

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v.

CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN,
SAMEEH HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATIM NAJI FARIZ

**RESPONSE OF THE UNITED STATES TO DEFENDANT'S MOTION
TO DISMISS FOR SELECTIVE PROSECUTION AND/OR
DISCOVERY ON THE SELECTIVE PROSECUTION CLAIM**

The United States of America, by Paul I. Perez, United States Attorney, Middle District of Florida, hereby responds to Defendant Fariz's Motion to Dismiss for Selective Prosecution and/or for Discovery on the Selective Prosecution Claim (Doc. 571).¹

It is well-established that “[t]he decision as to which crimes and criminals to prosecute is entrusted by the Constitution not to the judiciary, but to the executive who is charged with seeing that laws are enforced.” United States v. Smith, 231 F.3d 800, 807 (11th Cir. 2000), citing U.S. Const. Art II, § 3. Moreover, it is a “reality resulting from limited law enforcement and judicial resources” that “not every criminal violation of the United States Code can be prosecuted.” Id. Thus, the Eleventh Circuit has held that the judiciary cannot interfere with a prosecutor's exercise of charging discretion, except in narrow circumstances. Id. Notwithstanding this broad discretion and the serious

¹As of July 26, 2004, defendant Sameeh Hammoudeh has adopted Fariz's motion, but for purposes of the government's response, the United States refers only to defendant Fariz.

violations of federal law set forth in the highly detailed indictment, defendant Fariz seeks to challenge the government's decision to prosecute him under 18 U.S.C.

§ 2339B. He then asks that the *entire action* be dismissed based on the selective nature of the prosecution and/or that he be allowed to conduct discovery on his selective prosecution claim. The defendant, however, falls far short of establishing a prima facie case entitling him to such discovery, much less for dismissal of the indictment.

Accordingly, for the reasons explained more fully below, the United States respectfully requests that the Court deny the defendant's motion.

ARGUMENT

I. The Law Governing Selective Prosecution Claims.

One of the few constraints imposed upon a prosecutor's broad discretion in bringing charges against an accused is the equal protection component of the Due Process Clause of the Fifth Amendment, which mandates that the decision to prosecute a particular criminal case not be based upon an "unjustifiable" factor such as race, religion, or another arbitrary classification. See United States v. Armstrong, 517 U.S. 456, 464 (1996). Federal criminal charging decisions, however, enjoy a presumption of regularity. Id. at 464-465. Thus, "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 before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

In Wayte v. United States, 470 U.S. 598, 608 (1985), and later in Armstrong, 517 U.S. at 465, the Supreme Court discussed why courts are “properly hesitant to examine the decision whether to prosecute.” This deference is driven in part by the fact that certain factors, such as the strength of the case, the general deterrence value, the government’s enforcement priorities and the case’s relationship to an overall enforcement plan, are not “readily susceptible to the kind of analysis the courts are competent to undertake.” Id. In addition, the courts want to avoid unnecessarily impairing the operation of a core executive function. “Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government’s enforcement policy.” Id. at 607.

“In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present clear evidence to the contrary.” Armstrong, 517 U.S. at 465. The Eleventh Circuit has interpreted Supreme Court’s “clear evidence” standard as requiring the defendant to produce “clear and convincing” evidence. Smith, 231 F.3d at 808. To discharge this formidable burden, “a defendant must demonstrate that the prosecution ‘had a discriminatory effect and that it was motivated by a discriminatory purpose.’” Id., (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)). The defendant fails to satisfy either prong of this test.

Similarly, when a criminal defendant seeks discovery in support of a selective prosecution claim, he bears the burden of producing “some evidence” making a credible showing of *both* (1) that similarly situated individuals of a different race were not prosecuted, *and* (2) that the decision to prosecute was invidious or in bad faith. Armstrong, 517 U.S. at 469-70. As the Supreme Court made clear in United States v. Armstrong, 517 U.S. at 464, “the showing necessary to obtain discovery should be a significant barrier to the litigation of insubstantial claims.” See also United States v. Quinn, 123 F.3d 1415, 1426 (11th Cir. 1997) (defendants failed to establish colorable claim of discriminatory intent and therefore not entitled to discovery on selective prosecution claim). The defendant also fails to meet this evidentiary threshold.

II. The Defendant Fails to Meet the Test for Dismissal on the Grounds of Selective Prosecution.

In his motion, the defendant claims that “other similarly situated groups are engaged in *exactly* the same type of activity he and his co-defendants allegedly engaged in behalf of the PIJ, but have not been prosecuted under Section 2339B.” Defendant’s Motion at 3 (hereafter “Def.’s Motion”)(emphasis added). The defendant defines the relevant protected class as “Muslims of Middle Eastern descent” who allegedly belong to a Federal Terrorist Organization. Def.’s Motion at 5, 6, 8,10. In making this claim, the defendant asserts that “but for the FTO designation” his

“fundraising or advocacy activities” would be legal. Def.’s Motion at 5,² and that other similarly situated groups have not been prosecuted under Section 2339B. Id. The defendant then refers to a number of newspaper articles pertaining to the alleged activities of two other FTO’s, the Kahane Chai (Kach) and the Real IRA. The defendant also asserts that the designation process is flawed and discriminatory because organizations like the Cambodian Freedom Fighters and the IRA are not designated as FTOs. This is the evidence the defendant offers in his attempt to overcome the demanding burden articulated in Armstrong and its progeny. As set forth below, with this meager showing he fails to make a *prima facie* case for selective prosecution.

An examination of the defendant’s motion reveals a curious theory. The defendant attacks the government’s actions only with respect to Count Three, alleging a conspiracy to violate 18 U.S.C. § 2339B. The motion focuses solely on purported “similarly situated” individuals who have not been prosecuted pursuant to Section 2339B, claiming that Count Three is the “linchpin” of the government’s case. Def.’s

²In attempting to define the PIJ’s endeavors as “fundraising or advocacy” activities that would be legal but for the FTO designation, the defendant errs in two respects. First, he attempts to bootstrap a First Amendment claim into the selective prosecution claim; the defendants’ First Amendment challenges to Section 2339B, however, have already been litigated in this case and have no application here. Second, it is specious to argue that the PIJ’s fundraising activities would be legal but for the FTO designation given the alleged purpose for which the money was raised. For instance, it was not legal prior to 1997 to: (i) engage in conspiracy to violate RICO through the operation of a terrorist organization (18 U.S.C. § 1962); (ii) to raise money as part of a conspiracy to murder and maim abroad (18 U.S.C. § 956); (iii) to transfer money overseas with the intent to promote an unlawful activity (18 U.S.C. § 1956(a)(2)(A)); and (iv) to conspire to make contributions of funds to entities or individuals designated by Executive Order in January 1995 as Specially Designated Terrorists (50 U.S.C. § 1701).

Motion at 2-3. This approach is flawed in at least two respects. First, although certainly an important charge, Count Three is not the “lead” charge in this case. Count One, which alleges a conspiracy to violate RICO, is the primary violation alleged in this case because it encompasses nearly all the conduct alleged in the 50-count indictment, spanning a much broader time frame and carrying a more severe penalty than Count Three.³ Second, as the defendant admits, the Section 2339B charge is dependent on the PIJ’s designation as an FTO. As the remaining 49 counts illustrate, however, there is much in this case that does not turn on the Secretary of State’s designation of PIJ. Moreover, the defendant’s argument that other “similarly situated groups” are engaged in the same type of activity but have not been designated, and/or prosecuted, impermissibly widens the scope of the analysis of who is “similarly situated.” None of the case law interpreting Armstrong and its progeny permit the defendant to focus on the activities of “groups;” to the contrary, and as explained in greater detail below, the analysis is fact-specific and turns on the circumstances of alleged similarly situated individuals, not groups. Indeed, the factors to be considered under the analysis of who is “similarly situated” necessarily excludes a “group” approach.

Thus, in order to establish a discriminatory effect, the defendant must show that “similarly situated” individuals were not prosecuted. Smith, 231 F.3d at 808, 810. In the Eleventh Circuit, the court defines a “similarly situated” person as one who:

³ Conviction on Count One carries a possible life sentence (as does Count Two—conspiracy to maim and murder), whereas conviction on Count Three only carries a possible sentence of 15 years. As the defendant emphasizes in his motion, and as we discuss elsewhere in this response, Section 2339B only applies to conduct after the PIJ’s designation in October 1997. Count One encompasses all the conduct alleged in the indictment, beginning from in or about 1984. Indictment, Count One.

engaged in the **same type of conduct**, which means that the comparator committed the same basic crime in **substantially the same manner** as the defendant—so that any prosecution of that individual would have the **same deterrence value** and would be **related in the same way** to the Government’s enforcement priorities and enforcement plan—and against whom the **evidence was as strong or stronger** than that against the defendant.

Smith, 231 F.2d at 810-11(emphasis added).⁴

In Smith, the Court analyzed the defendants’ claims that they were selectively prosecuted for federal crimes relating to the violation of voting laws based on their race and political affiliation. The Court engaged in a detailed fact-specific inquiry to determine whether the defendants had met their burden of showing that other similarly situated individuals had not been prosecuted. Id. at 811. The Court held that the conduct of the purported comparators was not the “same” as the defendants, because the comparators had not violated the voting laws by writing false information or forged names on absentee voter forms or by voting more than once. Id. In addition, the Court opined that, although some of the alleged “similarly situated” individuals had committed serious crimes, it would not “second guess the government on which among the universe of different crimes should be prosecuted.” Id. Moreover, the Court explained that even if the comparators had committed the “same type of crime” as the defendants, they were not “similarly situated with respect to the number of crimes they committed.” Id. at 812. Thus, the government can legitimately place a higher priority on prosecuting someone who engages in a pattern of criminality. Id. Finally, the Smith court opined

⁴Similarly, the Fourth Circuit has explained that “defendants are similarly situated when their circumstances present no distinguishable legitimate prosecutorial factors that might justify making different prosecutorial decisions with respect to them.” United States v. Olvis, 97 F.3d 739, 744 (4th Cir. 1996); see also United States v. Lindh, 212 F. Supp. 2d 541, 566 (E.D. Va. 2002).

that it could not discern from the record the relative strength of the evidence that others may have committed similar crimes, because “saying something is one thing and testifying to it is another.” Id. The Court, however, noted that the evidence against the defendants was strong enough to convince a jury beyond a reasonable doubt. Id. at 813.

As in Smith, the defendant here fails to show that other “similarly situated” individuals have not been prosecuted. The defendant’s argument suffers from a very basic and critical flaw. The defendant grounds his argument on the fact that the defendant is alleged to be a member of the PIJ, which has been designated as a Foreign Terrorist Organization (“FTO”), and that certain FTO’s -- who are not comprised of Middle Eastern Muslims -- are operating with impunity in the United States. The defendant also acknowledges that the PIJ was not designated as an FTO until October 1997. In his analysis, however, the defendant completely ignores the unique context of the charges against him and his co-defendants in the 50-count indictment. As part of his assertion that other “similarly situated” groups “engaged in exactly the same type of activity,” Def’s Motion at 3, but have not been prosecuted for violations of 18 U.S.C. § 2339B, the defendant conveniently ignores the detailed allegations set forth in the 122- page indictment and instead summarily refers only to the government’s “highly arbitrary definition of what constitutes ‘terrorism’ and ‘material support....’” Def.’s Motion at 11. Try as he might, however, the defendant simply cannot equate this case to the alleged activities of members of the Kahane Chai, the Real IRA, the CFF and the IRA , as described in the news accounts recited in his motion.

More specifically, the defendant neglects to address the fact that the investigation into the activities of the PIJ in Tampa, Chicago and elsewhere began long before the Secretary of State identified the PIJ as an FTO; thus, in spite of his attempt to narrowly define the material support charges against him, the facts show that the history of this case began long before the FTO designation of the PIJ in October 1997.⁵ The indictment charges the PIJ as an unlawful RICO enterprise, with over 200 overt acts beginning as early as 1988. The members of the PIJ are alleged to have committed acts of violence, including murders and suicide bombings, and to have solicited and caused others to do so, with the intent to destroy Israel. Count One of the Indictment at ¶¶ 3, 29. The PIJ Manifesto states that in addition to destroying the state of Israel, the PIJ also strives to end all Western influence (of the “Great Satan-America”) in the Middle East. Id. at ¶ 3. Members of PIJ are also alleged to have solicited and raised monies to support the PIJ and its goals through various means in United States and elsewhere. Id. at ¶ 32. The indictment sets forth more than a dozen violent acts which have resulted in the deaths of more than 100 persons, including two American citizens. The indictment charges the defendant and seven co-conspirators with 50

⁵In United States v. Alameh, 341 F.3d 167 (2d. Cir. 2003), the defendant claimed that he was selectively prosecuted because of he was an Arab Muslim. He attempted to demonstrate his claim by adducing statistics regarding the number of individuals with Arab or Muslim surnames charged with certain immigration statutes both before and after September 11, 2001. The evidence, however, showed that the government had “diligently investigated” the case for nearly 18 months prior to September 11, 2001. The Second Circuit reasoned that since most of the investigation occurred prior to the date of the discriminatory motive, the defendant faced a particularly heavy burden because prosecutorial decisions are presumed to be proper. Id. at 174. The Court held that Alameh had offered no evidence sufficient to dislodge this presumption. Id.

counts, including conspiracy to violate RICO, conspiracy to murder and maim abroad, conspiracy to provide material support, conspiracy to violate IEEPA, “travel act” counts, immigration and perjury charges. Co-defendants include the spiritual leader of the PIJ (Awda), the current Secretary General of the PIJ (Shallah), and several members of the PIJ Shura Council (Al-Arian, Shallah, Awda, Nafi, and Al-Khatib).⁶ The gravity and scope of the charges are, simply put, unusual even if one considers the entire universe of all organized crime cases, and nearly unprecedented in the context of terrorism prosecutions. The defendant simply cannot show that there are other similarly situated individuals who have not been charged for similar crimes.

Moreover, as this Court and the defendants are well aware, the nature and quantity of the evidence supporting these charges is unusual: the indictment alleges that national security wiretaps (“FISA” wiretaps) were issued for co-conspirators’ telephone and facsimile lines no later than January 1994, and that such electronic intercepts continued until 2002.⁷ The quantity of FISA wiretap materials declassified and produced in this case is unprecedented. The defendant therefore cannot show that the strength of evidence against the Kahane Chai, the Real IRA, CFF or the IRA is similar to the evidence the government has amassed against the PIJ, or defendant Fariz in particular.

⁶Because the defendant is charged with conspiring to provide material support, and these individuals constitute some of his co-conspirators, he cannot escape the significance of their leadership roles in analyzing the case and whether “similarly situated” individuals have not been prosecuted.

⁷The evidence also includes wiretap intercepts of the defendant’s own telephone devices beginning in May, 2002.

Furthermore, the indictment alleges that in November 1995, federal search warrants were executed at co-defendant Sami Al-Arian's residence, his office at University of South Florida, and the WISE offices, based on an affidavit alleging Al-Arian's and others' involvement with the PIJ, and that compelling evidence against the defendants was seized at these locations. The defendant does not show that similar enforcement operations and valuable seizures of evidence apply to the purported similarly situated individuals/groups mentioned in his motion. The indictment also alleges that the PIJ, co-defendant Awda, and co-defendant Shallah, were designated as "Specially Designated Terrorists" by Executive Order in January 1995, two and a half years before the FTO designation. The defendant, however, does not indicate that the government could have charged SDT's who belong to the other "similarly situated" groups.

In sum, the case against the defendant is such an extraordinary one, in terms of both background and scope of investigation and quality and quantity of evidence, that the defendant cannot come close to showing that other individuals who have **not** been charged with Section 2339B are "similarly situated," as defined in Armstrong and Smith. He therefore has not made a *de minimis* showing of discriminatory effect. To cast it in another light, the government would surely welcome the defendant to identify other individuals similarly situated to him and his co-defendants; that is to say, we invite the defendant to identify to us others within our jurisdiction (or even in the United States) who are leaders of a violent terrorist organization that has murdered American citizens and has sought to disrupt the United States sponsored peace negotiations in the Middle East. If the defendant made such an identification, we would do our best to prosecute

those individuals as well, regardless of their religion or ethnicity.

Indeed, the facts show that the Department of Justice has charged numerous individuals who are NOT Muslims of Middle Eastern descent with violations of Section 2339B. The defendant himself points out one of the most prominent of these defendants—the “American Taliban” John Walker Lindh. Def.’s Motion at 6, fn. 5. Lindh, who is an American convert to Islam, and not of Middle-Eastern descent, was originally charged with a violation of 18 U.S.C. § 2339B but ultimately pleaded guilty to IEEPA “material support” charges. The Eastern District of Virginia, where Lindh was prosecuted, has also indicted a number of individuals who are not of Middle Eastern descent with violations of 18 U.S.C. § 2339B and its companion “material support” statute, 18 U.S.C. § 2339A, in the case entitled United States v. Royer, et al., No. Crim. 03-296-A (E.D. Va. 2003). These individuals include defendants Randall Royer, Seifullah Chapman, Hammad Abdur-Raheem and Yong Kwan. The District of Oregon also charged a number of individuals, who were not of Middle Eastern descent, with violations of Section 2339B in the case entitled United States v. Battle, et al., No. 02-CR-299 (D. Oregon 2002); those defendants include Jeffrey Leon Battle, Patrice Lumumba Ford and October Martinique Lewis. In 2003, the Southern District of Florida charged three individuals who are neither Muslim nor of Middle Eastern descent with violations of Section 2339B for providing material support to the Revolutionary Armed Forces of Colombia (“FARC”), a designated FTO. United States v. Caracas, et al., No. 03-CR-20261 (S.D. Fla. 2003). In addition, a number of individuals who are neither of Middle Eastern descent nor Muslim have been charged in the Southern District of Texas with violation of 18 U.S.C. § 2339B for providing material support to the United Self-

Defense Forces (“AUC”), an FTO located in Colombia. See United States v. Mora, No. 03-CR-352-ALL (S.D. Tex. 2003); United States v. DeAmaris, et al., No. 03-CR-812 (S.D. Tex. 2003); United States v. Jensen, et al., No. 02-CR-00714 (S.D. Tex. 2002). The Southern District of Florida has also charged individuals named Connor Claxton, Martin Mullan and Anthony Smyth with a violation of 18 U.S.C. § 2339A for providing material support to the Provisional IRA, a terrorist group that was not designated by the State Department as an FTO. United States v. Smyth, et al., No. 99-CR-6176-ALL (S.D. Fla. 1999).

It bears mentioning that 18 U.S.C. § 2339B is a relatively new statute that has been rarely used. The first trial on Section 2339B charges occurred during the summer of 2002 in Charlotte, North Carolina, in the case entitled United States v. Hammoud, No. 00-CR-147 (W.D. N.C. 2000) (Hizbollah supporters).⁸ The defendant here is only able to identify a handful of cases in which Muslims (not all of Middle Eastern descent) have been charged with Section 2339B. Several of those cases involved allegations of material support to Al-Qaeda and the Taliban. Surely the defendant is not claiming that after September 11, 2001 the United States does not have a legitimate enforcement priority, see Armstrong, 517 U.S. at 465, in prosecuting individuals associated with the

⁸In the Hammoud case, a number of defendants pleaded guilty to RICO and related charges, and one pleaded guilty to a violation of Section 2339B prior to trial. The two defendants who opted to go to trial were brothers, Chawki and Mohammed Hammoud, who were both Lebanese Muslims. Chawki was never charged with a violation of Section 2339B. Mohammed, however, was charged and convicted for conspiring to provide material support to Hizbollah, by attempting to procure and deliver a variety of military and dual use materials to the group, including explosives, night vision goggles, and global positioning systems.

group that carried out the attacks on that day, or that the prosecution of those cases is not related to the government's legitimate overall enforcement plan. Id.

The lack of specificity in the defendant's motion illustrates the stark difference in the circumstances surrounding the two allegedly "similarly situated" FTOs (the Kahane Chai and the Real IRA), the two allegedly "similarly situated" terrorist groups (the CFF and the IRA), and the circumstances of the instant prosecution against leaders and members of the PIJ. The defendant's theory assumes that mere designation as an FTO makes groups "similarly situated" for purposes of analysis under Armstrong and White; as explained above, this is an impermissible expansion of the reasoning set forth in those cases. The defendant then asserts that because the CFF and the IRA are not designated, the government is in effect selectively choosing groups for designation, and therefore, prosecution. Given that Armstrong and its progeny require a fact-specific inquiry into many different characteristics of the charged defendant(s) and the purported "similarly situated" individuals who have not been charged, the defendant's basic assumptions must fail from the outset. In other words, it is improper for the defendant to merely point to two other groups, claim selective prosecution and then attempt to shift the burden to the government to show a lack of discrimination. Again, this clearly is not consistent with the defendant's "demanding" burden as articulated by the Armstrong and Smith Courts, nor is it consistent with the fact-specific and individualized analysis required by those Courts.

Moreover, the defendant himself states that the United States is investigating the Kahane Chai (Kach) and in early 2001 (prior to September 11) had revoked a visa for one of Kach's leaders. The defendant also asserts that the United States has moved to

freeze the assets of the Real IRA and that the FBI has opened an investigation of the C.F.F.⁹ Def's Motion at 8,10, and 13. A quick search of legal databases indicates that the United States has in the past prosecuted a number of individuals for criminal activity relating to the IRA. Clearly, based on the information proffered by the defendant, the United States is not ignoring these groups and their activities within the United States.¹⁰ The defendant also does not allege that the goals of these organizations include the destruction of the State of Israel or the termination of Western influence in the region, or that they have killed over one hundred persons including two young American citizens.

In this connection, it is significant that the defendant asserts in his motion that "the double standards of the policy of designations," are illustrated by the non-designation of the CFF and the IRA. Def.'s Motion at 13-14. The defendant, however, also acknowledges on page 2 of his motion that one of the requirements for designation

⁹The government is referring only to the assertions made in the defendant's motion; nothing in these papers should be construed as commentary by the United States about any investigation of these groups or their supporters.

¹⁰The defendant places great weight on language taken from the Department of State's Patterns of Global Terrorism 2003 indicating that these groups receive financial assistance from the United States. Def.'s Motion at 8. The defendant, however, omits the definition of the activities of Kahane Chai and how that compares to the definition of activities for the PIJ. Kahane Chai is alleged to have "organize[d] protests against the Israeli Government. Kach has harassed and threatened Arabs, Palestinians and Israeli Government officials." It has "vowed revenge for the deaths of Binyamin Kahane and his wife." The Kach is also suspected of "involvement in low-level attacks since the start of the Al-Aqsa intifadah." See Department of State, Patterns of Global Terrorism 2003, at 125 (April 2004). The activities for PIJ are defined as follows: "PIJ activists have conducted many attacks including large-scale suicide bombings against Israeli civilian and military targets. The group decreased its operational activity in 2003 but still claimed numerous attacks against Israeli interests. The group has not yet targeted United States' interests and continues to confine its attacks to Israelis inside Israel and the territories. United States' citizens have died in attacks mounted by PIJ." *Id.* at 130.

of an FTO is that the group's terrorist activity must threaten the security of United States nationals or the United States' national security. A review of the descriptions for the CFF and the IRA in the Patterns of Global Terrorism 2003 immediately reveals that neither of these groups is articulated as having goals that would meet the test for designation. Thus, instead of being evidence of any "double standard," the non-designation of the CFF and the IRA merely affirms the accuracy of the current designations.

The defendant simply makes too much of a leap when he asserts that because these four groups purportedly receive funding from inside the United States and are either FTOs or terrorist groups, their members are therefore "similarly situated" to the defendants in this case. Irrespective of whether the United States has chosen to prosecute every person who may have violated § 2339B in the short period of time in which it has existed, the fact remains that the defendant has not pointed to even a single instance where a *truly* similarly-situated person was treated differently than he and his co-defendants.

Since the defendant relies on the same "evidence" to show both discriminatory effect and discriminatory purpose, he cannot satisfy either of the two prongs articulated in Armstrong -- but pursuant to that case, he must establish both prongs. 517 U.S. at 465. More than anything else, the strength of the evidence in this case eliminates the possibility of a discriminatory motive on the part of the prosecution. The defendant's motion to dismiss on grounds of selective prosecution should therefore be denied.

III. The Defendant Fails to Meet the Test for Discovery in Support of a Selective Prosecution Claim.

As set forth above, in Armstrong, the Supreme Court held that the “rigorous standard for discovery” in support of a selective prosecution claim “require[s] some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory motive.” 517 U.S. at 468. The defendant does not satisfy that standard here.

A recent Supreme Court case precisely illustrates the application of this rigorous standard to a motion for discovery. In United States v. Bass, 536 U.S. 862 (2002), the Supreme Court reversed the Sixth Circuit’s decision finding that the defendant had made a sufficient showing under Armstrong for discovery in support of a selective prosecution claim. In Bass, the defendant was charged with the intentional killings of two individuals, and the government filed a notice of intent to seek the death penalty. Id. The defendant alleged that the government sought the death penalty against him because he was black. The evidence he offered to support his claim of selective prosecution included “nationwide statistics demonstrating that ‘[t]he United States charges blacks with a death-eligible offense more than twice as often as it charges whites’ and that the United States enters into plea bargains more frequently with whites than it does blacks.” Id. at 863, quoting 266 F.3d, at 538-39.

The Supreme Court found that this sort of evidence was insufficient because “raw statistics regarding overall charges say nothing about charges brought against *similarly situated* defendants.” Id. at 864. The Supreme Court also expressed doubt about whether nationwide statistics, as opposed to a showing regarding the record of

the decision makers in the defendant's case, could suffice under the Armstrong test.¹¹ The Court therefore held that the defendant was not entitled to discovery. Id.

Here, the defendant has made even less of a showing of discriminatory effect and purpose than the defendant in Bass. In United States v. Quinn, 123 F.3d 1415, 1426 (11th Cir. 1997), the Eleventh Circuit likewise found that the defendant had not satisfied the Armstrong test in his bid to acquire discovery in support of a selective prosecution claim. In that case, the defendant claimed that he made a threshold showing because at least one black person was charged in federal court for a crime involving less than 50 grams of crack cocaine, while no white person had been so charged. Id. The Eleventh Circuit found that additional circumstances, such as a prior record, or involvement with a firearm, provided the impetus for the government to charge a case involving less than 50 grams of crack in the federal court; thus, the defendant had failed to show that a "similarly situated" person had not been prosecuted. Id. In the instant case, the defendant has not identified even one human being who is similarly situated and has not been charged with a violation of Section 2339B; his motion for discovery should therefore be denied.

Since the defendant has not met the threshold for discovery or dismissal, the Court need not convene a hearing to address the defendant's motion. The Eleventh

¹¹In Armstrong, the Supreme Court analogized its inquiry to the test articulated in Batson v. Kentucky, 476 U.S. 79 (1986), to determine whether an individual prosecutor has exercised peremptory challenges to remove venire members of the defendant's race. Armstrong, 517 U.S. at 467-68. A Batson analysis is focused on the prosecutor's motive, not the motives of all prosecutors in the Department of Justice. Similarly, here, the proper focus is on the decision-makers in this case, not the prosecutors in all cases across the nation in which Section 2339B has been charged.

Circuit has held that "[a]n evidentiary hearing on the issue of selective prosecution is not automatic; such a hearing is conducted 'only where a defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive.'" Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993), quoting Owen v. Wainwright, 806 F.2d 1519, 1523 (11th Cir. 1986).

CONCLUSION

For the foregoing reasons, the Court should deny the defendant's motion to dismiss for selective prosecution and/or for discovery on the selective prosecution claim in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2004, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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I hereby certify that on July 26, 2004, a true and correct copy of the foregoing document and the notice of electronic filing was sent by United States Mail to the following non-CM/ECF participants:

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