


4-15-1976

## Murguia v. Municipal Court - The Defense of Discriminatory Prosecution

Jeffrey L. Garland

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Criminal Procedure Commons](#), and the [Fourteenth Amendment Commons](#)

---

### Recommended Citation

Jeffrey L. Garland *Murguia v. Municipal Court - The Defense of Discriminatory Prosecution*, 3 Pepp. L. Rev. 2 (1976)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol3/iss2/6>

This Note is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

## Case Notes

### **Murguia v. Municipal Court—The Defense of Discriminatory Prosecution**

*Murguia v. Municipal Court*<sup>1</sup> begins to clarify California law on the subject of discriminatory prosecution and stands as the first decision of a supreme court, state or federal, to expressly hold that the defense of discriminatory prosecution is available to a criminal defendant. However, a close inspection of the practical and procedural aspects of implementing the defense reveals a number of serious problems and unanswered questions that, if not recognized and acted upon, may ultimately relegate this defense to the status of an idle curiosity of merely academic interest.

In *Yick Wo v. Hopkins*<sup>2</sup> the United States Supreme Court significantly swelled the protections afforded by the Fourteenth Amendment by holding<sup>3</sup> that the equal protection clause proscribes not merely the enactment of laws that are patently discriminatory, but also the unequal application of civil laws that appear to be fair:

[Although a] law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority 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 . . .<sup>4</sup>

---

1. 15 Cal. 3d 286, 540 P.2d 44, 124 Cal. Rptr. 204 (1975).

2. 118 U.S. 356 (1886).

3. *Id.* at 374.

4. *Id.* at 373-74.

there is a denial of the equal protection of the laws.

Subsequent cases,<sup>5</sup> supported by a host of authorities,<sup>6</sup> have struggled with the many considerations involved in extending the *Yick Wo* rationale to discriminatory enforcement of *criminal* laws. Except for a handful of disparate decisions scattered throughout a few jurisdictions, such attempts have been largely unsuccessful.

The United States Supreme Court has been confronted with the issue of discriminatory enforcement on two major occasions<sup>7</sup> but at no time have the facts allowed the Court to consider the issue directly. The policy of "restrained review" has consequently produced only oblique discussions of the problems.

In *Two Guys from Harrison-Allentown, Inc. v. McGinley*,<sup>8</sup> an action to enjoin the enforcement of a Pennsylvania Sunday closing law on the grounds that the statute unconstitutionally infringed upon First Amendment religious freedoms and that it was being discriminatorily enforced against plaintiff's department store in violation of the Fourteenth Amendment, the Court upheld the lower court's denial of injunctive relief against the discriminatory prosecution claim, stating that the pending prosecutions did not warrant such relief:

Since appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe the court below was incorrect in refusing to exercise its injunctive powers . . .<sup>9</sup>

The California court in *Murguia*<sup>10</sup> quite liberally characterizes this as part of the *ratio decidendi* and, therefore, an explicit holding of the case. The *Two Guys* Court, however, recognized this as only an "ancillary matter"<sup>11</sup> and actually held, in ruling on the constitutionality of the Sunday closing statute, "that neither the statute's

---

5. A comprehensive, California-oriented survey of the problem as it relates to preconviction procedures for raising the defense of discriminatory enforcement may be found in Annot., 4 A.L.R.3d 404 (1965). See also 21 AM. JUR. 2d, *Criminal Law* § 231 (1965) and 17 CAL. JUR. 3d, *Criminal Law* § 109 (1975).

6. The most notable of these are Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 1961 COLUM. L. REV. 1103 and Note, *Discriminatory Law Enforcement and Equal Protection From The Law*, 1949-50 YALE L.J. 354.

7. *Oyler v. Boles*, 368 U.S. 448 (1962); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

8. 366 U.S. 582 (1961).

9. *Id.* at 588-89.

10. *Murguia v. Municipal Court*, 15 Cal. 3d 286, 299, 540 P.2d 44, 52, 124 Cal. Rptr. 204, 212 (1975).

11. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 at 588 (1961).

purpose nor its effect is religious"<sup>12</sup> and that "the state does [not] have other means at its disposal to accomplish its secular purpose that would not . . . give state aid to religion."<sup>13</sup>

*Oyler v. Boles*<sup>14</sup> was a habeas corpus proceeding in which the defendant contended that the West Virginia habitual criminal statute had been discriminatorily enforced against him, alleging that the statute had not been enforced against others similarly situated. The Supreme Court rejected these arguments stating that

[T]he 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. Therefore grounds supporting a finding of a denial of equal protection were not alleged.<sup>15</sup>

The California court in *Murguia*<sup>16</sup> again quite emphatically concludes that this decision establishes the availability of the defense of discriminatory prosecution. But even if these statements are accurate, the decisions have left a number of significant procedural questions, inherent in establishing the defense of discriminatory prosecution, unanswered.

The Court of Appeals of New York<sup>17</sup> was the only state supreme court to favorably consider the issue prior to *Murguia*. In a memorandum decision, the court stated that "we do not hold that defendant has demonstrated intentional discrimination in her prosecution. We rule, merely, that she should have a fair opportunity to establish it on her trial."<sup>18</sup>

California decisions prior to *Murguia* provided little encouragement. A few cases<sup>19</sup> suggest that the defense of discriminatory en-

---

12. *Id.* at 598.

13. *Id.*

14. 368 U.S. 448 (1962).

15. *Id.* at 456.

16. 15 Cal. 3d 286, 300, 540 P.2d 44, 53, 124 Cal. Rptr. 204, 213 (1975).

17. *People v. Walker*, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

18. *Id.* at 902, 200 N.E.2d at 779-80, 252 N.Y.S.2d at 97.

19. *People v. Flanders*, 140 Cal. App. 2d 765, 296 P.2d 13 (1956); *People v. Sipper*, 61 Cal. App. 2d Supp. 844, 142 P.2d 960 (1943); *People v. Darcy*, 59 Cal. App. 2d 342, 139 P.2d 118 (1943); *People v. Montgomery*, 47 Cal. App. 2d 1, 117 P.2d 437 (1941).

forcement may not be raised at any stage of a criminal proceeding. Others<sup>20</sup> would allow the defense if the prosecution is for a *malum prohibitum* offense but not for one *malum in se*. Even when recognizing it, the courts have stated that the trial court cannot take judicial notice or otherwise raise the defense on its own motion.<sup>21</sup> In one case,<sup>22</sup> the court concluded that the use of a pretrial motion for dismissal of the indictment was not the appropriate procedure for raising the issue, and that the defense could only be asserted at trial. Other cases<sup>23</sup> suggest the opposite result. Two California cases<sup>24</sup> have even intimated that injunctive relief would be the proper remedy. It was against this setting that *Murguia* was decided.

### MURGUIA<sup>25</sup>

Jose Guadalupe Murguia and five other members of the United Farm Workers Union (hereinafter UFW) were variously charged with misdemeanor offenses<sup>26</sup> in the Municipal Court for the Bakersfield Judicial District of Kern County, California, emanating from picketing and organizational activities of the UFW in Kern County in the summer of 1973.

Prior to trial, defendants filed motions seeking the dismissal of the charges on the ground that the prosecutions violated their State<sup>27</sup> and Federal<sup>28</sup> constitutional rights to the equal protection of the laws, alleging that the charges against them were part of a deliberate systematic pattern of discriminatory enforcement of the

---

20. *People v. Harris*, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960); *People v. Winters*, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959).

21. *People v. Winters*, 171 Cal. App. 2d Supp. 876, 342 P.2d 538 (1959).

22. *People v. Van Randall*, 140 Cal. App. 2d 771, 296 P.2d 68 (1956). See also cases cited note 20 *supra*.

23. Although no reported California cases have held this, reported cases in other jurisdictions have so held and a number of California trial court decisions have been overturned for considering the "defense" on a motion to dismiss.

24. *Downing v. California State Board of Pharmacy*, 85 Cal. App. 2d 30, 192 P.2d 39 (1948); *Wade v. San Francisco*, 82 Cal. App. 2d 337, 186 P.2d 181 (1947).

25. The facts reported in this note are taken from the California Supreme Court's account in *Murguia*.

26. The sections allegedly violated were CAL. PEN. CODE §§ 166(4), 594 (West 1970); CAL. VEH. CODE §§ 12951(a), 21750, 23103 (West 1971). The charges were, respectively, willful disobedience of a court order, malicious mischief, driving without a driver's license in possession, failing to pass another vehicle to the left at a safe distance without interfering with the safe operation of the overtaken vehicle, and reckless driving.

27. CAL. CONST. art. I, § 7(a).

28. U.S. CONST. amend. XIV, § 1.

State's penal laws against UFW members and supporters, executed by the Kern County District Attorney and Sheriff and by County law enforcement officers generally.

In conjunction with their motion to dismiss, defendants filed a motion to discover documentary and testimonial evidence from law enforcement officials which, according to the defendants, related to their discriminatory prosecution claim. In support of this second motion, defendants submitted over 100 affidavits detailing numerous incidents of alleged discriminatory conduct toward UFW members and supporters during the summer of 1973. This conduct allegedly included the use of excessive force and brutality by Sheriff's deputies against nonviolent UFW members and violent assaults against picketing UFW members by various persons which were "ratified" and "encouraged" by the inaction of Sheriff's deputies in whose presence these assaults were committed. Defendants also filed affidavits alleging the participation of higher law enforcement officers (including the district attorney) in the discriminatory enforcement scheme. The affidavits were submitted not as proof of the fact of discriminatory enforcement, but rather as evidentiary support for defendants' discovery motion. The People contended that discriminatory enforcement could never constitute a basis for dismissing a criminal action and therefore filed no counter affidavits or declarations.

The trial court explicitly found that the declarations established a prima facie case of discriminatory enforcement of the laws,<sup>29</sup> yet it denied the discovery motion, apparently on the ground that California law had not clearly sanctioned the defense. The Court of Appeal, Fifth District, denied petitioners' writ of mandate seeking to compel the municipal court to grant the discovery motion.<sup>30</sup> The defendants then petitioned for a writ of mandate from the California Supreme Court.

### 1. *The Equal Protection Holding*

The California Supreme Court, en banc, in an opinion by Justice Tobriner, reviewed the random developments in this area of the

---

29. *Murguia v. Municipal Court*, 15 Cal. 3d 286, 293 n.3, 540 P.2d 44, 48 n.3, 124 Cal. Rptr. 204, 208 n.3 (1975).

30. *Murguia v. Municipal Court*, 117 Cal. Rptr. 888, 898 (1974).

law and held first that a showing by a defendant that he would not have been criminally prosecuted except for invidious discrimination against him establishes a violation of state and federal equal protection requirements.<sup>31</sup>

In developing this constitutional concept, the court made three additional determinations. They first emphasized that either an individual or a member of a particular class may complain of alleged equal protection violations.<sup>32</sup> The court then stated that the discriminatory motive need not be the sole motive as long as it is the *primary* one,<sup>33</sup> and in a mixture of fact finding and holding, the court concluded that a conscious policy of selective enforcement directed against members or supporters of a particular labor organization is *prima facie* discriminatory and invalid under the equal protection clause.<sup>34</sup>

## 2. The "Defense" Holding

The court then extended full recognition of the applicability of the *Yick Wo* rationale to criminal prosecutions by holding that the violation of equal protection requirements in the institution of criminal proceedings constitutes a defense to the charges arising therefrom.<sup>35</sup> This holding was also enlarged upon in three additional discussions.

---

31. *Murguia v. Municipal Court*, 15 Cal. 3d 286, 290, 540 P.2d 44, 46, 124 Cal. Rptr. 204, 206 (1975).

32. *Id.* at 294, 540 P.2d at 49, 124 Cal. Rptr. at 209. An excellent discussion of this issue may be found in Russo, *Equal Protection from The Law: The Substantive Requirements For A Showing Of Discriminatory Law Enforcement*, 3 Loy. U.L. REV. (L.A.) 65, 75-82 (1970) in which the author criticizes the apparent emphasis in *Oyler v. Boles* upon the requirement of a definable class before the protections of the equal protection clause may be invoked.

33. 15 Cal. 3d at 298 n.6, 540 P.2d at 52 n.6, 124 Cal. Rptr. at 212 n.6 (1975).

34. *Id.* at 301, 540 P.2d at 54, 124 Cal. Rptr. at 214.

35. *Id.* at 300-01, 540 P.2d at 53-54, 124 Cal. Rptr. at 213-14. The *Murguia* court does not set forth one of the policy aspects of the defense as clearly as does Klein, J., in *People v. Gray*, 254 Cal. App. 2d 256, 266, 63 Cal. Rptr. 211, 217 (1967) in which he states:

Although no case which we have read says so in so many words, the recognition of discriminatory enforcement of a penal law as a defense to a criminal action is one of the few means the individual citizen has to force public officials to do their job properly. Perhaps one of the unarticulated reasons why discriminatory enforcement is recognized as a defense to a criminal prosecution is pretty much the same as the basis for the rule excluding illegally obtained evidence. We refuse to admit such evidence because we know of no other way to force law enforcement agencies to obey the law. (citations omitted).

The court in *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 17, 225

The court first concluded that neither the "serious" nature of the charges nor the multiplicity of penal statutes in question invalidates a discriminatory prosecution defense.<sup>36</sup> Aware of the existing confusion in California surrounding the procedural aspects of raising the defense,<sup>37</sup> the court next determined that the issue of discriminatory enforcement is for resolution by the court and should not be tried to the jury as a "defense" to the substantive offense.<sup>38</sup>

The question of discriminatory prosecution relates not to the guilt or innocence of [the accused], but rather addresses itself to a con-

---

N.Y.S.2d 128, 133 (Sup. Ct. 1962) offered a somewhat more dramatic statement of policy:

The wrong sought to be prevented is a wrong by the public authorities. To allow such arbitrary and discriminatory enforcement of a generally disregarded law is to place in the hands of the police and the prosecutor a power of the type frequently invoked in countries ruled by a dictator but wholly out of harmony with the principle of equal justice under law prevailing in democratic societies. The court is asked to stop the prosecution not because the defendant is innocent but because the public authorities are guilty of a wrong in engaging in a course of conduct designed to discriminate unconstitutionally against the defendant.

The policy also might serve to reduce the instances in which the trial court might otherwise abuse its discretion. The appellate court in *Murguia v. Municipal Court*, 117 Cal. Rptr. 888, 895 (1974), after finding the first two prerequisites for the maintenance of a discriminatory prosecution defense (intentional discrimination, based "solely" on race, color, or other arbitrary classification), then attempted to balance the harm to the individual against society's interest in enforcing the criminal code. Not surprisingly, the court found that the crimes with which defendants were charged were serious enough to tip the balance against them. The *Murguia* court, however, rather than using policy considerations to "balance" on an ad hoc basis, appears to have obviated the need for this third step by doing the weighing initially and determining, as a matter of law, that no compelling state interest can justify the discriminatory enforcement of state penal laws. *But see* note 63 *infra*.

It should also be noted that in making this holding the *Murguia* court expressly disapproved California cases to the contrary. *See* 15 Cal. 3d at 301 n.11, 540 P.2d at 54 n.11, 124 Cal. Rptr. at 214 n.11.

36. 15 Cal. 3d at 303-05, 540 P.2d at 55-57, 124 Cal. Rptr. at 215-17.

37. Cases cited notes 19-24 *supra*.

38. 15 Cal. 3d at 293 n.4, 540 P.2d at 48 n.4, 124 Cal. Rptr. at 208 n.4.

The consequences of this decision are discussed *infra*.

Although beyond the scope of this note, methods other than preconviction procedures are available to raise the defense, including a motion for a new trial after a verdict of conviction has been rendered, a postconviction motion for an order in arrest of judgment, appellate review of a conviction, and postconviction habeas corpus proceedings.

It should also be noted that the approach adopted here is similar to that taken in *FED. R. CRIM. P. 41(e)* on a motion to suppress illegally seized evidence. *See also* *Mapp v. Ohio*, 367 U.S. 643 (1961).



stitutional defect in the institution of the prosecution.<sup>39</sup> . . . [As such, the claim] should not . . . be tried before the jury . . . but should be treated as an application to the court for a dismissal or quashing of the prosecution upon constitutional grounds.<sup>40</sup>

To further define the procedural process, it was finally held that a pretrial motion to dismiss is the proper procedure for resolution of the issue of discriminatory enforcement:

[B]ecause a claim of discriminatory prosecution generally rests upon evidence completely extraneous to the specific facts of the charged offense, we believe the issue should not be resolved upon evidence submitted at trial, but instead should be raised . . . through a pretrial motion to dismiss.<sup>41</sup>

### 3. *The Discovery Holding*

Recognizing that in a California criminal prosecution the accused is generally entitled to discover all relevant and material information in the possession of the prosecution that will assist him in his defense<sup>42</sup> and having already held that the defense of discriminatory prosecution is potentially available to all criminal defendants, the court finally held that a total denial of discovery is erroneous where a defendant can in fact show preliminarily that he would not have been prosecuted except for an invidious discrimination against him.<sup>43</sup> As even the appellate court had found that the defendants had made the requisite showing of discriminatory enforcement,<sup>44</sup> the Supreme Court issued a writ of mandate directing the

---

39. 15 Cal. 3d at 293 n.4, 540 P.2d at 48 n.4, 124 Cal. Rptr. at 208 n.4. See *U.S. v. Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973).

40. 15 Cal. 3d at 293 n.4, 540 P.2d at 48-49 n.4, 124 Cal. Rptr. at 208-09 n.4. See *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12 at 15, 225 N.Y.S.2d 128 at 131 (Sup. Ct. 1962).

41. 15 Cal. 3d at 293-94 n.4, 540 P.2d at 49 n.4, 124 Cal. Rptr. at 209 n.4 *disapproving* *People v. Van Randall*, 140 Cal. App. 2d 771, 296 P.2d 68 (1950) insofar as language in the latter case is inconsistent with the holding in *Murguia*.

The *Murguia* court, 15 Cal. 3d at 294 n.4, 540 P.2d at 49 n.4, 124 Cal. Rptr. at 209 n.4, expresses some concern over the trial court's authority to entertain a pretrial motion to dismiss in the absence of clear California statutory authority to do so, but concludes that the constitutional nature of the issue remedies the defect. See *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12 at 17, 225 N.Y.S.2d 128 at 133 (Sup. Ct. 1962); *but see* *People v. Walker*, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964).

The proposed State of California JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, CAL. CRIM. P. CODE §§ 10001, 10151, 10155 and 10301 (1975), though not expressly authorizing a pretrial dismissal on discriminatory enforcement grounds, nonetheless appears broad enough to encompass the *Murguia* situation.

42. *Hill v. Superior Court*, 10 Cal. 3d 812, 817, 518 P.2d 1353, 1356, 112 Cal. Rptr. 257, 260 (1974).

43. 15 Cal. 3d at 305, 540 P.2d at 57, 124 Cal. Rptr. at 217.

44. *Murguia v. Municipal Court*, 117 Cal. Rptr. 888 (1974) and discussion *supra* note 35.

trial court to vacate its order denying discovery and remanded the case.<sup>45</sup>

### THE SIGNIFICANCE OF MURGUIA

As promising as the Supreme Court's recognition of the defense of discriminatory enforcement may appear to be to California criminal defendants, the practical and procedural aspects of establishing the defense pose serious problems.<sup>46</sup> Even if the defense is effectively maintained, there are additional hazards awaiting the criminal defendant and few viable independent remedies at his disposal.

#### 1. *The Difficulty of Establishing the Defense*

Initially, for purposes of obtaining a discovery order (and later upon the proof of the matter), the criminal defendant must "qualify" for the defense by showing that he falls within that class of defendants, as defined by the *Murguia* court, to whom the defense is available. He must show that individually, or as a member of an identifiable class, he was singled out for prosecution on the basis of some invidious criterion.<sup>47</sup> Moreover, a showing that a discriminatory motive was a factor in the prosecution is insufficient; the discriminatory *animus* must have been the *primary* motive in bringing the prosecution.<sup>48</sup> Finally, the defendant must plead his case

45. 15 Cal. 3d at 306, 540 P.2d at 57, 124 Cal. Rptr. at 217.

46. The vast majority of reported cases have not sustained the defense even in those jurisdictions in which it is accorded some recognition. The *Murguia* decision may ironically have added to that imbalance. See discussion *infra*.

47. The *Murguia* court, almost without discussion, impliedly categorizes the defendants as members of a definable class (UFW members) rather than as individuals pressing separate discriminatory prosecution claims and then summarily finds the classification invidious (i.e. "unjustifiable"). 15 Cal. 3d at 290, 300, 540 P.2d at 46, 53, 124 Cal. Rptr. at 206, 213. Whether this is intentional or an inadvertent consequence of consolidating the six separate misdemeanor actions for trial cannot be determined. If the former, the summary finding of invidiousness is clearly a development of some significance in the context of California constitutional law. See 5 WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 347-408 (1974).

48. Although the *Murguia* court does hold that the primary motive must be discriminatory, 15 Cal. 3d at 294, 298 n.6, 540 P.2d at 49, 52 n.6, 124 Cal. Rptr. at 209, 212 n.6, other language in the opinion, if read out of context, might seem to suggest otherwise: "[T]he issue here is whether the prosecution is constitutionally free to select *only* these defendants and prosecute them *only* because they are members of a certain class, i.e. members or

carefully to avoid the problems a number of defendants have encountered before reluctant courts.<sup>49</sup>

The criminal defendant will next encounter problems in the discovery process itself.<sup>50</sup> The *Murguia* court only hinted at the difficulties involved:

Because the trial court ruled that no discovery with respect to the discriminatory enforcement issue was proper, it did not pass upon the discoverability of the specific items requested, nor the propriety, or permissible scope, of any oral examination of specific law enforcement officers. On remand, the People will be free to raise any objections to the specific information sought, including a claim for privileges for "official information"<sup>51</sup> . . . the trial court should, of course, resolve all such objections before compelling discovery.<sup>52</sup>

Although the state generally has no interest in denying the accused access to all evidence in their possession that can illuminate the issues in the case,<sup>53</sup> and even though several cases have authorized the discovery of specified documents in the possession of the prosecution,<sup>54</sup> a sufficient showing of need is required<sup>55</sup> and no California

---

supporters of a particular union." 15 Cal. 3d at 290-91, 540 P.2d at 46, 124 Cal. Rptr. at 206.

49. In *Oyler v. Boles*, 368 U.S. 448 (1962), for example, the Court denied relief directly on the ground that the defendant had failed to allege that the discrimination was based upon an unjustifiable standard. 368 U.S. at 456.

50. California criminal discovery rules are scattered throughout the codes and case law. Excellent general sources are WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 271-74, 783-85 (1963) and WITKIN, CALIFORNIA CRIMINAL PROCEDURE SUPPLEMENT §§ 271-74, 783-85 (1973); WITKIN, CALIFORNIA EVIDENCE §§ 1055-62, 878A, 881 (1966) and WITKIN, CALIFORNIA EVIDENCE 2D §§ 1055-62, 878A, 881 (Supp. 1974); CAL. EV. CODE §§ 1040, 1042 (a), 915 (b) (West 1966); Comment, *Governmental Privileges: Roadblock To Effective Discovery*, 7 U. SAN. FR. L.R. 282 (1973).

51. 15 Cal. 3d at 305-06 n.18, 540 P.2d at 57 n.18, 124 Cal. Rptr. at 217 n.18. An argument could be made that CAL. EV. CODE § 1040 (West 1966) is inapplicable where discovery is sought pursuant to a discriminatory prosecution claim. The annotation to the section states that official information is absolutely privileged if its disclosure is forbidden by state statute. As no state statute exists absolutely prohibiting such disclosure, the privilege is only conditional and is susceptible to being defeated if sufficiently persuasive policy arguments are advanced. See Comment, *Governmental Privileges: Roadblock To Effective Discovery*, 7 U. SAN. FR. L.R. 282, 300 (1973).

52. 15 Cal. 3d at 305-06 n.18, 540 P.2d at 57 n.18, 124 Cal. Rptr. at 217 n.18.

53. *People v. Riser*, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13 (1956).

54. *Pitchess v. Superior Court*, 11 Cal. 3d 531, 536-37, 522 P.2d 305, 308-09, 113 Cal. Rptr. 897, 900-01 (1974); *Powell v. Superior Court*, 48 Cal. 2d 704, 707, 312 P.2d 698, 700 (1957). The former case is also superb in its discussion of the claim of governmental (official) privilege. It is significant that in *Pitchess* the defendant was able to discover materials (through a subpoena duces tecum) in the sheriff's investigative records for the purpose

case has yet granted a motion to fully discover all documentary and testimonial evidence relating to a claim of discriminatory enforcement.<sup>56</sup> Even if the discovery order is granted, there is no assurance that the prosecution will comply with it,<sup>57</sup> and if he does not comply, whether his failure to do so will be to the defendant's advantage.<sup>58</sup>

Assuming that these obstacles have been met, the defendant must then convince the court by a preponderance of the evidence<sup>59</sup> that he has in fact been invidiously discriminated against in the initiation of the prosecution.<sup>60</sup> Only certain showings are sufficient,<sup>61</sup>

of determining whether the complaining witnesses (deputies) had a past propensity for violence (battery prosecution). See also *Hill v. Superior Court*, 10 Cal. 3d 812, 518 P.2d 1353, 112 Cal. Rptr. 897 (1974) and *WITKIN, CALIFORNIA EVIDENCE SUPPLEMENT* § 1055A (1974).

55. A "blanket" request is insufficient. *WITKIN, supra* note 54 at § 1061 explores this area thoroughly.

56. *Pitchess v. Superior Court*, 11 Cal. 3d 531, 522 P.2d 305, 113 Cal. Rptr. 897 (1974), discussed *supra* note 54, has perhaps made the greatest advances toward reaching this pinnacle, although that case was a battery prosecution and lacked the discriminatory enforcement element.

57. As a practical matter it would seem a relatively easy task for one so inclined to deny having possession of any of the documents requested, especially if the request was not for specific, previously identified documents, but only for classes of materials in the possession of the public officers. Establishing contempt or fraud would then be an extremely difficult task for the discovering party.

58. Establishing a willful failure to comply on the part of the prosecutor might produce one of two consequences. First, any proffered prosecution testimony relevant to the requested materials could be stricken on motion of the defendant. *Priestly v. Superior Court*, 50 Cal. 2d 812, 819, 330 P.2d 39, 43 (1958). The criminal action could also be dismissed in a proper case. *People v. Garcia*, 67 Cal. 2d 830, 842, 434 P.2d 366, 374, 64 Cal. Rptr. 110, 118 (1967). Dismissal might not preclude refiling, however. See note 69 *infra*. An excellent discussion may be found in *Margolin, Toward Effective Criminal Discovery In California—A Practitioner's View*, 56 CAL. L.R. 1040, 1054 (1968).

59. The burden of persuasion is upon the party defending a criminal prosecution on the ground of discriminatory prosecution. CAL. EV. CODE §§ 115, 605, 606, 664 (West 1966); *People v. Gray*, 254 Cal. App. 2d 256, 265, 63 Cal. Rptr. 211, 216-17 (1967). The quantum of proof required is a preponderance of the evidence. *People v. Gray, supra* at 265-66 n.12, 63 Cal. Rptr. at 217-18 n.12.

60. An interesting distinction is made in Note, 78 HARV. L. REV. 884, 885 (1965). In discussing *People v. Walker*, 14 N.Y.2d 901, 200 N.E.2d 779, 252 N.Y.S.2d 96 (1964), the author states:

Although the [U.S. Supreme] Court has consistently held that unequal application of a law is not a denial of equal protection unless intentional or purposeful discrimination is proved, it has not yet

and an evidentiary presumption operates against the proponent of the evidence on this issue.<sup>62</sup> Even if discrimination is found, the court could reject the defense on compelling grounds.<sup>63</sup>

## 2. Other Problems Following Dismissal

Granted the resourcefulness of the defendant and his desire and ability to establish the defense, other problems remain. Because the issue is now to be tried to the court on a pretrial motion to dismiss,<sup>64</sup> the People have a right to appeal from the dismissal.<sup>65</sup> This is undoubtedly true where the trial takes place in an inferior court,<sup>66</sup> but would not be true if the charge is a felony and the dismissal is entered by a superior court.<sup>67</sup> But because the felony matter must now also be tried to the court, jeopardy has not attached<sup>68</sup> and the People may consequently, upon a dismissal, reinsti-

---

considered the question presented in the instant case—whether intentional or purposeful discrimination existing within a scheme of general or random enforcement violates the equal protection clause. In *Walker* the court granted Miss Walker a new trial at which she would be allowed to present evidence of discriminatory enforcement within a random enforcement scheme. The *Murguia* court does not address the issue but its pronouncements place it clearly within the *Walker* class of cases, in which proof of discriminatory enforcement is much more difficult.

61. Mere laxity in the enforcement of the law is insufficient. *In re Finn*, 54 Cal. 2d 807, 812-13, 356 P.2d 685, 688, 8 Cal. Rptr. 741, 744 (1960). But proof of prosecution under a law that has fallen into desuetude would constitute some evidence of discriminatory enforcement. See Rodgers and Rodgers, *Desuetude As A Defense*, 52 Iowa L.R. 1, 9-13 (1966).

The fact that others equally guilty have not been prosecuted is insufficient. *People v. Montgomery*, 47 Cal. App. 2d 1, 14, 117 P.2d 437, 446 (1964); *People v. Darcy*, 59 Cal. App. 2d 342, 353-54, 139 P.2d 118, 126 (1943). Cf. *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N.Y.S.2d 128 (Sup. Ct. 1962).

Intentional, invidious discrimination may be inferred from statistical evidence. *People v. Gray*, 254 Cal. App. 2d 256, 269, 63 Cal. Rptr. 211, 219 (1967). See also *People v. Harris*, 182 Cal. App. 2d Supp. 837, 5 Cal. Rptr. 852 (1960).

A general survey of the problem may be found in Annot., 4 A.L.R.3d 404, 410-11 (1965).

62. CAL. EV. CODE § 664 (West 1966). See discussion *supra* note 59.

63. The court in *People v. Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 20, 225 N.Y.S.2d 128, 136 (Sup. Ct. 1962) stated: "Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as a part of a bona fide rational pattern of general enforcement. . . ." Whether *Murguia* has extinguished this possibility remains to be seen.

64. 15 Cal. 3d at 293-94 n.4, 540 P.2d at 48-49 n.4, 124 Cal. Rptr. at 208-09 n.4.

65. CAL. PEN. CODE § 1466 (West 1970).

66. *Id.*

67. CAL. PEN. CODE § 1238 (West 1970).

68. Cf. *Illinois v. Somerville*, 410 U.S. 458 (1973).

tute proceedings within the applicable statute of limitations period.<sup>69</sup> The doctrines of collateral estoppel and *res judicata* as to the issue of discriminatory enforcement would appear not to apply to the second prosecution.<sup>70</sup>

In the context of this potentially inadequate legal remedy (i.e. dismissal), some form of injunctive relief would appear desirable. The *Murguia* court, however, appears to have precluded this possibility.<sup>71</sup> The immunity of the investigative and prosecutorial authorities in tort is solidly established,<sup>72</sup> even apart from the effect the "pretrial" aspect of the *Murguia* holding will have upon the situation.<sup>73</sup> The only potential independent remedy for the victims of discriminatory enforcement would appear to be under federal civil rights statutes<sup>74</sup> or by way of a direct cause of action based upon the Fourteenth Amendment.<sup>75</sup> In most cases the public prose-

69. CAL. PEN. CODE § 1387 (West 1970). The adoption of the proposed State of California JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, CAL. CRIM. P. CODE § 10301(c) (1975), however, might have the effect of authorizing the reinstatement of proceedings after the dismissal of *misdemeanor* (as well as felony) prosecutions on discriminatory enforcement grounds.

70. The distinction made *supra* note 60 would prevent a *Walker* or *Murguia*-oriented court from entertaining a second prosecution if the doctrines were applicable. The prosecutor, having once lost, could not venture out and arrest a few additional persons and succeed in removing the taint of discriminatory prosecution in the second proceeding against the original defendant.

71. 15 Cal. 3d at 293-94 n.4, 540 P.2d at 48-49 n.4, 124 Cal. Rptr. at 208-09 n.4.

72. CAL. GOVT. CODE § 821.6 (West 1966). But there may be *criminal* liability. CAL. PEN. CODE § 170 (West 1970).

73. The most likely tort remedies, were it not for immunity problems, would be abuse of process and malicious prosecution. The latter cannot be established in any event. See cases collected 32 CAL. JUR. 2D, *Malicious Prosecution* § 8 (1956). Cf. *Imbler v. Pachtman*, 96 S. Ct. 984 (1976). In PROSSER, LAW OF TORTS 857 (4th ed. 1971) the author discusses abuse of process as follows: "[T]here is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." The pretrial process would establish nothing more than "bad intentions," and the possibility of refiling the charges (no *res judicata* effect) establishes the lack of conclusion.

74. 42 U.S.C. §§ 1983, 1985 (1970).

75. *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.*, 403 U.S. 388, 395-96 (1971); *Gabaldon v. United Farm Workers Organizing Committee*, 35 Cal. App. 3d 757, 762-63 n.4, 111 Cal. Rptr. 203, 206 n.4 (1973). *Contra*, *Imbler v. Pachtman*, 96 S. Ct. 984 (1976).

cutor would not even be subject to discipline by the California Bar Association.<sup>76</sup>

#### CONCLUSION

The procedural requirements controlling the implementation of the discriminatory prosecution defense make it highly unlikely that the defense will ever be raised successfully in California. Minor offenders will be reluctant to go to the trouble and considerable expense of successfully establishing the defense, while major offenders would theoretically never have the opportunity to raise the issue, as police and prosecutorial discretion are generally at their lowest when more serious crimes are involved.<sup>77</sup> Subsequent cases must grapple with the problems of construing the *Murguia* standards and adhering to its requirements; courts must remain alert to the possibility that a rigid reliance upon existing statutory and case authority might easily cause the defense of discriminatory enforcement to fall into desuetude. If it is really more desirable for society to allow an admittedly guilty person to go free than to permit a court to convict one whom the prosecutor has subjected to discriminatory enforcement of the law in violation of constitutional equal protection guarantees, as the *Murguia* court has maintained, then some rethinking must be done before this objective can be fully attained.<sup>78</sup>

JEFFREY L. GARLAND

---

76. The relevant provision (DR7-103) would be inapplicable as probable cause would ordinarily be present and, because the matter is tried to the court on a motion to dismiss, the question of the defendant's guilt would not be raised.

77. Richardson, J., concurring in *Murguia*, 15 Cal. 3d at 306, 540 P.2d at 58, 124 Cal. Rptr. at 218, appears to be overly concerned. Though the *Murguia* requirements are applicable to major crimes, as a practical matter such crimes are prosecuted in all instances, leaving little if any room for prosecutorial discretion. See Comment, *The Right To Nondiscriminatory Enforcement of State Penal Laws*, 1961 COLUM. L. REV. 1103, 1140-41, and KADISH AND PAULSEN, CRIMINAL LAW AND ITS PROCESSES 1124-26, 1178-91 (3d ed. 1975).

78. A *Murguia* discriminatory prosecution defense was recently rejected in *In re Elizabeth G.*, 53 Cal. App. 3d 725 (1975). The court affirmed a trial court ruling that a female minor had solicited to engage in an act of prostitution in violation of CAL. PEN. CODE § 647(b) (West 1970). The defendant's claim that many more females than males had been arrested for soliciting or engaging in prostitution was rejected when the evidence failed to show that the police had embarked on a systematic program of intentional and purposeful discriminatory enforcement of the statute against females. 53 Cal. App. 3d at 733.