## 5.4 Making Out a Claim of Selective Prosecution

### A. Obtaining Discovery Relevant to a Selective Prosecution Claim

**Importance of discovery to selective prosecution claims.** Discovery is important in a selective prosecution claim, as the decisions made by prosecutors generally are not publicly available. Therefore, evidence of discriminatory practices is difficult to uncover without discovery. *See Wayte*, 470 U.S. 598, 624 (Marshall J., dissenting) ("[M]ost of the relevant proof in selective prosecution cases will normally be in the Government's hands."). Where the State fails to comply with a discovery order pertaining to a selective prosecution claim, the court may impose sanctions, including potentially dismissal. *See People v. Ochoa*, 212 Cal. Rptr. 4 (Cal. Ct. App. 1985) (where the State refused to comply with a discovery order related to defendants' claim of selective prosecution based on race and the discovery materials would have allowed defendants to compare the population of offenders to the population of defendants prosecuted, the trial court properly dismissed the charges against the defendants).

**Discovery standard announced in *United States v. Armstrong*.** In interpreting federal rules, the United States Supreme Court held that, because a selective prosecution claim is not a defense to the merits of a criminal charge but instead is an independent claim of prosecutorial misconduct, 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 also United States v. Bass*, 536 U.S. 862, 863 (2002) (per curiam). The *Armstrong* court stated that the "showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims." 517 U.S. 456, 464. This creates what some have described as a Catch 22: selective prosecution claimants "cannot even get discovery without evidence, and one can rarely get evidence which will satisfy a court without discovery." Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 267 (2002); Kristen E. Kruse, Comment, *Proving Discriminatory Intent in Selective Prosecution Challenges - An Alternative Approach to United States v. Armstrong*, 58 SMU L. REV. 1523, 1534 (2005). While the discovery standard applicable to selective prosecution claims in federal court is rigorous, it is "less stringent" than that required to prove a selective prosecution claim on the merits. *United States v. James*, 257 F.3d 1173, 1178 (10th Cir. 2001). As one court observed, "defendants need not establish a prima facie case of selective prosecution to obtain discovery on these issues." *Id.*

In some federal criminal cases decided after *Armstrong*, courts have found that defendants presented the requisite "some evidence" of discriminatory effect and intent to satisfy the discovery standard. *See 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 prima facie evidence of discriminatory intent; referral of Black defendant for federal prosecution of crack cocaine charges combined with failure to refer for federal

prosecution eight non-Black defendants who were arrested and prosecuted for crack cocaine charges constituted "some evidence" of discriminatory effect); *United States v. Tuitt*, 68 F. Supp. 2d 4 (D. Mass. 1999) (where Black defendant was federally prosecuted for crack cocaine charges, evidence that no Whites were prosecuted for crack cocaine charges in four federal courts during a time period in which some Whites were prosecuted for crack cocaine charges in state courts in the same area constituted sufficient evidence of discriminatory effect and discriminatory intent for purpose of obtaining discovery).

**Discovery related to selective prosecution claims in North Carolina courts.** Since few North Carolina appellate cases have addressed selective prosecution claims in any detail, it is unclear whether North Carolina has adopted the discovery standard announced in *Armstrong*. In a case interpreting a previous version of North Carolina's discovery statute, the court denied discovery in a selective prosecution claim. *See State v. Rudolph*, 39 N.C. App. 293 (1979) (where defendant challenged prosecutor's "career criminal" program as a non-legislative enactment of a criminal law, defendant was not entitled to discovery of materials related to the program because, under previous version of discovery statute, they were not material to the preparation of the defense, intended for use by the State as evidence, or obtained from the defendant). However, now that North Carolina's discovery statute is broader, it may be easier for defendants to obtain such materials. *See* G.S. 15A-903; 1 NORTH CAROLINA DEFENDER MANUAL § 4.3 (Discovery Rights Under G.S. 15A-903) (2d ed. 2013). Further, whether or not the discovery statute specifically authorizes discovery related to claims of selective prosecution, the trial court has inherent authority to order disclosure if the discovery statutes do not specifically restrict disclosure. *See State v. Hardy*, 293 N.C. 105 (1977).

**Type of discovery relevant to selective prosecution claims.** When seeking discovery on a selective prosecution claim, the defendant should request information that will allow him to analyze whether race played a role in the prosecutorial decisions made in his case. The following example, from a selective prosecution claim in a federal cocaine prosecution, illustrates the type of information commonly sought by defendants raising claims of selective prosecution:

> 1. A list of all federal cases in which the defendant has been charged with a cocaine offense, specifying whether the charge involved cocaine base or cocaine powder.
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> 2. The racial or ethnic identity of each defendant in the listed case.
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> 3. A statement identifying (a) each of the law enforcement agencies, including joint federal-state-local task forces or other inter-Governmental organizations, involved in the selection of targets for investigation of cocaine powder or cocaine base criminal offenses, and (b) the policies followed in making that determination.
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> 4. Statements identifying (a) the agencies involved and (b) the policies

> followed in determining which particular persons will be prosecuted in state or federal court.
>
> 5. A statement of the practices followed in implementing each policy articulated in response to requests 3(b) and 4(b) including articulable criteria employed in actual practice.
>
> 6. An explanation of how the decisions to investigate and prosecute Defendant [] in the present case were made and how they were compliant with the policy and practices articulated in responses to requests 3 through 5.

*United States v. Tuitt*, 68 F. Supp. 2d 4, 17 (D. Mass. 1999).

Additionally, defendants may want to request any standards, policies, practices, or criteria employed by the district attorney's office to guard against the influence of racial, political, or other arbitrary or invidious factors in the selection of cases and defendants for prosecution. *See* Selective Prosecution Motion in the Race Materials Bank at www.ncids.org (select "Training & Resources"). The absence of such policies, in conjunction with other evidence, may lend support to a selective prosecution claim.

In some cases, the type of information described above may be voluntarily disclosed by the prosecution without the need for court-ordered discovery. *See, e.g.*, *United States v. Olvis*, 97 F.3d 739, 743 (4th Cir. 1996); *United States v. Turner* 104 F.3d 1180 (9th Cir. 1997); *United States v. Graham*, 146 F.3d 6, 9 (1st Cir. 1998).

### B. Selective Prosecution Motion

**Form of the motion.** Claims of selective prosecution should be raised in motions to dismiss all charges. The grounds for the motion to dismiss in a selective prosecution case are the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and article I, section 19 of the N.C. Constitution.

Motions to dismiss the indictment might be filed along with a motion in the alternative for discovery. The motions should include a description of all direct, circumstantial, and statistical evidence tending to show discriminatory effect and discriminatory intent in a defendant's prosecution, and should be accompanied by supporting exhibits. *See* Habitual Felon Motion and Selective Prosecution Motion in the Race Materials Bank at www.ncids.org (select "Training & Resources"). If the court does not find the evidence sufficient to dismiss the indictment, it may find a sufficient basis for granting the motion for additional discovery.

**Timing of the motion.** A selective prosecution claim should be raised pretrial or it may be deemed waived. *See, e.g.*, *People v. Carter*, 450 N.Y.S.2d 203 (N.Y. App. Div. 1982).

## C. Burden of Proof and Relief

"To prevail on a selective prosecution challenge, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not." *State v. Rogers*, 68 N.C. App. 358, 367 (1984) (quotation omitted). A defendant alleging "that he has been selectively prosecuted . . . must establish discrimination by a clear preponderance of proof." *State v. Pope*, 213 N.C. App. 413, 415–16 (2011) (internal quotation omitted). The burden shifting that occurs after a defendant sustains a prima facie case of selective prosecution is explained in Chapter 2. *See supra* § 2.3E, Burden of Proof and Burden Shifting.

When a criminal defendant prevails on a selective prosecution claim, the proper remedy is dismissal. *State v. Howard*, 78 N.C. App. 262, 266 (1985) (discussing this right in the context of selective enforcement); *see also supra* "Dismissal" in § 2.3F, Remedy for an Equal Protection Violation. It follows that if the selective prosecution concerns an enhancement, such as habitualization, the remedy would be dismissal of the enhancement. Any lesser remedy would be inadequate. *But see United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996) ("We have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.").

Dismissal may also be a sanction for discovery violations. *See generally* G.S. 15A-910 (listing permissible discovery sanctions). Where the trial court orders the State to produce discovery relevant to the defendant's selective prosecution claim and the State refuses to comply with the discovery order, the court may dismiss the indictment. *See People v. Ochoa*, 212 Cal. Rptr. 4 (Cal. Ct. App. 1985).

## D. Evidentiary Hearing

The North Carolina Supreme Court has held that defendants are entitled to an evidentiary hearing on a selective prosecution claim if they present "substantial evidence" of discrimination. *State v. Spicer*, 299 N.C. 309, 314 (1980); *see also State v. Rogers*, 68 N.C. App. 358, 367 (1984). Where a defendant presents "no evidence that he was subjected to any intentional or deliberate discrimination upon any unjustifiable standard," he will not be granted an evidentiary hearing on his selective prosecution claim. *Spicer*, 299 N.C. 309, 312. In considering the defendant's selective prosecution claim in *State v. Rogers*, 68 N.C. App. 358, 371 (1984), the North Carolina Court of Appeals observed that, while "the trial court did not conduct a full evidentiary hearing and take the testimony of witnesses, the court did consider defendant's proffer of proof and statements made by the attorneys which, without objection, were received as evidence. Based on these, the court made extensive findings of fact and conclusions of law that the prosecution did not result from impermissible considerations." In these circumstances, the court ruled that the "hearing afforded the defendant in this case met the requirements of due process." *Id.* at 371 n.4.

*Spicer* does not specify whether "substantial evidence" constitutes something less than a prima facie showing, but the court's use of that term suggests that less is required. Federal courts have reached different conclusions about whether a defendant must establish a prima facie showing of selective prosecution before an evidentiary hearing will be granted. *See, e.g.*, *United States v. Peterson*, 652 F.3d 979, 982 (8th Cir. 2011) (suggesting that the applicable standard is "some evidence"); *United States v. Parham*, 16 F.3d 844, 848 n.1 (8th Cir. 1994) (Heaney, J., dissenting) (noting split); *United States v. Bourgeois*, 964 F.2d 935, 938 (9th Cir. 1992) (requiring prima facie case); *United States v. Silien*, 825 F.2d 320, 322 (11th Cir. 1987) ("An evidentiary hearing is not automatically required; instead, the defendant must present facts 'sufficient to create a reasonable doubt about the constitutionality of a prosecution. . . .'" (citation omitted)).

### E. Success on the Merits

Defendants appealing a trial court's denial of a selective prosecution claim have achieved success on the merits in North Carolina appellate courts on at least one occasion, although it did not involve race discrimination. In *In re Register*, 84 N.C. App. 336, 347 (1987), the North Carolina Court of Appeals dismissed 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."