ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: UNITED STATES, Petitioner v.

CHRISTOPHER LEE ARMSTRONG, ET AL.

CASE NO: 95-157

PLACE: Washington, D.C.

DATE: Monday, February 26, 1996

PAGES: 1-53

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 95-157

CHRISTOPHER LEE ARMSTRONG, :

ET AL. :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, February 26, 1996

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

APPEARANCES:

DREW S. DAYS, III, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

BARBARA E. O'CONNOR, ESQ., Los Angeles, California; on behalf of the Respondents.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 95-157, United States v. Christopher Lee Armstrong.

General Days, you may proceed whenever you're ready.

ORAL ARGUMENT OF DREW S. DAYS, III

ON BEHALF OF THE PETITIONER

GENERAL DAYS: Thank you, Mr. Chief Justice, and may it please the Court:

Selective prosecution claims are among the most difficult our courts have to face, for they require striking an especially delicate balance between protecting prosecutorial discretion and decisionmaking from improper, outside interferences and scrutiny while ensuring that the law is in force in conformity with the Constitution and the rule of law.

This Court has noted that judicial scrutiny of a prosecutor's charging decision imposes high costs on the criminal justice system, and that since tradition and experience have taught that most prosecutors will faithfully obey their duty, courts should properly be hesitant to examine the decision whether to prosecute.

But courts must also discharge their

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responsibility to ensure that the Government enforces the laws evenhandedly, rather than based upon invidious discrimination, but when the Government acts with an evil eye and an unequal hand, rather than in a manner faithful to equal protection and due process, both those directly affected by that conduct in the rule of law are its victims.

This Court's decisions, especially in Yick Wo and Wayte, have struck this balance on the merits by requiring that, absent proof of an explicitly discriminatory classification, a criminal defendant alleging selective prosecution must make two showings in order to prevail, first, that persons in similar circumstances have not been prosecuted and, second, that the difference in treatment is motivated by an intent to discriminate against the group to which the defendant belongs. In other words, there has to be a showing of both discriminatory effect and discriminatory purport.

This case, however, presents for decision a question that this Court has yet to resolve, namely, what standards should Federal courts utilize in determining whether a criminal defendant alleging selective prosecution is entitled to discovery.

QUESTION: General Days, do you agree that the standard on this discovery claim should be whether a

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colorable basis is made out for the claim? Is that the standard? Is that the standard most commonly used in the Federal courts?

GENERAL DAYS: It is the locution that's used by most of the courts of appeals, Justice O'Connor.

QUESTION: And do you accept that --

GENERAL DAYS: Well, not completely --

QUESTION: -- or do you ask us to adopt some other standard?

GENERAL DAYS: Well, I think that, although the courts have used various formulations, the bottom line is that all the courts of appeals, with the exception of the Ninth Circuit, that have addressed this issue have required that there be a showing of individuals who are similarly situated to the defendant.

QUESTION: Well, is it your argument that that showing is necessary to establish a colorable basis? How do you articulate the standard that the court should apply?

GENERAL DAYS: The colorable basis terminology that's used -- there have been references to prima facie evidence. We think that the best standard is one derived from this Court's decision in Wade v. United States, that there has to be a substantial threshold showing.

That is, there has to be something more than

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assertions and generalized proffers on information and belief. There has to be concrete evidence that the court can look to that leads it to believe that there's some basis for thinking that there is selective prosecution at work.

QUESTION: I take it you have some reservation about phrases like, a colorable basis, as giving any real guidance to what to look for in the details.

GENERAL DAYS: Precisely right, Mr. Chief Justice.

QUESTION: Well, can you tell us what the details would be? In a case like this, just what evidence that's accessible to the defendant would be necessary to establish a basis for discovery?

GENERAL DAYS: Justice Ginsburg, the respondents have made the suggestion that the evidence that they need is within the control of the Government, but that is simply not so.

QUESTION: But at least would you seek --

GENERAL DAYS: There were many things that the respondents could have done, and let me lay them out.

QUESTION: Right.

GENERAL DAYS: They could have done a further review of their own files. They had looked at only cases closed in 1991, even though those cases would have been

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brought over a 3-year period. This is a Federal public defender's office. Presumably there are State public defender's offices, and they could have contacted those offices to determine whether the racial pattern that they asserted was reflected in Federal court was present or absent in State prosecutions.

Also, one of the respondents' counsel provided a declaration. Mr. Reed indicated --

QUESTION: Mr. Solicitor General, suppose -- I don't remember which brief it is. One of the amicus briefs says if you looked a little harder at statistics you'd find that there is a difference in the pattern in State and Federal courts. If those facts are correct, and if they had been presented to the district court, would it have been appropriate to have discovery here?

GENERAL DAYS: Well, Mr. Justice Stevens, it really would depend upon the nature of that evidence and whether it provided a basis for the court --

QUESTION: Well, if they came in with an affidavit, the public defender said, our files in State court show that 50 percent of the crack prosecutions are not Afro-Americans, whereas 100 percent of the Federal prosecutions are, would that be sufficient for discovery?

GENERAL DAYS: I think the court would have to decide whether that information --

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QUESTION: How would you decide if you were the court?

GENERAL DAYS: Well, I'd have to look at the universe. I would have to look at --

QUESTION: The universe is the files of the Federal -- of the State defender and the Federal defender in 1991.

GENERAL DAYS: I think 1991 would be too narrow a time frame for that type of determination.

QUESTION: Even if there are 100 cases in each file?

GENERAL DAYS: I don't think that that would be the case, Justice Stevens. I think that would be inadequate under these circumstances. It certainly would not solve the second part of the problem, which is whether there's some indication of discriminatory intent.

QUESTION: General Days, what is your basis for requiring a substantial threshold showing with respect to this category of defense, assuming that we're proceeding under Rule 16? Is that what we're -- are we proceeding under Rule 16?

If we're under Rule 16, what it says is that upon request of the defendant, the Government shall permit the defendant to inspect and copy, blah, blah, blah, which are within the possession, custody, or control of the

Government, and which are material to the preparation of the defense.

Now, we do not in other situations inquire how strong the defense is before we apply that provision. What is the justification for doing it here, unless -- unless Rule 16 is not applicable. Do we have some argument that it's not applicable?

GENERAL DAYS: Well, there are two responses, Justice Scalia. One is that, as the Court has recognized, there's no general right to discovery in a criminal trial, and this Court, for example, in Wade, recognized that there, the defendant had not made a substantial threshold showing to require the prosecutor to open up his files to explain why there had not been a motion for substantial assistance.

QUESTION: But there is a general right to discovery. It's set forth in Rule 16.

GENERAL DAYS: I think --

QUESTION: I mean, apart from Rule 16 there is no general right, I assume, and if you can get me out of Rule 16, then I'll be prepared to entertain your notion that we should require a substantial showing first.

GENERAL DAYS: I don't have to get you out of Rule 16, Justice Scalia. I think the materiality requirement suggests that there has to be some showing by

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the defendant of evidence, some factual basis for believing that he does have a particular defense, and so --

QUESTION: I --

GENERAL DAYS: -- that is really circular here. It gets us back to the point --

QUESTION: So you say a substantial threshold showing that the defense is valid is always necessary under Rule 16. Is that -- is that your position?

GENERAL DAYS: I think --

QUESTION: I thought it was just a special showing you were going to require in this kind of a case.

GENERAL DAYS: Well, there are obviously other types of material that are available under Rule 16, but the point here is that Rule 16 has to be read against a backdrop of this Court's presumption that prosecutors act lawfully, and that the investigation by outsiders or inquiries by outsiders of how prosecutors carry out their responsibility imposes substantial cost on the system.

QUESTION: Well, what I was going to suggest is that Rule 16 -- what is it, 16(a)(2) makes it clear that you can't use (C) -- (a)(1)(C).

QUESTION: Are you reading from somewhere in the briefs?

QUESTION: I'm reading from the Rules of

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Criminal Procedure, Chief Justice, Rule 16. I don't know where it's set forth in the briefs, but I think we have it up here somewhere. I'm not sure that the briefs anywhere set forth the entirety of Rule 16.

GENERAL DAYS: Well, Justice Scalia, as we've addressed in our reply brief, there are specific provisions of Rule 16 that go to the availability of certain material.

QUESTION: Let me complete the thought I was beginning with. There is a provision of Rule 16 which says that subsection (C), which is what is relied on here, does not, it says -- I'll read it. Except as provided in paragraphs (A), (B), (D) and (E) --

QUESTION: What page of the rules are you reading?

QUESTION: It is rule 16 --

QUESTION: 72.

QUESTION: -- (a)(2).

QUESTION: Thank you.

QUESTION: Which says that except as provided in paragraphs (A), (B), (D), and (E), notably excluding (C), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal Government documents made by the attorney for the Government or other Government agents in connection with the investigation or

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prosecution of the case.

Now, I suppose you could argue that (C) enables you to get all of the Government information relating to this discriminatory prosecution matter, all Government documents except those relating to this case, all those relating to these other cases but not to this case. I suppose you could argue that, but that would be a very strange rule, and it seems to me that the existence of (2) suggests that perhaps the word, relating to the defense, material to the preparation of the defendant's defense in (C) refers to defense on the merits.

GENERAL DAYS: That's correct.

QUESTION: And not to a defense of this sort.

QUESTION: Yes.

QUESTION: And that would get you out of Rule 16, and then we could talk about what the Constitution requires the Government to cough up, and we could adopt a rule such as, for a defense of this sort there has to be substantial threshold showing.

But as long as you leave me in Rule 16, I have real troubles.

GENERAL DAYS: Well, I'm certainly not going to reject that suggestion, Justice Scalia.

(Laughter.)

GENERAL DAYS: But I think that --

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QUESTION: What does that suggest you do, for example, to suppression? What does it do to motions to suppress? What does it do to Fifth Amendment claims? What does it do to Fourth Amendment claims?

GENERAL DAYS: Right.

QUESTION: What does it do to a whole range of claims that actually are there for reasons of constitutional or administrative --

GENERAL DAYS: Yes.

QUESTION: So I'm nervous about that.

GENERAL DAYS: Well, I think, Justice Breyer, that we believe we can remain within Rule 16 and nevertheless support the substantial threshold showing that we've been advocating. That's in essence what Wade said about --

QUESTION: Well, in aid of Justice Breyer's question, suppose -- what happened before Rule 16 was on the books? What was -- what is the authority or the source of law for the court ever to order discovery? Is it the inherent powers of the court?

GENERAL DAYS: I think it's a due process standard.

QUESTION: There was a rule that had in some words about reasonableness, and they cut out the words about -- at least that's what my law clerk found out.

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There was a previous rule that had a standard of reasonableness in it, and then they cut that out. Are you -- you may not be familiar with it, in which case it doesn't matter.

GENERAL DAYS: No, I'm not familiar --

QUESTION: Only in a constitutional case can a court ever order discovery? Before Rule 16 came onto the scene, because if we knew that, then we'd know whether or not Rule 16 was designed to contain the entire authority for the courts to order discovery, or whether or not there's some inherent authority, or something like that.

GENERAL DAYS: Well, Brady, for example, is a rule that is outside of Rule 16.

QUESTION: That has a constitutional basis.

GENERAL DAYS: That's correct, and so to the extent there are these constitutional requirements, I think as Justice Breyer was suggesting, they would stand outside of Rule 16.

QUESTION: General Days, are there things that were requested in this case that fall within Rule 16's (a)(1)(C) articulation -- books, papers, documents in the possession or control of the Government?

Were things asked for that fit within that rule?

GENERAL DAYS: Certainly documents. There was a request for a list of Federal narcotics prosecutions and

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firearms prosecutions that were brought over a 3-year period between 1989 and 1992.

QUESTION: Is a request for a list, where the Government has to compile a separate list, the same as a request for documents?

GENERAL DAYS: No, it is not.

QUESTION: Well then, it seems to me that this may not have been under Rule 16(C).

GENERAL DAYS: Well, if there were a print-out, just like a paper list, I suppose that could be regarded as a document, but I take your meaning. Normally discovery does not require a party to create documents in connection with discovery.

There was also a request for information with respect to the criteria that are used by the United States Attorney's Office for the Central District of California in bringing crack cocaine prosecutions.

Now, to the extent that that was written down somewhere, supposedly it could be argued that that's a document that was available under Rule 16.

QUESTION: General Days, before we get to the question of what could be discovered if there could be discovery, you were going to tell me what in the Government's view would be necessary concretely to satisfy that substantial threshold question, and you gave one

answer that I found surprising, but it was your answer that even if you had 100 percent African-Americans in Federal court in a given year and 50 percent Caucasians in the State court in that same year, that that would not have been enough.

GENERAL DAYS: Well, I think that, Justice Ginsburg, under those circumstances the Court might well ask the Government for some indication, but it may not result in full discovery, or the providing by the Government of the type of information that was being sought here to the defendants.

QUESTION: But you said that would require something rather than nothing, but if -- I'm just not clear on -- the Government does the negative side --

GENERAL DAYS: Yes.

QUESTION: -- well, but you don't say what it would take.

GENERAL DAYS: Well, I think that the example that Justice Stevens gave, and you gave, would be going a very long way toward showing that there was a selection. There would be people similarly situated. At least presumably that would require the Government to say something in response to that, but we certainly don't have that in this case, and what the Ninth Circuit has done is completely dispense with that requirement.

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Basically, what the en banc court held was, there's no need to show a comparable pool. What you're talking about is a comparable pool, a statistical disparity. Well, what the Ninth Circuit said was, in cases like this there's no need for that comparable pool. One simply assumes that persons of all races commit all crimes.

Now, that has some rhetorical power, but the question is, what objective rule it offers is very hard to discern.

QUESTION: Okay, but if we agree with you that in fact there's -- there are two prongs involved here, and we then pose Justice Ginsburg's question, what if they had come in with the evidence which I guess turned up later, a year or so later in the State reports, that something like 50 percent of the State crack prosecutions were Caucasians, I take it -- and please correct me if I'm wrong -- that you would say, even though that addressed the second prong, it did not address it to a sufficient degree.

It did not meet the high -- the substantial threshold test, and I assume the reason you would say that is because the State statistics do not show how many of these people were gun carriers, and it doesn't show the severity of the offense. Did they have just a little bit

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of crack, or were they dealers, and so on.

You would say that it still wasn't enough, even though it addressed the question of comparability, to show that there really was comparability. Would that be the Government's position?

GENERAL DAYS: No, Justice Souter. If you're referring to the Burke study that was introduced later, that is a study that I think proves only one thing that's relevant in our estimation in the context of this case, and that is that the defendants in that particular proceeding where the Burke study was introduced were able to show that they could get this information, and therefore the argument that respondents make in Armstrong, in this case, that they could not have acquired that comparative information, really seems quite unpersuasive.

QUESTION: Well, let's just assume that they couldn't have had anything but the terms of the study, and they said, this satisfies each of the prongs.

GENERAL DAYS: Yes.

QUESTION: Would it be the Government's position that it didn't satisfy the second one because it did not show to a sufficiently high or probable degree that there really was comparability?

GENERAL DAYS: No, Justice Souter. The en banc court suggests that what the Government was demanding here

was that defendants include some sophisticated regression analyses closely following the dictates of the scientific method. That is not what we were suggesting. We think in a situation such as you describe the Government would have a responsibility to come forward and show, in some fashion or another, that there was an absence of comparability, but we don't think that defendants should be put to the --

QUESTION: Okay, so you --

GENERAL DAYS: -- responsibility of figuring out at every point the degree to which one group is comparable to the other.

QUESTION: But you would say, then, that you had a burden to respond.

GENERAL DAYS: Yes.

QUESTION: But not a burden to comply with the discovery request.

GENERAL DAYS: Well, I think where there is this similarly situated showing, that may well shift the burden to the Government --

QUESTION: No, but I want to understand -- I, like Justice Ginsburg, I'm trying to get an example so that I know what we really mean --

GENERAL DAYS: Yes.

QUESTION: -- when we use the terms, and I take it in the example you're saying -- that I gave, that that

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would result perhaps in a shifting of the burden of persuasion, or at least the burden of going forward, but it would not result in a satisfaction of this threshold which would obligate you to produce the discovery that they want.

GENERAL DAYS: Well, not the full discovery. In other words, it would not operate automatically, but I think, Justice Souter, that unlike this case, when the defendants actually show that there is a similarly situated group -- that is, there appears to be some comparability between the two populations -- that then gives the district judge some authority to probe that, and to evaluate exactly what those figures mean.

QUESTION: So some discovery, then, would -- so you're saying discovery is a step-by-step process, and the Government would perhaps not merely have had the burden shifted back to it, but the Government could properly be subjected by the district judge, as it were, to satisfy that burden. The judge could say, look, you produce some rebutting evidence, and you would be subject to that degree of discovery, is that correct?

GENERAL DAYS: Right. It's a step-by-step process once the defendants have shown a group of similarly situated individuals.

The problem with this particular case is that

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the judge was asking the Government to respond before there had been an established --

QUESTION: Oh, I quite -- I realize that.

GENERAL DAYS: -- situation.

QUESTION: But what you're saying, then, is that I think that it's a mistake to think of discovery -- the discovery obligation as being an all-or-nothing obligation.

GENERAL DAYS: That's right. Take --

QUESTION: And you're saying that if you went as far as to get the Burke study in, there would be a discovery obligation to produce evidence, if you had it, that would tend to disprove the suggestion of comparability, and if you met that, that's where the process would end.

GENERAL DAYS: Yes.

QUESTION: If you didn't meet that, then I presume even further discovery might be warranted.

GENERAL DAYS: Yes.

QUESTION: Is that --

GENERAL DAYS: Let me make -- yes, that's correct, but let me make clear about the Burke study. That has been challenged by the Government as being significantly flawed, and it is not part of the en banc decision. It was referenced by --

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QUESTION: I realize -- no, I realize --

QUESTION: What was it --

GENERAL DAYS: -- the dissents for the panel.

QUESTION: May I ask --

QUESTION: Flawed or not, what was the percent that was shown in the State courts in that study?

GENERAL DAYS: I don't recall, Justice Ginsburg, because there were challenges as to the accuracy of that information.

But I just wanted to respond to Justice Souter a little bit further. We refer to the case of United States v. Holmes. That was a case where a black farmer had been charged with violating the law with respect to certain contracts that he had with the Government.

He was able to identify the names of 30 white farmers who had not been prosecuted for crimes charged against him. Under those circumstances, the district court asked that the Government come forward, or directed the Government to come forward and explain that disparity, which the Government did to the satisfaction of the district court.

QUESTION: Is this a court of appeals case --

GENERAL DAYS: Yes, it is.

QUESTION: -- or one of our cases?

GENERAL DAYS: It's from -- it's the Eighth

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Circuit.

QUESTION: You know, the only cases of ours that I'm aware of -- what cases of ours involve this area of selective prosecution? Yick Wo and Ah Sin --

GENERAL DAYS: Ah Sin, and Wayte.

QUESTION: And --

GENERAL DAYS: And Wayte.

QUESTION: What was the -- what was involved in Wick?

GENERAL DAYS: In Wayte?

QUESTION: Yes.

GENERAL DAYS: Wayte had to do with the allegation that persons who had failed to register for the draft were being selectively prosecuted because they were vocal opponents to that particular program.

QUESTION: You see, in both Ah Sin and Yick Wo, which are the classic cases, you had at issue a local ordinance, and the ordinance was a phony, because in fact it was only being enforced against one racial group.

I'm not sure that there's a parallel at the Federal level, where you have a valid Federal criminal statute and even in one jurisdiction, even one U.S. Attorney is in fact enforcing it against only one racial group. Why should that be the level that you inquire into to see whether there's been discriminatory enforcement?

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Why shouldn't it be all prosecutions by a particular U.S. Attorney? Suppose you show that this particular U.S. Attorney has never brought a prosecution against a white man under this statute. Would that be enough to show selective prosecution, even though the rest of the office is prosecuting everybody indiscriminately, and some of them may have brought prosecutions only against whites, and not against blacks?

GENERAL DAYS: I think there would have to be some showing that there was a comparably situated --

QUESTION: Probably --

GENERAL DAYS: -- white defendant.

QUESTION: So why should the office be the criterion? I'm very resistant to the notion that because you have one bad egg in the Federal prosecutor's office we punish him by letting somebody who's been duly convicted of a crime walk away.

Why shouldn't the test be whether this statute is being selectively enforced Nationwide, just as that was the issue in Yick Wo and Ah Sin? Why should one U.S. Attorney's Office invalidate the whole system?

GENERAL DAYS: Well, I think, Your Honor, the Government certainly is not standing here arguing that it's permissible for any U.S. Attorney to bring discriminatory prosecutions and avoid the sanction of the

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law simply because it's one office as opposed to the entire country.

QUESTION: Let's sanction him, but why should the criminal defendant who's been guilty of the offense walk away?

GENERAL DAYS: Well, the fact that the defendant shows that there is selective prosecution generally does not mean that that particular defendant would walk. I think the defendant has on the merits the responsibility to show that that discriminatory pattern in his case resulted in his being prosecuted.

QUESTION: General Days, can I go back to a really fundamental question that's troubling me here --

GENERAL DAYS: Yes.

QUESTION: -- because we're really talking about discovery, not the ultimate outcome of the case. Is it the Government's position that Rule 16 is the source of the authority, or is it the Government's position that the authority must be found elsewhere, the authority for a judge to order discovery?

GENERAL DAYS: Rule 16, within Rule 16.

QUESTION: Is it your position that Rule 16 provides the authority, or if it's not there, is it possible it's found elsewhere? That's my question.

What is the source -- do you acknowledge the

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judge has authority, and whatever the threshold is, when you meet the standard, can the judge order discovery, and if so, why? Where does he get the power? Is it all from Rule 16, or even if Rule 16 does not apply, is there nevertheless authority, an inherent power kind of authority in the judge to order discovery in an appropriate case?

GENERAL DAYS: Well, Justice Stevens, I think that as a general matter it would be Rule 16, but as I've indicated there are --

QUESTION: But if we find that Rule 16 applies, that's the end of the --

GENERAL DAYS: Well, the respondents are relying upon Rule 16 for the type of discovery that we're seeking, and I think we've made very clear that Rule 16 doesn't grant that authority.

QUESTION: And does it follow, if Rule 16 doesn't grant it, that there is no authority? Is that your position?

GENERAL DAYS: I would be reluctant to say that a district judge is completely precluded from ordering discovery under some circumstances, but there's no showing of any such circumstance here.

QUESTION: Oh, I understand you don't -- but if an appropriate showing is made, and if Rule 16 does not

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apply, would the Government agree that there is power in the judge to order discovery?

GENERAL DAYS: I would say that there is not that power.

QUESTION: There's not that power.

GENERAL DAYS: No.

QUESTION: Well, is your answer to Justice Stevens that there is not that power an answer across the board?

GENERAL DAYS: No. I -- no. There is this general power.

QUESTION: There are some constitutional issues which can only be litigated if the court does have the power to order discovery --

GENERAL DAYS: Yes, that --

QUESTION: Isn't that so?

GENERAL DAYS: Yes. As I mentioned --

QUESTION: Why wouldn't this be one of them?

GENERAL DAYS: Yes, Justice Souter. I mentioned earlier that something like Brady is a constitutional rule. There are other rules that --

QUESTION: Okay. What about this? Why wouldn't the judge simply as a matter of necessity in implementing the Equal Protection Clause --

GENERAL DAYS: Yes.

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QUESTION: Have the right?

GENERAL DAYS: Yes.

QUESTION: And he would.

GENERAL DAYS: I misspoke.

QUESTION: Yes.

GENERAL DAYS: I'd like to reserve the rest of my time for rebuttal.

QUESTION: Very well, General Days.

Ms. O'Connor, we'll hear from you.

ORAL ARGUMENT OF BARBARA E. O'CONNOR

ON BEHALF OF THE RESPONDENTS

MS. O'CONNOR: Mr. Chief Justice, and may it please the Court:

We believe the district court's order for limited discovery in this case should be affirmed for several reasons. First -- and we agree with much of what Solicitor General Days has said.

We agree that Rule 16 applies to this case. The request made at the district court level was for specific documents. Those documents were found by the district judge to be relevant and material under Rule 16, and we believe the district court applied the appropriate standard and applied the appropriate considerations in determining --

QUESTION: But you wouldn't be entitled to --

under 16 you wouldn't be entitled to any documents pertaining to this case.

MS. O'CONNOR: That's correct, Justice Scalia, but --

QUESTION: It's very strange to establish a selective prosecution claim without the use of any documents pertaining to the case in which the selective prosecution is alleged to have occurred. Isn't that extraordinary?

MS. O'CONNOR: I think, as the Court has suggested in argument, discovery is a step-by-step process. This was the preliminary step that we took toward the end of meeting the burden of -- to --

QUESTION: I understand that, but what it suggests to me, the fact that you cannot get any of these documents from this prosecutor, is that Rule 16 was not designed for this kind of a defense at all, that perhaps when it refers to the defendant's defense, it means his defense on the merits, and this constitutional claim comes up under our inherent powers to require discovery with respect to constitutional claims. Isn't that a possibility?

MS. O'CONNOR: Well --

QUESTION: Indeed, a likelihood?

MS. O'CONNOR: -- we disagree with that

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position. I think selective prosecution is a defense, and is encompassed by the phrase, defense, in Rule 16. There's certainly nothing to exclude it from application of the rule.

QUESTION: Well, but certainly there is a difference, Ms. O'Connor, between the kind of defenses one normally talks about to a criminal prosecution and the selective prosecution argument, is there not?

MS. O'CONNOR: Selective prosecution doesn't go to the traditional notion of guilt or innocence, as I believe you're suggesting --

QUESTION: Yes.

MS. O'CONNOR: -- Mr. Chief Justice. Nevertheless, it is a defense in the sense it, if proven, results in nonconviction.

QUESTION: So you say it results -- in other words, the person simply "walks."

MS. O'CONNOR: That would be the ultimate result were we able to put forward sufficient evidence at that level.

QUESTION: To show that there was a selective prosecution.

MS. O'CONNOR: That's correct.

QUESTION: He goes scott-free.

MS. O'CONNOR: Dismissal would be the

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appropriate remedy for a constitutional violation based on race. Certainly the Ninth Circuit recognized immediately this is the most serious kind of a claim that a defendant can raise, and that is racial selectivity.

Based on that claim, the district judge ordered very limited information, which we do believe is encompassed by Rule 16, and we believe that the standards, the traditional standards that apply to Rule 16 requests, apply in this case, and no higher standard should be set because we are making a claim of possible racial selectivity.

QUESTION: Ms. O'Connor, do you think that either the district court or the Ninth Circuit was relying on Rule 16 in making their various orders and judgments?

MS. O'CONNOR: I --

QUESTION: You don't mention it, and how are we to know if they were thinking in terms of Rule 16?

MS. O'CONNOR: I understand your question, Justice O'Connor, and while we never mention Rule 16, it was clear we were asking for documents, it's clear the documents are contained in Rule 16.

QUESTION: Is everything you were seeking matters that you think are covered by Rule 16?

MS. O'CONNOR: I believe that those documents would be covered by Rule 16. Certainly we don't know if

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the documents were in the Government's possession because the Government chose to not comply with the order. The Government never suggested they didn't have possession of the documents, or --

QUESTION: Do you think Rule 16 can be used to require the Government to conduct a survey, or produce information that it doesn't already have reduced to documentation?

MS. O'CONNOR: What I would anticipate, and what I would have anticipated at the time in early 1992, was that the Government would proffer that objection to the request and say we don't have these documents and we can't be compelled to create a summary based on your request.

QUESTION: Yes, and what is the answer?

MS. O'CONNOR: I think that the answer would be the Government cannot be compelled to create a document under Rule 16.

QUESTION: Now, at the time that your discovery request was made, and that the district court made its ruling, is the only thing the district court had before it the summary of the closed cases for the year in question from the central district? Is that the sum total of what was offered, and that the district court had in front of it?

MS. O'CONNOR: The district court --

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QUESTION: At the time of its order.

MS. O'CONNOR: -- at the time of its order was in possession of the limited survey to which you reference.

QUESTION: And that's all.

MS. O'CONNOR: And that was all at the initial hearing.

QUESTION: And at the time the district court entered its order.

MS. O'CONNOR: The final order was issued in December.

QUESTION: Well, its initial order.

MS. O'CONNOR: At the time of the initial order.

QUESTION: And do you think that that was sufficient to compel the discovery, and to justify the order?

MS. O'CONNOR: I do think it was sufficient, and I also believe the record reflects that the district judge was relying to some extent on her own experience, as district judges do when presented with discovery requests.

This judge, having been in the Central District of California for a number of years and previously having been a State court judge, would know whether we had access to the documents requested, would bring her own experience to the discovery order.

QUESTION: Well, her own experience of what sort, Ms. O'Connor? Could she say, now, I've been sitting here for 10 years, and I've tried so many of these crack cocaine cases, and all the defendants were black?

MS. O'CONNOR: Well, certainly we wouldn't expect a district judge to proffer her own evidence in support of the motion. Nevertheless, when district judges make discovery orders and consider requests by defendants, I think they rely on their experience, and that's part of the reason that this Court and the appellate courts offer discretion to the trial judge --

QUESTION: So it would be permissible, in your view, for the district court to take into consideration in granting a discovery request her own recollection of the percentage of blacks and Caucasians that had been in crack cocaine cases in her particular court?

MS. O'CONNOR: I think that common sense tells us that district judges rely on their own --

QUESTION: I didn't ask you what common sense told us. I asked you if you thought it would be correct for a district --

MS. O'CONNOR: Yes.

QUESTION: You do.

MS. O'CONNOR: I think it would be correct, and I think this district judge, in framing the order,

recognized and mentioned that a number of these type of cases had come through the Central District of California. This is something that would be within her particularized knowledge, not apparent to an appellate court reviewing the decision.

QUESTION: What about the knowledge of the public defender? The public defender has knowledge, or access to knowledge of what's going on in the State courts, and also typical in these cases to have statistics, and sometimes individual instances, but no individual instance was brought forward of a similarly situated Caucasian who was prosecuted in the State court.

MS. O'CONNOR: That's correct, Justice Ginsburg, and had we been ordered to find one, perhaps we could have gone out --

QUESTION: The question is, what did you have to show to meet the threshold for discovery, and I'm asking, is such information accessible to a defendant without resort to discovery against the U.S. Attorney, and I think you've just answered yes, it is, but you didn't get it.

MS. O'CONNOR: The information that you are referencing is not easily accessible, and in many instances is not accessible at all.

QUESTION: Why couldn't you just go to a -- you know, in your own office, in your own experience, other

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people? You'd say, look, have -- anybody had a defendant who was white, who was accused of a crack case?

You could go to a bar association meeting and say, aren't there anybody here, you know, a bar -- a criminal defense lawyers meeting, or -- say, please, I just need some examples. Aren't there any examples here of two or three people who are crack defendants who are white?

And I would have thought, if there is selective prosecution, they would have had lots of examples, and why is that a burden?

MS. O'CONNOR: At the time that we raised the motion, we were not limiting our claim solely to the possibilities among crack defendants. In fact, we were talking about patterns. We presented a pattern to the district judge. We were never under the impression that had we come in with one white crack defendant --

QUESTION: I'm not saying one, but -- I have no idea what the number would be. What I'm trying to get at I think is what Justice Ginsburg was trying to get at.

The Government has argued within Rule 16 a selective prosecution case is a tough case to make, really tough, because it -- because of various policies and prosecutorial discretion, and so forth. You should at least have to show that there are some -- they don't say

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what number, but that there were some comparably situated white defendants who were not prosecuted in the Federal courts.

Now, is it a burden to do that? Why is it difficult just to go to a meeting in your own office, the State office, the bar association, and say, we're trying to make out this defense. I'd appreciate anyone who can give me examples of white crack defendants who were prosecuted in State court. It should be easy. Why isn't it?

MS. O'CONNOR: Number 1, we disagree that that's required in order to obtain discovery. But Number 2, the more practical question that you pose, Justice Breyer, we did make some efforts to obtain that information, and again, I have to suggest to this Court that the local circumstances in Los Angeles were important considerations, and something that again requires deference to the district judge.

Los Angeles, the Central District of California encompasses a huge geographical area. The State court system is broken up into many, many different courts. In fact, there is no centralized record-keeper of crack and powder cases, for example, and the information is not accessible to defendants with ease, and in some instances is not accessible at all.

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For example, our request for the Government's charging criteria is solely within the possession and knowledge --

QUESTION: Would you comment on the Solicitor General's argument that the Burke study shows that this information was in fact available?

MS. O'CONNOR: The Burke study was conducted over a period of time that encompassed, I believe, more than a year. The district judge in that case ordered payment for a paralegal to compile information. The attorneys were paid by the court to collect the information. Certainly that took --

QUESTION: But it was done by the defense, I take it.

MS. O'CONNOR: Pardon me?

QUESTION: The Burkes memorandum was prepared by a submitted by the defense.

MS. O'CONNOR: That's correct, although ordered by the district judge in the context of an ongoing discovery dispute and resolution of the request.

Because the Burke study came into existence, however, I don't think means that the discovery order in this case was improperly granted. I think the district judge must have the discretion to order levels of discovery, and perhaps had the district judge been

presented with the information that we requested, that might have been the end of the issue completely.

This is one reason why we suggest that Solicitor General Days' substantial threshold showing is inappropriate, and that the district judge must have the discretion to order limited discovery along the way, perhaps moving towards an easy and quick resolution of the matter rather than wait 18 months through many, many months of hearings to obtain something like the Burke study.

It might have been that had the Government complied with this order, the case might have been closed, or resolved in the manner that a district judge would, for example, resolve a summary judgment question.

QUESTION: Ms. O'Connor, am I wrong in thinking that the Burke study showed that there was -- the figure of white defendants was between 3 and 4 percent?

MS. O'CONNOR: I believe that's the ultimate finding.

The Burke study --

QUESTION: But just sticking with that, it's nothing like 50 percent, 3 and 4 percent. If you take the universe of prosecutions in the Federal court for crack cocaine conspiracies, 3 to 4 percent would equal how many defendants? Not many. Maybe even a fraction of one.

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MS. O'CONNOR: Well, may I suggest, Justice Ginsburg, this is precisely why the district judge made the order that she did asking for expert testimony.

The judge was not willing, on the record before her, to find the Government's explanation for the pattern persuasive. In fact, she said, I cannot resolve this issue without expert testimony, and the kind of issues that you pose, Justice Ginsburg, are the kind of disputes that would be ongoing --

QUESTION: I don't understand the expert testimony. If the numbers would show that if you're comparing State and Federal you would expect very few Caucasians in the Federal court, because you're not trying to make -- you're trying to make a case of comparing State and Federal. Well, the numbers that came out don't seem to support your case very strongly.

MS. O'CONNOR: I don't believe that we're limited solely to that claim and, in fact, there may be other areas of selectivity that come up as discovery is --

QUESTION: I thought your claim was the disparity between State and Federal prosecutions, because the Federal prosecutions involve the higher penalty, and as Justice Ginsburg points out, even under the Burke study, 3 percent of 42 defendants is 1 defendant. That universe is completely insubstantial as a showing.

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MS. O'CONNOR: The question of the appropriate universe for comparison has been shifting over the course of time, and during this 3-1/2 years or --

QUESTION: But it is correct that you were comparing State prosecutions and Federal prosecutions. That was your point, was it not?

MS. O'CONNOR: That was one point. There may have been other areas for us to pursue.

QUESTION: But that's the problem, because being a very good defense lawyer, you probably could think of dozens and dozens of possible comparisons, and what's worrying me is that, because you are so good at thinking up definite --you know, lots of different comparisons, some of which may be true, I don't know, but if the -- if there isn't some burden to show, in addition to the large number of African-Americans who were prosecuted in this category, here are some comparable people who were Caucasian, and they weren't, which doesn't seem like a big burden, that the thing could go on endlessly as you think of more and more categories and they have to respond more and more.

That's what's actually worrying me. That's why I asked, couldn't you just ask at a meeting of defense lawyers, did anyone have a white defendant? That's my whole problem, which I'm asking you to respond.

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MS. O'CONNOR: I understand that, Justice Breyer.

My problem in responding to that question, however, is that I think it's wrong to say that the universe of comparators is established, or must be established by the defense before the defense requests discovery, and this case is the perfect example of an evolving universe of comparators.

QUESTION: Well, why isn't that just in accord with the principle that, you know, we do try to have the main issue in trials be whether the defendant is guilty or not. That is so rarely the issue nowadays, in cases that come up to us, anyway.

The issue is whether the Government has been guilty of not turning over information required by Brady, or whether the Government conducted an unlawful search and seizure, or whether the Government did not give a proper Miranda warning, or, if the Government has behaved properly, whether the attorney was incompetent and did something wrong.

Isn't it reasonable to insist that by and large our criminal trials ought to be about whether the defendant is guilty of what he's charged with having done and, therefore, shouldn't we establish a fairly high threshold to bring in these extraneous issues which enable

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defense counsel to put the Government on trial instead of the defendant, and the Government is saying, we want a high threshold. You have to come in with a substantial showing.

Why isn't that a good enough reason for it? The criminal prosecutions are supposed to be about whether the defendant is guilty of the crime.

MS. O'CONNOR: Well, certainly, Justice Scalia, the universe of cases presented to you is much different from the universe of cases that are dealt with at the district level, where guilt and innocence is determined every day, and we are certainly present for much of that. It's the rare case where a racial claim does go forward, and it's the rare case where a motion to suppress is granted.

When statistics such as those we compile are presented, however, that is the rare case where a district judge must --

QUESTION: Ms. O'Connor --

MS. O'CONNOR: -- have discretion to look at the issue.

QUESTION: -- the question, why should this be the rare case in light of something else that has been going on?

The Ninth Circuit said, we must assume going in

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that all kinds of people commit all kinds of crimes, and yet we have seen for the first time ever a proposal of the Sentencing Commission rejected by Congress, and it was to even out the penalties between crack cocaine crimes and powdered cocaine for the very reason that whites commit disproportionately powdered cocaine crimes and African-Americans disproportionately crack cocaine crimes.

MS. O'CONNOR: That certainly is the backdrop against which this whole issue is framed, the disparity between the sentencing schemes that everyone is concerned about at all levels and in all branches of Government.

QUESTION: But the concern stems from the identity of a particular crime with one racial group more than another.

MS. O'CONNOR: If that presumption is true, and the Government is able to come forward with evidence that shows --

QUESTION: The Sentencing Commission thought it was true.

MS. O'CONNOR: I believe the Sentencing Commission is certainly concerned about the pattern of prosecutions. The Sentencing Commission has no idea what cases are being declined.

QUESTION: Well, I take it, just for -- Justice Ginsburg's point is that the backdrop that you refer to

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has a premise which is fundamentally inconsistent with yours.

MS. O'CONNOR: I would disagree with the idea that that has been proven. I think there are many white crack cocaine users and dealers out there. I don't think the Government argues that --

QUESTION: So the Sentencing Commission is wrong in its suggestion.

MS. O'CONNOR: The Sentencing Commission is looking at the end result. They're looking at the convictions, the sentences imposed. They have some information about users and dealers, but primarily their focus is on the sentencing scheme.

QUESTION: But if you don't accept judgments of conviction as probative because you say they themselves may have been the result of racial prosecution, then there can never be any end to the argument.

MS. O'CONNOR: Mr. Chief Justice, what we're seeking is the beginning of the argument, in this case, to attempt to gather more information.

Certainly, the focus of the Sentencing Commission is different, and at the same time it involves the same issue, the issue of concern about racial injustice.

Solicitor General Days mentioned the high cost

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to the Government of providing information, and we'd suggest that an even higher cost to the criminal justice exists when unfairness is perceived.

QUESTION: You, I take it, don't depend upon Judge Reinhardt's assumption to establish the second prong, the similarly situated but not prosecuted prong. Am I correct you don't depend on Judge Reinhardt's assumption?

MS. O'CONNOR: Justice Souter, you're referring to Judge Reinhardt's statement that we must assume all persons commit all crimes?

QUESTION: That's right.

MS. O'CONNOR: I think that that statement was more in the nature of a descriptive statement. I did not read that --

QUESTION: Well, do you depend on it?

MS. O'CONNOR: -- as a binding presumption.

QUESTION: Do you depend on it for your argument? I assumed you didn't.

MS. O'CONNOR: No.

QUESTION: All right.

MS. O'CONNOR: And in fact I would suggest the Government is depending on the opposite presumption, that only blacks commit the crime, and had they shown that, we might not have succeeded in our request --

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QUESTION: Well, the Government at least has some figures, and I'm not sure that you do. You mentioned a moment ago that you thought, or you believed that whites were committing these crimes. Why didn't you come forward with an affidavit of your own detailing what it was you knew that was the basis for this belief?

MS. O'CONNOR: Well, as the Court may be aware, I did provide a limited declaration in response to the Government's motion for reconsideration, and I think the district judge did consider the two declarations that we submitted.

QUESTION: That was the reference to the State experience?

MS. O'CONNOR: Mr. Reed submitted a declaration laying out his experience in State court, his perceptions of the nature of the defendants that were being prosecuted in State court, which is directly across the street --

QUESTION: Right.

MS. O'CONNOR: -- from us, and we submitted another declaration regarding some information from a treatment facility.

QUESTION: When you say declaration, Ms. O'Connor, does that suggest the statements were sworn?

MS. O'CONNOR: I recall they were signed declarations. Whether they were sworn under penalty of

perjury, I can't recall. Perhaps not. I can represent one of them but not for jurat.

QUESTION: Ms. O'Connor, specifically what was declared in the statement, in the two statements that you say came up later.

MS. O'CONNOR: Mr. Reed laid out a description of his experience in State court. Again --

QUESTION: Which was --

MS. O'CONNOR: Well, I would suggest to this Court that the district judge in Central District of California --

QUESTION: Did he say there have been a white -- similarly situated whites prosecuted in State court?

MS. O'CONNOR: He did say that whites were prosecuted in State court for crack cocaine violations. At the time, the definition of similarly situated was somewhat up in the air, and I would suggest remains somewhat up in the air.

QUESTION: He just said whites were prosecuted, but not similarly situated?

MS. O'CONNOR: We at the time did not know what similarly situated was, and as I am perhaps not explaining sufficiently, I think that definition continues to evolve, and our point is to require us to present evidence of similarly situated individuals at such an early stage is

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premature, because we don't know who is similarly situated.

QUESTION: Well, if you don't know that, then you don't know sort of the fundamental structure of your argument. You have no claim unless there are similarly situated individuals. Don't you therefore, in order to make a claim, have at least an initial obligation to define a class so that both you can tell, in making your assertion, and the judge can tell in passing on it, what you mean by similarly situated?

MS. O'CONNOR: I don't believe any court has ever held that there must be a showing of a similarly situated individual to succeed on a claim of selective prosecution, and certainly the Government concedes that's not true.

QUESTION: Well, if there isn't an understanding of what similarly situated means, how is there even a claim of selective prosecution?

MS. O'CONNOR: I would --

QUESTION: It implies selection, and the implication of selection requires some understanding of a class, some of those members are being treated one way, and some of whose members are being treated differently. How can you make the claim without at least defining your class and hence defining what similarly situated people

are?

MS. O'CONNOR: Our position is that selectivity is the issue, not similarly situated individuals, and certainly --

QUESTION: We're not meeting. We're not engaging here.

Maybe I'm missing some point, but I'm saying that if you claim that there has been selective prosecution -- I understand you to be claiming that there has been disparate treatment of individuals who are in all relevant respects alike, and in order to make that claim you have to understand what the class is which is in all respects alike, and you therefore at least have to start with a notion of what similarly situated people might be like.

Isn't that true? Isn't that what you mean when you say the prosecution has been selective?

MS. O'CONNOR: I think I'm proffering a broader definition, which is that at the initial stage it's clear selectivity has occurred. In the vast number of criminal cases, very few are brought to -- to Federal court.

QUESTION: Well, why is it clear in this case that selectivity has occurred? You came up -- came forward and said there were, what, 24 prosecutions of black individuals for crack and guns.

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MS. O'CONNOR: That's correct.

QUESTION: What is self-evident about selectivity there?

MS. O'CONNOR: What is evident is that based on our experience it was an unusual pattern, a pattern that caused my office concern and then, in turn, caused the district judge concern. It's not the normal pattern for us to observe.

QUESTION: Well, it may be the point from which you start, but it is not the point at which you have defined a similarly situated class, I would suppose.

MS. O'CONNOR: I would agree that it is the point at which to start, and that's where we were.

QUESTION: Was -- were the 24 related to each other? I mean, is there a -- were there in the same gangs, any group of them? Were they in the same housing projects, are they 24 totally disparate -- separate individuals, or is there some relationship among subsets of those 24?

MS. O'CONNOR: I would not know what the relationship is and, frankly, based on the Government's proffer of different variables over time, we are looking at those aspects also.

QUESTION: Did the 24 include these defendants?

MS. O'CONNOR: Yes, I believe these were --

QUESTION: Well, they were all related, and then how many defendants were there?

MS. O'CONNOR: I perhaps am misspeaking on that. I perhaps am misspeaking. I would have to look at my chart to see if they were listed in fact.

Nevertheless, what these defendants had in common was their race. They were charged in the same case. They are not all similar. Some of the variables --

QUESTION: They also had in common that they knew each other and they were in the same conspiracy. I take it that was also a common --

MS. O'CONNOR: I wouldn't suggest that that is true or is proven at this point, Justice Kennedy.

If I may, to sum up, I believe that the special standard proposed by the Solicitor General is far too stringent on a claim of racial selectivity and that, in fact, no special standard is required.

Rather, the court is compelled to do what it did in this case, which is, number 1, to determine, as Justice Souter suggested, there is some evidence that a defense exists, a colorable basis to believe that selective prosecution has occurred which can be defeated by the Government and in this case was not.

The court then reviews the defense and determines whether the evidence requested is material.

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The court is also obligated to look at the factors that any court does in a district -- in a discovery dispute, namely the access of the parties. It's clear there are findings, exclusive findings in this case, that the Government had access to the information.

QUESTION: I suppose that discriminatory prosecution cannot be remedied as discriminatory taxation can, for example, in a Commerce Clause case, by after the fact going out and finding the 24 white people to prosecute. It's too late, isn't it?

MS. O'CONNOR: I'm not certain that I should comment on that, Justice Scalia, but --

QUESTION: Thank you, Ms. O'Connor.

(Laughter.)

QUESTION: General Days, you have a minute remaining.

GENERAL DAYS: Unless the Court has further questions, I have no further comments.

CHIEF JUSTICE REHNQUIST: Very well. The case is submitted.

(Whereupon, at 12:03 p.m., the case in the above-entitled matter was submitted.)

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UNITED STATES, Petitioner v. *CHRISTOPHER LEE ARMSTRONG, ET AL.*

CASE NO: *95-157*

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BY Ann Marie Federico

(REPORTER)