**United States v. Armstrong**

517 U.S. 456 (1996)

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In this case, we consider the showing necessary for a defendant to be entitled to discovery on a claim that the prosecuting attorney singled him out for prosecution on the basis of his race. We conclude that respondents failed to satisfy the threshold showing: They failed to show that the Government declined to prosecute similarly situated suspects of other races.

In April 1992, respondents were indicted in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute more than 50 grams of cocaine base (crack) and conspiring to distribute the same, in violation of 21 U. S. C. §§ 841 and 846, and federal firearms offenses. For three months prior to the indictment, agents of the Federal Bureau of Alcohol, Tobacco, and Firearms and the Narcotics Division of the Inglewood, California, Police Department had infiltrated a suspected crack distribution ring by using three confidential informants. On seven separate occasions during this period, the informants had bought a total of 124.3 grams of crack from respondents and witnessed respondents carrying firearms during the sales. The agents searched the hotel room in which the sales were transacted, arrested respondents Armstrong and Hampton in the room, and found more crack and a loaded gun. The agents later arrested the other respondents as part of the ring.

In response to the indictment, respondents filed a motion for discovery or for dismissal of the indictment, alleging that they were selected for federal prosecution because they are black. In support of their motion, they offered only an affidavit by a "Paralegal Specialist," employed by the Office of the Federal Public Defender representing one of the respondents. The only allegation in the affidavit was that, in every one of the 24 § 841 or § 846 cases closed by the office during 1991, the defendant was black. Accompanying the affidavit was a "study" listing the 24 defendants, their race, whether they were prosecuted for dealing cocaine as well as crack, and the status of each case.

The Government moved for reconsideration of the District Court's discovery order. With this motion it submitted affidavits and other evidence to explain why it had chosen to prosecute respondents and why respondents' study did not support the inference that the Government was singling out blacks for cocaine prosecution. The federal and local agents participating in the case alleged in affidavits that race played no role in their investigation. An Assistant United States Attorney explained in an affidavit that the decision to prosecute met the general criteria for prosecution, because

"there was over 100 grams of cocaine base involved, over twice the threshold necessary for a ten year mandatory minimum sentence; there were multiple sales involving multiple defendants, thereby indicating a fairly substantial crack cocaine ring; ... there were multiple federal firearms violations intertwined with the narcotics trafficking; the overall evidence in the case was extremely strong, including audio and videotapes of defendants; ... and several of the defendants had criminal histories including narcotics and firearms violations." Id., at 81.

The Government also submitted sections of a published 1989 Drug Enforcement Administration report which concluded that "[l]arge-scale, interstate trafficking networks controlled by Jamaicans, Haitians and Black street gangs dominate the manufacture and distribution of crack." J. Featherly & E. Hill, Crack Cocaine Overview 1989; App. 103.

In response, one of respondents' attorneys submitted an affidavit alleging that an intake coordinator at a drug treatment center had told her that there are "an equal number of caucasian users and dealers to minority users and dealers." Id., at 138. Respondents also submitted an affidavit from a criminal defense attorney alleging that in his experience many nonblacks are prosecuted in state court for crack offenses, id., at 141, and a newspaper article reporting that federal "crack criminals ... are being punished far more severely than if they had been caught with powder cocaine, and almost every single one of them is black," Newton, Harsher Crack Sentences Criticized as Racial Inequity, Los Angeles Times, Nov. 23, 1992, p. 1; App. 208-210.

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The requirements for a selective-prosecution claim draw on "ordinary equal protection standards." Wayte v. United States, 470 U. S. 598 (1985). The claimant must demonstrate that the federal prosecutorial policy "had a discriminatory effect and that it was motivated by a discriminatory purpose.” To establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. This requirement has been established in our case law since Ah Sin v. Wittman, 198 U. S. 500 (1905).

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Having reviewed the requirements to prove a selective prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

The parties, and the Courts of Appeals which have considered the requisite showing to establish entitlement to discovery, describe this showing with a variety of phrases, like "colorable basis," "substantial threshold showing," Tr. of Oral Arg. 5, "substantial and concrete basis," or "reasonable likelihood," Brief for Respondents Martin et al. 30. However, the many labels for this showing conceal the degree of consensus about the evidence necessary to meet it. The Courts of Appeals "require some evidence tending to show the existence of the essential elements of the defense," discriminatory effect and discriminatory intent. United States v. Berrios, 501 F.2d 1207, 1211 (CA2 1974).

In this case we consider what evidence constitutes "some evidence tending to show the existence" of the discriminatory effect element. The Court of Appeals held that a defendant may establish a colorable basis for discriminatory effect without evidence that the Government has failed to prosecute others who are similarly situated to the defendant. We think it was mistaken in this view. The vast majority of the Courts of Appeals require the defendant to produce some evidence that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law.

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In the case before us, respondents' "study" did not constitute "some evidence tending to show the existence of the essential elements of" a selective-prosecution claim. The study failed to identify individuals who were not black and could have been prosecuted for the offenses for which respondents were charged, but were not so prosecuted. This omission was not remedied by respondents' evidence in opposition to the Government's motion for reconsideration. The newspaper article, which discussed the discriminatory effect of federal drug sentencing laws, was not relevant to an allegation of discrimination in decisions to prosecute. Respondents' affidavits, which recounted one attorney's conversation with a drug treatment center employee and the experience of another attorney defending drug prosecutions in state court, recounted hearsay and reported personal conclusions based on anecdotal evidence. The judgment of the Court of Appeals is therefore reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

[Justices Souter, Ginsburg and Breyer wrote concurring opinions.]

JUSTICE STEVENS, dissenting.

Federal prosecutors are respected members of a respected profession. Despite an occasional misstep, the excellence of their work abundantly justifies the presumption that "they have properly discharged their official duties." United States v. Chemical Foundation, Inc., 272 U. S. 1, 14-15 (1926). Nevertheless, the possibility that political or racial animosity may infect a decision to institute criminal proceedings cannot be ignored. Oyler v. Boles, 368 U. S. 448, 456 (1962). For that reason, it has long been settled that the prosecutor's broad discretion to determine when criminal charges should be filed is not completely unbridled.

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The Court correctly concludes that in this case the facts presented to the District Court in support of respondents' claim that they had been singled out for prosecution because of their race were not sufficient to prove that defense. Moreover, I agree with the Court that their showing was not strong enough to give them a right to discovery, either under Rule 16 or under the District Court's inherent power to order discovery in appropriate circumstances. Like Chief Judge Wallace of the Court of Appeals, however, I am persuaded that the District Judge did not abuse her discretion when she concluded that the factual showing was sufficiently disturbing to require some response from the United States Attorney's Office. See 48 F.3d 1508, 1520-1521 (CA9 1995). Perhaps the discovery order was broader than necessary, but I cannot agree with the Court's apparent conclusion that no inquiry was permissible.

The District Judge's order should be evaluated in light of three circumstances that underscore the need for judicial vigilance over certain types of drug prosecutions. First, the Anti-Drug Abuse Act of 1986 and subsequent legislation established a regime of extremely high penalties for the possession and distribution of so-called "crack" cocaine. Those provisions treat one gram of crack as the equivalent of 100 grams of powder cocaine. The distribution of 50 grams of crack is thus punishable by the same mandatory minimum sentence of 10 years in prison that applies to the distribution of 5,000 grams of powder cocaine…

Second, the disparity between the treatment of crack cocaine and powder cocaine is matched by the disparity between the severity of the punishment imposed by federal law and that imposed by state law for the same conduct. For a variety of reasons, often including the absence of mandatory minimums, the existence of parole, and lower baseline penalties, terms of imprisonment for drug offenses tend to be substantially lower in state systems than in the federal system. The difference is especially marked in the case of crack offenses. The majority of States draw no distinction between types of cocaine in their penalty schemes; of those that do, none has established as stark a differential as the Federal Government. For example, if respondent Hampton is found guilty, his federal sentence might be as long as a mandatory life term. Had he been tried in state court, his sentence could have been as short as 12 years, less worktime credits of half that amount.

Finally, it is undisputed that the brunt of the elevated federal penalties falls heavily on blacks. While 65% of the persons who have used crack are white, in 1993 they represented only 4% of the federal offenders convicted of trafficking in crack. Eighty-eight percent of such defendants were black. United States Sentencing Commission, Special Report to Congress: Cocaine and Federal Sentencing Policy 145 (Feb. 1995).

The extraordinary severity of the imposed penalties and the troubling racial patterns of enforcement give rise to a special concern about the fairness of charging practices for crack offenses. Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny by the federal judges in that district. In my view, the District Judge, who has sat on both the federal and the state benches in Los Angeles, acted well within her discretion to call for the development of facts that would demonstrate what standards, if any, governed the choice of forum where similarly situated offenders are prosecuted.

The criticism that the affidavits were based on "anecdotal evidence" is also unpersuasive. I thought it was agreed that defendants do not need to prepare sophisticated statistical studies in order to receive mere discovery in cases like this one. Certainly evidence based on a drug counselor's personal observations or on an attorney's practice in two sets of courts, state and federal, can" 'ten[d] to show the existence'" of a selective prosecution. Ante, at 468. Even if respondents failed to carry their burden of showing that there were individuals who were not black but who could have been prosecuted in federal court for the same offenses, it does not follow that the District Court abused its discretion in ordering discovery. There can be no doubt that such individuals exist, and indeed the Government has never denied the same. In those circumstances, I fail to see why the District Court was unable to take judicial notice of this obvious fact and demand information from the Government's files to support or refute respondents' evidence.

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In sum, I agree with the Sentencing Commission that "[w]hile the exercise of discretion by prosecutors and investigators has an impact on sentences in almost all cases to some extent, because of the 100-to-1 quantity ratio and federal mandatory minimum penalties, discretionary decisions in cocaine cases often have dramatic effects." Special Report 138.7 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. Cf. McCleskey v. Kemp, 481 U. S. 279, 366 (1987) (STEVENS, J., dissenting). In this case, the evidence was sufficiently disturbing to persuade the District Judge to order discovery that might help explain the conspicuous racial pattern of cases before her court. I cannot accept the majority's conclusion that the District Judge either exceeded her power or abused her discretion when she did so. I therefore respectfully dissent.