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United States v. Armstrong: Permissible Prosecutorial Discretion?

In *United States v. Armstrong*,[1] the Supreme Court explicitly set forth the threshold requirement the defendant must meet in order to be entitled to discovery on a selective prosecution claim. There must be a credible showing that similarly situated persons of other races could have been prosecuted, but were not.[2]

I. FACTUAL BACKGROUND

In April 1992, respondents, all black men, were indicted on crack cocaine and federal firearms charges.[3] Respondents filed a motion for discovery, or for dismissal, alleging they were the targets of selective prosecution based on their race.[4] In support of their motion, they produced an affidavit indicating that all twenty-four crack cocaine cases closed in 1991 by the federal public defender's office in Los Angeles involved black defendants.[5] The government opposed the discovery motion alleging that the affidavit was insufficient because it did not show that defendants who were not black were not prosecuted.[6] The district court granted respondents' motion and ordered the government to provide detailed discovery on the selective prosecution claim.[7]

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1. 116 S. Ct. 1480 (1996).

2. *Id.* at 1489.

3. *Id.* at 1483 (citing 21 U.S.C. §§ 841, 846 (1988)). Section 841 provides that "it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or [t]o possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841. Section 846 provides that any person who conspires to commit an offense, such as described in § 846, "shall be subject to the same penalties as those prescribed for the offense." 21 U.S.C. § 846.

4. 116 S. Ct. at 1483.

5. *Id.*

6. *Id.* at 1484.

7. *Id.* The district court's order instructed the government to provide the following material: (1) a list of all cases from the last three years in which the government charged both cocaine and firearms offenses, (2) identification of the race of the defendants in those cases, (3) identification of the levels of law enforcement involved in the investigations of the cases, and (4) an explanation of the criteria used for deciding to prosecute those

The government moved for reconsideration, providing the court with the alleged facts of the criminal charge and a report indicating the manufacture and distribution of crack is controlled in part by black street gangs.[8] Respondents supplemented their original offer with evidence that both black and white people use crack cocaine and that there are white persons prosecuted for crack offenses in state courts.[9] The district court denied the motion to reconsider and dismissed the case when the government indicated that it would not comply with the discovery order.[10]

A three-judge panel for the Ninth Circuit reversed the district court's order and held that the defendants must provide a colorable basis for believing that other similarly situated persons have not been prosecuted in order to be entitled to discovery.[11] Upon a rehearing en banc, the Ninth Circuit affirmed the district court's order of dismissal holding that a defendant is not required to demonstrate that the government has failed to prosecute similarly situated persons as long as some evidence of selective prosecution is shown.[12]

The Supreme Court granted certiorari to determine the appropriate showing a defendant must make in order to compel the government to provide discovery on a selective prosecution claim.[13] In reversing the en banc panel of the Ninth Circuit, the Court held that in order to compel discovery a defendant must meet the threshold requirement of a credible showing of different treatment of similarly situated persons.[14]

II. LEGAL BACKGROUND

The Supreme Court laid the foundation for the law on selective prosecution in *Yick Wo v. Hopkins*.[15] In that case, petitioners challenged a local ordinance[16] granting licensing discretion to the board of

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defendants for federal cocaine offenses. *Id.*

8. *Id.*

9. *Id.* Respondents submitted an affidavit by an intake coordinator at a drug treatment center alleging that there were equal numbers of caucasian and minority drug users and dealers. They also submitted an affidavit from a federal criminal defense attorney stating that many nonblack persons were prosecuted in state court for crack offenses. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 1484-85.

13. *Id.* at 1485.

14. *Id.* at 1489.

15. 118 U.S. 356 (1886).

16. *Id.* at 356. The ordinance provided as follows:

supervisors on equal protection grounds, alleging that all two hundred Chinese applications for laundry licenses were denied while all but one of the eighty Caucasian applications were approved.[17] In deciding that petitioners' rights had been violated, the Supreme Court reasoned that a certain amount of discretion in the administration of the law was acceptable.[18] However, the exercise of discretion "directed so exclusively against a particular class of persons . . . administered . . . with an evil eye and an unequal hand" is not constitutionally permissible.[19]

The Supreme Court further defined permissible prosecutorial discretion in *Oyler v. Boles*.[20] There, petitioners alleged a Fourteenth Amendment Equal Protection violation in that they were discriminated against as habitual criminals and sentenced to life imprisonment when five other persons, who were subject to sentencing under the habitual criminal statute,[21] were not sentenced under it.[22] In disagreeing with petitioners' equal protection claim the Court stated, "[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 . . . ."[23]

In *United States v. Berrios*,[24] the Second Circuit developed a frequently cited formulation for the defense of selective prosecution. After describing the defendant's burden as a heavy one, the court found that a defendant must produce prima facie evidence that similarly situated persons were not prosecuted and that the government's charging decision was invidious or in bad faith.[25] In order to compel discovery on

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> It shall be unlawful from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry, within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

Id.

17. *Id.*
18. *Id.* at 370.
19. *Id.* at 373-74.
20. 368 U.S. 448 (1962).
21. *Id.* at 449 (citing W. VA. CODE §§ 6130, 6131 (1961)). Section 6130 provided "for a mandatory life sentence upon the third conviction of a crime punishable by confinement in a penitentiary." W. VA. CODE § 6130. Section 6131 provided the penalty would be "invoked by an information filed by the prosecuting attorney immediately upon conviction and before sentence." *Id.* § 6131.
22. 368 U.S. at 454-55.
23. *Id.* at 506.
24. 501 F.2d 1207 (2d Cir. 1974).
25. *Id.* at 1211.

selective prosecution, the court found that a colorable basis must exist for the claim.[26] There must be some evidence tending to show that the essential elements of the defense exist and that the requested documents would be probative of the claim.[27] Despite its belief that neither standard was met in the case, the court of appeals found the district court had not abused its discretion in finding a prima facie case of selective prosecution.[28]

In *Wayte v. United States*,[29] the Supreme Court confirmed that selective prosecution claims were appropriately judged by ordinary standards of equal protection.[30] Thus, in order to maintain a claim of selective prosecution, a defendant would have to show both a discriminatory effect and a discriminatory purpose behind the prosecutorial scheme.[31] However, the Court specifically declined to answer the question the dissent viewed as crucial; the standard by which the prosecution could be compelled to provide discovery on the issue of selective prosecution.[32] The dissent argued that a defendant need not make out a prima facie case in order to compel discovery.[33] Instead, a defendant would have to make a nonfrivolous showing on the selective prosecution claim before discovery would be compelled from the prosecution.[34]

The federal circuits have not been uniform regarding the burden a defendant must meet to compel discovery on selective prosecution.[35] Some circuits require a heavy burden of a prima facie showing of selective prosecution before discovery is required.[36] Other circuits have adopted the standard of a nonfrivolous showing of the elements of

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26. *Id.*

27. *Id.* at 1211-12 (citing United States v. Berrigan, 482 F.2d 171, 177, 181 (3d Cir. 1973)).

28. *Id.* at 1212.

29. 470 U.S. 598 (1985).

30. *Id.* at 608.

31. *Id.* To make out a prima facie case, Wayte must show, first, that he is a member of a recognizable distinct class. Second, he must show that a disproportionate number of this class was selected for investigation and possible prosecution. Third, he must show that this selection procedure was subject to abuse or was otherwise not neutral. *Id.* (citing Castaneda v. Partida, 430 U.S. 482 (1977)).

32. *Id.* at 605 n.5. Wayte did not raise the claim before the Court, nor was the issue argued or briefed. *Id.*

33. *Id.* at 615 (Marshall, J., dissenting).

34. *Id.*

35. United States v. Armstrong, 48 F.3d 1508, 1514 (9th Cir. 1995).

36. *See* United States v. Parham, 16 F.3d 844, 846 (8th Cir. 1994); United States v. Penagaricano-Soler, 911 F.2d 833, 837 (1st Cir. 1990) (to overcome the threshold presumption that the prosecution acted in good faith, the defendant must make a prima facie showing of selective prosecution).

selective prosecution.[37] Finally, some circuits have adopted a lower burden of some evidence tending to show the existence of the essential elements of selective prosecution.[38]

III. RATIONALE OF THE COURT

The Supreme Court in *United States v. Armstrong*[39] established the threshold requirement of a credible showing of different treatment of similarly situated persons before the government will be required to comply with a discovery request regarding selective prosecution.[40] In setting this standard, the Court concluded that the "showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims."[41]

The primary rationale offered in support of the higher burden before compelling discovery results from a respect for the separation of powers between the judicial and executive branches of government and a reluctance to subject prosecutorial charging decisions to judicial scrutiny.[42] Furthermore, doing so has several negative consequences.[43] First, it delays criminal prosecutions.[44] Second, law enforcement efforts are hampered through scrutiny of the prosecutor's motives and decisions.[45] Third, revealing the government's enforcement policies undermines the effectiveness of prosecutions.[46] There are most certainly constitutional restraints on prosecutors.[47] However, under normal circumstances, as long as there is probable cause to believe a

37. United States v. Gordon, 817 F.2d 1538, 1540 (11th Cir. 1987) (defendant must show a colorable entitlement that takes the question past the frivolous state and raises a reasonable doubt as to the prosecutor's purpose); United States v. Greenwood, 796 F.2d 49, 52 (4th Cir. 1986) (a nonfrivolous showing of both elements of the claim is sufficient to support a hearing and related discovery).

38. *Armstrong*, 48 F.3d at 1513 (the "high threshold" description of the colorable basis standard is an artificially onerous burden); United States v. Heidecke, 900 F.2d 1155, 1158 (7th Cir. 1990) (colorable basis is coming forward with some evidence to support the charge of selective prosecution).

39. 116 S. Ct. 1480 (1996).

40. *Id.* at 1489.

41. *Id.* at 1486.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (citing United States v. Batchelder, 442 U.S. 114, 125 (1979)). *See also* Oyler v. Boles, 368 U.S. at 456 (holding the decision whether to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification").

violation of the law has occurred, "the decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion."[48]

Despite lower courts' failure to address the issue, the Supreme Court also concluded that discovery on selective prosecution is not required by Federal Rule of Criminal Procedure 16.[49] Although Rule 16 allows for discovery of material within the government's possession that is "material to the preparation of the defendant's defense,"[50] the Court found that selective prosecution claims were not covered because such claims are not defenses within the meaning of the rule.[51] They are assertions that the charges have been brought for reasons forbidden by the Constitution.[52] The concurrence argued that selective prosecution claims were defenses contemplated by the rule because such defenses can take differing forms.[53] Finding that the rule would authorize discovery in an appropriate case, Justice Breyer found the standard of materiality to defendant's defense was not met here because there was no clear evidence of selective prosecution on these facts.[54]

The primary infirmity in respondents' allegation of selective prosecution in this case was that there was no showing that similarly situated persons of different races were not prosecuted.[55] Respondents' study indicated only that the persons who were prosecuted were black.[56] It did not indicate that nonblack persons were not prosecuted.[57] Reasoning that, by definition, selective prosecution means that some type of selection has occurred, the Court rejected the lower court's decision that

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48. *Armstrong*, 116 S. Ct. at 1486 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)).

49. *Id.* at 1485 (citing FED R. CRIM. P. 16(a)(1)(C)). Rule 16 states, in relevant part:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

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

50. *Id.*

51. 116 S. Ct. at 1486.

52. *Id.*

53. *Id.* at 1490 (Breyer, J., concurring). "A defendant's defense can take many forms, including (1) a simple response to the Government's case-in-chief, (2) an affirmative defense unrelated to the merits . . ., (3) an unrelated claim of constitutional right, (4) a foreseeable surrebuttal to a likely Government rebuttal, and others." *Id.*

54. *Id.* at 1491 (Breyer, J., concurring).

55. *Id.* at 1489.

56. *Id.*

57. *Id.*

defendant need not show that similarly situated persons of other races were not prosecuted.[58]

IV. IMPLICATIONS

The primary effect the decision in *United States v. Armstrong*[59] will have on selective prosecution claims will be on the type and sufficiency of evidence necessary to prove the claim. No longer will simply showing that, for example, only black persons were prosecuted for a particular type of crime be sufficient.[60] The new standard requires at least some evidence creating a credible showing that nonblack persons could have been prosecuted, but were not.[61] Furthermore, simply relying on the general entitlement to discovery in Federal Rule of Criminal Procedure 16 is no longer sufficient.[62] Courts are no longer permitted to consider selective prosecution claims as defenses within the meaning of the rule.[63]

Critics of a higher burden for the entitlement to discovery point out that defendants face difficult evidentiary obstacles in making their selective prosecution claims because the evidence they need is often in the hands of the prosecutor.[64] Some have advocated a system where judicial notice of similarly situated persons who were not prosecuted could be established.[65] However, this turns the presumption of prosecutorial good faith on its head and removes from the defendant the burden of making at least a credible showing that there is some evidence of selective prosecution.[66]

The decision in *Armstrong* also recognizes that certain types of persons are more likely to commit certain types of crimes.[67] The Court criticized the court of appeals for presuming that people of all races commit all types of crimes.[68] It cited a sentencing report that indicated that certain types of people were in fact sentenced more frequently for certain

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58. *Id.* at 1488.
59. 116 S. Ct. 1480 (1996).
60. *Id.* at 1489.
61. *Id.*
62. *Id.* at 1485.
63. *Id.*
64. Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2067-68 (1996).
65. *See Armstrong*, 116 S. Ct. at 1494 (Stevens, J., dissenting).
66. *See* United States v. Olvis, 97 F.3d 739, 743 (4th Cir. 1996).
67. *See* 116 S. Ct. at 1488-89.
68. *Id.*

types of crimes.[69] Some argue that the statistics only lend credence to the existence of impermissible selective prosecution,[70] but the fact remains that the statistics would not exist if there was not sufficient evidence to convict the persons of the various categories of crimes.

Another important implication of the decision in *Armstrong* regards the amount of discretion remaining with the district courts to order discovery on selective prosecution. The Second Circuit, in *United States v. Al Jibori*,[71] has already considered the issue and found the holding in *Armstrong* to seriously undermine the discretionary authority of the district courts to order discovery.[72] In fact, it was the Second Circuit that established the discretionary power of the district courts to order discovery in *United States v. Berrios*.[73]

It is difficult to know the exact limitation the decision in *Armstrong* will have on the district court's discretionary power to order discovery. The majority did not indicate the standard of review it employed in reaching its decision.[74] However, at least arguably, the Second Circuit was prophetic in its conclusion that district court discretion has been undermined. In *United States v. Olvis*,[75] the Fourth Circuit found that because the Supreme Court had developed such rigorous requirements before discovery on selective prosecution claims can be compelled, district court orders on selective prosecution claims are reviewed de novo.[76] The court found the discovery orders were based on the legal adequacy of the evidence and therefore appellate courts are not required to defer to the discretion of the district courts.[77]

The decision in *Olvis* also noted significant obstacles in showing that similarly situated persons of other races were not prosecuted.[78] The district court had ruled that five white unindicted members of a cocaine conspiracy ring were similarly situated to the black indicted members of the ring because they all had similar involvement in the criminal enterprise.[79] However, the district court was reversed because it had

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69. *Id.* (citing United States Sentencing Commission's 1994 Annual Report, indicating that more than 90% of the persons sentenced in 1994 for crack cocaine trafficking were black, 93.4% of convicted LSD dealers were white, and 91% of those convicted for pornography or prostitution were white).

70. *See id.* at 1494 (Stevens, J., dissenting).

71. 90 F.3d 22 (2d Cir. 1996).

72. *Id.* at 25.

73. 501 F.2d 1207 (2d Cir. 1974).

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

75. 97 F.3d 739 (1996).

76. *Id.* at 743.

77. *Id.*

78. *Id.* at 744.

79. *Id.*

focused only on the relative culpability of the persons in deciding they were similarly situated.[80] According to the three-judge panel of the Fourth Circuit, defendants are similarly situated only when "their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them."[81] In utilizing the variety of factors the Fourth Circuit found relevant to determine whether a person is similarly situated for selective prosecution purposes,[82] it would seem that the government could often articulate factors leading to the conclusion that the individuals being compared are not similarly situated.

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80. *Id.*

81. *Id.*

82. *Id.* A finding that the defendants are not similarly situated could be based on any of the following factors: offers of immunity to defendants who are more cooperative, the relative strength of the cases against the defendants, the fact that the defendant's role in the crime could differ, the fact that a defendant may be facing prosecution by state or other authorities, the defendant's candor and willingness to plead guilty, the amount of resources required to prosecute a defendant may differ, the potential impact that a prosecution of a particular defendant will have on other prosecutions, and the prosecutorial priorities for prosecuting certain types of crimes. *Id.*