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REVERSING THE STANDARD: THE DIFFICULTY IN PROVING SELECTIVE PROSECUTION

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INTRODUCTION

The state has the burden of proving all elements of an offense beyond all reasonable doubt. Now picture a scenario where the defendant holds all the incriminating evidence necessary to convict him of murder. This includes, but is not limited to police reports, affidavits, depositions, coroners' reports, and witnesses. Also picture that the defendant is not required to disclose this evidence until a rigorous standard has been met by the prosecution. This standard requires the prosecution to produce incriminating evidence of criminal intent and that the suspect did, in fact, unlawfully cause the death of the victim. Additionally, the defendant's criminal background, which is also not discoverable and is unknown to the prosecutor, will show that the defendant has a unique modus operandi in how he kills his victims—and he has several convictions which would prove his guilt if these facts were discoverable. The rationale behind this process is to protect the presumption of a defendant's innocence until proven guilty, even if discovery of the evidence would show that this murder is consistent with the unique modus operandi of the defendant's previous convictions. Therefore the withholding of evidence is justified because the State has the burden to prove its case even if it does not have evidence or know what evidence exists to prove its case.

This scenario might sound unlikely, but a similar process takes place when trying to prove selective prosecution. In 1996 the Sixth Circuit of the United States Court of Appeals upheld established law that "to establish a discriminatory effect in a race case, the claimant must make" a "credible showing" that "similarly situated individuals of a different race were not prosecuted."[1] The court in *United States v. Thorpe* remarked that the standard is "rigorous" but relatively light.[2]

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1. United States v. Armstrong, 517 U.S. 456, 465, 470 (1996).

2. United States v. Thorpe, 471 F.3d 652, 657 (6th Cir. 2006) (citing United States v. Jones, 159 F.3d 969, 978 (6th Cir. 1998)).

This paradoxical standard is made more difficult by the prosecutor generally having all of the evidence, and the claimant having to prove the specific intent of the prosecutor. Intent is a mental operation usually proven by circumstantial evidence, words, acts, or policy.[3] However, to prove selective prosecution, because it is an independent assertion of misconduct, discovery is not available pursuant to the Federal Rules of Criminal Procedure.[4] This essentially requires the claimant to prove his case without substantial incriminating evidence. Not only does this standard produce an insuperable standard for discovery, the countervailing goal of judicial economy encourages this insuperable standard. This standard must be changed.

This note considers the need for prosecutorial discretion but will focus on the need for more accountability and oversight in prosecutorial investigation and selection. At the surface of the issue is proving discriminatory intent and whether there exists similarly situated individuals of a different race that the prosecution could have but did not prosecute. The deeper issue is proving intent with only "background" statistics because the most probative evidence cannot be produced. Additionally, given the history of racism in the criminal justice system and its institutional nature, racial disparities in the criminal justice system are accepted without examining the policies and methods of criminal investigations. The historical backdrop of de jure segregation when paired with rampant racial disparity destroys the presumption of a legitimate exercise of prosecutorial discretion. To maintain the current standard preventing discovery for selective prosecution claims when one can show significant racial disparities related to the offense are present is a denial of Due Process and Equal Protection under the law.

THE CASE

The Eastern District of Michigan indicted James Thorpe for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g).[5] Thorpe moved for dismissal on account of selective prosecution. He moved for discovery of all government files regarding the Project Safe Neighborhoods (PSN) program, a Department of Justice initiative encouraging state and federal collaboration to reduce gun crime which Thorpe was being prosecuted under. Thorpe submitted several statistical reports in support of his motion. The most pertinent report was from the Federal Defender's Offices in Detroit and Flint, which revealed that of the sixty-eight pending firearm cases with state origin in

3. Washington v. Harris, 650 F.2d 447 (2d Cir. 1981).
4. FED. R. CRIM. P. 16 ; *Jones*, 159 F.3d at 975 (citing *Armstrong*, 517 U.S. at 463).
5. *Thorpe,* 471 F.3d at 654.

both offices, sixty were African American defendants.[6] The PSN program however was not mentioned by the report offered by Thorpe nor from the U.S. Sentencing Commission reports.[7] "According to the PSN web site, the U.S. Attorney must have a strategic plan to *attack* gun crime . . . and must report semi-annually to the Department of Justice . . . ."[8] But, "there were no set criteria for how a case is determined to qualify for a PSN prosecution."[9]

Thorpe argued that because of this, it was impossible to define a similarly situated individual for PSN prosecutions.[10] The court ordered the Government to produce for in camera review the following documents, *inter alia*, related to PSN:

> (1) [t]he criteria for cooperation and for prosecution or rejection of state cases;
> (2) [t]he strategic plan regarding the Project;
> (3) [a] list of what documents and information the U.S. Attorney retains for cases prosecuted or rejected as part of [PSN] . . . ; [and]
> [(4)] [a]ny statistics on the cases the U.S. Attorney prosecutes or rejects by race.[11]

The court granted the motion because Thorpe could not support his selective prosecution claim without the requested material and the harm to the government which had already produced some of the materials in a different case would be minimal.[12] The government refused to comply and the indictment was dismissed with prejudice.

On December 27, 2006, the Sixth Circuit for the Court of Appeals held that the lower court abused its discretion when it ordered discovery of government files regarding the program.[13] The order dismissing the indictment was reversed, *inter alia,* because: (1) the defendant did not establish discriminatory effect of state referrals to federal government as required for discovery; (2) alleged knowledge by government prosecutors that referrals being made under PSN was having discriminatory effect was not some evidence of discriminatory intent; (3) alleged impossibility of showing some discriminatory intent without first engaging in discovery did not excuse satisfaction of discovery requirement; and (4) evidence that counties selected for the project had the highest proportion of African Americans did not satisfy the discriminatory intent threshold.[14]

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6. *Thorpe*, 471 F.3d at 656-57.
7. *Id.* at 657.
8. *Id.* at 655.
9. *Id.* at 658.
10. *Id.*
11. *Id.* at 656.
12. *Id.* at 655.
13. *Thorpe*, 471 F.3d at 652.
14. *Id.* at 656.

BACKGROUND

The court's jurisdiction is proper because the district court's dismissal of an indictment constituted a "final appealable order."[15] The standard of review is the abuse of discretion standard derived from *Armstrong*: "Even if respondents failed to carry their burden of showing that there were individuals who were not African American 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."[16] "A district court abuses its discretion when it 'relies on erroneous finding of fact, *applies the wrong legal standard, misapplies the correct legal standard* when reaching a conclusion, or makes a clear error of judgment.'"[17]

Both parties agree that *Armstrong* governs the court's disposition of discovery requests.[18] *Armstrong* held, as the court noted in *United States v. Jones,* selective prosecution is not a defense to the merits of a criminal charge, "but an independent assertion of misconduct in which discovery is not available pursuant to Federal Rule of Criminal Procedure 16."[19] The presumption of regularity supports prosecutorial decisions, and in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.[20] "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring rests entirely in his discretion.'"[21] However, a prosecutor's discretion is "subject to constitutional constraints imposed by the equal protection component of the Due Process Clause of the Fifth Amendment."[22] When the basis for prosecution is examined this diverts the prosecutor's resources and may disclose the Government's prosecutorial strategy.[23] This justifies the rigorous standards for the elements of a selective prosecution and for discovery in aid of such a claim.[24]

A defendant hoping to get discovery must show "some evidence" tending to prove the existence of the essential elements of the de-

15. *See* United States v. Bass, 266 F.3d 532, 535-36 (6th Cir. 2001).
16. United States v. Armstrong, 517 U.S. 456, 482 (1996) (Stevens J., dissenting) (emphasis added).
17. Reeb v. Ohio Dep't of Rehab. & Corr., 435 F.3d 639, 644 (6th Cir. 2006) (emphasis added).
18. *Thorpe*, 471 F.3d at 657.
19. United States v. Jones, 159 F.3d 969, 975 (6th Cir. 1998).
20. United States v. Chem. Found., Inc., 272 U.S. 1 (1926).
21. *Armstrong*, 517 U.S. at 464 (quoting Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978)).
22. Bolling v. Sharpe, 347 U.S. 497, 500 (1954).
23. *See Armstrong*, 517 U.S. at 458.
24. *Id.*

fense, discriminatory effect and discriminatory intent. [25] Although, the "some evidence" standard is rigorous, it is still relatively light, because a defendant need not prove his case in order to justify discovery on an issue.[26] To show discriminatory effect "some evidence" means a credible showing that "similarly situated individuals of a different race were not prosecuted."[27] Even where discriminatory effect and discriminatory intent are proved and discovery is compelled, this does not necessarily prove selective prosecution or result in dismissal of the indictment. [28] The prevailing test to show discriminatory intent predates *Armstrong*, which recognizes that requirements for selective prosecution draw from equal protection standards.[29] In *McCleskey v. Kemp*, it was held that in all but "certain limited contexts," general statistics, without more, are insufficient to show discriminatory intent.[30] A defendant must show discriminatory purpose, which implies the decision maker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.[31] "A discriminatory effect which is severe enough can provide sufficient evidence of discriminatory intent.[32] But, such a finding remains the exceedingly rare exception to the general rule."[33]

At least two federal courts, in addition to the Sixth Circuit in *Thorpe,* have questioned this approach in the discovery context.[34] "In *Bradley*, the court noted that '*McCleskey* did not address the significance of disparate impact [in] the context of a discovery request,' where the standard is 'more lax.'"[35] "[T]he *Bradley* court determined the *McCleskey* standard did not govern its determinations of evidentiary sufficiency at the discovery stage."[36] In *United States v. Bass*, the Sixth Circuit noted that although *McCleskey* will "preclude Bass's selective prosecution claim if, at the end of discovery, he fails to show any additional evidence [of intentional discrimination, *McCleskey*] does not . . . pose any bar to Bass at the preliminary stage."[37]

Additionally, Justice Stevens' dissent in *Armstrong* pointed out that a study from the Federal Public Defender's Office showing that

25. *Id.*
26. *Jones,* 159 F.3d at 978.
27. *Armstrong,* 517 U.S. at 468.
28. *See Jones,* 159 F.3d at 978.
29. *Armstrong,* 517 U.S. at 465.
30. McCleskey v. Kemp, 481 U.S. 279, 292 (1987).
31. *Id.* at 298.
32. United States v. Tuitt, 68 F. Supp. 2d 4, 10 (D. Mass. 1999).
33. *Id.*
34. *Thorpe*, 471 F.3d at 660.
35. *McCleskey,* 481 U.S. at 281.
36. *Thorpe*, 471 F.3d at 660.
37. *Bass,* 266 F.3d at 540.

twenty-four out of twenty-four defendants prosecuted for crack offenses were black.[38] The dissent noted that "[s]tatistics are not, of course, the whole answer, but nothing is as emphatic as zero."[39] The Supreme Court also invalidated the Court of Appeals presumption that people of all races commit all types of crime because there is no authority cited to support the proposition while statistics from the United States Sentencing Commission appear to show otherwise.[40] Those statistics showed more than 90% of the persons sentenced in 1994 for crack cocaine trafficking were African American.[41] The statistics also showed that 93.4% of convicted LSD dealers were white, and 91% of those convicted for pornography or prostitution were white.[42] Concerning the case of crack, far greater numbers of whites are believed to be guilty of using the substance.[43] However, a split majority held that the district court abused its discretion in ordering discovery for the selective prosecution claim.

ANALYSIS

Rife with contradictions, speculation, and logic which misses the point, the Sixth Circuit's holding in *Thorpe* is surprisingly consistent with precedent.[44] As a backdrop, the inaccurate statutory interpretation given to Rule 16(a)(1)(E) helped to create bad precedent.[45] As Justice Breyer points out, the defendant is permitted to inspect all "documents" in the government's possession material in preparing his defense.[46] The majority's conclusion that this is limited to the Government's case in chief is clearly inaccurate given the structure of the rule. The text has three distinct categories, each followed by a semicolon and joined by the conjunctive word "or."[47] This is significant because the improper reading of this rule is what placed defendants trying to prove a claim of selective prosecution in this Catch-22 position. A "defendant's defense" can include a simple response, an affirmative defense unrelated to the merits, an unrelated claim of constitutional right, or a foreseeable surrebuttal to a likely Government rebuttal.[48] A claim of selective prosecution can fall within this

38. *Armstrong*, 517 U.S. at 480 (Stevens, J. dissenting).
39. *Id.* at 482 n.6 (quoting United States v. Hinds County School Bd., 417 F.2d 852, 858 (C.A. Miss. 1969) (per curiam)).
40. *Armstrong*, 517 U.S. at 469.
41. *Id.* (quoting Table 45 of U.S. Sentencing Commission's 1994 Annual Report p.107).
42. *Id.* Ibid at 41, Table 13.
43. *Armstrong*, 517 U.S. at 482.
44. *Thorpe*, 471 F.3d at 654.
45. *See* FED. R. CRIM. P. 16(a)(1)(E).
46. *Armstrong*, 517 U.S. at 471 (Breyer, J., concurring).
47. FED R. CRIM P. 16(a)(1)(E).
48. *Armstrong*, 517 U.S. at 471-72.

category. Additionally, "in the civil context, privileged work product 'is discoverable on a substantial showing of necessity or justification.'"[49] It is reasonable to say that in a criminal context where life and liberty are at stake, that the production of all evidence material to a defense is needed so that a defendant "may" not be wrongfully convicted, or become a victim of selective prosecution. This is in accord with the burden the Government faces to overcome the defendant's presumption of innocence. However, this is outweighed to preserve the prosecutor's discretion, for reasons of judicial economy, and the presumption that the prosecution was carried out in good faith. The reasoning in *Thorpe* is only tangential to those legitimate reasons.

In *Thorpe,* the Court acknowledged that the PSN referral scheme was not a clearly defined statute and conceded that it is impossible to find a similarly situated defendant for PSN prosecutions without knowing any of the criteria in the referral scheme,[50] but determines the argument ultimately misses the point. The court further suggests because Thorpe was charged with a specific statute, he could find persons charged under the same statute by the State, and were known to federal law enforcement officers but were not prosecuted.[51] This reasoning is circular because PSN's criteria for referring cases are unknown. Even if Thorpe could find individuals charged with violating the same statute, his case is not any stronger if the individuals found would be rejected by the PSN criteria anyway. The court focused on finding persons similarly charged, but the issue was not the charge itself, but how PSN refers cases from the state to federal level which includes multiple gun related charges.

The applied reasoning of diversion of resources is null here because some of the information requested would have been fairly easy to produce. Basic information that was requested such as the criteria for cooperation and rejection of state cases and statistics on the cases the U.S. Attorney prosecutes or rejects by race are legitimate and nonintrusive ways of holding this agency accountable. The inspection of these documents in camera also preserves the Government's accepted, though speculative, need to not disclose its strategy. Pre-*Armstrong* and pre-*Bass*, case law supports this proposition.[52] This would justify disclosure of the strategic plan regarding PSN, and a list of what documents the U.S. Attorney retains for cases prosecuted as part of PSN.

49. *Id.* at 474 (quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947)) (internal quotation marks omitted).

50. *Thorpe*, 471 F.3d at 658.

51. *Id.* at 659.

52. *See Thorpe*, 471 F.3d at 665; *see also Bass,* 536 U.S. at 862.

However, the Ninth Circuit blindly followed the Supreme Court's precedent in a page-long per curiam opinion in *United States v. Bass*.[53] The court adopted the *Bass* decision which reversed this court's holding although the court notes that the Supreme Court did not address or mention the in camera review requirement and the Sixth Circuit concludes that Thorpe's argument is void.[54] While both cases deal with accusations of selective prosecution, the documents requested by Thorpe shed light on a vague referral scheme as opposed to the capital sentencing scheme in *Bass*. Even more disturbing is the report published by the Department of Justice pre-*Bass* suggesting the capital sentencing scheme is plagued with ethnic bias and the post-*Bass* call for a moratorium on the death penalty in part because of racial bias.[55] This illustrates the absurdity that even where evidence does exist to prove selective prosecution, if it is in the prosecutor's hands, the defendant cannot get discovery without producing "some evidence" of discriminatory intent and effect.

Not only had Thorpe been denied the discovery needed for clarity of how he was being prosecuted and who was a similarly situated individual, but he also had to show that PSN policy was intentionally discriminatory and that it affected people similarly situated. Thorpe conceded he would not meet the standard of showing "some evidence" because he did not know how or where to find the evidence. In *United States v. Arena-Ortiz*, the court asserted that it is the nature of a standard that there will be times when that standard cannot be met.[56] Additionally, "merely demonstrating that better evidence cannot be obtained without discovery does not suddenly render otherwise insufficient evidence sufficient."[57] While Thorpe may not have sufficient evidence available to him, if there are articulable reasons which create reasonable doubt that the presumption of a good faith prosecution exists, has the state met their burden?

Thorpe attempted to identify similarly situated individuals through reports from two Federal Public Defender's Offices (FDO) in Eastern Michigan. The general purpose of PSN prosecutions was to curb firearm-related crime in America by collaborations between federal and state prosecutors, and Thorpe identified sixty eight pending firearm cases with state origin known to the FDOs. These reports showed that sixty cases involved African American defendants and only three in-

53. *Bass*, 536 U.S. 862.

54. *Id.*

55. *See* American Bar Association, Death Penalty Moratorium Implementation Project: Didn't the U.S. Supreme Court conclude that the death penalty is constitutional? If so, why is the A.B.A. calling for a moratorium?, http://www.abanet.org/moratorium/faq.html#a11. .

56. United States v. Arena Ortiz, 339 F.3d 1066 (9th Cir. 2003).

57. *Id.* at 1071.

volved Caucasian defendants.[58] The court rejects this because there is no specification of similarly situated defendants on the particular charge Thorpe faces. However, the PSN program itself does not deal exclusively with that particular charge and is directed at referring state cases to the federal level. Furthermore, what the court itself suggests coincides with what Thorpe produced. The court suggested Thorpe find Caucasian persons known to federal law enforcement officers not prosecuted in federal court. Thorpe produced only three Caucasian defendants, out of individuals for "overall firearm charges," but these three were known to the FDO and originated from Michigan state prosecutions. These individuals may not be exactly situated as Thorpe is, but given the available evidence, the nature of the charges, and the state and federal cooperation, they appear to be similarly situated. However, even though the court acknowledges the limited number of Caucasians prosecuted, it overlooks the disparate impact presented by the statistics.

An "unattributed report" showed the top five counties in the Eastern District of Michigan with the highest percentage of African Americans in population were Wayne County (42.2%), Genessee County (20.4%), Washtenaw (12.3%), Oakland (10.1%), and Jackson (7.9%).[59] Given this information, there was no inquiry into why approximately 88% of African Americans, sixty out of sixty-eight, were being prosecuted for firearm-related offenses when this percentage is double the amount of African Americans in that district.[60] The court briefly addresses this by saying "general statistics without more substantiation are insufficient to show discriminatory intent."[61] However, these statistics provide the basis for discovery to meet the court's standard.

Furthermore, the court wrongfully repeats the reasoning of a Ninth Circuit case which held that a district court abused its discretion when it ordered discovery in a selective prosecution case. That court rejected the theory that: "[s]election of a particular community for a particular enforcement operation constitutes racial discrimination if it is foreseeable that the ethnic composition of the community will provide most of the government's targets," with an argument that is underdeveloped and without support.[62] The Ninth Circuit recognized that when almost all defendants charged with a particular offense have the same skin tone, it is natural to think ethnic prejudice must be

58. *Thorpe,* 471 F.3d. at 658.

59. *Id.* at 655.

60. *Id.*

61. *Id.* at 660.

62. *See* United States v. Turner, 104 F.3d 1180, 1185-86 (9th Cir. 1997).

at work.[63] However, the court enunciated that one familiar with demographic and occupational patterns would know that if a particular crime comes into vogue it may be a feature of that neighborhood, occupation, or another racial characteristic.[64] No support of any kind is cited in supporting this proposition, yet, *Thorpe* adopted this.

The remainder of the Ninth Circuit's argument is not analogous to *Thorpe*, although it too is adopted. The remainder explains that there is a high possibility of there being an overwhelming amount of minority suspects in inner city Los Angeles, as opposed to Beverly Hills, because of the racial compositions of those areas but this does not necessarily mean selective prosecution is occurring.[65] Even though no statistics were shown in support of that argument, it still does not apply in *Thorpe* where an overwhelming amount of African Americans (88%) were being prosecuted for firearm offenses, whereas the population of African Americans in the district (26.5%), less than a third of that. Therefore, *Thorpe* adopted speculative reasoning in support of an argument with dissimilar facts, primarily being a drastic difference in racial composition.

Thorpe also accepted the underdeveloped reasoning established in *Armstrong* that specific crimes are unique to different cultural communities. *Armstrong* refutes the lower court's presumption that people of all races commit all types of crime, because no support was presented for it whereas the government presented statistics from the U.S. Sentencing Commission showing that 90% of persons sentenced for crack cocaine trafficking were African American, while 91% of those convicted for pornography or prostitution were white.[66] "Anecdotal" evidence, which was not objected to by the government and ignored by the court, showed that on the state level there were similarly situated white cocaine traffickers who were not prosecuted federally. Furthermore, comparing a 91% conviction rate for pornography is not nearly as disproportionate for a racial group that is 75% of the population, when a 90% conviction rate exists for 12% of the population. Absent multi-discipline arguments, when read in context the evidence the Sentencing Commission presented does not contradict the presumption that people of all races commit all types of crimes, rather it highlights the disparate impact of crack cocaine prosecutions on the African American community. Pursuant to this, the court overlooked a possible disparate impact claim which could satisfy a discovery request because the established standard is more lax.[67] Furthermore,

63. *Id* at 1185.
64. *Id.*
65. *Id.*
66. *Armstrong,* 517 U.S. at 469.
67. *Thorpe,* 471 F.3d at 660.

the district court did not abuse its discretion in ordering discovery when the established standard was not abridged in *Bass* which did not address the same facts or the in camera review requirement.

This court notes in *Bass* and *Bradley,* that *McCleskey* does not address the significance of disparate impact in a discovery request.[68] This means if at the end of discovery the defendant cannot show additional evidence of intentional discrimination the claim fails, but discovery is allowable.[69] By ignoring "background" statistics, missing the point of what Thorpe was alleging, and adopting reasoning from a similar case with distinguishable facts, Thorpe was precluded from qualifying his claim in an exception which this circuit recognized. Disparate impact occurs when a facially neutral practice nonetheless results in racial discrimination, and there is no sufficient justification proffered.[70] Discriminatory intent does not need to be proved in this context. African Americans in the district made up only 42% of the population in the highest African American populated county, and only 26% overall in that whole district, but were 88% of the prosecutions in that same district. No articulable reasons were given for this disparity and it is logical to conclude that these firearm offenses of state origin, known to the FDOs, are having a disparate impact among African Americans. Even though PSN is not directly inculpated or exculpated by these statistics, only the discovery of the requested documents can provide the clear evidence needed to evaluate the PSN referral program.

The insuperable task of proving intent, which is a mental operation, can be proven by acts, words, or policy; but with one side having all of the information, such a test has a one-sided outcome.[71] However, where discriminatory effect is severe enough, discriminator purpose is implied, but this is an exceedingly rare exception.[72] In *Jones,* flagrant and uncontroverted evidence of discriminatory intent was found in the form of the arresting officers sending racially charged postcards, and wearing custom made t-shirts with inappropriate language and pictures at the arrest scene. However, the evidence Thorpe presents falls far short of the showing made in *Jones.*[73] In *Yick Wo v. Hopkins,* the city denied 200 permit applications submitted by Chinese nationals, but granted all 80 permit applications submitted by non-Chinese na-

68. *Id.*
69. *Id.*
70. BLACK'S LAW DICTIONARY 504 (8th ed. 2004).
71. Washington v. Harris, 650 F.2d 447, 450 (2d Cir. 1981).
72. *See* United States v. Tuitt, 68 F. Supp.2d 4, 10 (D. Mass. 1999).
73. *Thorpe,* 471 F.3d at 658.

tionals prohibiting the operations of laundries in wooden buildings.[74] The court in *Yick Wo* stated that

> if [the law] be fair on its face yet applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.[75]

In *Gomillion v. Lightfoot,* a square voter district went to a twenty-eight sided figure which resulted in the exclusion of all but 99% of possible African American voters but not a single eligible white voter.[76] *Gomillion* echoed the reasoning of *Yick Wo*, but these famous cases that contain a standard Thorpe falls short of reaching are extreme cases that would seldom be found in modern society. In fact, *Yick Wo* took place in 1886, and *Gomillion* in Alabama in 1960. This standard of absolute evidence will rarely if ever exist in modern society. However, this does not mean de facto segregation does not exist in modern society. Furthermore, neither *Gomillion* nor *Yick Wo* were criminal cases with allegations of selective prosecution. Yet, *Armstrong* adopted these standards which *Thorpe,* in blissful ignorance to support judicial economy, upheld.

Even in *Jones,* where the conduct of the police officers was described as "outrageous, unprofessional, childish, and generally disgusting," the district court did not order discovery.[77] This court later found that there was sufficient evidence to find discriminatory intent, but insufficient evidence to prove discriminatory effect. While this decision was remanded to compel discovery, even in the extreme case presented in *Jones* there was insufficient evidence to prevail on a claim of selective prosecution.

CONCLUSION

It can be argued that in a selective prosecution case the defendant becomes the prosecutor and the prosecution becomes the defense. The defendant must have enough evidence to indict the prosecutor to continue to the trial and prove a charge of selective prosecution. While this is true in some aspects, the distinguishing factor is the prosecutor is not deprived of life, liberty, or property if he does not get a true bill, whereas the defendant in this analogy is. Moreover, in an indictment, evidence that is inadmissible at trial is allowed at the indictment, which is not the case here. Even if the trial does not pro-

74. Yick Wo v. Hopkins, 118 U.S. 356 (1886).
75. *Id.* at 373-74.
76. Gomillion v. Lightfoot, 364 U.S. 339, 340-41 (1960).
77. *Jones,* 159 F.3d at 969.

duce a guilty verdict or get past the indictment, after all the relevant admissible evidence is discovered the defendant can be adjudicated and held accountable for their actions. Thereafter, any reasonable doubt of any wrongdoing has been alleviated.

Historically, because African Americans are only about 13% of the nation's population and the only group continually affected by this issue, it is understandable why the presumption of propriety attaches to a prosecutor's discretion. But, there are clear racial disparities in the criminal justice system from the jail population, to capital punishment, to sentencing ranges for offenders possessing crack. In the jail population, according to the Bureau of Justice, per 100,000 people only 736 white people are incarcerated, as opposed to 1,826 Hispanics, and 4,879 African American.[78] *McCleskey* tried to use statistics to show racial disparity in the use of the death sentence in 1986. The dissent in *Callins v. Collins*, stated "[i]f any discernable basis could be identified for the selection of those few who were chosen to die, it was the 'constitutionally impressible basis of race,'" in 1994.[79] Finally, in 2007, the American Bar Association called for a moratorium on the death penalty in part because of racial disparities in its application.[80] In sentencing, the U.S. Sentencing Commission lowered the range of jail sentencing for possession of crack under which African Americans have been disproportionately sentenced under harsher penalties.[81] In sum,

> [i]rrespective of whether the evidence could prove sufficient to support a charge . . . it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African Americans in jury selection. This evidence, of course, is relevant to the extent that it casts doubt on the legitimacy of the motives underlying the State's actions . . . Even if we presume at this stage the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it.[82]

The standard should not be to prove or disprove discriminatory intent of the individual implementing policy when there is evidence of policy and practices set into motion prior to the end of dejure segregation are just being continued. This is a general approach to a specific problem. Modern prosecutors do not have to specifically select Afri-

78. Dep't of Justice, Bureau of Justice Statistics, Correctional Populations in the U.S. 2006, http://www.ojp.usdoj.gov/bjs/abstract/cpusst.htm tbl. 14.

79. Callins v. Collins, 510 U.S. 1141, 1143 (1994) (quoting Furman v. Georgia, 408 U.S. 238, 310 (1972)).

80. Jaime Jansen, *ABA Urges Nationwide Death Penalty Moratorium*, JURIST, Oct. 29, 2007, http://jurist.law.pitt.edu/paperchase/2007/10/aba-urges-nationwide-moratorium-on.php.

81. *U.S. Sentencing Ranges Lowered for Crack Cocaine*, NPR REPORTS AND THE ASSOCIATED PRESS, Nov. 2, 2007, http://www.npr.org/templates/story/story.php?storyId=15885119.

82. Miller-El v. Cockrell, 537 U.S. 322, 347 (2003).

can Americans because of their race, for a disparate impact to exist. This ignores the ingrained policies from slavery, to Black Codes, to separate but equal polices that helped form this society and its criminal justice system. Additionally, it is not being proposed that because prosecutors prosecute in spite of awareness of an African American's race that this is an abuse of discretion. However, when a triad of factors indicate that the offense charged is not unique to a given region, there is one racial group far in excess of their proportional share of the population to a particular offense, and there is no showing of a justifiable reason for this phenomenon, discovery is mandatory. While the prosecutor is the icon who will be examined first, policies, strategies, and other pertinent factors involving the group and the criminal justice system that interacts with them must also be examined.

The standard must be changed. While the reasoning in *Thorpe* is fairly consistent with *Armstrong,* it is also an extension of the contradictions and unexamined policies of selective prosecution. Additionally, the resulting extension of *Armstrong* derived from *Thorpe* misunderstanding the allegation that the PSN referral scheme as a whole is biased as opposed to a particular charge in the PSN referral scheme. A conscious re-evaluation of policies or institutions that formerly and openly approved discrimination to either prove or disprove any improprieties from is needed. After this evaluation of whether certain policies or strategies lead to selective investigation, which produces probable cause for a prosecutor to accept a case, then and only then has the state met their burden of proving all elements of the crime and disproved any abuse of discretion, beyond all reasonable doubt.