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UNEQUAL JUSTICE: THE SUPREME COURT'S FAILURE TO CURTAIL SELECTIVE PROSECUTION FOR THE DEATH PENALTY

United States v. Bass, 536 U.S. 862 (2002)

I. INTRODUCTION

In *United States v. Bass*,¹ the Supreme Court, in a per curiam opinion, ruled on the standard of proof required for a defendant to obtain discovery to support a claim of selective prosecution for the death penalty. The Court held that in order to attain such discovery, a defendant must demonstrate that the prosecutors were motivated by a discriminatory intent and that the prosecutors' conduct had a discriminatory effect upon the defendant.² Such a showing may be accomplished by submitting relevant evidence that similarly situated persons were treated differently.³

This Note argues that the Supreme Court's decision in *United States v. Bass* was incorrect. The Court's decision imposes too high a burden upon a defendant seeking to obtain discovery in support of a selective prosecution defense where the Government is seeking the death penalty. In reaching its conclusion, the Supreme Court relied exclusively upon *United States v. Armstrong*, which set forth the general standard for obtaining discovery in a selective prosecution case: defendants must submit some evidence that similarly situated individuals could have been prosecuted but were not.⁴ However, the Court's absolute reliance on *Armstrong* was misplaced. The pervasive policy consideration underlying the decision in *Armstrong* was the Court's reluctance to intrude upon the constitutionally granted discretion of the Executive to enforce criminal laws.⁵ However, the importance of ensuring that the death penalty is not imposed arbitrarily

¹ 536 U.S. 862 (2002).

² *Id.* at 864.

³ *Id.*

⁴ 517 U.S. 456, 469 (1996).

⁵ *Id.* at 464.

outweighs the need to maintain the Executive's independence in enforcing criminal laws. The Court should have examined the applicability of its policies in the death penalty context and imposed a lower burden on defendants seeking discovery to support selective prosecution claims in capital cases. The standard created in *Bass* will likely be highly criticized for preventing meritorious claims of selective prosecution from coming to light in the important cases where a defendant is subject to the death penalty.⁶

Moreover, this Note argues that the Court should have used *Bass* to reconsider the standard imposed by *Armstrong* for non-capital selective prosecution cases. While the severe nature of the death penalty requires a more lenient standard, all selective prosecution cases are likely to fail under the current "similarly situated individuals" test.⁷ The importance that laws be executed fairly requires that the selective prosecution defense be available in all cases, not only in cases where the death penalty is at stake.

II. BACKGROUND

A. THE SELECTIVE PROSECUTION DEFENSE

The selective prosecution defense arises under the Equal Protection Clause of the Fourteenth Amendment, which states in pertinent part that no state shall "deny to any person within its jurisdiction the equal protection of the laws."⁸ Accordingly, the Supreme Court has determined that under the Equal Protection Clause, a decision whether to prosecute may not be based upon "an unjustifiable standard such as race, religion, or other arbitrary classification."⁹ Thus, to prove a selective prosecution defense, a defendant must show that administration of a law is, "directed so exclusively against a particular class of persons . . . with a mind so unequal and oppressive" that the system results in "a practical denial" of equal protection of the law.¹⁰

⁶ Many commentators contend that the Court's ruling in *Armstrong* effectively disallowed the selective prosecution defense by making it nearly impossible for a defendant to obtain discovery in order to sustain their defense. See, e.g., Richard H. McAdams, *Symposium on Race and Criminal Law: Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT. L. REV. 605 (1998); Marc Michael, *United States v. Armstrong: Selective Prosecution—A Futile Defense and its Arduous Standard of Discovery*, 47 CATH. U. L. REV. 675 (1998); Melissa L. Jampol, Note, *Supreme Court Review: Goodbye to the Defense of Selective Prosecution*, 87 J. CRIM. L. & CRIMINOLOGY 932 (1997).

⁷ See *McAdams*, *supra* note 6.

⁸ U.S. CONST. amend. XIV, § 1.

⁹ *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

¹⁰ *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

The first case in which the Supreme Court considered the selective prosecution defense was *Yick Wo v. Hopkins*.¹¹ In *Yick Wo*, the petitioners alleged that a San Francisco ordinance limiting the use of wooden buildings as laundry cleaners was enforced exclusively against Chinese individuals.¹² The Supreme Court held that the ordinance violated the Equal Protection Clause because 200 Chinese subjects were prohibited from operating their cleaners in such buildings, while eighty non-Chinese subjects were allowed to continue operating their businesses.¹³ The Court thereby established that the Constitution prohibits the unequal application of a facially neutral law.¹⁴

The Supreme Court next considered the selective prosecution defense in *Ah Sin v. Whitman*.¹⁵ The petitioner in *Ah Sin* alleged that a San Francisco ordinance prohibiting gaming tables in rooms barricaded to prevent police entrance was enforced exclusively against Chinese individuals in violation of the Equal Protection Clause.¹⁶ The Court held that the petitioner's claim was not substantiated because he did not provide evidence that there were non-Chinese offenders against whom the law was not enforced.¹⁷ Since *Ah Sin*, the Supreme Court has held that in order to prevail on a selective prosecution claim, defendants must demonstrate "that similarly situated individuals . . . were not prosecuted."¹⁸

In *Oyler v. Boyles*,¹⁹ the Court considered petitioners' allegations that a West Virginia statute, imposing a duty upon prosecutors to seek mandatory sentences for repeat offenders, was selectively enforced in violation of the Equal Protection Clause. To support their claim, petitioners introduced statistics demonstrating that the maximum sentence was actually sought in a minority of cases.²⁰ The Court denied their claim, holding that it was not a constitutional violation to exercise some selectivity when enforcing the laws.²¹ In order to succeed on a selective prosecution claim, defendants must also demonstrate that such selectivity was intentionally based upon an unconstitutional standard.²²

¹¹ 118 U.S. 356 (1886).

¹² *Id.* at 359.

¹³ *Id.* at 374.

¹⁴ *Id.* at 373-74.

¹⁵ 198 U.S. 500 (1905).

¹⁶ *Id.* at 504.

¹⁷ *Id.* at 507-08.

¹⁸ *Armstrong*, 517 U.S. at 465 (citing *Ah Sin*, 198 U.S. 500).

¹⁹ 368 U.S. 448 (1962).

²⁰ *Id.* at 455-56.

²¹ *Id.* at 456.

²² *Id.*

In *Wayte v. United States*,²³ petitioners were “vocal” opponents to the Selective Service registration process.²⁴ They alleged that they were selectively prosecuted out of an estimated 674,000 non-registrants because they had exercised their First Amendment right in vocalizing their opposition to the registration program.²⁵ In rejecting petitioners’ claim, the Court determined that selective prosecution defenses should be subjected to the ordinary equal protection standards: a defendant must show that the government engaged in discriminatory treatment that had a discriminatory effect upon the defendant, and that the government was motivated by discriminatory intent.²⁶

The most recent case in which the Supreme Court considered the selective prosecution defense was *United States v. Armstrong*.²⁷ In *Armstrong*, the defendants were indicted for selling crack cocaine and alleged that the United States’ decision to prosecute them was based upon their race.²⁸ The defendants sought discovery of certain documents possessed by the Government, and in support of their request, introduced statistical evidence demonstrating that African Americans were prosecuted for crack sales in a disproportionate number of cases.²⁹ The Court rejected the defendants’ discovery request, emphasizing its reluctance to intrude upon the discretion of the Executive in enforcing criminal laws.³⁰ The Court held that the strong presumption in favor of honoring the United States’ prosecutors’ decisions mandated a rigorous standard to prove a selective prosecution claim, and that an equally rigorous standard was required for discovery requests in aid of such claims because “[d]iscovery . . . imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution.”³¹ The Court thus established the current standard for procuring discovery documents in a selective prosecution case: defendants must “produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not.”³²

²³ 470 U.S. 598 (1985).

²⁴ *Id.* at 604.

²⁵ *Id.*

²⁶ *Id.* at 608-09 (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977); *Washington v. Davis*, 426 U.S. 229 (1976)).

²⁷ 517 U.S. 456 (1996).

²⁸ *Id.* at 459.

²⁹ *Id.*

³⁰ *Id.* at 464-65.

³¹ *Id.* at 468.

³² *Id.* at 469.

B. LIMITS ON DISCRETION IN CAPITAL SENTENCING

The Supreme Court has held that under the Constitution, the United States Government is afforded broad discretion in enforcing the nation's criminal laws.³³ However, the Court has also noted that the death penalty is unique due to its severe and final nature.³⁴ Therefore, while the Court has not significantly limited *prosecutors'* discretion in deciding against whom they will seek the death penalty, it has imposed restraints upon *sentencers'* ability to impose the death penalty. The Court has held that the discretion of sentencers must be "limited so as to minimize the risk of wholly arbitrary and capricious action."³⁵ Although the Court has thus limited sentencers' discretion in capital punishment cases,³⁶ it has never precisely determined the scope of that discretion.³⁷

In *Furman v. Georgia*,³⁸ the defendants, convicted of rape and murder, challenged the validity of the Georgia death penalty statute. The defendants claimed that the imposition of the death penalty under the Georgia statute constituted "cruel and unusual punishment" in violation of the Eighth and Fourteenth Amendments.³⁹ The Court ruled in favor of the defendants, and vacated their death sentences.⁴⁰ However, the Court declined to hold that the death penalty is a per se violation of the Constitution.⁴¹ Instead, the Court held that a state's death penalty statute is unconstitutional if the sentencer is allotted too much discretion in deciding whether to impose capital punishment.⁴² Accordingly, the Court held that the death penalty could not be imposed pursuant to a procedure that granted unfettered discretion to the sentencer, thereby creating a great risk that the death penalty would be imposed arbitrarily.⁴³

The Georgia death penalty statute was again challenged in *Gregg v. Georgia*.⁴⁴ The petitioner in *Gregg* contended that the amended Georgia capital punishment statute did not effectively eliminate the dangers of

³³ *Id.* at 464 (citing *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

³⁴ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring)).

³⁵ *Id.* at 189 (quoting *Furman*, 408 U.S. at 238).

³⁶ *Id.*

³⁷ *Leading Case, Death Penalty—Aggravating and Mitigating Circumstances*, 104 HARV. L. REV. 129, 139 (1990).

³⁸ 408 U.S. 238 (1972).

³⁹ *Id.* at 239.

⁴⁰ *Id.* at 240.

⁴¹ *Id.* at 310-11 (White, J., concurring).

⁴² *Id.* at 309-10 (Stewart, J., concurring).

⁴³ *Id.* (Stewart, J., concurring).

⁴⁴ 428 U.S. 153 (1976).

arbitrariness in capital sentencing procedures, as *Furman* mandated.⁴⁵ Georgia's death penalty statute included a list of aggravating circumstances, one of which the jury had to find in order to impose the death penalty.⁴⁶ The petitioner alleged that the statute violated the Constitution because, among other things, one of the aggravating circumstances was too broad to actually limit discretion.⁴⁷ The Court found that the Georgia statute did not allow for the arbitrary imposition of the death penalty.⁴⁸ While the Court acknowledged that the statute may have afforded the sentencer too much discretion, it held that the state court could, and in this case did, limit that discretion by interpreting the statute narrowly.⁴⁹ Thus under *Gregg*, even if a state capital sentencing statute allows for too much discretion on its face, the statute may still be constitutional if that discretion is appropriately limited by the state court's interpretation of the statute.⁵⁰

In *Woodson v. North Carolina*,⁵¹ the Court held that an offense may not carry a mandatory capital punishment sentence. The Court concluded that such a mandatory sentence violated both the Eighth and Fourteenth Amendments, because it precluded consideration of factors such as the defendant's character and life experiences in coming to a punishment decision.⁵² The Court affirmed its *Woodson* decision in *Roberts v. Louisiana*,⁵³ holding that even where a state narrowly defines an offense for which capital punishment *must* be given, a mandatory imposition of the death penalty is unconstitutional.⁵⁴

⁴⁵ *Id.* at 199-203.

⁴⁶ *Id.* at 196-97. In order to meet the constitutionality requirements imposed in *Furman*, nearly all states now require that conviction and sentencing hearings be separated and that at sentencing hearings, juries weigh aggravating circumstances against mitigating circumstances in reaching their conclusion of whether to impose the death penalty or not. Daryl Kessler, Note, *Eighth Amendment—Sentencer Discretion in Capital Sentencing Schemes*, 84 J. CRIM. L. & CRIMINOLOGY 827, 829 n.11 (1994) (citing various state death penalty statutes).

⁴⁷ *Gregg*, 428 U.S. at 201. In order to impose the death penalty, the jury had to find that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." *Id.* (quoting GA. CODE ANN. §27-2534.1(b)(7) (1978)).

⁴⁸ *Id.* at 207.

⁴⁹ *Id.* at 201.

⁵⁰ *Id.*

⁵¹ 428 U.S. 280 (1976) (plurality opinion).

⁵² *Id.* at 304.

⁵³ 428 U.S. 325 (1976) (plurality opinion).

⁵⁴ *Id.* at 333.

In *Zant v. Stephens*,⁵⁵ a petitioner again alleged that an aggravating circumstance listed in the Georgia capital sentencing statute was invalid.⁵⁶ Although it rejected the petitioner's claim,⁵⁷ the Court addressed the constitutionality of aggravating circumstances. The Court held that an aggravating circumstance must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁵⁸

The Court considered the constitutionality of Georgia's capital sentencing system once more in *McClensky v. Kemp*,⁵⁹ this time in light of a study submitted by the petitioner showing that the death penalty was imposed in a racially discriminatory manner.⁶⁰ The Court held that the fact that similar defendants did not receive the death penalty did not constitute a violation of the Constitution since there is no prohibition against leniency in a particular case.⁶¹ Because the petitioner was sentenced to death in accordance with the Georgia statute, which required appropriate procedures to screen out arbitrary selection, petitioner's sentence was constitutional.⁶²

In *Walton v. Arizona*,⁶³ the petitioners challenged the constitutionality of the Arizona capital sentencing statute, arguing that an aggravating circumstance listed therein was unconstitutionally vague.⁶⁴ As in *Gregg*, the Court held that while the statute was impermissibly vague on its face, the Arizona court had sufficiently narrowed the statute thereby bringing it within constitutional limits.⁶⁵ The Court then clearly set forth the test that federal courts must undergo in order to determine the constitutionality of a state's capital sentencing statute.⁶⁶ Courts must first determine whether the statute is sufficiently narrow so as to provide real guidance to sentencers.⁶⁷ If the statute is too vague facially, federal courts must determine whether state courts have sufficiently narrowed the terms in the statute so that the

⁵⁵ 462 U.S. 862 (1983).

⁵⁶ *Id.* at 880.

⁵⁷ *Id.* at 890-91.

⁵⁸ *Id.* at 877.

⁵⁹ 481 U.S. 279 (1987).

⁶⁰ *Id.* at 279.

⁶¹ *Id.* at 304.

⁶² *Id.* at 305.

⁶³ 497 U.S. 639 (1990).

⁶⁴ *Id.* at 643.

⁶⁵ *Id.* at 654.

⁶⁶ *Id.*

⁶⁷ *Id.*

statute provides “some guidance to the sentencer.”⁶⁸ The *Walton* holding was reaffirmed in *Arave v. Creech*,⁶⁹ where the Court held that an aggravating circumstance is not unconstitutionally vague if a state’s capital sentencing scheme limits sentencers’ discretion so that their decision is not completely arbitrary,⁷⁰ and if the aggravating circumstance genuinely narrows the class eligible for the death penalty.⁷¹

C. THE LIMITS OF PROSECUTORIAL DISCRETION

Prosecutors are given near limitless discretion in deciding whom to charge, what to charge them with, and whether to seek the death penalty.⁷² The judiciary rarely reviews prosecutors’ decisions due to separation of powers concerns, the desire to enhance the efficiency of the criminal justice system, the potential chilling effect on law enforcement, and because the prosecutors’ decisions reflect their expertise.⁷³ In addition, the Supreme Court presumes that the prosecutors properly discharged their duties and strong evidence is required to rebut that presumption.⁷⁴ However, the discretion of prosecutors does not go entirely unchecked. Their decisions may not be based upon “an unjustifiable standard such as race, religion or other arbitrary classification.”⁷⁵

III. FACTS AND PROCEDURAL HISTORY

On December 9, 1998 a federal grand jury sitting in the United States District Court for the Eastern District of Michigan returned a second superseding indictment charging Bass, and thirteen other individuals, with multiple counts of intentional killing with firearms in the course of drug trafficking in violation of 21 U.S.C. § 921(j) (1996).⁷⁶ Following the

⁶⁸ *Id.*

⁶⁹ 507 U.S. 463 (1993).

⁷⁰ *Id.* at 470.

⁷¹ *Id.* at 474.

⁷² For a more in depth discussion of prosecutorial discretion generally, see Andrew Loewenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001). For a discussion of prosecutorial discretion in the death penalty arena, see John Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 FORDHAM L. REV. 2571 (1997).

⁷³ *Armstrong*, 517 U.S. at 464-66.

⁷⁴ *See id.* at 465 (quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

⁷⁵ *Oyler v. Boles*, 368 U.S. 448, 456 (1962).

⁷⁶ *United States v. Bass*, 266 F.3d 532, 534 (6th Cir. 2001); Brief for Respondent in Opposition to Petition for Writ of Certiorari at 1, *United States v. Bass*, 536 U.S. 862 (2002) (No. 01-1471).

indictment, the United States filed its notice of intent to seek the death penalty against only Bass.⁷⁷ Over the course of three years, the charges against the thirteen others were either dropped, or the government entered into plea bargains with the individuals.⁷⁸ In fact, the government began the plea bargaining process with Bass, but due to complications, the plea bargain was aborted.⁷⁹ Subsequent to the failed plea bargain process, Bass moved to dismiss the death penalty notice or, alternatively, to obtain discovery of certain documents relating to the United States' capital charging practices.⁸⁰ In support of his discovery request, Bass submitted a survey conducted by the Department of Justice that concluded that the United States seeks the death penalty twice as often against African Americans as it does against whites.⁸¹ In addition, Bass submitted plea bargaining statistics that showed that the United States enters into plea bargains with whites nearly twice as often as with African Americans.⁸² The District Court granted Bass's discovery request, and when the United States refused to comply, dismissed the death penalty notice.⁸³

The United States appealed to the Sixth Circuit Court of Appeals under 18 U.S.C. § 3731.⁸⁴ The Sixth Circuit affirmed the District Court's discovery order⁸⁵ because it determined that the District Court had not abused its discretion in holding that the statistical evidence introduced by

⁷⁷ Respondent's Brief at 1, *Bass* (No. 01-1471).

⁷⁸ *Id.*

⁷⁹ The exact facts of the situation are rather complicated, but in sum, defendant Bass provided confidential information to the government in the plea bargaining process. A written copy of Bass's confidential statement was somehow obtained by a prisoner who had been arrested due to the information Bass provided the government. That prisoner confronted Bass and threatened his safety. As a result, the plea bargain was aborted and a motion to dismiss the case was filed. *Id.* at 1-2, n.1.

⁸⁰ *Bass*, 266 F.3d at 534.

⁸¹ *Id.* at 537.

⁸² *Id.*

⁸³ *Id.* at 535.

⁸⁴ *Id.* In pertinent part, § 3731 states that "[i]n a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment. . . ." 18 U.S.C. § 3731 (2002). While this note does not address the issue, the statute does not appear to authorize an appeal from a court's dismissal of a notice to seek the death penalty. See Respondent's Brief at 4-10, *Bass* (No. 01-1471). The Supreme Court failed to address the § 3731 issue in its per curiam decision. See *United States v. Bass*, 536 U.S. 862 (2002).

⁸⁵ *Bass*, 266 F.3d at 534.

Bass demonstrated both discriminatory effect and intent.⁸⁶ The Sixth Circuit then remanded the case for further proceedings.⁸⁷

The United States petitioned the Supreme Court for a writ of certiorari.⁸⁸ The Supreme Court granted certiorari on the question of whether Bass met the standard of proof required in order to obtain discovery in a selective prosecution defense.⁸⁹

IV. SUMMARY OF THE OPINION

In a per curiam decision the Supreme Court concluded that in order to obtain discovery pertaining to a selective prosecution defense where the Government is seeking the death penalty, defendant must submit some evidence that similarly situated individuals were treated differently.⁹⁰

The Court's decision consisted of only one page, and thus its treatment of the case was limited. It first reiterated its decision in *United States v. Armstrong*, that a defendant seeking to obtain discovery upon a claim of selective prosecution must demonstrate some evidence of discriminatory effect upon the defendant and discriminatory intent of the Government.⁹¹ Under *Armstrong*, in order to demonstrate a discriminatory effect, defendant must make a "credible showing" that similarly situated individuals could have been prosecuted, but were not.⁹² The Court concluded that such a showing was not made by nationwide statistics introduced by Bass demonstrating that "[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites and that the United States enters into plea bargains more frequently with whites than it does with blacks."⁹³ The Court determined that such statistics said nothing about individuals who could have been prosecuted but were not.⁹⁴ Therefore, the Court found that the statistics, which regarded overall prosecution decisions, did not adequately demonstrate that similarly situated individuals were treated differently.⁹⁵ Moreover, because

⁸⁶ *Id.* at 538-40.

⁸⁷ *Id.* at 540.

⁸⁸ United States Petition for a Writ of Certiorari at 1, *United States v. Bass*, 536 U.S. 862 (2002) (No. 01-1471).

⁸⁹ *Bass*, 536 U.S. at 863.

⁹⁰ *Id.* at 864.

⁹¹ *Id.* at 863.

⁹² *Id.* (quoting *United States v. Armstrong*, 517 U.S. 456, 470 (1996)).

⁹³ *Id.* (quoting *United States v. Bass*, 266 F.3d at 538-39 (6th Cir. 2001) (citing U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY (1988-2000), at 2 (2000))).

⁹⁴ *Id.*

⁹⁵ *Id.* at 864.

defendant was offered a plea bargain, the Court determined that statistics regarding plea bargains were inapplicable to the case.⁹⁶ The Court determined that because of his failure to meet the *Armstrong* similarly situated individuals test, defendant was not entitled to discovery.⁹⁷

In a unanimous opinion, the Supreme Court reversed the Sixth Circuit's decision to allow discovery because it was inconsistent with *Armstrong* and because it threatened the Executive's discretion in seeking the death penalty.⁹⁸

V. ANALYSIS

In accordance with the constitutional grant of power to the Executive, the Supreme Court affords broad discretion to the Attorney General and the United States Attorneys to "enforce the nation's criminal laws."⁹⁹ A selective prosecution claim challenges that discretion by asserting that the prosecutor brought a charge for reasons prohibited by the Constitution,¹⁰⁰ and such a claim potentially causes the dismissal of a case.¹⁰¹ Because abundant deference is given to the Executive in enforcing criminal laws, the Court has been reluctant to allow selective prosecution claims and requires that strong evidence be submitted to rebut the presumption that prosecutors have properly discharged their duties.¹⁰²

Although the Supreme Court has not traditionally placed many limits on prosecutorial discretion in choosing whether to seek the death penalty against a particular defendant, the Court *has* placed some limitation on when capital punishment may be imposed because of its position that the death penalty is uniquely severe and final.¹⁰³ Therefore, the Court requires that a state's capital sentencing procedures adequately limit sentencers' discretion to minimize the risk of arbitrary administration of the death penalty.¹⁰⁴ The Court requires that a state "channel the sentencer's discretion by 'clear objective standards,'"¹⁰⁵ and that a state's capital

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Armstrong*, 517 U.S. at 464 (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

¹⁰⁰ *Id.* at 463.

¹⁰¹ See *McAdams*, *supra* note 6, at 640-41, 653.

¹⁰² *Id.* at 464.

¹⁰³ *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring); *Furman*, 408 U.S. at 306 (Stewart, J., concurring)).

¹⁰⁴ *Gregg*, 428 U.S. at 189.

¹⁰⁵ *Lewis v. Jeffers*, 497 U.S. 764, 774 (1990) (citing *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)).

sentencing scheme actually narrows the class of defendants eligible for the death penalty.¹⁰⁶

This Note argues that the standard adopted in *Armstrong* for obtaining discovery to support a selective prosecution defense, that the defendant demonstrate some evidence that similarly situated individuals could have been prosecuted but were not, is ill-suited to capital cases because of the severe and final nature of the death penalty. Part A of this note argues that the discovery rule established in *Armstrong* and imposed in *Bass* makes it virtually impossible for a defendant to obtain discovery and thereby attempt to prove a selective prosecution claim.¹⁰⁷ Part B argues that the importance that the death penalty not be imposed arbitrarily outweighs the Supreme Court's rationales for imposing such a high standard upon defendants in order to obtain discovery in selective prosecution cases.¹⁰⁸ Part C argues that the Supreme Court should have adopted a more lenient standard for obtaining discovery in selective prosecution cases where the government is seeking the death penalty.¹⁰⁹ In Part D, this note further argues that the Court should have taken an additional step by overruling the standard imposed by *Armstrong* and creating a more lenient discovery standard for all selective prosecution cases.¹¹⁰

A. THE *ARMSTRONG* RULE EFFECTIVELY DISALLOWS DISCOVERY IN SELECTIVE PROSECUTION CASES

In order to prove a selective prosecution claim on the merits, a defendant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory intent.¹¹¹ To demonstrate a discriminatory effect, a defendant must show that similarly situated individuals could have been prosecuted but were not.¹¹² In *Armstrong*, the Supreme Court extended virtually the same standard to obtaining discovery in order to prove a selective prosecution claim by requiring that defendants show some evidence that similarly situated individuals could have been prosecuted but were not.¹¹³ The Court explained that because many of the costs imposed upon the government in

¹⁰⁶ *Zant v. Stephens*, 462 U.S. 862, 877 (1983).

¹⁰⁷ See *infra* notes 111-36 and accompanying text.

¹⁰⁸ See *infra* notes 137-66 and accompanying text.

¹⁰⁹ See *infra* notes 167-82 and accompanying text.

¹¹⁰ See *infra* notes 183-200 and accompanying text.

¹¹¹ *Armstrong*, 517 U.S. at 465 (citing *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

¹¹² *Id.*

¹¹³ *Id.* at 470.

responding to a selective prosecution defense on the merits are the same as those imposed when discovery is ordered, the same standard should be applied.¹¹⁴ Thus, the Court determined that “[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim . . . require a correspondingly rigorous standard for discovery in aid of such a claim.”¹¹⁵

The standard imposed by the Court to obtain discovery will be impossible for most defendants to meet.¹¹⁶ In order to obtain discovery, a defendant must demonstrate that similarly situated individuals were not prosecuted.¹¹⁷ However, the information necessary to demonstrate that fact will likely be in the hands of the prosecutor.¹¹⁸ Therefore, most of the information required by the defendant to justify discovery is exactly the information the defendant is trying to discover.¹¹⁹ In some cases the defendant may get lucky and gain access to pertinent information prior to discovery,¹²⁰ but most defendants will not be so fortunate.¹²¹ This effectively places defendants in a Catch-22—they cannot obtain discovery until proving the merits of their defense, and yet they cannot prove the merits of their defense until they obtain discovery.

The Court’s position that statistics demonstrating a disparity in prosecution are insufficient to substantiate a claim for discovery puts defendants in an even more precarious situation.¹²² Because the Court requires defendants to show that similarly situated individuals could have been prosecuted but were not,¹²³ and because the evidence required to meet the standard will usually be unattainable without discovery,¹²⁴ a defendant’s only hope in meeting the similarly situated individuals test will often be to

¹¹⁴ *Id.* at 468.

¹¹⁵ *Id.*

¹¹⁶ *See, e.g.,* McAdams, *supra* note 6, at 612.

¹¹⁷ *Armstrong*, 517 U.S. at 465.

¹¹⁸ *Wayte v. United States*, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting); *see also* Tobin Romero, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2049 (1996).

¹¹⁹ *See* McAdams, *supra* note 6, at 621-23.

¹²⁰ *See United States v. Al Jibori*, 90 F.3d 22 (2d Cir. 1996) (where discovery was allowed in selective prosecution case because the prosecution specifically stated that it brought charges against defendant Al Jibori because he was a Middle Easterner traveling on a false passport).

¹²¹ *See* McAdams, *supra* note 6, at 623.

¹²² *See id.* at 624-42 (arguing that the Court should allow discovery in cases where statistics demonstrate a large disparity in the racial composition of those convicted of an offense).

¹²³ *Armstrong*, 517 U.S. at 465.

¹²⁴ *Wayte v. United States*, 470 U.S. 598, 624 (1985) (Marshall, J., dissenting).

rely upon statistics.¹²⁵ Unfortunately, the Court has consistently held that statistics showing a disparity in prosecutions do not sufficiently demonstrate that similarly situated individuals were not prosecuted, because such statistics say nothing about individuals who could have been prosecuted but were not.¹²⁶

In *Armstrong*, petitioners introduced data showing that African Americans were charged with selling crack cocaine much more frequently than whites.¹²⁷ The Court held that such statistics failed to demonstrate that similarly situated individuals could have been prosecuted but were not because the statistics said nothing about white offenders that had not been prosecuted.¹²⁸ Petitioners then introduced evidence regarding an attorney's conversation with a drug treatment center employee who stated that whites and African Americans deal and use crack cocaine in roughly the same numbers.¹²⁹ From this evidence, the Court could have deduced that because the defendant had submitted some evidence showing that whites and African Americans commit the same crime in roughly equal numbers, and that African Americans are prosecuted much more frequently, similarly situated white individuals were not prosecuted.¹³⁰ However, the Court held that the attorney's testimony regarding his conversation with the drug treatment center employee was hearsay and inadmissible, and considered the issue no further.¹³¹

In *Bass*, the defendant introduced a study by the United States Department of Justice demonstrating that African Americans are charged with death-eligible offenses twice as often as whites.¹³² Notably, Deputy Attorney General Holder and then-Attorney General Reno considered the results of the survey troubling and found that the statistics warranted further investigation into whether intentional discrimination motivated the disparity.¹³³ Nonetheless, like in *Armstrong*, the Court found the statistics

¹²⁵ See *McAdams*, *supra* note 6, at 612.

¹²⁶ See, e.g., *Armstrong*, 517 U.S. at 456; *Oyler v. Boles*, 368 U.S. 448 (1962).

¹²⁷ *Armstrong*, 517 U.S. at 459.

¹²⁸ *Id.* at 470.

¹²⁹ *Id.* at 460.

¹³⁰ See *id.* at 481 (Stevens, J., dissenting) (arguing that the evidence provided by petitioner was sufficient to support the District Court's discovery order).

¹³¹ *Id.* at 470. In his dissent, Justice Stevens argued that the report given by the drug counselor should not have been excluded. He contended that such a report of personal observations tended to support petitioner's claim of selective prosecution, and that at the discovery stage, the drug counselor's experience should have been considered. *Id.* at 481 (Stevens, J., dissenting).

¹³² 536 U.S. 862, 863 (2002).

¹³³ *United States v. Bass*, 266 F.3d 532, 538 (6th Cir. 2001).

unpersuasive.¹³⁴ The Court held that “raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*.”¹³⁵

The Supreme Court’s reluctance to allow statistics to play a role in a defendant’s attempt to obtain discovery to sustain a selective prosecution defense virtually forecloses the only realistic ability of defendants to meet the standard articulated in *Armstrong*.¹³⁶ Without the assistance of statistics, in order to obtain that discovery, defendants must effectively prove their prima facie case. Thus, the standard of proof imposed in *Armstrong* has all but eviscerated the availability of the selective prosecution defense.

B. THE CONCERN THAT THE DEATH PENALTY NOT BE IMPOSED ARBITRARILY OUTWEIGHS THE RATIONALES UNDERLYING THE *ARMSTRONG* DISCOVERY STANDARD

The Supreme Court imposes such a high burden upon defendants to obtain discovery in selective prosecution cases primarily due to its reluctance to infringe upon the province of the Executive.¹³⁷ Under Article II of the Constitution, the Executive bears the responsibility of taking care that the laws are faithfully executed.¹³⁸ For that reason, prosecutors are afforded broad discretion in enforcing the criminal laws of the United States.¹³⁹ Therefore, “[i]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.”¹⁴⁰

The Court’s reluctance to question prosecutorial discretion is justified by administrative concerns as well.¹⁴¹ Factors such as the strength of a case, deterrence value, and a case’s overall significance are deemed best made by executive officers.¹⁴² The Court fears that its over-involvement in such decisions will “chill law enforcement” by requiring the Executive to answer to the Court.¹⁴³ Moreover, the high standard for obtaining discovery may also be motivated by hesitance to allow the extreme consequence of a

¹³⁴ *Bass*, 536 U.S. at 864.

¹³⁵ *Id.*

¹³⁶ *See McAdams*, *supra* note 6, at 623.

¹³⁷ *Armstrong*, 517 U.S. at 464.

¹³⁸ U.S. CONST. art. II, § 3.

¹³⁹ *Armstrong*, 517 U.S. at 464.

¹⁴⁰ *Id.* (citing *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

¹⁴¹ *See id.*

¹⁴² *Id.* at 465.

¹⁴³ *Id.*

successful selective prosecution claim, which in most cases is a complete dismissal.¹⁴⁴ Because the result of a successful claim of selective prosecution is often to allow a potentially guilty person to avoid punishment, the Court may impose a high burden simply to avoid that outcome.¹⁴⁵

Although prosecutorial decisions are highly protected, they do not go entirely unchecked.¹⁴⁶ Prosecutors' decisions are subject to constitutional constraints: they may not base their decisions upon constitutionally prohibited standards such as race or religion.¹⁴⁷ Hence, the Court will review a prosecutor's decision for abuse of discretion where a potential constitutional violation has occurred.

The Court's reluctance to interfere with the Executive obviously stems from significant concerns.¹⁴⁸ However, the policy that the death penalty must not be administered in an arbitrary fashion is critical.¹⁴⁹ In *Bass*, the Court failed to weigh these two policies against one another and thus rendered a decision that ignored the latter.

While the Supreme Court has not significantly limited prosecutorial discretion in seeking the death penalty, it has limited the discretion of sentencers in imposing the death penalty based upon the rationale that capital punishment is unique due to its severity and finality.¹⁵⁰ The Court thus requires states to take adequate measures to ensure that capital punishment is not imposed arbitrarily.¹⁵¹ In *Bass*, two policies were thus in conflict: the policy against unduly interfering with prosecutorial discretion,¹⁵² and the policy against allowing the death penalty to be imposed arbitrarily.¹⁵³ The Court should have recognized that the two policies were in conflict and attempted to balance them in order to reach a decision.

First, the Court should have considered what weight it would give to the policy of non-interference with prosecutorial discretion due to separation of powers principles.¹⁵⁴ The Court considers this policy very

¹⁴⁴ See *McAdams*, *supra* note 6, at 640-41, 653.

¹⁴⁵ *Id.* at 653.

¹⁴⁶ *Armstrong*, 517 U.S. at 464.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.*

¹⁴⁹ *Gregg v. Georgia*, 428 U.S. 154, 189 (1976) (citing *Furman v. Georgia*, 408 U.S. 238, 286-91 (1972) (Brennan, J., concurring)); *id.* at 309-10 (Stewart, J., concurring).

¹⁵⁰ *Gregg*, 428 U.S. at 189; see also *infra* notes 33-71 and accompanying text.

¹⁵¹ *Id.*

¹⁵² *Armstrong*, 517 U.S. at 464.

¹⁵³ *Gregg*, 428 U.S. at 189.

¹⁵⁴ See *Armstrong*, 517 U.S. at 464.

persuasive, and will only interfere with prosecutorial decisions when clear evidence rebuts the presumption that prosecutors properly discharged their duties.¹⁵⁵ However, the Court should have considered the degree to which it would have had to interfere with the prosecutors' discretion. If it had lowered the standard by which a defendant can obtain discovery in a selective prosecution case where the government is seeking the death penalty, the Court would have preserved the threshold that defendants must meet in order to prove their claim of selective prosecution on the merits.¹⁵⁶ In proving their case, defendants would still have to meet a high burden—that the federal prosecutorial policy “[h]ad a discriminatory effect and that it was motivated by a discriminatory purpose.”¹⁵⁷ Therefore, the discretion of the prosecutors would remain adequately protected by the formidable additional hurdle that defendants would need to overcome—actually proving their claim on the merits.¹⁵⁸

Next, the Court should have considered the basis of its policy of limiting sentencers' discretion in order to curtail the risk that the death penalty be imposed arbitrarily.¹⁵⁹ The Court limits the discretion of sentencers in imposing the death penalty because of its position that capital punishment is unique in its finality and severity.¹⁶⁰ While the Court is more lenient in its application of this policy than it is with its protection of prosecutorial discretion, it nonetheless considers the avoidance of arbitrary selection for the death penalty a compelling goal.¹⁶¹ However, the Court should have examined to what degree the discovery standard created in *Armstrong* and upheld in *Bass* threatened the policy that the death penalty not be imposed arbitrarily. Unlike the discretion of prosecutors, which would be preserved by a defendant actually proving his selective prosecution claim on the merits,¹⁶² a defendant has no other means of proving that the United States determined to seek the death penalty in their case because of their race.¹⁶³ The Court thus runs the impermissible risk of

¹⁵⁵ *Id.*

¹⁵⁶ *See id.* (citing *Oyler v. Boyles*, 368 U.S. 448, 456 (1962)) (stating the requirements for a defendant to prove a selective prosecution claim on the merits).

¹⁵⁷ *Id.* at 465.

¹⁵⁸ *See* *McAdams*, *supra* note 6, at 624 (arguing that the high standard for proving a selective prosecution claim on the merits does not mandate a corollary high standard for obtaining discovery in such a case).

¹⁵⁹ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

¹⁶⁰ *Id.*

¹⁶¹ *See supra* notes 62-67 and accompanying text.

¹⁶² *See* *McAdams*, *supra* note 6, at 624.

¹⁶³ *See* *Jampol*, *supra* note 6, at 933 (asserting that the selective prosecution defense is the means by which a defendant can challenge a prosecutor's motives in bringing charges

denying meritorious claims of selective prosecution where the government is seeking the death penalty. While this risk may be permissible in other contexts, the risk is unacceptable where the ultimate consequence is so dire.

If the Court's high standard was prompted by the desire to avoid the harsh result of a selective prosecution claim—that the case be dismissed—the Court should have examined this result in the death penalty context. Unlike in other situations, where the result of a successful selective prosecution claim is that the case is dismissed completely, a successful claim of selective prosecution for capital punishment only results in the dismissal of the government's notice to seek the death penalty.¹⁶⁴ Thus, the stakes are lower in the death penalty context because the defendant does not escape punishment all together. The Court, therefore, should have concluded that its policy of not imposing the death penalty arbitrarily outweighed the policy of not interfering with the Executive,¹⁶⁵ especially given the fact that the defendant will not escape punishment altogether if a selective prosecution defense is successful on the merits.¹⁶⁶

C. THE SUPREME COURT SHOULD HAVE ADOPTED JUSTICE MARSHALL'S "NON-FRIVOLOUS" TEST SET FORTH IN HIS DISSENT IN *WAYTE V. UNITED STATES* FOR CASES WHERE THE GOVERNMENT IS SEEKING THE DEATH PENALTY

In light of the considerable importance that the death penalty not be imposed arbitrarily, the Court should have constructed a more lenient standard for defendants seeking discovery to support their selective prosecution claims where the government is seeking the death penalty. Justice Stevens, in his dissent in *Armstrong*, stated that the "severity of the penalty heightens both the danger of arbitrary enforcement and the need for careful scrutiny of any colorable claim of discriminatory enforcement."¹⁶⁷ A more appropriate discovery standard for death penalty cases is articulated in Justice Marshall's dissent in *Wayte v. United States*.¹⁶⁸

In *Wayte*, Justice Marshall devised a three-prong "nonfrivolous" standard for defendants to meet in order to obtain discovery in selective

against him).

¹⁶⁴ See *United States v. Bass*, 266 F.3d 532, 534 (6th Cir. 2001). Defendant Bass sought to either obtain discovery documents from the Government regarding its methods for seeking the death penalty, or, in alternative, *dismissal of the notice to seek the death penalty*. *Id.*

¹⁶⁵ See *Gregg*, 428 U.S. at 189.

¹⁶⁶ See *Bass*, 266 F.3d at 534.

¹⁶⁷ *Id.* at 483 (Stevens, J., dissenting) (citing *McClensky v. Kemp*, 481 U.S. 279, 366 (1987) (Stevens, J., dissenting)).

¹⁶⁸ *Wayte v. United States*, 470 U.S. 598, 626 (1985) (Marshall, J., dissenting).

prosecution cases.¹⁶⁹ *Wayte* did not concern a case where the government had filed notice to seek the death penalty, but involved the selective prosecution of violators of the United States draft laws.¹⁷⁰ Thus, Justice Marshall intended to apply his three-prong test to all selective prosecution defenses.¹⁷¹ However, the Court has clearly rejected Justice Marshall's test for general selective prosecution defenses.¹⁷² Therefore, this section argues only that even if, as the Court contends, the test is not appropriate for general selective prosecution cases, it is necessary in the extraordinary cases where the Government is seeking the death penalty.

Under Justice Marshall's "nonfrivolous" standard, a defendant would be required to make a prima facie case by demonstrating that: 1) he is a member of a class of persons protected by the Equal Protection Clause; 2) a disproportionate number of persons from his class were selected for prosecution; and 3) the selection was subject to abuse.¹⁷³ Defendant is required only to introduce enough evidence establish a "nonfrivolous" claim that each of the three prongs are met.¹⁷⁴

In order to meet the second prong of the test, that a disproportionate number of persons were selected from defendant's class for prosecution, defendant must introduce some evidence showing that the government identified for prosecution a disproportionate number of members of defendant's class.¹⁷⁵ Justice Marshall did not specifically state whether statistics could be used to prove the second prong of the "nonfrivolous" test.¹⁷⁶ However, the case from which he derived the test did allow statistics to prove the second prong.¹⁷⁷ Thus, Justice Marshall's test would likely allow statistics to make a "nonfrivolous" claim that a disproportionate number of persons were selected from defendant's class for prosecution. The third prong of the test is met if defendant can demonstrate that selection for prosecution is subject to abuse because the

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 601.

¹⁷¹ *See id.* at 626.

¹⁷² *See Armstrong*, 517 U.S. at 469 (establishing the "similarly situated individuals" test for obtaining discovery in a selective prosecution defense).

¹⁷³ *Wayte*, 470 U.S. at 626 (Marshall, J., dissenting).

¹⁷⁴ *Id.* at 629 (Marshall, J., dissenting) (contending that defendant met the three prong test even though he did not introduce evidence sufficient to make out a prima facie case of the second element, but did introduce enough evidence to make a "nonfrivolous" claim).

¹⁷⁵ *Id.* at 627 (Marshall, J., dissenting).

¹⁷⁶ *Id.*

¹⁷⁷ *See Castaneda v. Partida*, 430 U.S. 482, 495 (1977) (holding that the second prong of the test was met in a selective jury selection case where the percentage of Mexican-Americans selected for jury duty was significantly below their representation in the overall population).

government can relatively easily disguise an unconstitutional selection as a lawful prosecution.¹⁷⁸

This test would lower the threshold that defendants must meet in order to obtain discovery in the special cases where the government is seeking to obtain the death penalty. However, this test would not lead to a flood of baseless selective prosecution claims because the requirements for proving the claim on the merits would remain high and it would only apply in cases where the government has filed notice to seek the death penalty.¹⁷⁹

Moreover, this more lenient standard would foster public confidence in the judiciary. Public confidence in the judicial system is adversely affected by the appearance of bias in prosecution.¹⁸⁰ The Supreme Court has long held that “[t]o perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”¹⁸¹ The more lenient standard proposed by Justice Marshall would serve this ideal and would increase the appearance of justice in the highly public arena of death penalty cases.

If Justice Marshall’s “nonfrivolousness” test had been implemented in *United States v. Bass*, Bass would have met the criteria. He is an African American, and thus he is a member of a class protected by the Equal Protection Clause. He submitted statistical evidence that the United States seeks the death penalty twice as often against African Americans as against whites. In addition, prosecutorial decisions whether or not to file a notice of the death penalty are subject to abuse because the Government’s discretion is highly protected.¹⁸² Thus, Bass would have been able to obtain discovery and would have had the opportunity to attempt to prove his claim on the merits.

¹⁷⁸ *Wayte*, 470 U.S. at 628 (Marshall, J., dissenting) (asserting that the Selective Service’s draft enforcement policy was subject to abuse because it “[made] it relatively easily to punish speech under the guise of enforcing the laws”).

¹⁷⁹ *Romero*, *supra* note 119, at 2070.

¹⁸⁰ *See* *Romero*, *supra* note 119, at 2054-55 (arguing that statistical racial disparities undermine public confidence in the judicial system). Many commentators have noted that minorities have little confidence in the judicial system due to the perception that laws are not enforced fairly. *See, e.g.*, Talbot D’Alembert, *After the Verdict: Racial Injustice and American Justice*, A.B.A. J., Aug. 1992 at 58-59; Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 699 (1995). However, most polls demonstrate that approximately seventy percent of Americans support the death penalty. *See* Samuel Gross, *Still Unfair, Still Arbitrary—But Do We Care?*, 26 OHIO N.U. L. REV 517, 527 (2000).

¹⁸¹ *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

¹⁸² *See* *Armstrong*, 517 U.S. at 464.

D. THE SUPREME COURT SHOULD HAVE OVERRULED THE STANDARD IMPOSED BY *ARMSTRONG* AND ADOPTED A MORE LENIENT DISCOVERY STANDARD FOR ALL SELECTIVE PROSECUTION CASES

While the severe nature of capital punishment requires that a more lenient discovery standard be imposed where a defendant is claiming selective prosecution for the death penalty, a more lenient standard should also be adopted for selective prosecution defenses generally.¹⁸³ This more lenient standard would better adhere to the constitutional standard that the laws be enforced fairly and would foster public confidence in the judicial system.

The burden imposed upon defendants in order to obtain discovery to sustain selective prosecution defenses effectively disallows discovery in most cases.¹⁸⁴ This result reflects the Court's willingness to forgo some meritorious claims of selective prosecution in exchange for protecting the discretion of the government in making its prosecutorial decisions.¹⁸⁵

However, the Court's decision is incorrect because it does not adequately consider the negative results of its judgment. The Court has long held the Fourteenth Amendment, guaranteeing equal protection of the laws, to have a special bite when addressing racial discrimination.¹⁸⁶ The Court has held that the concept of equal protection of the laws stems from "our American ideal of fairness," and that discrimination based upon race, or any unjustifiable standard, is "contrary to our traditions."¹⁸⁷ The Court's decisions in *Armstrong* and *Bass* threaten this "American ideal of fairness," by removing the ability of a defendant to prove a selective prosecution defense.¹⁸⁸

In addition to jeopardizing the American ideal of fairness as embodied in the Constitution, the Court's decision in *Bass* endangers the public's perception of justice.¹⁸⁹ The appearance that laws are enforced unfairly

¹⁸³ See *supra* Part V-C.

¹⁸⁴ See *supra* Part V-A.

¹⁸⁵ See *McAdams*, *supra* note 6, at 624 (arguing that the *Armstrong* decision will ensure that many defendants with meritorious claims of selective prosecution are never able to defend their case on the merits because they will be unable to procure discovery). See also *Armstrong*, 517 U.S. at 464-65 (emphasizing the importance that the Executive retains broad discretion to enforce the nation's criminal laws).

¹⁸⁶ *Strauder v. West Virginia*, 100 U.S. 303, 306 (1880).

¹⁸⁷ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

¹⁸⁸ See, e.g., *McAdams*, *supra* note 6, at 624.

¹⁸⁹ See *Romero*, *supra* note 119, at 2054-55 (arguing that statistical racial disparities undermine public confidence in the judicial system).

undermines public confidence in the judicial system.¹⁹⁰ The criminal law system is dependent upon public participation and respect.¹⁹¹ Without these elements, law enforcement officials would be in a considerably more precarious position because officers of the law often rely on public participation to aid in the enforcement of the laws.¹⁹² In addition, low public confidence in the criminal justice system reduces the deterrent effect of prosecuting individuals.¹⁹³ Thus, the Court's decision ultimately creates a less effective criminal justice system.

Moreover, if the Court presents a real threat to dismiss cases where individuals have been selectively prosecuted, prosecutors will be encouraged to bring charges against offenders regardless of race.¹⁹⁴ Although the Court presumes that prosecutors' have faithfully discharged their duties in the absence of strong evidence to the contrary,¹⁹⁵ the Court should not assume that prosecutors are immune from racism.¹⁹⁶ Racism is contrary to the constitutional standard set forth in the Equal Protection Clause.¹⁹⁷

In addition, prosecutors are under a great deal of pressure to win cases, and thus may selectively prosecute because charges against minorities are more likely to succeed than charges against white individuals.¹⁹⁸ Regardless of the motivations behind decisions to prosecute selectively, if the Court establishes a sincere threat against selective prosecution, prosecutors will be forced to prosecute offenders regardless of race.¹⁹⁹

Even if the Court adopted a more lenient standard for discovery in non-capital selective prosecution cases, the discretion of the government

¹⁹⁰ *See id.*

¹⁹¹ *See id.*

¹⁹² *Id.* (arguing that the public is involved in the criminal justice system by providing law enforcement officials with information about crimes, by acting as witnesses and by serving as jurors (citing Brief Amicus Curiae of Former Law Enforcement Officials and Police Organizations et al., in Support of Respondents at 8-9, *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (No. 93-50031; 93-50057))).

¹⁹³ *McAdams*, *supra* note 6, at 667 (stating that the deterrent effect of the criminal justice system is dependent upon the "moral credibility of the criminal law").

¹⁹⁴ *Id.*

¹⁹⁵ *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926).

¹⁹⁶ *McAdams*, *supra* note 6, at 667 (arguing that the Court's presumption that prosecutors have appropriately carried out their duties rises to the level of presuming that prosecutors are immune from racism).

¹⁹⁷ *See* U.S. CONST. amend. XIV, §2 (stating that no state shall "deny to any person within its jurisdiction the equal protection of the laws").

¹⁹⁸ *See McAdams*, *supra* note 6, at 651-52 (arguing that prosecutors may be as motivated as any individual to perform their duties with an eye towards personal gain).

¹⁹⁹ *Id.* at 667.

would still be protected by the high standard imposed upon defendants to prove a selective prosecution claim on the merits.²⁰⁰ Therefore, by establishing an easier burden for defendants to meet in order to obtain discovery, the Court would not unduly compromise the Executive's discretion in enforcing the nation's criminal laws and would aid the effectiveness of the criminal justice system.

VI. CONCLUSION

The Supreme Court's per curiam decision in *Bass* reaffirms their decision in *Armstrong* that created an unreasonably high standard for defendants to meet in order to obtain discovery in support of a selective prosecution defense.²⁰¹ Additionally, the Court clearly established that the same discovery standard that applies to selective prosecution cases in general also applies to cases in which the government is seeking the death penalty,²⁰² an area of law in which racial bias is frequently alleged.²⁰³ Although a unanimous, per curiam decision speaks with significant authority, the Court's decision was ultimately incorrect. Moreover, it is troubling that the Court would issue a per curiam decision in this case, considering the number of commentators who contend that the decision in *Armstrong* was incorrect.²⁰⁴

The decision in *Bass* is unlikely to actually effect the number of successful selective prosecution claims, given that the last time a defendant successfully proved a claim of race-based selective prosecution in the Supreme Court was more than 100 years ago.²⁰⁵ However, the decision in *Bass* is likely to negatively affect the public's perception of justice because the case occurred in the highly contested context of the death penalty. Where the public suspects that the government seeks the death penalty based upon individuals' races, the entire integrity of the scheme of criminal law is jeopardized.

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²⁰⁰ See *Romero*, *supra* note 119, at 2070.

²⁰¹ *Bass*, 536 U.S. at 863.

²⁰² *Id.*

²⁰³ See, e.g., David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 LAW & SOC'Y REV. 437 (1984).

²⁰⁴ See *supra* note 6.

²⁰⁵ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see also discussion *infra* notes 8-14 and accompanying text; *Armstrong*, 517 U.S. at 466-68.

