendants in those cases;[142] (3) identify whether state, federal or joint law enforcement authorities investigated each case;[143] and (4) explain the criteria used by the U.S. Attorney's Office in deciding to prosecute those defendants for federal cocaine base offenses.[144]

On September 16, 1992, the Government moved for reconsideration of the district court's discovery order[145] and submitted affidavits from three law enforcement officers[146] and two Assistant United

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136 *Armstrong*, 116 S. Ct. at 1483.

137 *Id.* The filing stamp numbers on the closed cases in the study indicated that the defendants were prosecuted over a four-year period. *Armstrong*, 48 F.3d at 1522 (Rymer, J., dissenting). Other defendants alleging selective prosecution defenses had introduced this study in support of similar discovery motions in at least two other prosecutions in the Central District of California. *Armstrong*, 116 S. Ct. at 1483 n.1.

138 *Armstrong*, 48 F.3d at 1511. Former Solicitor General Drew S. Days III later explained that

> [t]hese prosecutions involved more than twice the quantity necessary to trigger ten-year mandatory sentences; there were multiple sales involving multiple defendants, thereby indicating a substantial crack cocaine ring; there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence was extremely strong, including audio and videotapes of the defendants; threats had been made to the arresting officers by one of the defendants; and several of the defendants had criminal histories including narcotics and firearm violations.

Drew S. Days, *Race and the Criminal Justice System: A Look at the Issue of Selective Prosecution*, 48 ME. L. REV. 179, 184 (1996).

139 *Armstrong*, 48 F.3d at 1511.

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 United States v. Armstrong, 116 S. Ct. 1480, 1484 (1996).

145 United States v. Armstrong, 21 F.3d 1431, 1433 (9th Cir. 1994), *rev'd en banc*, 48 F.3d 1508 (9th Cir. 1995).

146 The three officers were: a Special Agent of the Drug Enforcement Agency with 21

States Attorneys.[147] The affidavits stated that race played no role in the investigation of the named defendants and that the case had been referred for federal prosecution because it involved provable crack and firearms offenses that met the U.S. Attorney's guidelines for federal prosecution.[148]

The Government also submitted a list of all defendants charged with violations of 21 U.S.C. §§ 841 and 846 over a three-year period[149] and sections from a published 1989 Drug Enforcement Administration report detailing the sociological patterns of crack use and distribution in the United States.[150]

In response, the defendants submitted the affidavit of a defense attorney alleging that an intake coordinator at a Pasadena drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers."[151] Defendants also submitted an affidavit from an experienced defense attorney practicing in the Central District of California, alleging that, in his experience and conversations with "judges, lawyers and defendants," many non-blacks are prosecuted for crack offenses in state court; however, he had never handled, known of, or heard of a single federal crack cocaine case involving non-black defendants.[152] Additionally, the defendants submitted a *Los Angeles Times* newspaper article reporting grave racial inequities in crack cocaine sentencing.[153]

The district court denied the motion for reconsideration on December 29, 1992.[154] When the Government indicated that it would

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years experience; a Special Agent of the Bureau of Alcohol, Tobacco and Firearms with three years experience at the BATF and three additional years experience as a narcotics officer; and a narcotics detective from the Inglewood, California, Police Department with three years experience in narcotics. *Armstrong*, 21 F.3d at 1433.

147 *Armstrong*, 48 F.3d at 1511. For example, the Declaration from David C. Scheper, Assistant United States Attorney and Chief of the Major Crimes Unit in the United States Attorney's Office for the Central District of California, delineated the criteria for charging decisions. *See Armstrong*, 116 S. Ct. at 1484.

148 Brief for the United States at 16, *Armstrong* (No. 95-157).

149 *Id.* The defendants' study indicated that approximately 2400 people were charged with violations of §§ 841(a)(1) and 846, of whom eleven were non-black defendants charged with crack cocaine violations. These eleven were all members of other racial or ethnic minority groups. *Armstrong*, 48 F.3d at 1517. The defendants claimed that all eleven "appeared from their names to be Hispanic." Brief for Respondent Robert Rozelle at 48, *Armstrong* (No. 95-157).

150 *Armstrong*, 116 S. Ct. at 1484; Brief for the United States at 17, *Armstrong*, (No. 95-157). The Prosecution also claimed many blacks had been tried at the state court level for cocaine base offenses. *Armstrong*, 48 F.3d at 1511.

151 *Armstrong*, 116 S. Ct. at 1484 (quoting App. at 138); *Armstrong*, 48 F.3d at 1518.

152 *Armstrong*, 48 F.3d at 1512-18.

153 Jim Newton, *Harsher Crack Sentences Criticized as Racial Inequity*, L.A. TIMES, Nov. 23, 1992, at A1; *see also* Armstrong, 116 S. Ct. at 1484.

154 *Armstrong*, 21 F.3d 1431, 1434 (9th Cir. 1994), *rev'd en banc*, 48 F.3d 1508 (9th Cir.

not comply with the court's discovery order, the court dismissed the case and stayed execution of the dismissals pending appeal by the Government.[155] The district court judge declared,

> The statistical data provided by the Defendant raises a question about the motivation of the Government which could be satisfied by the government disclosing its criteria, if there is any criteria, for bringing this case and others like it in Federal court. Without this criteria the statistical data is evidence and does suggest that the decisions to prosecute in Federal court could be motivated by race. Without expert testimony, this Court cannot conclude that the defendants' evidence is explained by social phenomena.[156]

A divided, three-judge panel of the Ninth Circuit reversed, finding that the defendants' affidavit failed to establish a colorable basis for ordering discovery because it lacked a showing that others similarly situated were not prosecuted.[157] The court of appeals quickly voted to rehear the case en banc. The en banc panel affirmed the district court's order of dismissal, 7-4, holding that a "colorable basis" standard permits discovery when the defendants "introduce some evidence tending to show the essential elements of selective prosecution and the government fails to explain it adequately."[158]

Thus, the Ninth Circuit held that, by itself, statistical evidence about whom the government has prosecuted can establish a prima facie case of race-based selective prosecution.[159] Indeed, the Ninth Circuit held that the discovery standard in selective prosecution defenses should be lower than the standard necessary to prove a prima facie case.[160] As a result, the court of appeals believed that the Federal Public Defender study "raise[d] enough of a question to justify further inquiry."[161] The en banc panel stated that "a defendant is not required to *demonstrate* that the government has failed to prosecute others who are similarly situated."[162]

The United States Supreme Court granted certiorari to determine the appropriate standard for discovery for a selective prosecution claim.[163]

1995).

155 *Id.*

156 *Armstrong*, 48 F.3d at 1512.

157 *Armstrong*, 21 F.3d at 1438.

158 *Armstrong*, 48 F.3d at 1514.

159 *Id.*

160 *Id.*

161 *Id.* at 1515.

162 *Id.* at 1516 (emphasis in original). The court of appeals rejected the analysis of *United States v. Bourgeois*, 964 F.2d 935, 940 (9th Cir. 1992).

163 United States v. Armstrong, 116 S. Ct. 377 (1996).

IV. SUMMARY OF OPINIONS

A. THE MAJORITY OPINION

Writing for the majority,[164] Chief Justice Rehnquist argued that the defendants failed to "satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races."[165] Chief Justice Rehnquist addressed three areas of a selective prosecution claim: (1) whether Federal Rule of Criminal Procedure 16 applies to selective prosecution defenses;[166] (2) what showing is necessary to prove discriminatory effect and discriminatory purpose in selective prosecution claims;[167] and (3) what showing is necessary to obtain discovery in selective prosecution claims.[168]

First, to establish a standard of proof in selective prosecution claims, Chief Justice Rehnquist turned to Federal Rule of Criminal Procedure Rule 16, which governs discovery in criminal cases.[169] The defendants had argued that they should be permitted access to documents within the possession of the Government.[170] Rejecting the defendants' interpretation, Chief Justice Rehnquist held that Rule 16(a)(1)(C) "authorizes defendants to examine Government documents material to the preparation of their defense against the Government's case-in-chief, but not to the preparation of selective-prosecution claims."[171] Justice Rehnquist pointed out that "[u]nder Rule 16(a)(1)(C), a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product in connection with his case."[172] The concern was that the defendants' interpretation would open the door to unlimited access of government documents, thereby circumventing the work product discovery exemption under Rule 16(a)(2).[173] This is because the claim of selective prosecution does not bear on the merits of the

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164 Justices O'Connor, Scalia, Kennedy, Souter, Thomas and Ginsburg joined in the opinion. Justice Breyer joined in part.

165 United States v. Armstrong, 116 S. Ct. 1480, 1483 (1996).

166 *Id.* at 1485.

167 *Id.* at 1487.

168 *Id.* at 1488.

169 Both parties raised the relevance of Federal Rule of Criminal Procedure 16 for the first time in their briefs to the United States Supreme Court. Neither the district court nor the court of appeals mentioned Rule 16 in their decisions. *Id.* at 1485.

170 Brief for Respondents Shelton Martin et al. at 40-48, *Armstrong*, (No. 95-157). The defendants argued that they were not entitled to government documents pertaining to their case per se, but to discovery of documents regarding their selective prosecution claim. *Id.*

171 *Armstrong*, 116 S. Ct. at 1485.

172 *Id.*

173 *Id.*

offense but rather is an "independent [Constitutional] assertion."[174] Thus, the Court stated that "[b]ecause respondents' construction of 'defense' creates the anomaly of a defendant's being able to examine all Government work product except the most pertinent, we find their construction implausible."[175] As construed by the majority, Rule 16 implicitly exempts selective prosecution defenses.[176]

However, aside from Rule 16, Chief Justice Rehnquist implied that he would permit discovery through the inherent powers of the court[177] if the defendants met a "significant barrier" that was designed to weed out insubstantial claims.[178]

Second, Chief Justice Rehnquist addressed the equal protection issues raised by the defendants.[179] The defendants claimed that the Government violated the Equal Protection Clause of the Fourteenth Amendment. The defendants claimed that the prosecutors targeted African-Americans for prosecution in federal court, while whites were prosecuted in state court.[180] In addition, the defendants argued that they could prove selective prosecution without establishing that the Government failed to prosecute others similarly situated.[181]

Noting that a "selective-prosecution claim asks a court to exercise judicial power over a 'special province' of the Executive,"[182] Chief Justice Rehnquist reviewed the derivation of a prosecutor's power from the President's constitutional responsibility to "take Care that the Laws be faithfully executed."[183] The majority thus expressed concern "not to unnecessarily impair the performance of a core executive constitutional function."[184]

Reaching back to *Ah Sin v. Wittman*,[185] Chief Justice Rehnquist firmly asserted the requirement that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted."[186] Although *Ah*

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174 *Id.* at 1486.

175 *Id.* at 1485.

176 *Id.*

177 *See supra* text accompanying notes 85-86.

178 *Armstrong*, 116 S. Ct. at 1486.

179 *Id.* at 1487.

180 Brief for Respondents Shelton Martin et al. at 18-20, *Armstrong* (No. 95-157) (quoting Mot. for Disc. and/or Dismissal of Indictment for Selective Prosecution at 2-3).

181 *Id.* at 66 ("Even if Christopher Lee Armstrong were the only person ever suspected of selling crack in the Central District of California, federal officials would undeniably violate the Constitution if they targeted, investigated, arrested, or selected him for prosecution because he was black or Catholic or a Republican.").

182 *Armstrong*, 116 S. Ct. at 1486.

183 U.S. CONST. art. II, § 3; *Armstrong*, 116 S. Ct. at 1486.

184 *Armstrong*, 116 S. Ct. at 1486.

185 198 U.S. 500 (1905); *see supra* text accompanying notes 23-27.

186 *Armstrong*, 116 S. Ct. at 1487. This standard reversed the Ninth Circuit Court of

Sin involved federal review of a state conviction, Chief Justice Rehnquist extended the requirement of proof of similar situation to federal review of "one of the core powers of the Executive Branch of the Federal Government, the power to prosecute."[187]

Finally, Chief Justice Rehnquist turned to the showing necessary to obtain discovery in a selective prosecution claim.[188] He advocated a high threshold for proving discovery claims, stating, "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."[189] Rejecting the Ninth Circuit Court of Appeal's analysis, Chief Justice Rehnquist held that a "colorable basis" standard depends on evidence that the Government failed to prosecute others who are similarly situated to the defendant.[190] Without such proof, the district court should not permit discovery. He stated that the defendant should be required "to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law."[191] Thus, the Defendants' study, which listed twenty-four defendants by race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case, did not meet the showing of different treatment of similarly situated persons and thus was not sufficient to obtain discovery.[192]

B. JUSTICE SOUTER'S CONCURRENCE

In a brief concurrence, Justice Souter stated that he joined the Court's opinion, but "in its discussion of Federal Rule of Criminal Procedure 16 only to the extent of its application to the issue in this case."[193]

C. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg joined the majority opinion with the caveat that

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Appeal's contention that a "colorable basis" for selective prosecution claims did not require proof that others similarly situated were not being prosecuted. United States v. Armstrong, 48 F.3d 1508, 1516 (9th Cir. 1995) (en banc).

187 *Armstrong*, 116 S. Ct. at 1487.

188 *Id.* at 1488.

189 *Id.*

190 *Id.* at 1489. Justice Rehnquist also rejected the Ninth Circuit's contention that selective prosecution analysis should start "'with the presumption that people of *all* races commit *all* types of crimes—not with the premise that any type of crime is the exclusive province of any particular racial or ethnic group.'" *Id.* at 1488-89 (quoting *Armstrong*, 48 F.3d at 1516-17) (emphasis in original).

191 *Id.* at 1488.

192 *Id.*

193 *Armstrong*, 116 S. Ct. at 1489 (Souter, J., concurring).

the opinion would be limited to only issues before the Court.[194] She stated that "the Court has decided a precise issue: whether the phrase 'defendant's defense,' as used in Rule 16(a)(1)(C), encompasses allegations of selective prosecution."[195] Justice Ginsburg reserved judgment on whether Rule 16(a)(1)(C) applies in "any other context" such as to affirmative defenses unrelated to the merits.[196]

D. JUSTICE BREYER'S CONCURRENCE

Concurring in the judgment, Justice Breyer took issue with the majority's limitation of Federal Rule of Criminal Procedure 16 to documents related to the case-in-chief.[197] He stated that "the language and legislative history make clear that the Rule's drafters meant it to provide a broad authorization for defendants' discovery, to be supplemented if necessary in an appropriate case."[198] Justice Breyer disagreed with the majority's exclusion of other defenses from Rule 16(a)(1)(C),[199] stating that "[t]o interpret the Rule in this limited way creates a legal distinction that, from a discovery perspective, is arbitrary."[200] Moreover, Justice Breyer warned that the majority's interpretation would lead to "two full parallel sets of criminal discovery principles,"[201] a division that he believed was not justified from the "linguistics" of the Rule.[202]

Justice Breyer also rejected the majority's concern regarding the protection of work product.[203] He noted that the work product doctrine is not absolute, that the "work-product exception may itself contain implicit exceptions,"[204] and that other rules of law can supplement, authorize, or require the same information that Rule 16 could mandate.[205]

Finally, disagreeing with the majority, Justice Breyer asserted that

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194 *Armstrong*, 116 S. Ct. at 1489 (Ginsburg, J., concurring).

195 *Id.* (Ginsburg, J., concurring).

196 *Id.* (Ginsburg, J., concurring).

197 *Armstrong*, 116 S. Ct. at 1489 (Breyer, J., concurring in part and concurring in the judgment).

198 *Id.* at 1491 (Breyer, J., concurring in part and concurring in the judgment).

199 Justice Breyer delineated other forms of a "defendant's defense" such as: (1) an affirmative defense unrelated to the merits (such as a Speedy Trial Act claim); (2) an unrelated claim of constitutional right; and (3) a foreseeable surrebuttal to a likely Government rebuttal. *Id.* at 1490 (Breyer, J., concurring in part and concurring in the judgment).

200 *Id.* at 1490 (Breyer, J., concurring in part and concurring in the judgment).

201 *Id.* (Breyer, J., concurring in part and concurring in the judgment).

202 *Id.* (Breyer, J., concurring in part and concurring in the judgment).

203 *Id.* (Breyer, J., concurring in part and concurring in the judgment).

204 *Id.* (Breyer, J., concurring in part and concurring in the judgment).

205 *Id.* at 1491 (Breyer, J., concurring in part and concurring in the judgment). *E.g.*, Brady v. Maryland, 373 U.S. 83 (1963) (constitutionally, discovery may be required independent of Rule 16). *See supra* note 86.

the defendants sought information that was not work product.[206] However, Justice Breyer passed on the issue of "whether in an appropriate case it would be necessary to find an implicit exception to the language of Rule 16(a)(2), or to find an independent constitutional source for the discovery, or to look for some other basis."[207]

In his conclusion, Justice Breyer stated that the discovery standard should be whether the requested documents are "material to the preparation of the defendant's defense."[208] He concurred in the judgment because, in his opinion, the defendants failed to satisfy this threshold.[209] Moreover, Justice Breyer believed that it should have been "fairly easy" for the defendants to find evidence of a government policy to discriminate,[210] and the resulting prosecution of African-Americans, accompanied by the non-prosecution of whites.[211]

E. JUSTICE STEVENS' DISSENT

Justice Stevens opened by stating that he agreed with the Court that Rule 16 is not the source of the power to make the discovery inquiry.[212] However, Justice Stevens disagreed with the majority's "implicit assumption that a different, relatively rigid rule needs to be crafted to regulate the use of this seldom-exercised inherent judicial power."[213] While the discovery order may have been broader than necessary, Justice Stevens did not believe that the district court abused its discretion.[214]

Justice Stevens stated that the discovery order should be contextualized in light "of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions:"[215] (1) the disparity in sentencing between crack cocaine offenses and other cocaine offenses as promulgated by the Anti-Drug Abuse Act of 1986;[216] (2) the disparity in sentencing between state and federal courts;[217] and (3) the statistical fact that crack cocaine sentencing falls disproportionately upon African-Americans.[218] In this context, Justice Ste-

206 *Armstrong*, 116 S. Ct. at 1491 (Breyer, J., concurring in part and concurring in the judgment).
207 *Id.* (Breyer, J., concurring in part and concurring in the judgment).
208 *Id.* (Breyer, J., concurring in part and concurring in the judgment).
209 *Id.* (Breyer, J., concurring in part and concurring in the judgment).
210 *Id.* at 1492 (Breyer, J., concurring in part and concurring in the judgment).
211 *Id.* (Breyer, J. concurring in part and concurring in the judgment).
212 *Armstrong*, 116 S. Ct. at 1492 (Stevens, J., dissenting).
213 *Id.* (Stevens, J., dissenting).
214 *Id.* (Stevens, J., dissenting).
215 *Id.* (Stevens, J., dissenting).
216 *Id.* at 1492-93 (Stevens, J., dissenting). *See supra* text accompanying notes 114-15.
217 *Armstrong*, 116 S. Ct. at 1493 (Stevens, J., dissenting).
218 *Id.* at 1493-94 (Stevens, J., dissenting).

vens viewed the evidence presented by the defendants as credible, thereby agreeing with the Ninth Circuit Court of Appeals finding that the district court judge acted "well within her discretion."[219]

V. ANALYSIS

The claim of selective prosecution treads a fine constitutional line between the responsibilities of the Government to prosecute criminals and the right of the accused to be accorded equal protection under the law. The Article II constitutional mandate that the Executive Branch "take care" that the laws are enforced directly conflicts with the Equal Protection rights enunciated in the Fifth and Fourteenth Amendments. Fearing an encroachment on the Executive Branch's power, the Supreme Court in *Armstrong* adopted a very high threshold for obtaining discovery in selective prosecution defenses. The effect of this high threshold is to practically merge the requirements for obtaining discovery in a selective prosecution claim with the threshold for proving such a claim on the merits.

This note argues that this "clear evidence" test imposes a heightened pleading standard for those alleging claims of selective prosecution defenses, particularly for those alleging race-based selective prosecution defenses. In Part A this note argues that a heightened standard for discovery of government documents is not warranted by the language of Federal Rule of Criminal Procedure 16. Part B argues that the Court wrongly rejected the use of statistical studies to meet the defendants' burden of proof. Part C argues that without statistical studies, post-*Armstrong* defendants have little else to meet the "clear evidence" threshold required by the Majority. Finally, Part D urges an adoption of Justice Marshall's "nonfrivolous" standard as the required threshold showing to gain discovery on a selective prosecution claim. The Court's decision in *Armstrong* will place a "crippling burden of proof"[220] on defendants with legitimate claims, thereby installing a regime where "prosecutors . . . are now largely immune from constitutional scrutiny."[221]

A. A HEIGHTENED STANDARD FOR DISCOVERY IS NOT WARRANTED BY THE LANGUAGE OF RULE 16

The Ninth Circuit succinctly stated the importance of selective prosecution defenses:

> There are few claims as serious as the charge . . . that the government

219 *Id.* at 1494 (Stevens, J., dissenting).
220 Batson v. Kentucky, 476 U.S. 79, 92 (1986).
221 *Id.* at 92-93.

> has selected [defendants] for prosecution because of their race. Such claims deserve the most careful examination by the courts so that the prosecutorial power does not become a license to discriminate based on race. Discovery is the crucial means by which defendants may provide a trial judge with the information needed in order to determine whether a claim of selective prosecution is meritorious.[222]

Yet, the Court rejected such determinations in *Armstrong*, giving prosecutors wide latitude in deciding whom to charge.[223]

First, the Court created a heightened standard for discovery in selective prosecution defenses that is not warranted by the language in Federal Rule of Criminal Procedure 16. As Justice Breyer pointed out in his partial concurrence, Rule 16 sets out a "three-part categorization of the documents and other physical items that the Rule requires the Government to make available to the defendant."[224] This rule is not discretionary, but a mandatory limitation on the government. The majority, however, "creates a legal distinction that, from a discovery perspective, is arbitrary"[225] by setting up a separate system of discovery for those items that relate to the case-in-chief from those elements that relate to other defenses—even those defenses directly based in the Constitution.[226] As Justice Breyer correctly pointed out, there are a number of different ways in which the majority's stance in *Armstrong* influences motions to suppress and other areas that were traditionally considered under the aegis of Federal Rule of Criminal Procedure 16, but that are now no longer protected.[227] Indeed, defenses directly based on the Constitution should be accorded special protection, similar to those accorded to *Brady v. Maryland*,[228] and not relegated to a second-class treatment simply because they do not directly bear on the case-in-chief. Constitutional defenses strike at the core of our legal tradition and should be afforded as much protection—or even more—than the protection under the carefully constructed and liberalized Federal Rule 16.[229]

In the civil context, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*[230] illustrates the Court's reluctance to infer a heightened pleading standard under the Federal Rules of Civil Pro-

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222 United States v. Armstrong, 48 F.3d 1508, 1520 (9th Cir. 1995) (en banc).

223 *Armstrong*, 116 S. Ct. at 1486.

224 *Id.* at 1490 (Breyer, J., concurring in part and concurring in the judgment).

225 *Id.* (Breyer, J., concurring in part and concurring in the judgment).

226 *Id.* at 1484-85.

227 *See generally supra* text accompanying notes 64-84.

228 *See supra* note 85.

229 *See supra* text accompnying notes 78-84.

230 507 U.S. 163 (1993). *See also* Brief for Respondents Shelton Martin et al. at 49-51, *Armstrong* (No. 95-157).

cedure.[231] In an unanimous opinion written by Chief Justice Rehnquist, the Court held that federal courts may not apply a "heightened pleading standard," more stringent than the usual pleading requirements of Federal Rule of Civil Procedure 8(a) in civil rights cases alleging municipal liability under 42 U.S.C. § 1983.[232] The Court contrasted the "short and plain statement" of Rule 8(a) with the heightened pleading requirements in Rule 9(b), and found that Rule 9(b) does "address . . . the question of the need for greater particularity in pleading certain actions, but do[es] not include" the plaintiffs' action.[233]

Yet, in this criminal context, the Majority in *Armstrong* adopted a "clear evidence" test as a threshold requirement to obtaining discovery—a stricter test than that created by the drafters of Federal Rule 16 and warranted by the language. The drafters intended to allow a liberalized discovery process, one that would allow a defendant the opportunity to uncover facts that may be crucial to her defense. While the ability to obtain discovery from the Government is not as complete as in the civil context, the Rules of Criminal Procedure have been liberalized since their creation to encourage the discovery of "material" evidence.[234]

Moreover, in enunciating a "clear evidence" test for discovery into selective prosecution claims, the Court ignored the traditional distinction between proving a prima facie case on the merits and proving the necessary showing to gain a discovery motion.[235] The defendants in *Armstrong* did not maintain that they were entitled to discovery of any item that they wanted—they claimed that they met a "colorable basis" threshold.[236] Under the "colorable basis" threshold, they sought discovery to find out if their contentions were meritorious.

In accordance with settled jurisprudence, the Majority correctly turned to *Wade v. United States*[237] for the determination that some threshold showing is necessary to obtain discovery "to determine whether the Government based its decision on the defendant's race or religion,"[238] but carried this threshold too far with the "demanding"[239] standard adopted. Writing for the Court, Chief Justice Rehnquist stated that, "[t]he justifications for a rigorous standard for the

231 *Leatherman*, 507 U.S. at 168.
232 *Id.* at 168-69.
233 *Id.*
234 *See supra* text accompanying notes 78-84.
235 *Armstrong*, 116 S. Ct. at 1488.
236 *See* Brief for Respondents Shelton Martin et al. at 37, *Armstrong* (No. 95-157).
237 504 U.S. 181 (1992).
238 *Armstrong*, 116 S. Ct. at 1485.
239 *Id.* at 1486.

elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim."[240]

After following the clear precedent in *Wayte* that those claiming that they were selectively prosecuted need to prove that the decision to prosecute had a "discriminatory effect and that it was motivated by a discriminatory purpose,"[241] the Court essentially required the defendants to prove these two prongs at the discovery stage under the "clear evidence" standard.[242] This standard, thus, is a prerequisite, and heightened burden, for obtaining discovery from the government.

Yet, there are crucial differences between the level of proof that should be required at the discovery stage and the level of proof that should be required to prove a prima facie case under our system of liberal discovery. As the drafters of the modern Federal Rule of Criminal Procedure intended, discovery should be made available to help defendants prepare their defense. The effect of the majority's interpretation is to bar discovery that in other circumstances would satisfy the criteria enumerated in Federal Rule of Criminal Procedure 16.

B. THE COURT WRONGLY REJECTED THE USE OF STATISTICAL STUDIES TO PROVE INFERENCES OF DISPROPORTIONATE IMPACT IN PROSECUTORIAL DECISION MAKING

In ordinary equal protection cases, a plaintiff alleging intentional race discrimination need only demonstrate the claim by a preponderance of the evidence.[243] The majority in *Armstrong* nominally agreed that selective prosecution defenses should be judged according to "ordinary equal protection standards,"[244] but then proceeded to apply a more stringent burden of proof than ordinary equal protection cases.[245] For example, the defendants in *Armstrong* urged the court to follow *Batson v. Kentucky*,[246] where "the special stringent evidentiary requirements of *Swain* were 'inconsistent with standards that have been developed . . . for assessing a prima facie case under the Equal Protection Clause.'"[247]

The defendants also urged the analogy with *Batson* because a "claim of selective prosecution, . . . like a claim of systematic discrimi-

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240 *Id.* at 1488.

241 *Id.* at 1487.

242 *Id.* at 1486-88.

243 *See* Brief for Respondents Shelton Martin et al. at 51, *Armstrong* (No. 95-157).

244 *Armstrong*, 116 S. Ct. at 1487.

245 *See supra* text accompanying notes 40-55.

246 476 U.S. 79 (1986).

247 Brief for Respondents Shelton Martin et al. at 51, *Armstrong* (No. 95-157) (quoting Batson v. Kentucky, 476 U.S. 79, 93 (1986)).

nation under *Swain v. Alabama*, involves at most a far more limited number of prosecutors, all working for the same agency and presumably responsive to similar pressures and incentives."[248]

Similarly, the defendants in *Armstrong* urged an analogy with *Hunter v. Underwood*[249] because "[e]qual protection principles preclude the government from targeting a particular type of criminal act for greater scrutiny, harsher penalties, or more vigorous prosecution because most or all of the individuals who commit that offense are racial minorities."[250]

In rejecting the defendants' analogies to *Batson* and *Hunter*, the Court manipulated the holdings in these cases, claiming that *Hunter* proved that there was "indisputable evidence that the state law had a discriminatory effect on blacks as compared to similarly situated whites. . . . *Hunter* thus affords no support for [the defendants'] position."[251] Moreover, the Court skirted the defendants' contentions regarding the applicability of *Batson*, failing to explain why the holding in that case, which directly applied to the allegations of disparities in treatment of races in the judicial system,[252] should not be applied to the facts in *Armstrong*.[253]

Perhaps, most significantly, in the wake of *Armstrong*, there is a question regarding what weight of authority, if any, should be allocated to statistical studies delineating racial disparity in the prosecution of blacks and whites.[254] The Court flatly rejected the defendants' study of prosecutorial inequity in the Central District of California,[255] and foreclosed the defendants' ability to conduct further research into the issue by denying the discovery motion.

Yet, there are studies detailing wide disparities in prosecution in the Central District of California, and in numerous jurisdictions throughout the United States.[256] For example, the Berk Study,[257]

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248 *Id.* at 53.

249 471 U.S. 222 (1985).

250 Brief for Respondents Shelton Martin et al. at 40, *Armstrong* (No. 95-157).

251 *Armstrong*, 116 S. Ct. at 1487.

252 *See supra* text accompanying notes 40-47.

253 *Armstrong*, 116 S. Ct. at 1487.

254 *See generally* Joseph L. Gastwirth & Tapan K. Nayak, *Statistical Aspects of Cases Concerning Racial Discrimination in Drug Sentencing:* Stephens v. State *and* U.S. v. Armstrong, 87 J. CRIM. L. & CRIMINOLOGY 583 (1997).

255 *Armstrong*, 116 S. Ct. at 1488.

256 *See* Brief of NAACP Legal Defense & Educational Fund, Inc. & American Civil Liberties Union as Amicus Curiae in Support of Respondents at 19-26, *Armstrong* (No. 95-157) (surveying state and federal task forces on racial disparities in sentencing); *see also* Dan Weikel, *War on Crack Targets Minorities Over Whites*, L.A. TIMES, May 21, 1995, at A1.

257 Richard Berk & Alec Campbell, *Preliminary Data on Race and Crack Charging Practices in Los Angeles*, 6 FED. SENT. R. 36 (1993). *Cf.* Joseph E. Finley, *Discrimination in Crack Charging in Los Angles: Do Statistics Tell the Whole Truth About "Selective Prosecution?"* 6 FED. SENT. R. 113

which came to light after the district court proceeding and therefore was not part of the record in Armstrong,[258] demonstrates that the United States Attorney for the Central District of California has failed to prosecute white offenders in federal court.[259] Analyzing all arrests for sale of cocaine base within Los Angeles County between January 1, 1990 and October 10, 1992, and all cocaine base cases prosecuted by the United States Attorney for the Central District of California between 1988 and 1992, Professor Berk found that over a two-year period, the United States Attorney did not charge one single white person with the sale of crack cocaine.[260] In contrast, the Los Angeles County District Attorney charged over 200 whites with the sale of cocaine base during this same period.[261]

In *United States v. Turner*,[262] a case following on the heels of the Ninth Circuit's *Armstrong* decision, a study provided by the government revealed that, of 149 person charged on crack-trafficking offenses in the Central District of California between January 1992 and March 1995, 109 (74.7%) were African-American, twenty-eight (19.2%) were Hispanic, eight (5.5%) were Asian, three were unclassified, and one was white.[263]

Additional studies have found similar results nationally. For example, a House of Representatives Report recently stated that:

> A 1992 Commission survey shows that only minorities were prosecuted by crack offenses in more than half the federal court districts handling crack cases. No Whites were federally prosecuted in 17 states and many cities, including Boston, Denver, Chicago, Miami, Dallas and Los Angeles. Out of hundreds of cases, only one White was convicted in California, two in Texas, three in New York and two in Pennsylvania.[264]

These studies suggest that whites are more likely to be prosecuted in state courts for crack cocaine offenses, while blacks are more likely

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(1993) (criticizing the methodology of the Berk Study).

258 The Berk Study was developed in the course of litigation to support the defendant's claims of selective prosecution in *United States v. Jenkins*, No. 91-632-TJH (C.D. Cal.). Berk & Cambell, *supra* note 257, at 36.

259 *Id.* at 38.

260 *Id.*

261 The Government responded to the Berk Study at Oral Argument, where then-Solicitor General Drew S. Days stated that the study "proves only one thing that's relevant [to the Armstrong case], that the defendants should have been able to acquire comparative information." Official U.S. Supreme Court Transcript, 1996 WL 8850 at *19 (Feb. 26, 1996), *Armstrong* (No. 95-157). However, despite the Government's contentions, it seems likely that the Berk Study would be rejected by the Court as an insufficient showing.

262 901 F. Supp. 1491 (C.D. Cal. 1995).

263 *Id.* at 1495-96. The court concluded that the white defendant was "the last to be selected for prosecution . . . Had he not been included the number of whites prosecuted in this district would still have been zero." *Id.* at 1496.

264 H.R. REP. No. 104-272, at 20 (1995), *reprinted in* 1995 U.S.C.C.A.N. 335, 353.

to be prosecuted in federal courts.

C. IN REJECTING THE USE OF STATISTICAL STUDIES TO OBTAIN DISCOVERY, THE COURT LEFT SELECTIVE PROSECUTION DEFENDANTS LITTLE ELSE WITH WHICH TO MEET THEIR THRESHOLD SHOWING.

An important question left unanswered by the Court's opinion is how defendants can prove selective prosecution claims without statistical studies. While the twenty-four person study of *Armstrong* was rejected,[265] it seems unlikely that other, more in depth statistical studies can meet the Court's "clear evidence" standard.[266]

One potential way in which a defendant could meet the "clear evidence" threshold is an outright declaration of racial bias by a prosecutor, which is unlikely in almost all instances.[267] But, out of hundreds of reported cases, this scenario has occurred only a handful of times.[268] In addition, this leaves the success of a defendant's case to the fortune of being in a jurisdiction with an outspoken prosecutor rather than a silent prosecutor. The success of a defendant's case cannot be left to the cunning of a prosecutor when other powerful evidence exists to support claims of selective prosecution.

Thus, statistical studies seem as though they are the only mechanism by which the wide range of variables affecting a decision to pros-

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265 United States v. Armstrong, 116 S. Ct. 1480, 1489 (1996).

266 For example, in the death penalty context, the Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), rejected a study by David Baldus, Charles A. Pulaski and George Woodworth, which was an extensive and rigorous statistical study. The authors concluded that prosecutors seek and obtain the death penalty more frequently in cases involving white victims than in cases involving blacks. *Id.* Using multiple regression analysis, 400 factors were analyzed in 2400 homicide sentences. *Id.*

267 The Ninth Circuit rejected this formulation, stating that "[t]he availability of discovery must not turn on the unlikely event that a federal prosecutor will confess to private biases." United States v. Armstrong, 48 F. 3d 1508, 1519 (9th Cir. 1995) (en banc), *rev'd* 116 S. Ct. 1480 (1996). One commentator noted prior to *Armstrong*: "Absent exceedingly rare instances of racist remarks by prosecutors or formal policies that visibly target minorities for harsher treatment, virtually the only method of documenting actual racial discrimination is through empirical studies that statistically demonstrate the disparate treatment of minority defendants." *Developments*, *supra* note 96, at 1525. Yet, even such an outright declaration of racial bias may not be unconstitutional. Indeed, the Supreme Court stated that they "reserve[d] the question whether a defendant must satisfy the similarly situated requirement" in cases where prosecutor admits a discriminatory intent. *Armstrong*, 116 S. Ct. at 1488 n.3.

268 *See, e.g.*, United States v. Camminsano, 433 F. Supp. 964 (W.D. Mo. 1977); *see also* Romero, *supra* note 101, at 2049-50. Fortunately, the Court refrained from adopting the strange reasoning of one amicus who declared, "If a racist conspiracy were truly being perpetrated over an extended period by a U.S. Attorney's Office, it is probable that some employee or former employee would eventually be willing to come forward an expose it." Brief for Amicus Curiae Criminal Justice Legal Foundation in Support of Petitioners at 53, *Armstrong* (No. 95-157).

ecute an individual can be accounted for.[269] For example, proponents of statistical studies stress that the multiple regression analysis used in many of these studies can control for hundreds of potential factors.[270] Thus, an expert using multiple regression can account for prosecutorial decisions to prosecute in federal over state court. As one commentator has stated,

> Because of the myriad of factors that could affect a prosecutor's decision to bring charges, including the strength of the evidence, the culpability of the offender, and the need to send out various enforcement signals, courts are generally unwilling to infer a discriminatory intent from non-enforcement statistics . . . Yet, it is usually difficult to get evidence of discriminatory intent beyond such statistics.[271]

Additionally, defendants face the problem that data on which they could potentially base their threshold showing of similar situation is very difficult to obtain. The Court suggested that the defendants in *Armstrong* could have "investigated whether similarly situated persons of other races were prosecuted by the State of California, were known to federal law enforcement officers but were not prosecuted in federal court."[272] Similarly, Justice Breyer also agreed that "it should have been fairly easy" for the defendants to obtain this information.[273]

Yet, it is not clear from the Court's opinion where the defendants in this case could obtain information from law enforcement authorities regarding those arrestees who were not prosecuted. Indeed, it appears that data regarding those "similarly situated" is precisely what the defendants attempted to uncover through their discovery motion. As the defense counsel stated at oral argument, "The State [of California] court system is broken up into many, many different courts. In fact there is no centralized record-keeper of crack and powder cocaine cases, . . . and the information is not accessible to defendants with ease, and in some instances is not accessible at all."[274]

There are also wider-ranging problems for defendants in gathering data regarding prosecutorial decision-making and sentencing.

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269 *See Developments, supra* note 96, at 1545 ("The feasibility of such empirical studies makes the need for showing direct evidence of discriminatory purpose much less compelling in the racial selective prosecution context.").

270 *Id.*

271 Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373 (1987).

272 United States v. Armstrong, 116 S. Ct. 1480, 1489 (1996).

273 *Id.* at 1492 (Breyer, J., concurring in part and concurring in the judgment).

274 Official U.S. Supreme Court Transcript, 1996 WL 88550, at *37 (Feb. 26, 1996), *Armstrong* (No. 95-157). Moreover, the U.S. Attorneys' Office in the Central District of California is ten times the size of the Federal Public Defender. Brief for Respondents Shelton Martin et al. at 30, *Armstrong* (No. 95-157). The defendants also claimed that the Government stores this information on computer. *Id.* at 75-78.

Although the United States Sentencing Commission publishes information about federal defendants sentenced for cocaine base offenses, states do not keep such detailed statistics.[275] Many states do not distinguish between cocaine base and cocaine power offenses at either the penalty or the record-keeping levels.[276] According to former Solicitor General Drew Days III, in response to a request for the Sentencing Commission to produce data on cocaine base offenders, only three states were able to provide the total number of offenses handled in one year.[277] Moreover, information on a given defendant's race is not usually ascertainable from the public court files.[278]

Indeed, information is often extremely difficult for defendants to obtain, especially for the majority of defendants who are represented by Federal Public Defenders and have limited time and resources.[279] For example, the Berk study was compiled after a district court ordered the payment of a paralegal to organize the statistics—a task that took eighteen months to complete.[280] Under the Court's interpretation of the threshold showing, a district court would not have the inherent powers to order such compilation; the defendant would have to already have such statistics complied when presenting a discovery motion to the court.

As a result, the opinion in *Armstrong* establishes a virtual catch-22 for a defendant seeking to prove selective prosecution. The defendant cannot obtain discovery unless he first proves the prima facie case. But there is virtually no way for the defendant to prove the case without some discovery of those "similarly situated" to him whom prosecutors chose not to prosecute for similar offenses. Thus, despite Justice Rehnquist's reassurances that "the similarly situated requirement does

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275 Days, *supra* note 137, at 188.

276 *Id.*

277 *Id.*

278 Brief for Amicus Curiae NAACP Legal Defense & Educational Fund Inc. & American Civil Liberties Union in Support of Respondents at 41, *Armstrong* (No. 95-157). The Amicae point out that the United States advanced a similar argument for retaining *Swain v. Alabama*—a view that was later rejected by the Supreme Court in *Batson v. Kentucky*. The Government stated at the time, "[W]e also find unpersuasive the argument that *Swain* makes it unduly difficult to demonstrate impermissible use of peremptory challenges even when such abuse practices are actually going on . . . . Moreover, public defender's offices and defense counsel's organizations are well situated to collect the requisite statistics." Brief of the United States As Amicus Curiae Supporting Affirmance, *Swain v. Alabama*, 408 U.S. 936 (1972) (No. 69-5044), *quoted in* Brief for Amicus Curiae NAACP Legal Defense Fund, Inc. & American Civil Liberties Union in Support of Respondents at 42 n.35, *Armstrong* (No. 95-157).

279 Brief of NAACP Legal Defense & Educational Fund, Inc. & American Civil Liberties Union in Support of Respondents at 27-29, *Armstrong* (No. 95-157).

280 Official U.S. Supreme Court Transcript, 1996 WL 88550, at *38 (Feb. 26, 1996), *Armstrong* (No. 95-157).

not make a selective prosecution claim impossible to prove,"[281] the Court has left defendants with little room to maneuver.

A survey of the post-*Armstrong* cases reveals that a high barrier is in effect. While discovery requests to prove selective prosecution cases were rarely granted prior to *Armstrong*,[282] there has been a streamlining of such requests since the decision. For example, in *United States v. Olvis*,[283] the Fourth Circuit rejected the defendants' claim of selective prosecution because they did not meet the "'rigorous' standard recently articulated by the Supreme Court to obtain discovery . . ."[284] The Fourth Circuit flatly rejected the defendants' statistical study, stating that it "suffers from the same fatal defect that the Court recognized in *Armstrong* . . . Without an appropriate basis for comparison, raw data about the percentage of black cocaine defendants proves nothing."[285] Thus, the Supreme Court has set up a threshold that is too difficult for most defendants to meet, even those with potentially meritorious claims.

D. THE COURT SHOULD HAVE ADOPTED JUSTICE MARSHALL'S "NONFRIVOLOUS STANDARD" FROM *WAYTE V. UNITED STATES*

Noticeably absent from either the majority or the minority opinions was any explicit references to Justice Marshall's "nonfrivolousness" standard for discovery and his three-prong test laid out in his dissent in *Wayte*.[286] This three-prong test requires that a defendant prove that he is a member of a definable class, that a disproportionate number of the class was selected for prosecution, and that the selection was subject to abuse.[287] Justice Marshall's test would provide a more balanced threshold standard for defendants to meet. While enabling defendants seeking to obtain discovery from the government to meet a lower threshold of proof before the Court addresses their

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281 United States v. Armstrong, 116 S. Ct. 1480, 1487 (1996). The only case cited by the Chief Justice to support this claim is *Yick Wo*—a 1886 case. *Id.*

282 *See* Brief Amicus Curiae of Former Law Enforcement Officials and Police Orgs. et al. in Support of Respondents at 43, *Armstrong* (No. 95-157) (stating that few federal cases have ever reached the discovery threshold).

283 97 F.3d 739 (4th Cir. 1996).

284 *Id.* at 741. The court rejected defendants' arguments that they were selectively prosecuted. The defendants presented evidence that of the more than 80 people allegedly involved in the drug trafficking of marijuana and crack cocaine in this operation, only 25 were prosecuted—all of whom were black. The defendants also presented statistics stating that out of the 285 of the 312 cases involving crack cocaine offenses since 1992 where the defendants race was known, 90% of those tried were African-American. *Id.*

285 *Id.*

286 470 U.S. at 624-26 (Marshall, J., dissenting). *See supra* text accompanying notes 87-95.

287 470 U.S. at 626 (Marshall, J., dissenting).

claims on the merits, it would not result in a floodgate of claims.

One of the benefits of Justice Marshall's proposal is that it would in no way limit the government from seeking *in camera* reviews or protective orders to lessen the burden upon the government and would allow for evaluation of the propriety of further discovery if necessary.[288] It also accounts for potential margins of error in empirical studies and accounts for the existence (or lack thereof) or prosecutorial guidelines.[289] Moreover, it also allows the case to be placed within the proper context of larger racial disparities in sentencing.[290]

Applying Justice Marshall's three-prong test to the facts in *Armstrong*, the defendants would have met the "nonfrivolous" threshold to obtain discovery.[291] First, they meet the requirement that the defendant must be a member of a recognizable, distinct class, since they are African-Americans, the prototypical example.[292] Second, in proving that a disproportional number of their class are selected for investigation and prosecution, the statistical study could suffice. However, even assuming that the Court agrees with Chief Justice Rehnquist that the study is inadequate,[293] the newspaper article alone could raise a "nonfrivolous inference."[294] The affidavits would serve this purpose as well.[295] And third, in claiming that the selection procedure is capable of being abused, the defendants indicated that the charging guidelines of the Central District's U.S. Attorney's Office were unavailable.[296]

It is important to note, however, that without an explicit reference, Justice Stevens's dissent focused almost exclusively upon the third prong of the nonfrivolous test—the totality of the circumstances test. Expressing a need for "judicial vigilance over certain types of drug prosecutions,"[297] Justice Stevens emphasized the statistics

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288 *Developments*, *supra* note 96, at 1553.

289 *Id.*

290 *See supra* text accompanying notes 114-15.

291 470 U.S. at 626 (Marshall, J., dissenting).

292 *See generally* Rose v. Mitchell, 443 U.S. 545, 551-57 (1979).

293 Justice Marshall's dissent in *Wayte* did not address the sufficiency of statistical studies to prove disproportionate impact.

294 *See supra* text accompanying notes 92-94; Newton, *supra* note 153, at A1.

295 Justice Stevens took issue with the Majority's labeling of the affidavits as hearsay. *See* United States v. Armstrong, 116 S. Ct. 1480, 1494 (1996) (Stevens, J., dissenting).

296 *See also Developments*, *supra* note 96, at 1552-53 ("Under this conception of the standard, a minority defendant who alleges selective prosecution and submits an empirical study would meet the first two elements. . ., but would not meet the susceptible-to-abuse element without also submitting evidence that the prosecutor's office in question had inadequate procedural protections against discrimination.").

297 *Armstrong*, 116 S. Ct. at 1492 (Stevens, J., dissenting).

presented by the defendants as well as the affidavits claiming racial bias in the prosecution of black defendants in the Central District of California.[298] In addressing the a totality of the circumstances surrounding the defendants' prosecutions, Justice Stevens plunged head-on into the politically charged disagreements regarding racial bias in the sentencing guidelines, an area in which the Executive and Legislative Branches of the Federal Government have had considerable disagreement in recent years.[299] This is an area that the rest of the Court was unwilling to enter, more concerned with a departmentalist separation of powers.[300]

Finally, it should be emphasized that those alleging race-based claims of selective prosecution have different claims than those alleging other constitutional violations, due to the special history of race discrimination in our country.[301] As the Court stated in *Rose v. Mitchell*, "Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice."[302] Thus, "[r]acism has the potential to affect every felony charging decision. This situation is fundamentally different from the nonracial contexts out of which current selective prosecution doctrine arose."[303] Selective prosecution, while disturbing in any setting, flies in the face of the protections guaranteed in the Fifth and Fourteenth Amendments, and deserves special attention.

VI. CONCLUSION

No defendant since Yick Wo in 1886 has been successful in proving a race-based claim of selective prosecution.[304] Thus, in practical terms, the Supreme Court's opinion will not stem a tide of selective prosecution defenses. These claims were generally not succeeding prior to *Armstrong*. Now, with the heightened evidentiary standards enunciated by Chief Justice Rehnquist, a selective prosecution defense is even more difficult to prove. The legacy of the *Armstrong* decision will be an increased hostility to the use of statistical evidence to prove

298 *Id.* (Stevens, J., dissenting).

299 *See supra* note 112; *see generally* Jefferson Morley, *Crack in Black & White; Politics, Profits and Punishment in America's Drug Economy*, WASH. POST, Nov. 19, 1995, at C1.

300 *See, e.g., Armstrong*, 116 S. Ct. at 1486.

301 *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

302 443 U.S. 545, 555 (1979).

303 *Developments, supra* note 96, at 1545.

304 *Armstrong*, 116 S. Ct. at 1488-89; *see* Brief of Amicus Curiae of Former Law Enforcement Officials and Police Orgs., et al. in Support of Respondents at 42-43, *Armstrong*, (No. 95-157).

discrimination, and the "crippling burden of proof"[305] placed on defendants that insures that prosecutors will continue to be "largely immune from constitutional scrutiny."[306]

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305 Batson v. Kentucky, 476 U.S. 79, 92 (1986).
306 *Id.* at 93.