

5.3 Equal Protection Limits on Selective Prosecution

A. Identifying Selective Prosecution

The following list is not exhaustive, but may be helpful in considering whether your client may have been subjected to unconstitutional selective prosecution:

- Have you noticed that only (or primarily) defendants of a certain race or races are prosecuted for a specific crime or category of crimes within your judicial district?
- Does your client face more severe charges than equally or more culpable co-defendants of a different race, with comparable prior record levels?
- Is there evidence that your client is facing more severe charges than similarly situated offenders because of the race of the victim in your client's case? Similarly, have you noticed that only offenders charged with victimizing members of a certain race face certain charges or penalty enhancements? Does the race of the victim play a role in which defendants are offered favorable outcomes, such as a PJC or a deferred prosecution agreement?
- Do your Black or Latino clients tend to receive less favorable plea offers than your similarly situated White clients?
- Have you noticed racial disparities in the deferral of defendants to diversionary courts, such as drug treatment courts, in which defendants may earn dismissals or reduction of charges?
- Are racial minorities in your district more frequently prosecuted as habitual felons than similarly situated White defendants?
- Was your Black client referred for federal prosecution while similarly situated White defendants were tried in state court? *See United States v. Jones*, 36 F. Supp. 2d 304, 311–13 (E.D. Va. 1999) (the challenged program “would be vulnerable on selective prosecution grounds if African-American defendants were routinely diverted from state to federal prosecution while prosecutors allowed similarly situated Caucasian defendants to remain in state court”). In such a case, it may be the federal defender who will need to investigate a claim of selective enforcement, but the state defender may provide useful context about the number and type of cases that are “federalized.” In order to spot possible patterns of disparate transfers to federal court, state defenders could keep records of such transfers, collaborate with federal defenders to investigate potential violations, and/or discuss any concerning patterns with the district attorney for that district.
- Was your Black client, following an acquittal in federal court, arrested on state charges stemming from the same event, while defendants of other races are not prosecuted in state court following an acquittal on similar charges in federal court? *See* Gail Robinson, [Selective Prosecution](#), THE ADVOCATE, May 2008, at 5, 5. *Cf.* G.S. 90-97 (prohibiting prosecution under North Carolina's Controlled Substances Act of acts forming the basis of a conviction or acquittal in federal court).
- Has the prosecutor, or any member of the district attorney's office involved in your client's case, said anything to you, the media, or others indicating that race may have

played a role in a prosecutorial decision in your client's case? *See, e.g., Wake D.A. Rejected Plea Deal in Taft Murder Case*, WRAL.COM (July 25, 2012) (reporting defense attorney's recollection of comments by district attorney, based on which he believed that race was a factor in the prosecutor's decision to pursue the death penalty).

Addressing charges of particular concern. Racial disparities may be greater in some types of prosecutions than in others. For example, a recent study found that, in North Carolina in 2011, Black people represent 21.5% of the state's total population, 69.6% of the habitual felon prison population, and 53.2% of the prison population incarcerated for drug offenses. *See* NCAJ Racial Justice Task Force, [NC Habitual Felon Prison Population Data – June 2011](#), NCAJ.COM (last visited Aug. 4, 2014); NCAJ Racial Justice Task Force, [NC Drug Prison Population Data – June 2011](#), NCAJ.COM (last visited Aug. 4, 2014). Many of the well-known selective prosecution claims have been raised in response to drug prosecutions. *See, e.g., United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998); *see also supra* § 1.3G, Legislation (explaining how crack-cocaine penalties resulted in racial disparities in punishment). Attorneys have also raised claims that the exercise of prosecutorial discretion has contributed to racial disparities in habitual felon prosecutions. *See* Habitual Felon Motion and Affidavit in the Race Materials Bank at www.ncids.org (select "Training & Resources").

B. Potential Benefits of Raising Selective Prosecution Claims

Reasons for raising claim. There are several reasons for raising good faith claims of selective prosecution, even though they may be difficult to win:

- In some instances, you may prevail on the merits. *See, In re Register*, 84 N.C. App. 336, 346 (1987) (dismissing juvenile petitions against several co-defendants after finding that a prosecutor engaged in selective prosecution in violation of the Equal Protection Clause by making the ability of a juvenile to pay compensation to a victim the "determinative factor in the decision of whether to file a complaint as a juvenile petition").
- Where the evidence suggests that your client may have been subjected to selective prosecution, investigating and raising a claim of selective prosecution is consistent with your ethical obligation of zealous advocacy. *See* North Carolina Rules of Professional Conduct 0.1[2] ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").
- If a client appears to have been the subject of selective prosecution, you are, in all likelihood, the only person who can effectively inquire into the possibility of inequitable treatment.
- Selective prosecution claims, even if unsuccessful in district or superior court, may lay the groundwork for a successful appeal. The failure to object to selective prosecution usually waives the issue for appellate review or federal review.

- Data collected as part of a selective prosecution investigation may be useful in subsequent cases involving similar issues, charges, or state actors.
- Even when unsuccessful, litigating selective prosecution may reduce disparities by drawing the attention of court actors to the possibility that race may be playing a role in case decisions, which may cause those concerned to consider the possible influence of implicit racial bias. *See supra* § 1.3D, Implicit Bias.
- While reported cases of success on selective prosecutions claims are rare, this scarcity may not be an accurate reflection of the potential for positive results. On occasion, when a defendant's selective prosecution claim is strong, an attractive plea offer or a dismissal in the interests of justice may lead to a favorable result for the client not reflected in any judicial opinion. *See, e.g.*, Racial Disparity Project Website, [Summary of Selective Enforcement Litigation](http://RDP.DEFENDER.ORG), RDP.DEFENDER.ORG (last visited Aug. 4, 2014).
- Prosecutorial responses to discovery requests in selective prosecution claims, whether voluntary or compelled, can reveal instructive information about the prosecutorial charging processes and may lead to greater dialogue between defense attorneys and prosecutors about ways to reduce racial disparities in prosecutions.
- Litigating selective prosecution claims may lead to the development of selective prosecution jurisprudence that accounts for the potential influence of implicit bias. *See supra* § 1.3D, Implicit Bias.

Case study: Raising a claim of selective prosecution. Below are the reflections of Assistant Federal Defender Gregory Davis on raising a claim of selective prosecution in a federal case:

I raised a claim of racially selective prosecution in a federal case when I believed that there was strong evidence supporting the claim and I knew that raising the claim was in my client's best interest.

My client and his juvenile co-defendant, both young African American males, were charged with killing a former UNC student body president, a young White woman. From the outset, I could not identify any aspects of the charged offense that justified seeking the death penalty in federal court, other than the identity of the victim. My suspicion that the victim's race and identity as a widely admired student leader played a role in the prosecution of my client was supported by statistical data I discovered on the SBI website concerning similar cases. In the history of the Middle District of North Carolina, there was only one other case in which the death penalty was sought in federal court. The facts of that case were more egregious than the facts of my client's case and, in that case, I represented one of the two co-defendants and was able to persuade the prosecutors not to seek the death penalty at an early stage of the case. I also discovered other cases with multiple victims and more heinous crimes that were not tried capitally in the Middle District. Because it appeared to me that the decision to try my client capitally in federal court was based on the race and identity of the victim, I filed a motion to bar the death penalty based on selective prosecution and/or for discovery of information pertaining to the government's decision to charge the defendant and pursue the case capitally.

After filing the selective prosecution motion, I was able to negotiate a plea to a life sentence. The judge did not rule on the motion because it never advanced to a hearing. However, the filing of the

motion may have played a role in the prosecutor's eventual willingness to accept a plea to a life sentence.

While I don't believe that the decision to prosecute my client capitally in federal court was motivated by conscious racism, I do believe that race influences all of our decisions, consciously and unconsciously. I have known the prosecutor in the case for a long time and consider him a friend. I feel certain that he was upset when the motion was filed, but the case has now been resolved, and we are still friends. It hasn't had a negative impact on our ability to work well together in other cases. In any event, I cannot let concerns about a prosecutor's reaction dissuade me from filing a meritorious motion on my client's behalf. One has to be selective in determining when to raise the issue of race. However, when the evidence suggests that race has played a role in my client's prosecution, it is my duty to raise the issue.

C. Selective Prosecution Distinguished from Selective Enforcement

Selective prosecution and selective enforcement claims may both arise in a given case. For this reason, this chapter should be considered in conjunction with the principles on selective enforcement discussed in Chapter 2. *See supra* § 2.3, Equal Protection Challenges to Police Action. Both claims involve a defendant's allegation that he has received harsher treatment than similarly situated individuals in the criminal justice system on account of his race in violation of his right to equal protection of the law. In some cases, the evidence may suggest that a defendant's criminal prosecution was influenced by race, but it may be unclear whether law enforcement officers, prosecutors, or both were responsible for the exercise of discretion. In such cases, it may be important to raise claims of both selective enforcement and selective prosecution.

While the case law often blurs the distinction between selective enforcement and selective prosecution, these two practices are distinct. *See supra* "Selective enforcement distinguished from selective prosecution" in § 2.3E, Burden of Proof and Burden Shifting. Racially selective enforcement of the law occurs when police or other law enforcement officers make enforcement decisions based on race, and racially selective prosecution occurs when a prosecutor treats one accused person less favorably than another based on race. The elements of the selective prosecution and selective enforcement claims are identical, but courts may accord more deference to prosecutorial decision-making in light of concerns that are unique to the district attorney's office:

This broad discretion [afforded prosecutors] rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial

effectiveness by revealing the Government's enforcement policy. All of these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Wayte v. United States, 470 U.S. 598, 607–08 (1985).

D. Elements of a Selective Prosecution Claim

Racially discriminatory selective prosecution violates the right to equal protection guaranteed by both the United States Constitution and the North Carolina Constitution. *United States v. Armstrong*, 517 U.S. 456 (1996); *State v. Rogers*, 68 N.C. App. 358, 368 (1984); see generally *supra* § 2.3, Equal Protection Challenges to Police Action. The exercise of selectivity in enforcing criminal statutes is inherent in the prosecutorial function and, standing alone, is not a denial of equal protection. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Oyler v. Boles*, 368 U.S. 448, 456 (1962) (“[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.”). To sustain a claim of selective prosecution, a defendant must show “that in the exercise of . . . discretion there has been intentional or deliberate discrimination by design.” *In re Register*, 84 N.C. App. 336, 341, 346 (1987) (prosecutor engaged in selective prosecution in violation of the Equal Protection Clause by making the ability of a juvenile to pay compensation the “determinative factor in the decision of whether to file a complaint as a juvenile petition”). As with all equal protection claims, a claim of selective prosecution will succeed where the defendant demonstrates that the prosecution of the case had a discriminatory effect and was motivated by a discriminatory purpose. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (“It is appropriate to judge selective prosecution claims according to ordinary equal protection standards.”). The two prongs of an equal protection claim of selective prosecution are discussed in more detail in the succeeding sections.

Significance of “some evidence” of discriminatory effect and discriminatory intent.

In interpreting federal discovery rules, the United States Supreme Court has held that discovery related to selective prosecution allegations will be granted only if defendants first demonstrate “some evidence” of discriminatory effect and discriminatory intent. See *United States v. Armstrong*, 517 U.S. 456, 463 (1996); see *infra* § 5.4A, Obtaining Discovery Relevant to a Selective Prosecution Claim (discussing significance of this ruling in North Carolina courts). For this reason, when analyzing the two elements of a selective prosecution claim, many of the federal rulings discussed below focus on whether the defendant has presented “some evidence” sufficient to obtain discovery.

E. First Prong of a Selective Prosecution Claim: Discriminatory Effect

“Similarly situated” defined. To establish that a particular prosecution or prosecutorial policy had a discriminatory effect, a defendant must demonstrate that similarly situated individuals belonging to a different racial group were not prosecuted or received more favorable treatment. *United States v. Armstrong*, 517 U.S. 456, 465 (threshold for discovery is “a credible showing of different treatment of similarly situated persons”); *Ah*

Sin v. Wittman, 198 U.S. 500 (1905); *State v. Pope*, 213 N.C. App. 413 (2011) (defendant raising selective prosecution claim must show “that he has been singled out for prosecution while others similarly situated and committing the same acts have not” (quotation omitted)); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999) (similarly situated White defendants receiving more favorable treatment constituted evidence of discriminatory effect). A claim of selective prosecution will also lie where the charging decision is influenced by the race of the victim. See *State v. Garner*, 340 N.C. 573, 587 (1995) (affirming trial court’s rejection of selective prosecution claim based in part on the finding that “[t]here is no evidence before the Court that the District Attorney in making these decisions is in any way influenced by the race, sex or national origin of the defendant or the victim”).

The defendant’s ability to demonstrate discriminatory effect will often turn on the court’s understanding of the term “similarly situated.” See, e.g., *State v. Johnson*, 125 Wash. App. 1040 (Wash. Ct. App. 2005) (unpublished) (analyzing definition of “similarly situated” individuals that trial court used to define scope of discovery in selective enforcement case). The leading case on selective prosecution, *United States v. Armstrong*, 517 U.S. 456, 458 (1996)—in which the Supreme Court overturned an order requiring the Government to provide discovery related to allegedly racially selective prosecution of crack cocaine offenses because the defendants “failed to show that the Government declined to prosecute similarly situated suspects of other races”—left this term largely undefined. The United States Supreme Court has not defined this critical term in other cases. See Giovanna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 586 (2011) (“[m]any important equal protection opinions contain no substantive ‘similarly situated’ analysis”).

“Similarly situated” in North Carolina courts. Defendants raising claims of selective prosecution should always raise parallel claims under article I, section 19 of the North Carolina Constitution. While some North Carolina appellate decisions examining constitutional claims of selective prosecution cite the leading U.S. Supreme Court cases on the topic, there has not been a North Carolina appellate decision expressly adopting federal standards when reviewing claims of selective prosecution based on the N.C. Constitution. See, e.g., *State v. Spicer*, 299 N.C. 309, 314 (1980); *State v. Howard*, 78 N.C. App. 262 (1985). North Carolina cases concerning selective prosecution have held that selectivity in prosecution is permissible when based on assessments of “the likelihood of successful prosecution, the social value of obtaining a conviction as against the time and expense to the State, and [the prosecutor’s] own sense of justice in the particular case.” *State v. Spicer*, 299 N.C. 309, 311 (1980) (internal quotations omitted); *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662 (1971); *State v. Blyther*, 175 N.C. App. 226, 228 (2005). As the North Carolina Supreme Court confirmed in *McNeill v. Harnett County*, 327 N.C. 552 (1990), interpretations of federal constitutional protections, while persuasive, do not control the North Carolina Supreme Court’s construction of rights guaranteed by the North Carolina Constitution.

“Similarly situated” in federal courts. The Fourth Circuit has adopted a narrow interpretation of “similarly situated” for federal claims of selective prosecution. In *United*

States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996), the Court held that 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.” The *Olvis* court provided this list of possible legitimate prosecutorial factors justifying differential treatment of different offenders:

- the strength of the evidence against a particular defendant;
- the defendant’s role in the crime;
- the defendant’s candor and willingness to plead guilty;
- the amount of resources required to convict a defendant;
- the extent of prosecutorial resources;
- the potential impact of a prosecution on related investigations and prosecutions; and
- prosecutorial priorities for addressing specific types of illegal conduct.

Id.; see also *United States v. Khan*, 461 F.3d 477, 498 (4th Cir. 2006) (upholding denial of discovery motion on selective prosecution claim in reliance on the *Olvis* court’s definition of “similarly situated”). According to the Fourth Circuit’s formulation, if the individuals of another race who were treated more favorably than your client can be distinguished on any of the above-listed bases, they are not “similarly situated.”

North Carolina courts are not bound by the narrow interpretation of “similarly situated” in *Olvis*. Some observers have posited that the definition announced in *Olvis* misconstrues the *Armstrong* holding, as the court appears to have replaced “similarly situated” with “identically situated.” See, e.g., Thomas P. McCarty, Note, *United States v. Khan*, 461 F.3d 477 (4th Cir. 2006): *Discovering Whether “Similarly Situated” Individuals and the Selective Prosecution Defense Still Exist*, 87 NEB. L. REV. 538, 562 (2008) (arguing that *Olvis* elevated the similarly situated requirement announced in *Armstrong* by requiring that defendant and those receiving more favorable treatment be “virtually identical”).

Other jurisdictions have adopted a more flexible approach to “similarly situated” in selective prosecution cases. A typical formulation, used by the Second Circuit, is that when identifying similarly situated individuals for comparison to the defendant, “exact correlation is neither likely nor necessary; the test is whether a prudent person would think them roughly equivalent.” *Holmes v. Gaynor*, 313 F. Supp. 2d 345, 355 (S.D.N.Y. 2004) (quotation omitted); see also *Chavez v. Illinois State Police*, 251 F.3d 612, 636 (7th Cir. 2001) (in selective enforcement case court found no “magic formula” for determining who is similarly situated; the inquiry is a common sense one); *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008) (“A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced.”).

Illustrative cases: sufficient evidence of discriminatory effect. Whether similarly situated individuals must be virtually identical in all respects other than race, or merely similar, the defendant will need to present evidence substantiating his or her allegation

that similarly situated individuals of another race received more favorable treatment. In the following cases, the court held or suggested that the evidence was sufficient to show that a defendant was treated less favorably than similarly situated suspects of a different race or races:

United States v. Jones, 159 F.3d 969 (6th Cir. 1998). The Sixth Circuit Court of Appeals held that, where the police department in Murfreesboro, Tennessee, over a five year span of time, referred only the Black defendant and his White co-defendant “for a federal prosecution that involved crack cocaine, and failed to refer for federal prosecution eight [non-Black defendants] who were arrested and prosecuted for crack cocaine,” the defendant presented sufficient evidence to warrant discovery on a selective prosecution claim. While the number of defendants compared for purposes of alleging selective prosecution was small, the evidence of discriminatory intent in this case was fairly stark and may have been the deciding factor in the Court’s ruling that the district court abused its discretion by denying the defendant’s motion to compel discovery.

United States v. Greene, 697 F.2d 1229 (5th Cir. 1983). In a case that did not involve race, evidence that 300 people committed the same crime of participating in a strike while employed by the federal government, but only six (including three union leaders) were prosecuted, satisfied the first prong of the selective prosecution test. *Id.* at 1234 (cited with approval in *State v. Rogers*, 68 N.C. App. 358, 373 (1984)). In this case, the court was ruling on the merits of the defendants’ claims, not on a discovery motion.

United States v. Wilson, 639 F.2d 500, 504 (9th Cir. 1981). In a case involving a claim of selective prosecution in response to the exercise of a constitutional right, the court assessed the merits of the defendants’ claim, and found that evidence that hundreds of people committed the same tax-related offense as the defendant but an IRS investigator only recalled prosecuting tax protesters for the offense constituted some evidence of discriminatory effect. However, since defendants did not meet their burden of demonstrating that similarly situated offenders who did not exercise their constitutional right were treated differently, their selective prosecution claims did not succeed.

United States v. Tuitt, 68 F. Supp. 2d 4 (D. Mass. 1999). The federal district court found evidence of a significant racial disparity between federal and state defendants charged with similar crimes in the same geographic area sufficient to warrant discovery on a selective prosecution claim. In *Tuitt*, a Black defendant charged with a crack-cocaine offense in federal court presented evidence that Whites comprised 0% of defendants charged with crack-cocaine offenses in federal court in his region while they comprised at least 10% of defendants charged with crack-cocaine offenses in state court in his region. The court concluded that, by undertaking “a comprehensive survey of the local state courts in order to provide an appropriate comparison,” the defendant had succeeded in demonstrating some evidence of similarly situated White defendants receiving more favorable treatment, and was therefore entitled to discovery on his claims. *See supra* “Significance of ‘some evidence’ of discriminatory effect and discriminatory intent” in § 5.3D, Elements of a Selective Prosecution Claim.

Illustrative cases: insufficient evidence of discriminatory effect. Courts have found the following evidence insufficient to meet the “similarly situated” test:

United States v. Bass, 536 U.S. 862 (2002). The United States Supreme Court held that a nationwide study showing that the federal government seeks the death penalty against Black death-eligible defendants twice as often as White death-eligible defendants was insufficient to show some evidence of discriminatory effect. *See supra* “Significance of ‘some evidence’ of discriminatory effect and discriminatory intent” in § 5.3D, Elements of a Selective Prosecution Claim. The Court concluded that, “[e]ven assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decision-makers in respondent’s case), raw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*. And the statistics regarding plea bargains are even less relevant, since respondent was offered a plea bargain but declined it.”

United States v. Armstrong, 517 U.S. 456 (1996). The United States Supreme Court reversed a discovery order related to a defendant’s selective prosecution claim where the defendant’s evidence consisted of (1) an affidavit of a paralegal from a federal public defender’s office stating that all 24 crack-cocaine cases resolved by the office over the course of a year involved Black defendants; (2) a newspaper article reporting that federal defendants charged with crack offenses are punished more severely than those charged with powder cocaine offenses and that almost all federal crack defendants are Black; (3) an affidavit recounting an attorney’s conversation with a drug treatment center employee who stated that there are an equal number of White and non-White drug users and dealers; and (4) an affidavit from a criminal defense attorney who stated that non-Black crack offenders are typically prosecuted in state court. This evidence did not constitute “some evidence” of discriminatory effect because (1) the paralegal’s affidavit did not identify that similarly situated offenders of other races were not prosecuted; (2) the newspaper article pertained to disparities produced by federal sentencing laws, not the decision to prosecute; and (3) the attorneys’ affidavits consisted of hearsay, anecdotes, and personal conclusions.

In re United States, 397 F.3d 274 (5th Cir. 2005). The Fifth Circuit Court of Appeals has held that “sharing a charge alone,” i.e., being charged with the same offense, is not enough to establish that two offenders are similarly situated. “A much stronger showing, and more deliberative analysis, is required before a district judge may permit open-ended discovery into a matter that goes to the core of a prosecutor’s function.” In this case, the Latino co-conspirators were not similarly situated to the Black defendant because, during the commission of the crime, the defendant had a greater opportunity than the co-conspirators to mitigate the harm caused by the crime.

Johnson v. Outlaw, 659 F. Supp. 2d 732, 736 (M.D.N.C. 2009). Vague claims that similarly situated persons of other races and/or from other counties were not indicted as habitual felons are insufficient to demonstrate discriminatory effect. The defendant’s “failure to indicate the[] criminal histories [of those he alleged were similarly situated] is a critical omission where the issue is status as an habitual felon.” *Id.* at 736–37.

State v. Parks, 146 N.C. App. 568 (2001). The North Carolina Court of Appeals ruled that, although prosecutors in one judicial district may have a policy of charging all eligible defendants as habitual felons while prosecutors in a neighboring district do not, this is not evidence of discriminatory effect, as it does not show that the defendant was treated differently than similarly situated individuals of a different race, religion, or other arbitrary classification.

State v. Rogers, 68 N.C. App. 358, 373 (1984). The North Carolina Court of Appeals concluded that a similarly situated “class of two members is too statistically small a sampling to accurately measure a claim of selective prosecution.”

Evidence of discriminatory effect may be unnecessary in certain cases. When defense counsel has evidence of a direct admission of discriminatory intent by a prosecutor, it may not be necessary to present evidence of similarly situated members of another race receiving more favorable treatment. In *United States v. Armstrong*, the Supreme Court “reserve[d] the question whether a defendant must satisfy the similarly situated requirement in a case involving direct admissions by prosecutors of discriminatory purpose.” 517 U.S. 456, 469 n.3 (1996) (internal quotation omitted). In *United States v. Al Jibori*, 90 F.3d 22, 25–27 (2d. Cir. 1996), the Government introduced into evidence an affidavit of an Assistant U.S. Attorney explaining that the defendant was prosecuted for presenting a false passport at least in part because of his Iraqi national origin. Even in the absence of some evidence of discriminatory effect, this affidavit was enough to cause the U.S. Court of Appeals for the Second Circuit to remand the defendant’s case for further inquiry into his selective prosecution claim. *See supra* “Significance of ‘some evidence’ of discriminatory effect and discriminatory intent” in § 5.3D, Elements of a Selective Prosecution Claim.

F. Second Prong of a Selective Prosecution Claim: Discriminatory Intent

The second element of a selective prosecution claim is discriminatory intent. To demonstrate that differential treatment was “motivated by a discriminatory purpose,” *Armstrong*, 517 U.S. 456, 465, the defendant must show that the prosecutor’s action was “deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler v. Boles*, 368 U.S. 448, 456 (1962). As with claims of selective enforcement, discriminatory intent in a selective prosecution claim may be proven with direct or circumstantial evidence. *See supra* § 2.3C, Elements of a Selective Enforcement Claim.

There is some uncertainty about what sort of evidence would satisfy the defendant’s burden to demonstrate discriminatory intent in a case of selective prosecution. In the leading case of *United States v. Armstrong*, 517 U.S. 456 (1996), the court ruled that the defendants had not presented sufficient evidence of discriminatory effect to warrant discovery, and the court therefore declined to consider the defendant’s evidence of discriminatory intent. *See United States v. Thorpe*, 471 F.3d 652, 659 (6th Cir. 2006) (“For the purpose of satisfying the discriminatory-intent prong, what ‘some evidence’ means is not entirely clear.”); *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999)

(concluding that since the *Armstrong* Court “claims to address the discriminatory *effect* element only . . . it is hard to tell what evidence of *intent* a defendant must produce in order to obtain discovery,” and noting that the Court “in some ways appears to conflate the elements of effect and intent”); *see also supra* “Significance of ‘some evidence’ of discriminatory effect and discriminatory intent” in § 5.3D, Elements of a Selective Prosecution Claim. No United States Supreme Court case decided since *Armstrong* has addressed the proof necessary to show discriminatory intent.

Intent may be inferred where evidence of discriminatory effect is stark. In cases where the discriminatory effect is extreme, the discriminatory effect itself may satisfy the discriminatory intent prong. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). “If the Supreme Court [in *Armstrong*] meant to hold defendants to actual knowledge of a discriminatory choice on the part of a prosecutor . . . the discovery standard [the standard at issue in the case] would be impossible to meet. It is exceedingly rare for a prosecutor to admit that the decision to prosecute was based on ethnicity or nationality.” *United States v. Tuitt*, 68 F. Supp. 2d 4, 10 (D. Mass. 1999) (concluding that “[t]he evidence offered by Defendant suggests not only a discriminatory effect but—given the fact that no whites were prosecuted federally, although whites were prosecuted in the state courts—an inference of discriminatory intent”). *See also Washington v. Davis*, 426 U.S. 229, 254 (1976) (Stevens J., concurring) (“the line between discriminatory purpose and discriminatory impact is not . . . bright”); *United States v. Thorpe*, 471 F.3d 652, 661 (6th Cir. 2006) (recognizing that, if severe enough, statistical evidence of discriminatory effect can raise an inference of discriminatory intent); *United States v. Alameh*, 341 F.3d 167, 173 (2d Cir. 2003) (discriminatory purpose “may . . . be demonstrated through circumstantial or statistical evidence”).

For purposes of obtaining discovery, evidence of discriminatory impact, alone or in combination with other evidence, may constitute “some evidence” of discriminatory intent for purposes of obtaining additional discovery. *See supra* “Significance of ‘some evidence’ of discriminatory effect and discriminatory intent” in § 5.3D, Elements of a Selective Prosecution Claim; *see also infra* § 5.4A, Obtaining Discovery Relevant to a Selective Prosecution Claim. The Supreme Court has held that discriminatory “impact alone is [rarely] determinative and the Court must look to other evidence” to find discriminatory intent. *Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). This formulation suggests that, while discriminatory impact “alone” will not sustain a prima facie case, it may constitute “some evidence” of discriminatory intent, and “some evidence” is all that a defendant pursuing a selective prosecution claim needs at the discovery stage. *See United States v. Armstrong*, 517 U.S. 456, 468–69 (1996) (holding that, before defendant will be granted discovery on a claim of selective prosecution, he must show some evidence supporting such a claim); *Roberts v. United States*, 741 F.3d 152, 161 (D.C. Cir. 2014) (in a ruling on the merits, evidence of disparate impact was not irrelevant to equal protection claim but could not sustain it without evidence of discriminatory intent). *But cf. United States v. Thorpe*, 471 F.3d 652, 661 (6th Cir. 2006) (rejecting defendant’s argument that “the government’s pursuit of a program despite knowledge of that program’s discriminatory effect is by itself ‘some evidence’ of discriminatory intent”).

Practice note: In proving discriminatory intent, defendants should distinguish their claims from those in *McCleskey v. Kemp*, 481 U.S. 279 (1987), a capital case in which the Court ruled that discriminatory purpose could not be proven by system-wide statistical findings suggesting disparate impact. The *McCleskey* court acknowledged that it had “accepted statistics as proof of intent to discriminate in other contexts,” but concluded that such evidence was not sufficient in the capital sentencing context, because the nature of that decision and the “relationship of the statistics to that decision are fundamentally different.” *Id.* at 294–95.

In a non-capital case, a pretrial claim of selective prosecution will generally differ from the claim raised in *McCleskey* because it will focus on a single prosecutor or group of prosecutors instead of countless jurors and prosecutors, and because it will typically be filed shortly after the initiation of prosecution rather than “years after” the defendant has been convicted. *Id.* at 296 (quotation omitted); *see also Belmontes v. Brown*, 414 F.3d 1094, 1127 (9th Cir. 2005) (“statistics relating to the charging entity . . . are materially more probative of discrimination in capital charging than those considered by the Supreme Court in *McCleskey* . . . [and consequently] may support a prima facie showing of unlawful charging discrimination”), *rev’d on other grounds sub nom Ayers v. Belmontes*, 549 U.S. 7 (2006). Also, in cases in which defendants are seeking discovery, they can point out that the *McCleskey* ruling concerned the standard of proof necessary for proving discriminatory intent, not for seeking discovery.

G. Gathering Evidence to Support Selective Prosecution Claims

Gathering evidence of discriminatory effect. To develop a claim of selective prosecution on the basis of race, a defendant generally will need to examine statistical data from his or her judicial district. In some cases, extensive data collection may not be necessary, as when the defendant argues that he or she has been treated less favorably than similarly situated co-defendants in the case on account of race. *See, e.g., United States v. Jones*, 159 F.3d 969 (6th Cir. 1998) (police officers’ custom-made t-shirts celebrating arrest of two Black defendants—but not their White co-defendant—along with postcard sent by police officer to Black defendant awaiting trial featuring Black woman with bananas on her head constituted evidence of discriminatory intent). In such cases, evidence from the defendant’s case may be sufficient to demonstrate racially disparate impact. However, in most cases, the defendants’ claims will be broader in scope and will require data beyond that produced in his or her case.

Statistics sufficient to demonstrate the discriminatory effect prong of a selective prosecution claim (discussed *supra* in § 5.3E, First Prong of a Selective Prosecution Claim: Discriminatory Effect) will compare the group to which a selective prosecution claimant belongs with similarly situated individuals of other races. For example, a Black man in Durham County indicted as a habitual felon with an underlying offense of armed robbery and a prior record level of IV might gather data on the percentage of cases in which prosecutors have sought habitual felon indictments for other men in the geographic area with the same charge and record level, and examine whether the rates differ for offenders based on race.

Attorneys may obtain data from a variety of sources, including the ACIS computer system maintained by the Administrative Office of the Courts, which includes race of defendants, and the superior court docket sheets maintained by the Clerk of Court. *See* Habitual Felon Motion and Affidavit (using such sources in a motion to dismiss based on selective enforcement and selective prosecution) in the Race Materials Bank at www.ncids.org (select “Training & Resources”). For a list of sources of statistics relevant to selective prosecution claims, see *infra* Chapter 10, Sources of Information about Matters of Race.

For those working in public defender offices, information contained in the records of their own offices may prove a good starting point. For example, internal data reflecting the racial and ethnic makeup of clients facing drug charges or habitual felon sentencing enhancements and the outcome in those cases, including plea arrangements, may prove useful in litigating selective prosecution claims. Additionally, data on prosecutions for similar crimes in federal court, broken down by race, may provide evidence of differential treatment by state prosecutors of similarly situated offenders. *See United States v. Armstrong*, 517 U.S. 456, 470 (1996) (suggesting that one strategy for collecting evidence of selective prosecution in federal prosecution is to compare whether similarly situated persons of other races were prosecuted in state court but not in federal court); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999). Coordination with regional federal defender offices may facilitate gathering and analysis of such data. *See also* Bureau of Justice Statistics, [Federal Criminal Case Processing Statistics](http://www.bjs.gov), BJS.GOV (last visited Aug. 7, 2014) (a searchable database maintained by the U.S. Department of Justice).

Additionally, public health records may contain information about the estimated percentage of Black drug users in a given region over a certain time period, which can be compared with the percentage of Black defendants charged with drug possession in that region during the same time period. *See, e.g.*, KATHERINE BECKETT, [RACE AND DRUG LAW ENFORCEMENT IN SEATTLE](#) 28–34 (2008); *see also* Substance Abuse and Mental Health Services Administration, [Data, Outcomes, and Quality](#), SAMHSA.GOV (last visited Aug. 8, 2014). A report analyzing the racial and ethnic ethnographic composition of participants in the illegal drug market in Seattle, Washington contains examples of the types of data sources that may prove useful in conducting such comparisons, including drug use surveys of city residents, drug use surveys of public school students, mortality data collected by the Medical Examiner’s office, a survey conducted at a public health needle exchange agency, drug treatment admission data collected by the State, and an observational study of two of the city’s open air drug markets. KATHERINE BECKETT, [RACE AND DRUG LAW ENFORCEMENT IN SEATTLE](#) (2008).

Some district attorney’s offices may be willing to collect data regarding prosecutorial decisions to learn whether race is playing a role in them. Professor Angela Davis suggests that prosecutors employ Racial Impact Statements to examine the influence of race or ethnicity in prosecutions in their region and make the results of such analyses publicly available. Angela Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 54 (1998). One resource available to interested prosecutors is

the Vera Institute of Justice's Prosecution and Racial Justice Program, which partners with district attorneys' offices to analyze the racial impact of their discretionary decisions and to promote transparency regarding the results of their analysis and the programs instituted to address any discriminatory practices. *See infra* § 5.5, Beyond Litigation.

To meet the standards facing selective prosecution claimants, defendants will often need to partner with social scientists, public health researchers, or other interested academics to collect and analyze data relevant to an appropriate pool of similarly situated offenders. The data collected should be extensive enough to reflect any possible patterns of selective prosecution. For example, if you are investigating prosecution patterns for a common charge such as marijuana possession, data reflecting a one-year time period including your client's charge may be sufficient to indicate any possible pattern of selective prosecution. Graduate students in political science, statistics, mathematics, or public administration at local universities may be interested in conducting some of the necessary analysis. *See* Habitual Felon Motion and Affidavit (explaining analysis of the habitual felon data submitted in support of defendant's selective prosecution and selective enforcement claim) in the Race Materials Bank at www.ncids.org (select "Training & Resources"). In light of the statistical showing that is generally required to demonstrate selective prosecution, a defendant may have grounds to request funds to hire a statistician. *Compare State v. Moore*, 100 N.C. App. 217 (1990) (initial motion for statistical expert to analyze race discrimination in grand and petit juries granted; motion for funds for additional study denied), *rev'd on other grounds*, 329 N.C. 245 (1991), *with State v. Massey*, 316 N.C. 558 (1986) (finding defendant did not make adequate showing to warrant funds for a statistician). For a further discussion of requesting funds for expert assistance, see 1 NORTH CAROLINA DEFENDER MANUAL Ch. 5 (Experts and Other Assistance) (2d ed. 2013).

Gathering evidence of discriminatory intent. While *Armstrong* is not instructive on the subject of proving discriminatory intent, a broader survey of case law provides some guidance for lawyers about potential evidence of discriminatory intent:

- Evidence of the actions, statements, or practices of prosecutors will be most persuasive when it reflects the behavior of a narrow group of prosecutors in a specific county or even of a specific prosecutor. The Supreme Court in *Bass* suggested that a study revealing practices in a more discrete region would be more powerful than the broader showing of "nationwide statistics" presented by the defendant in that case. *United States v. Bass*, 536 U.S. 862, 863–64 (2002).
- Circumstantial evidence of factors other than disparate impact may constitute "some evidence" of discriminatory intent. *Johnson v. Outlaw*, 659 F. Supp. 2d 732, 737 (M.D.N.C. 2009) ("intent may be proved by circumstantial as well as direct evidence"). *See supra* "Significance of 'some evidence' of discriminatory effect and discriminatory intent" in § 5.3D, Elements of a Selective Prosecution Claim. For example, the "specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977); *see also United States v. Heatley*, 1999 WL 61816, at *16 (S.D.N.Y. Jan. 29, 1999) (unpublished) (in ruling on defendant's

discovery motion in support of his selective prosecution claim, then-District Judge Sotomayor noted that intent may be established by “circumstantial evidence of disproportionate impact”). In the selective prosecution context, that might include deviations from standard prosecutorial practices, such as a failure to offer a deferred prosecution in circumstances in which such an offer is generally made.

- Evidence that the prosecutor declined to prosecute one offender or group of offenders while proceeding against a comparable offender or group of offenders based on the ability or willingness of the non-charged group to pay restitution to a victim may demonstrate discriminatory intent. *In re Register*, 84 N.C. App. 336, 341, 352 (1987) (citations omitted) (prosecutor engaged in selective prosecution in violation of the Equal Protection Clause by making the ability of a juvenile to pay compensation the “determinative factor in the decision of whether to file a complaint as a juvenile petition”). This is an example of a race-neutral selective prosecution claim that, given the correlation between race and poverty, might serve as a useful tool in addressing potential racial disparities.
- Evidence that prosecutors “followed unusual discretionary procedures in deciding to prosecute” or failed to follow an office policy not to prosecute a certain crime may demonstrate discriminatory intent. *United States v. Greene*, 697 F.2d 1229, 1236 (5th Cir. 1983); *see also United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (defendant’s evidence of unusual procedures, including an agreement between the military and the Department of Justice that they would not prosecute registrants who turned in their draft cards rather than burning them, succeeded in shifting burden to prove nondiscriminatory intent to government); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (same).
- The U.S. Supreme Court “has accepted statistics as proof of intent to discriminate in certain limited contexts.” *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987) (explaining that “statistical proof normally must present a ‘stark’ pattern to be accepted as the sole proof of discriminatory intent under the Constitution”). Statistical evidence alone may be sufficient to show discriminatory intent if it involves extensive data collection, rigorous statistical analysis, and findings of gross disparities. In extreme cases, raw data has been stark enough on its own to demonstrate discriminatory intent. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), where a race-neutral ordinance was applied against all Chinese laundry-shop operators but not against other similarly situated laundry-shop operators and sophisticated multiple regression studies were not available, “the raw statistics were still accepted by the Supreme Court as proof of discriminatory intent.” Kristen E. Kruse, Comment, *Proving Discriminatory Intent in Selective Prosecution Challenges - An Alternative Approach to United States v. Armstrong*, 58 SMU L. REV. 1523, 1542 (2005); *see also McCleskey v. Kemp*, 481 U.S. 279, 293 n.12 (recognizing *Yick Wo* as a case in which raw data alone was sufficient to demonstrate both the discriminatory effect and discriminatory intent prongs of a selective prosecution claim); *United States v. Armstrong*, 517 U.S. 456, 466 (1996) (same). Even if insufficient alone to show discriminatory intent, statistical analysis may be used to bolster other evidence of discriminatory intent. *See supra* “Intent may be inferred where evidence of discriminatory effect is stark” in § 5.3F, Second Prong of a Selective Prosecution Claim: Discriminatory Intent.

- Discriminatory intent may be demonstrated by “direct admissions by [prosecutors] of discriminatory purpose.” *United States v. Al Jibori*, 90 F.3d 22, 25 (2d. Cir. 1996). In *Al Jibori*, the Government submitted an affidavit from an Assistant U.S. Attorney explaining that one of the reasons the defendant was prosecuted for presenting a false passport was his Iraqi national origin. *Id.* This apparently discriminatory purpose was confirmed by another Assistant U.S. Attorney on questioning from the district judge at a hearing on the matter. This evidence was enough to cause the U.S. Court of Appeals for the Second Circuit to remand the defendant’s case for further inquiry into his selective prosecution claim. *Id.* at 26–27.
- Demonstrating the prosecutor’s awareness of similarly situated offenders receiving preferable treatment may help establish discriminatory intent. *See, e.g., State v. Rogers*, 68 N.C. App. 358, 373 (1984) (defendant failed to show that “he was deliberately prosecuted on the basis of any impermissible ground” in part because he “presented no evidence to show that the [similarly situated offender] was called to the attention of a prosecutor”). In *Armstrong*, the U.S. Supreme Court suggested that the defendants may have been able to meet the discovery standard if they had investigated whether similarly situated defendants of other races were “known to . . . law enforcement officers, but . . . not prosecuted.” *United States v. Armstrong*, 517 U.S. 456, 470 (1996). Attorneys can create a record that prosecutors were aware of similarly situated offenders by putting them on notice in writing and filing it with the court.