

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
KING COUNTY

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|------------------------|---|-------------------------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | |
| |) | |
| JOHNNY VARNER, et al., |) | No. 00-C-10016-3 SEA |
| |) | DEFENSE MEMORANDUM |
| Defendants. |) | IN SUPPORT OF REQUEST |
| |) | FOR DISCOVERY |
| _____ |) | *** CORRECTED COPY *** |

1. The defendants,¹ by undersigned counsel, respectfully submit this Memorandum of Points and Authorities² in support of their First Request for Discovery³ related to their motions to dismiss and/or to suppress evidence due to racial discrimination in Seattle Police Department narcotics enforcement.

¹ 19 cases were consolidated by order of the Hon. Richard Jones dated May 31, 2001, for joint litigation of defense motions to dismiss and/or suppress evidence due to racial discrimination in narcotics enforcement by the Seattle Police Department. One case, State v. Freddy Lira, was subsequently dismissed. The 18 remaining defendants submit this Memorandum. The Court has directed that pleadings be captioned as above.

² This corrected copy supercedes the version served and filed on June 25, 2001.

³ Attached as Exhibit A.

III INTRODUCTION

In theory, it is a felony to deliver narcotics in Seattle,⁴ regardless of the type of drug involved, regardless of the race of the person committing the offense, and regardless of when or where the delivery takes place. In practice, however, narcotics enforcement by the Seattle Police Department concentrates on limited locales and subgroups of street “dealers,” resulting in two stark racially-inflected realities. One: because of S.P.D. enforcement choices, the overwhelming majority of those who are arrested and prosecuted for narcotics delivery in Seattle are African-American and Latino. Two: because of S.P.D. enforcement choices, whites who deliver narcotics in Seattle are a phantom population who have *de facto* immunity from the criminal justice system.

The 18 defendants herein assert that such a system amounts to unlawful racial discrimination. They assert that a remedy exists in a criminal case for such discrimination. To assist in establishing their factual and legal claims, they seek discovery of certain materials from the State (the prosecutor’s office and law enforcement).

What follows is a brief overview of the good-faith basis for the defense belief that S.P.D. narcotics arrests are racially disproportionate; an outline of the possible legal theories underlying the defense motions to dismiss and/or suppress evidence; and points and authorities in support of disclosure of the requested material.

⁴ RCW 69.50.401.

II. DEFENDANTS HAVE A GOOD FAITH BASIS TO BELIEVE THAT SEATTLE POLICE DEPARTMENT NARCOTICS ENFORCEMENT PRACTICES ARE RACIALLY DISCRIMINATORY

A. 1999 Minority & Justice Commission report: police priorities in narcotics enforcement are likely an important factor contributing to racial disproportionality among incarcerated drug offenders in Washington

In 1999, the Washington State Minority and Justice Commission released a report analyzing the relationship between discretionary decisions by judges and prosecutors in King, Pierce and Yakima counties, and the acknowledged racial disparity in the population of drug offenders in Washington prisons and jails.⁵ The authors concluded that neither sentencing decisions by judges, nor charging decisions by prosecutors, were a significant cause of the striking racial disparity in the population of incarcerated drug offenders.⁶ The majority of the criminal justice professionals⁷ whom the authors interviewed, however, believed that arrest decisions by local law enforcement agencies are a significant cause of racial disparities among drug defendants.⁸ As one Superior

⁵ By 1997, over 50% of those in Washington prisons for drug offenses were racial or ethnic minorities. See Engen, Gainey & Steen, "The Impact of Race & Ethnicity on Charging & Sentencing Processes for Drug Offenders in Three Counties of Washington State," Washington State Minority & Justice Commission (1999) (hereinafter "Minority & Justice Commission report") at 4; see <http://www.courts.wa.gov/mjc/reports/FinalReport.pdf>. State Office of Fiscal Management estimates were that, in 1998, only 17% of Washington's population was comprised of racial and ethnic minorities. See <http://www.ofm.wa.gov/sps/1998/index.htm>.

⁶ Minority & Justice Commission report at 69-70.

⁷ A total of 23 superior court judges, prosecuting attorneys and public defenders with extensive experience in drug cases in King, Pierce and Yakima counties were interviewed. At least two individuals at each position were interviewed in each county. Minority & Justice Commission report at 19.

⁸ Minority & Justice Commission report at 40-43. These pages are attached as Exhibit B.

Court judge explained, “[s]ince blacks and Hispanics are involved in street dealing, they get a ... disproportionate impact in terms of enforcement.”⁹

In-depth analysis of the racial impact of discretionary police decisions in narcotics enforcement was beyond the scope of the Minority & Justice Commission report, which focused on decisions by judges and prosecutors. A 2001 report by graduate researchers from the Kennedy School of Government at Harvard University, however, examined the narcotics enforcement choices of the Seattle Police Department, and concluded that they do have a racially disparate effect, albeit complex and indirect.¹⁰ Much of the researchers’ data came from S.P.D. itself, in the form of both quantitative reports and in-depth interviews with police officials throughout the command structure. While the defense will not ask the Court simply to adopt the findings of the Kennedy School researchers, the quantitative and qualitative data they gathered, some of which are discussed in sections B and C below, support the defense proposition that S.P.D. narcotics enforcement is racially discriminatory, without adequate justification.

B. In King County, narcotics involvement by race is largely proportionate to demographic distribution in the general population

The available public health data suggest that, in King County, as elsewhere, African-Americans, Latinos and whites use controlled substances roughly in proportion

⁹ Minority & Justice Commission report (Exhibit B) at 41.

¹⁰ Klement & Siggins, “A Window of Opportunity: Addressing the Complexities of the Relationship Between Drug Enforcement & Racial Disparity in Seattle” (John F. Kennedy School of Government, Harvard University, 2001). “A Window of Opportunity,” referred to hereinafter as the “Kennedy School report,” is attached as Exhibit C.

to their percentage of the general population.¹¹ For instance, non-Hispanic whites make up 73.4% of the population of King County,¹² and 87% of recent users of illicit drugs.¹³ African-Americans constitute 5.3% of the King County population,¹⁴ and 7% of recent drug users.¹⁵ Hispanics/Latinos of any race make up 5.5% of the King County population,¹⁶ and 2% of recent drug users.¹⁷

While public health and epidemiological studies do not attempt to estimate the breakdown of those who sell or deliver illegal drugs by race, they do find that narcotics users of all races are most likely to obtain drugs from a source belonging to the same racial group.¹⁸ Together with the drug use data for King County, this suggests that a large fraction of local narcotics deliveries likely are committed by whites.

C. Narcotics arrests by the Seattle Police Department are racially disproportionate, not only to the general population, but also to the population believed to be involved in narcotics activity

¹¹ See Washington Division of Alcohol & Substance Abuse (DASA) Profile of Substance Abuse and Need for Treatment Services in King County (“DASA Profile”), 1999, excerpted in Kennedy School report (Exhibit C) at 10.

¹² 2000 census figures, reprinted in the Kennedy School report (Exhibit C) at 58.

¹³ DASA Profile, excerpted in Kennedy School report (Exhibit C) at 10.

¹⁴ 2000 census figures, reprinted in the Kennedy School report (Exhibit C) at 58.

¹⁵ DASA Profile, excerpted in Kennedy School report (Exhibit C) at 10.

¹⁶ 2000 census figures, reprinted in the Kennedy School report (Exhibit C) at 58.

¹⁷ DASA Profile, excerpted in Kennedy School report (Exhibit C) at 10.

¹⁸ J. Riley, “Crack, Powder Cocaine, and Heroin: Drug Purchases and Use Patterns in Six U.S. Cities,” National Institute of Justice & Office of National Drug Control Policy (1997) at 1, quoted in Kennedy School report (Exhibit C) at 9 n.17.

In 1999, the only year for which such data have been produced to date, 57% of all S.P.D. narcotics arrests were of African-American suspects.¹⁹ According to the 2000 census, Seattle's population is 8.3% African-American. As noted above, the population of King County is just 5.3% African-American. More pertinent as a baseline for comparison with the arrest rate, African-Americans comprise just 6-7 % of users of illegal drugs in King County.²⁰ Put in terms of comparative likelihood of arrest, all other things being equal, an African-American user of illegal drugs in King County²¹ was 22 *times* more likely to be arrested on a drug charge by the Seattle police in 1999 than a white user of illegal drugs.

It would be difficult to dispute that this is a staggering, and meaningful, disparity. John Lamberth, a professor of psychology at Temple University who has studied racial disproportionality in traffic stops in several jurisdictions, has suggested that problematic police practices are likely when stops of one racial group are more than 50% greater than that group's proportion of the relevant baseline population (i.e., where African-Americans account for 15% of stops but make up only 10% of the driving population).²² Comparing King County narcotics use rates with S.P.D. arrest rates, the proportion of

¹⁹ Kennedy School report (Exhibit C) at 59, Figure 1.

²⁰ DASA profile, excerpted in the Kennedy School report (Exhibit C) at 10, Table 5 (rates of use in past 30 days); 61, Figure 1 (rates of use in past 12 months); and 62, Figure 2 (rates of lifetime use). The discrepancy between 6% and 7% depends on whether one looks at the figures for most recent use (African-Americans comprise 7% of all illegal drug users within the past 30 days) or for use over a longer period (African-Americans are 6% of users within the past year and over a lifetime).

²¹ Using the 1999 DASA profile figures for use within the past twelve months.

²² See J. Pritchard, "More U.S. Police Study Racial Profiling, But What Are They Looking For?," <http://news.findlaw.com/ap/1/0000/1-15-2001/20010115001300250.html>.

narcotics arrestees who are African-American (57%) is *850% greater* than the proportion of the user population that is African-American (6%).

It appears likely that the dramatic over-representation of African-Americans among those arrested on narcotics charges by S.P.D. is due, in significant part, to S.P.D. reliance on undercover “buy bust” operations to apprehend low-level street sellers or narcotics. Over half of all incidents resulting in a narcotics arrest in 2000 -- 54% -- occurred in the West Precinct.²³ Buy-bust operations are much more frequent in the West Precinct than in any other precinct.²⁴ For complex reasons, many of the buyers and most of the sellers in the open-air drug markets downtown, in the West Precinct, are low-income addicts who are predominantly African-American and Latino.²⁵ The concentration of African-American and Latino users and low-level sellers in the downtown open-air drug markets, combined with an overwhelming concentration of S.P.D. buy-bust efforts in the West Precinct, and the ease of making buy-bust arrests (as Lt. Daniel Whelan described buy-busts, “it’s like shooting fish in a barrel”),²⁶ has contributed significantly to the high proportion of narcotics arrestees who are African-American or Latino. An analysis of certificates of probable cause filed in all drug cases

²³ Kennedy School report (Exhibit C) at 25, 68.

²⁴ Kennedy School report (Exhibit C) at 25.

²⁵ Kennedy School report (Exhibit C) at 12-18.

²⁶ Kennedy School report (Exhibit C) at 34.

filed in King County Superior Court in March 2000 reveals that 73% of all those arrested in buy-bust operations were African-American.²⁷

Former Seattle Police Chief Norm Stamper, who had an excellent vantage point on S.P.D. narcotics enforcement through the end of 1999, told the Kennedy School team that “[i]t is so much easier for the police to enforce drug laws in communities of color-- socially, economically, demographically, even topographically. This leads to a disproportionate number of people of color being arrested.”²⁸ One implication of the Kennedy School study is that S.P.D. commanders and line officers are more or less clear-eyed about the implications, racial and otherwise, of the priorities the department has set in narcotics enforcement. The report does not conclude that, and did not set out to discover whether, the racial disparities in narcotics arrests amount to intentional racial discrimination.²⁹ However, the report provides a good faith basis to believe that the racial implications of the department’s enforcement strategies are known to the command structure and thus far have been, at the least, consciously disregarded. The report is laced with acknowledgments by S.P.D. commanders and line officers that drug activity, including sales and delivery, occurs as much in more private locales as in the open-air

²⁷ A. Fryer, “Record Number of Drug Arrests Clogging King County Court System,” Seattle Times, September 17, 2000 (of 56 defendants arrested in buy-bust operations in cases filed in March 2000, 41 were African-American).

²⁸ Kennedy School report (Exhibit C) at 34.

²⁹ Kennedy School report (Exhibit C) at 30.

drug markets downtown,³⁰ and that choosing to concentrate enforcement on the street markets has racial consequences.³¹

The Kennedy School research team had substantial cooperation from the S.P.D. command structure in conducting in-depth interviews about the department's narcotics enforcement strategy.³² With respect to quantitative data, however, it should be noted that the authors were largely limited to figures available from S.P.D. annual reports and a one-time-only analysis by the department of 1999 arrests and other police contacts. While these data alone suggest much about the connection between enforcement choices and racial disparity in S.P.D. drug arrests, plainly more investigation and discovery is needed before the defense will be in a position to adequately establish that connection for the Court.³³

³⁰ See, e.g., Kennedy School report (Exhibit C) at 29--statement of Chief Kerlikowske: "In the condos, there could be as much cocaine use as in certain street corners of downtown, but often it's more difficult--if not impossible--to get. ... We end up going to the hot spots. If we had additional time and resources for our detectives, we could institute a more comprehensive system in terms of identifying targets and not just going where the opportunity is. Yes, you could and should do that."

³¹ Kennedy School report (Exhibit C) at 12-18.

³² The research team will not provide audio tapes or copies of interview notes to the defense voluntarily.

³³ For example, the Kennedy School researchers requested, but did not receive, copies of all narcotics incident reports in which an arrest was made. This information would be valuable in order to compare arrest rates by race for various drugs with use rates by race for the same drugs. For example, the DASA profile provides the fraction of recent cocaine users in King County who are African-American -- 6% -- but, using publicly-available S.P.D. figures, we can only compare that to the proportion of all S.P.D. narcotics arrests, for any drug, that involve African-American suspects -- 57%. It would be helpful to understand whether the proportion of cocaine arrests involving African-Americans is higher. See Kennedy School report (Exhibit C) at 7 n.13. Similarly, the 1999 narcotics arrest figures are not broken down based on the nature of the offense. Possession arrests are combined with arrests for delivery and possession with intent to deliver. Additional discovery will be necessary to develop the defense claim that defendants arrested specifically in buy-bust operations and charged specifically with delivery are being subjected to racial discrimination.

III. ANTICIPATED LEGAL BASES FOR DEFENSE MOTIONS TO DISMISS AND/OR SUPPRESS EVIDENCE DUE TO RACIAL DISCRIMINATION & SELECTIVE ENFORCEMENT³⁴

A. Equal Protection under the Fourteenth Amendment to the United States Constitution and Article 1, Section 12 of Washington Constitution.

The Supreme Court has long recognized that racial bias presents a pervasive and insidious problem for the enforcement of criminal laws. McCleskey v. Kemp, 481 U.S. 279, 309 (1987), citing Batson v. Kentucky, 476 U.S. 79, 85 (1986) (noting Court's "unceasing efforts" to eliminate racial bias in jury selection procedures); see also Whren v. United States, 517 U.S. 806, 813 (1996) (stops based on race of suspect are improper and subject to challenge under Equal Protection Clause).

The defense expects to argue that the Seattle Police Department ("S.P.D.") in general, and the Anti-Crime Teams ("ACT") and personnel deployed in narcotics enforcement in particular, utilize impermissibly arbitrary classifications (racial or otherwise) in determining which geographic areas to target and whom to approach for undercover narcotics operations. Unlike police actions responding to 911 emergency calls or to on-view crimes, drug transactions seldom require police *response*. To deal with essentially consensual crime of drug transactions, police *proactively* target specific substances, methods of transfer, neighborhoods, and suspects for investigation and arrest.

³⁴ CrR 8.3 creates a remedy in a criminal case when the court finds that "arbitrary action or governmental misconduct" compromises the accused's right to a fair trial. Any of the legal theories outlined below would support such a finding.

The unbridled discretion of undercover officers and teams to pick and choose targets is the central characteristic of discrimination in buy-bust operations.

Buy-bust operations are further distinguished from other law enforcement strategies in that officers approach the chosen target without probable cause that crime is afoot. The available information strongly suggests that undercover officers approached these defendants, as is typical, on nothing more than an unsubstantiated hunch based on racial profiling about propensity to engage in crime. In fact, conspicuously missing in the “Certification for Determination of Probable Cause” for each defendant is *any* attempt on the part of the officers to justify their decision to approach the particular defendant for the operation. Given the evident racially disparate effect of their targeting, it is likely that race, ethnicity, or other arbitrary classifications acted as proxies for probable cause or reasonable suspicion. Were this proven, it would amount to a violation of the Equal Protection Clause of the Fourteenth Amendment.

Defendants were all arrested in the West Precinct, downtown, on the street, after undercover officers solicited a drug deal. It appears plain that persons with similar propensity to engage in low-level drug exchanges located elsewhere in the city, particularly within the walls of condos, clubs and businesses, are neither approached by undercover officers to solicit narcotics transactions, nor arrested for narcotics delivery. Thus, in addition to their claim of intentional racial discrimination, the defendants also expects to assert that they were selected for enforcement actions by the S.P.D. based on classifications among offenders and potential offenders that were both intentional and arbitrary (whether or not they were race-based). The defense expects to argue that the

decision to concentrate enforcement efforts on street sales of very small quantities of narcotics in a few limited locales downtown is arbitrary, and lacks any substantial justification in legitimate law enforcement goals.

1. Defendants have a good-faith basis to believe that violation of defendants' equal protection rights begins during the pre-contact stage when police decide to target members of a particular racial or ethnic minority for buy-bust operations

The police decision to pursue and contact an individual because of race, or a general practice or pattern that primarily targets minorities, implicates due process and equal protection concerns. See United States v. Cuevas-Ceja, 58 F. Supp. 2d 1175 (1999); United States v. Avery, 137 F.3d 343 (1998). “Citizens are cloaked at all times with the right to have the laws applied to them in an equal fashion—undeniably, the right not to be exposed to the unfair application of the laws based on their race.” See Avery, 137 F.3d at 353. The “pre-contact” stage (just prior to the solicitation of a drug deal, when an undercover officer or team selects a target) is where the officer has the highest discretion. Avery, 137 F.3d at 353. Moreover, a law enforcement agency violates the Equal Protection clause if it adopts a policy, employs a practice, or in a given situation initiates an investigation of a citizen based solely upon that citizen’s race, without more. Avery, 137 F.3d at 355. While a reasonable hunch itself *may* be a basis for an officer’s decision to initiate a consensual encounter with a citizen, *if* the hunch is at least in part based on racial stereotyping it would taint the police conduct. State v. Maryland, (Dkt # A-118-99, June 5, 2001)³⁵ (evidence suppressed where officers approached the defendant

³⁵ Available through <http://www.judiciary.state.nj.us/opinions/supreme/A-118-99.htm>

because he was one of three Black persons seen in the area, even though the defendant later placed a brown paper bag into his pants.).

2. Targeting specific areas for drug buy-bust operations absent a substantial legitimate justification amounts to selective enforcement of the laws in violation of the 14th Amendment of the United States Constitution and Article I, Section 12 of the Washington Constitution

To comport with the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the Washington Constitution, law enforcement must not be “deliberately based upon an unjustifiable standard such as race, religion, *or other arbitrary classification.*” See State v. Judge, 100 Wn.2d 706, 713 (1984) (emphasis added), quoting Oyler v. Boles, 364 U.S. 448, 456 (1962). The proponent of a motion to dismiss for selective enforcement under these provisions must show “(1) disparate treatment, and (2) improper motivation. Improper motivation means a selection deliberately based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” See State v. Terravonia, 64 Wn. App. 417, 420, review denied, 119 Wn.2d 1015 (1992) (internal citations omitted).

Here, selection of city neighborhoods for concentrated enforcement, solely because they are presumed to be “hot spots” for a particular type of drug activity, without more, constitutes an arbitrary classification. The State may assert that S.P.D. relies heavily on buy-bust operations downtown because that is where the most visible drug exchanges occur, because the department places accords more weight to citizen complaints about narcotics activity downtown than elsewhere, and because enforcement

in other, more private locales is more costly and more difficult.³⁶ However, the buy-bust strategy appears to be singularly ineffective in eradicating the downtown open air drug markets.³⁷ The operations serve to temporarily move buyers and sellers from one corner to another, or, at best, from one neighborhood to another, without alleviating the purported problem. In fact, for the nine or more years in which S.P.D. has concentrated its buy-bust operations on such “hot spots,” there has been no discernible reduction in drug activities in those locations.³⁸ Indeed, the buy-bust strategy may even serve to exacerbate the level of drug buying and selling, as the actions of the undercover officers disguised as addicts would not be easily distinguishable from real street-level drug buyers. The defense expects to establish that the practice of targeting open-air drug markets, where minority sellers may be concentrated, to the exclusion of other drug deliveries occurring elsewhere, serves no significant law enforcement interest.

In the absence of any legitimate governmental interest which would justify it, the S.P.D.’s intentional and arbitrary selection of open air drug markets, where racial minorities are over-represented, for concentrated enforcement, infringes upon the defendants’ rights to be left alone under Article 1, Section 7,³⁹ as well as their right to equal protection under the Fourteenth Amendment and its Washington state counterpart.

³⁶ See Kennedy School report (Exhibit C) at 25-29.

³⁷ Id. at 39-40.

³⁸ “It’s a monster you can’t control. . . . We make an impact in certain areas at certain times and it seems to shift somewhere else.” Kennedy School report (Exhibit C) at 28, quoting West Precinct Lieutenant Evenson.

³⁹ See Section B below.

3. **The defendants' good-faith proffer that selective enforcement has occurred exceeds the "colorable basis" threshold for ordering discovery on a claim of discriminatory enforcement**

Courts require a colorable basis threshold in order to weed out frivolous claims while permitting the real problem of racially selective law enforcement to be heard when properly raised. A colorable basis for purposes of discovery is defined as "some evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent." United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974).

The data summarized in this preliminary memorandum go far past speculation to raise a reasonable question that police are directing the bulk of narcotics enforcement resources at certain groups, whether defined by race or other arbitrary classification.

The question central to the selective enforcement argument is whether the officers were motivated by racial or other arbitrary factors in their decision about whom to approach to solicit narcotics deliveries. This argument requires a particularly close examination of the events leading up to the decision to approach, including prior training and institutional assumptions about proper policing. That information can only be obtained from the officers and the police department. Depriving the defendants of the government's records as to what the officers believed or likely believed at the time of the decision to approach these defendants would make a meaningful cross-examination almost impossible.⁴⁰ Denying the defendants the right to effective cross-examination

⁴⁰ In cases involving allegations of police misconduct, a particularly vexing problem for the defense is discovery of any misconduct relating to officers. Many scholars have noted that "powerful cultural and institutional factors create a 'blue wall of silence': a perhaps unspoken understanding among the police

would be “constitutional error of first magnitude and no amount of showing of want of prejudice would cure it.” See Davis v. Alaska, 415 U.S. 308 (1974).

4. Discovery is required to establish that government actions had a discriminatory effect and were motivated by a discriminatory purpose

To establish a denial of equal protection, a party must prove that government actions had a discriminatory effect and were motivated by a discriminatory purpose. See Chavez v. Illinois State Police, 2001 U.S. App. LEXIS 10560 (7th Cir. 2001); Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 264-66 (1977); Washington v. Davis, 426 U.S. 229, 239-42 (1976).

Defendants may show that government officials treated them differently than other similarly-situated individuals either by identifying such individuals or through the use of statistics. Chavez, 2001 U.S. App. LEXIS 10560 (7th Cir. 2001), Hunter v. Underwood, 471 U.S. 222 (1985) (Blacks were 1.7 times as likely than whites to suffer disfranchisement under the law in question); see also State v. Soto, 734 A.2d 350 (1996). Circumstantial evidence of discrimination may be so plain as to make statistical certainty superfluous. Yick Wo v. Hopkins, 118 U.S. 356, 373-4 (1886) (denial of two hundred

that they are neither to admit their own wrongdoing nor to expose that of brother officers.” Christopher Slobogin, “Testilying: Police Perjury and What to Do About It,” 67 U. Colo. L. Rev. 1037 (1996); See Gabriel J. Chin & Scott C. Wells, “The ‘Blue Wall of Silence’ as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury,” 59 U. Pitt. L. Rev. 233 (1998). Officers who breach this wall face retaliation, ostracism, and harassment by fellow officers. “At the same time, the desire to get the ‘bad guys’ and the corresponding belief that legal ‘technicalities’ can block that goal, combined with a military, war-like mentality, lead many officers to bend the rules.” Andrew E. Taslitz, “Slaves No More! The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings,” 15 Ga. St. U.L. Rev. 709, 764 (Spring 1999). Without adequate discovery of the internal records, it would be impossible to cross-examine the officers given this entrenched practice of police silence.

Chinese license applications, when all but one of the eighty petitions of others were granted, constituted an impermissible racially discriminatory practice). Finding that common sense understanding and reasonable proof of discrimination were adequate bases for a court's protection of those discriminated against, the court noted: "Can a court be blind to what must be necessarily known to every intelligent person in the state?" Id., 118 U.S. at 362.

Implicit in courts' acceptance of statistics to establish intent is that defendants need not show that *only* minorities are subjected to the challenged law enforcement practice. To show discriminatory effect, defendants need only show that the selection of minorities for enforcement exceeds, in a statistically significant fashion, their actual percentage in the violator group. Here, as indicated above, S.P.D.'s own drug arrest records indicate stark racial disparities in comparison with the best available profile of potential offenders.

The more challenging question in this case is whether the challenged law enforcement practices are based on a discriminatory intent. The "invidious quality" of the challenged practice "must be ultimately traced to a racially discriminatory purpose." See Washington v. Davis, 426 U.S. 229, 240 (1976). Discriminatory purpose is established if it is shown that officers acted at least in part "because of" the adverse effects of their action on racial minorities. See McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

As there is seldom direct evidence of discriminatory intent, courts allow inferences to be drawn from "relevant statistical evidence of disparate impact or other

circumstantial evidence.” See Avery, 137 F.3d at 355 (citing United States v. Travis, 62 F.3d 170 (6th Cir. 1995)); see also McCleskey v. Kemp, 481 U.S. 279, 293 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Claimants may point to other indirect evidence to show that the officers were racially motivated, or that the practices and procedures of the police department encouraged racial profiling. Chavez, 2001 U.S. App. LEXIS 10560 (7th Cir. 2001). Absent direct evidence of an intent to discriminate (e.g., derogatory language, training materials urging or written policies endorsing racial profiling), a prima facie case can be made “by showing [that] the totality of the relevant facts gives rise to an inference of discriminatory purpose.” Id. at 242.⁴¹ That is, regardless of what official policies state, what matters is how these policies are interpreted and translated into actual practice by line officers. Id. The court must conduct a “sensitive inquiry into such

⁴¹ Racial animus has produced disparities in criminal justice throughout U.S. history. For example, in nineteenth century Portland, Oregon, Chinese were more than 60 percent of all persons arrested for violations of city ordinances from 1871-1885; gambling arrests peaked in 1883 with a Chinese to non-Chinese ratio of 29 to 1. See C. R. Mann, Unequal Justice: A Question of Color, 132-33, 137 (1993). Since early on in the regulation of narcotics through criminal penalties, Congress passed laws that imposed severe sanctions on use of various addictive substances primarily when they became popular with minorities. See United States v. Clary, 846 F. Supp. 768 (1994), rev'd 34 F.3d 709 (8th Cir. 1994) (the Eighth Circuit, however, did not dispute the district court’s findings regarding the historical roots of racial animus in drug enforcement). Influenced by inaccurate media accounts about opium smoking, Congress passed the 1909 Smoking Opium Exclusion Act targeting Chinese, to prevent the habit of opium-smoking from spreading to upper class whites. See, e.g., San Francisco Post, March 1, 1879: “The Chinaman has impoverished our country, degraded our free labor, and hoodlumized our children. He is now destroying our young men with opium.” Similarly, Congress passed the Harrison Act of 1914 as a result of the media-whipped fear of “heroin-addicted black prostitutes and criminals in the cities.” United States v. Clary, 846 F. Supp. at 775. In contrast, when cocaine was seen as the rich white man’s drug in the 1960s and 1970s, and became the “drug of the eighties,” no new drug laws were enacted to harshly deal with the offense, other than interdiction efforts to stop large shipments of powder cocaine into the United States. See “Racism, racial discrimination, xenophobia and all forms of discrimination,” Human Rights Watch statement to the United Nations (12-30-99). Predictably, in the mid-1980s, the “War on Drugs” was accelerated when the media repeatedly portrayed users as violent young black males. Between 1985 and 1986, the networks rushed to report crack-user horror stories involving African-Americans, despite the statistical data that whites were the primary crack users. United States v. Clary, 846 F. Supp. at 783. The racially-skewed media portrayal of crack users was tremendously influential in driving legislative action during this period. Id.

circumstantial evidence of intent as may be available.” See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).⁴² Here, the question is whether S.P.D. engaged in a de jure or de facto policy of selective enforcement. The inquiry will focus on the existence or non-existence of a course of conduct, one that presumably can be proven or disproven by objective evidence. The material sought is highly material to demonstrating institutional direction, tolerance, recklessness, and neglect amounting to de facto or de jure policy.

* * *

Discovery of training material also is an indispensable part of the defense request, for similar reasons. ACT members and personnel concentrating on narcotics are specially trained to proactively enforce drug laws. Absent the standards or criteria that guide an officer’s application of his expertise in individual cases, there remain only broad, self-serving police assurances that the approach actually taken is both consistent with training, and necessary for effective law enforcement. Resting at the confluence of criminal and civil rights law principles, claims of selective enforcement based on racial or other arbitrary classifications may require more extensive discovery than does the standard criminal case. In State of New Jersey v. Soto, 324 N.J. Super. 66 (1996) -- in which the defense ultimately succeeded in establishing intentional racial discrimination in traffic stops by the New Jersey state police -- a trial judge supervised six months of

⁴² Such a motive can be found from circumstantial evidence by considering seven non-exhaustive factors: 1) adverse racial impact of the official action; 2) historical background of the decisions; 3) specific sequence of events leading up to the challenged action; 4) departures from normal procedure sequence; 5) substantive departure from routine decisions; 6) the inevitability or foreseeability of consequence of the law; and 7) contemporaneous statements made by the decisionmakers. Id.

testimony and argument in discovery and suppression hearing before the issue was fully developed.

* * *

IV. CONCLUSION

For the foregoing reasons, the defendants respectfully request that the Court order the State to disclose the materials enumerated in Exhibit A, and such other materials as may later be identified by the defense as necessary and useful in developing the motions to dismiss and/or suppress evidence due to racial discrimination and selective enforcement.

Respectfully submitted this 26th day of June, 2001.

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EXHIBITS

- Exhibit A: Defendants' first Request for Discovery
- Exhibit B: Excerpt from 1999 Minority & Justice Commission report
- Exhibit C: 2001 Kennedy School report
- Exhibit D: Camden decision on enforceability of Title VI regulations via Sec. 1983