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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA

v.

FALGUN PATEL and
ANERI, Corp.
d/b/a Tobacco and
Beverage Mart.

CRIMINAL INDICTMENT

NO. 4:05-CR-27-02
NO. 4:05-CR-27-03

UNITED STATES OF AMERICA

v.

SUDHIRKUMAR N. PATEL and
KASHIBA, Inc.,
d/b/a Deep Springs Grocery.

CRIMINAL INDICTMENT

NO. 4:05-CR-33-02
NO. 4:05-CR-33-03

UNITED STATES OF AMERICA

v.

SATISHKUMAR PATEL
and JAI GOPAL, Inc.,
d/b/a Creekside Grocery.

CRIMINAL INDICTMENT

NO. 4:05-CR-38-01
NO. 4:05-CR-38-03

ORDER

The above-listed cases are before the Court on Defendants' Motion to Dismiss or, in the Alternative, for Discovery Based on Newly Discovered Evidence of Selective Enforcement [106]/[116]/[115].

I. Background

A. The Indictments and Operation Meth Merchant

In early to mid-2005, a federal grand jury sitting in the Northern District of Georgia returned twenty-four sealed indictments, involving forty-nine individuals and sixteen corporations. (Crim. Indict. Nos. 4:05-CR-018 through 4:05-CR-041.) The indictments asserted that the individuals and corporations named therein sold legal items from convenience stores located in the Rome Division, with knowledge that those items would be used to manufacture methamphetamine. On June 3, 2005, the indictments were unsealed and numerous Defendants were arrested.

AO 72A

In virtually all of the cases, the Government used confidential sources ("CS") or undercover law enforcement officers to make at least one controlled purchase of pseudoephedrine or ephedrine from each of the named Defendants, at which time the CS or undercover officers informed the Defendants that they intended to, inter alia, "make meth," "cook," "make dope," or "cook dope" with the items purchased. (App. for Search Warrants and Supp. Aff., Case Nos. 4:05-MJ-63 through 4:05-MJ-69.) In several instances, the CS or undercover officers also purchased other items that the Government contends are used to manufacture methamphetamine, including, inter alia, Red Devil® Lye, matchbooks, lighter fluid, butane, Coleman fuel, HEET®, isopropyl alcohol, hydrogen peroxide, Drano®, and iodine. (Id.)

The indictments charged all Defendants with violating 21 U.S.C.A. § 841(c)(2), which makes it unlawful to distribute pseudoephedrine or ephedrine, a listed I chemical as defined in 21 U.S.C.A. § 802, while knowing or having reasonable cause to believe that the listed chemical will be used to manufacture a controlled substance, such as methamphetamine, in a manner other than as authorized by Title 21 of

AO 72A

the United States Code. If the facts alleged in an indictment reflected that the CS or undercover officers also purchased items such as matchbooks or HEET®, then the Defendants responsible for those sales also were charged with violating 21 U.S.C.A. § 843(a)(7). 21 U.S.C.A. § 843(a)(7) makes it unlawful to distribute a chemical, product, or material that may be used to manufacture a controlled substance, while knowing, intending, or having reasonable cause to believe that it will be used to manufacture a controlled substance, in a manner other than as authorized by Title 21 of the United States Code.

B. Previous Motions to Dismiss Based on Selective Prosecution

On August 1, 2005, Attorney C. Gregory Price filed Motions to Dismiss for Selective Prosecution on behalf of Defendants Rameshbhai Patel (Criminal Indictment No. 4:05-CR-024, Docket Entry No. 41), Shantilal Patel (Criminal Indictment No. 4:05-CR-025, Docket Entry No. 66),[1] and Bharatkumar Patel (Criminal Indictment No. 4:05-CR-026, Docket Entry No. 32) (the "Price Motions").

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[1] The Government subsequently dismissed its case against Defendant Shantilal Patel. (Crim. Indict. No. 4:05-CR-025, Docket Entry No. 95.)

AO 72A

On September 2, 2005, the Federal Public Defender Program, Inc. filed Motions to Dismiss Based Upon Selective Prosecution on behalf of two Defendants: (1) Defendant Govinbhai Patel (Criminal Indictment No. 4:05-CR-21, Docket Entry No. 65)[2]; and (2) Defendant Balwinder Parmar (Criminal Indictment No. 4:05-CR-22, Docket Entry No. 52) (the "Federal Defender Motions").

On September 7, 2005, Attorney Manubir S. Arora filed Motions to Dismiss for Selective Prosecution on behalf of Defendants Falgun Patel, Mangesh Patel, and ANERI, Corp. (Criminal Indictment No. 4:05-CR-27, Docket Entry No. 53) (the "Arora Motions").

Many of the Defendants in the other related cases adopted the Price, Federal Defender, or Arora Motions as their own, including:

(1) Docket Entry No. 32 in Criminal Indictment No. 4:05-CR-19, in which Defendant Jigneshkumar B. Patel moved to adopt the Price Motions;

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[2] The Government later dismissed its case against Defendant Govinbhai Patel. (Crim. Indict. No. 4:05-CR-021, Docket Entry No. 82.)

AO 72A

(2) Docket Entry No. 36 in Criminal Indictment No. 4:05-CR-19, in which Defendant Jigneshkumar B. Patel moved to adopt the Arora Motions;

(3) Docket Entry No. 33 in Criminal Indictment No. 4:05-CR-19, in which Defendant SATU, Inc. moved to adopt the Price Motions;

(4) Docket Entry No. 68 in Criminal Indictment No. 4:05-CR-20, in which Defendant Balvedbhai Patel moved to adopt the Arora Motions;

(5) Docket Entry No. 69 in Criminal Indictment No. 4:05-CR-20, in which Defendant Remesh Rekha moved to adopt a selective prosecution defense, without indicating which Motion he intended to adopt;

(6) Docket Entry No. 70 in Criminal Indictment No. 4:05-CR-21, in which Defendant Pradipkumar Patel moved to adopt the Federal Defender Motions;

(7) Docket Entry No. 83 in Criminal Indictment No. 4:05-CR-25, in which Defendant Carolyn Flarity moved to adopt the Price Motions;

(8) Docket Entry No. 77 in Criminal Indictment No. 4:05-CR-25, in which Defendant Nikesh Patel moved to adopt the Price Motions;

AO 72A

(9) Docket Entry No. 81 in Criminal Indictment No. 4:05-CR-25, in which Defendant Nikesh Patel moved to adopt the Arora Motions;

(10) Docket Entry No. 78 in Criminal Indictment No. 4:05-CR-25, in which Defendant Parul Patel moved to adopt the Price Motions;

(11) Docket Entry No. 77 in Criminal Indictment No. 4:05-CR-29, in which Defendant Mohammed Ahmed moved to adopt the Price Motions;

(12) Docket Entry No. 83 in Criminal Indictment No. 4:05-CR-29, in which Defendant Mohammed Ahmed moved to adopt the Arora Motions;

(13) Docket Entry No. 46 in Criminal Indictment No. 4:05-CR-30, in which Defendant Matthew Samuel moved to adopt the Arora Motions;

(14) Docket Entry No. 33 in Criminal Indictment No. 4:05-CR-31, in which Defendant Mitesh Laxmanbhai Patel moved to adopt the Price Motions;

(15) Docket Entry No. 36 in Criminal Indictment No. 4:05-CR-31, in which Defendant Laxenmanbhai Patel moved to adopt the Price Motions;

AO 72A

(16) Docket Entry No. 55 in Criminal Indictment No. 4:05-CR-33, in which Defendant Sudhirkumar N. Patel and Kashiba, Inc. moved to adopt the Arora Motions;

(17) Docket Entry No. 24 in Criminal Indictment No. 4:05-CR-34, in which Defendant Nilesh Ramanbhai Patel moved to adopt the Price Motions;

(18) Docket Entry No. 25 in Criminal Indictment No. 4:05-CR-35, in which Defendant Nilesh Ramanbhai Patel moved to adopt the Arora Motions;

(19) Docket Entry No. 46 in Criminal Indictment No. 4:05-CR-35, in which Defendants Pravinkumar H. Patel and Babuben, Inc. moved to adopt the Arora Motions;

(20) Docket Entry No. 72 in Criminal Indictment No. 4:05-CR-36, in which Defendant Rupesh Patel moved to adopt the Price Motions;

(21) Docket Entry No. 75 in Criminal Indictment No. 4:05-CR-36, in which Defendant Rupesh Patel moved to adopt the Arora Motions;

(22) Docket Entry No.776 in Criminal Indictment No. 4:05-CR-36, in which Defendant Ashley Knight moved to adopt the Arora Motions;

AO 72A

(23) Docket Entry No. 73 in Criminal Indictment No. 4:05-CR-36, in which Defendant Dipesh, Inc. moved to adopt the Price Motions;

(24) Docket Entry No. 31 in Criminal Indictment No. 4:05-CR-37, in which Defendant Hasmukh Thanki moved to adopt the Price Motions;

(25) Docket Entry No. 34 in Criminal Indictment No. 4:05-CR-37, in which Defendant Gita Hasmukh Thanki moved to adopt the Price Motions;

(26) Docket Entry No. 53 in Criminal Indictment No. 4:05-CR-38, in which Defendants Satishkumar Patel, Visal Patel and Jai Gopal, Inc. moved to adopt the Arora Motions;

(27) Docket Entry No. 42 in Criminal Indictment No. 4:05-CR-39, in which Defendant Ghanshyambhai Patel moved to adopt the Price Motions;

(28) Docket Entry No. 47 in Criminal Indictment No. 4:05-CR-39, in which Defendant Ghanshyambhai Patel moved to adopt the Arora Motions;

(29) Docket Entry No. 43 in Criminal Indictment No. 4:05-CR-39, in which Defendant Daksha Jani moved to adopt the Price Motions;

AO 72A

(30) Docket Entry No. 40 in Criminal Indictment No. 4:05-CR-40, in which Defendant Kamlesh Patel moved to adopt the Price Motions;

(31) Docket Entry No. 43 in Criminal Indictment No. 4:05-CR-40, in which Defendant Vipul Patel moved to adopt the Price Motions;

(32) Docket Entry No. 47 in Criminal Indictment No. 4:05-CR-40, in which Defendant Vipul Patel moved to adopt the Arora Motions;

(33) Docket Entry No. 32 in Criminal Indictment No. 4:05-CR-41, in which Defendant Alpesh Patel moved to adopt the Price Motions; and

(34) Docket Entry No. 35 in Criminal Indictment No. 4:05-CR-41, in which Defendant Ashaben Patel moved to adopt the Price Motions.

On October 19, 2005, United States Magistrate Judge Walter E. Johnson issued a Report and Recommendation recommending that the Court deny the various Motions to Dismiss for Selective Prosecution. On November 18, 2005, the Court entered an Order adopting the

AO 72A

Report and Recommendation and denying the various Motions to Dismiss for Selective Prosecution. (Order of Nov. 18, 2005.)

C. The Instant Motion

In mid-December 2005 and in January 2006, after Judge Johnson entered Orders certifying the instant actions as ready for trial and after the Court had placed the instant actions on a trial calendar, attorneys from the American Civil Liberties Union ("ACLU") entered appearances as counsel for Defendants in the instant actions. On April 5, 2006, Defendants filed their Motion to Dismiss or, in the Alternative, for Discovery Based on Newly Discovered Evidence of Selective Enforcement. Defendants Ashraf Baig, Mohammed Ahmed, Sameena Fathima, and Nisha Business, Inc., defendants in Criminal Indictment No. 4:05-CR-29, filed Motions to Adopt Defendants' Motion to Dismiss or, in the Alternative, for Discovery Based on Newly Di scovered Evidence of Selective Enforcement. (Crim. Indict. No. 4:05-CR-29-HLM, Docket Entries Nos. 129, 131-32, 134-35.) The Court granted those Motions to Adopt. (Crim. Indict. No. 4:05-CR-29-HLM, Order of Apr. 25, 2006; Order of Apr. 19, 2006.)

AO 72A

Defendants assert that the Court should dismiss the indictments against them because the Government has subjected them to selective prosecution based on their Indian, Pakistani, or South Asian national origin. Defendants seek an Order dismissing this case, or, alternatively, an Order allowing discovery and an evidentiary hearing concerning all portions of the Government's investigative files related to Operation Meth Merchant that will reveal (a) all investigative leads collected at the time Government officers began a campaign of targeted buys, and (b) whether the Government investigators pursued those leads in a selective and discriminatory fashion.

1. Defendants' Factual Investigation

Defendants contend that the ACLU conducted an extensive factual investigation into the selective prosecution issue, and that the investigation involved the services of five attorneys, three investigators, and numerous ACLU staff members. (Decl. of Christina Alvarez ¶¶ 2-3.) According to an ACLU attorney, the ACLU spent over $60,000 on this investigation, including more than $35,000 in private investigator fees. (Id. ¶¶ 6, 8.) Defendants assert that their counsel issued

AO 72A

numerous Georgia Open Records Act requests, conducted detailed reviews of police records, and interviewed individuals who had been arrested on charges involving the manufacture of methamphetamine in Northwest Georgia. (Decl. of Skyla Olds ¶¶ 3-10.) Defendants also assert that ACLU staff compiled quantitative data concerning the representations of South Asians in the class of similarly-situated merchants. (Decl. of Zachary Kerns; Decl. of Michael E. Tate.) Defendants contend that none of this information was available to Defendants or their counsel before the ACLU attorneys entered an appearance in this action and the ACLU provided additional resources.

2. Defendants' Statistical Evidence

In support of their Motion, Defendants point to evidence indicating that twenty-three of the twenty-four stores indicted were owned or operated by individuals of South Asian descent, but only 19.3 percent of the stores in the relevant area were owned or managed by individuals of South Asian descent. According to Defendants, stores owned or operated by individuals of South Asian descent were ninety-five percent more likely to be indicted.

AO 72A

3. Defendants' Contention that Law Enforcement Failed to Target Non-South Asian Stores and Instead Targeted South Asian Stores

Defendants further contend that law enforcement officers ignored numerous active leads that the officers received concerning identical sales by non-South Asian merchants and deliberately targeted South Asian retailers by directing CSs to perform controlled buys almost exclusively at South Asian stores. Specifically, John Doe 2 contended that he informed Georgia Bureau of Investigation ("GBI") Agent Del Thomasson that he purchased products from stores such as Wal-Mart, Target, Dollar General, Family Dollar Store, convenience stores, and "mom & pops." (Decl. of John Doe 2 ¶ 5.) However, according to John Doe 2, the officers only sent him to Indian stores. (Id. ¶ 8.) According to John Doe 2, the officers wanted him to make statements during the buys such as "'I need it to go cook' or 'Hurry up, I've got to get home and finish a cook.'" (Id. ¶ 9.) John Doe 2 also stated: "The officers told me that the Indians' English wasn't good, and they wouldn't say a lot so it was important for me to make those kinds of statements." (Id. ¶ 12.)

AO 72A

Defendants further contend that in October 2003, Stephanie Lolley, who was arrested in connection with a methamphetamine manufacturing operation, made a statement to Agent Thomasson providing that her husband asked her to get cold pills at two Dollar Stores, and that she had gone to each of the Dollar Stores on two different occasions. (Defs.' Mot. Dismiss Ex. H.) Further, Terri Bates, who was arrested in January 2004 in connection with a methamphetamine manufacturing operation, stated that she purchased matches and pills from Jerrell's Food Market and that others purchased HEET® from Wal-Mart. (Id. Ex. J.) Additionally, Telina Wasserman, who was arrested in February 2004 in connection with a methamphetamine manufacturing operation, reported that the individuals involved with the operation purchased matches and pills from Jerrell's Food Market, acid and tubing from the Warehouse Store, fuel injection cleaner from the Dollar Store, and matches from Creekside Store. (Id. Ex. I.) Finally, in approximately October 2004, Kathy Combs informed detectives in Dade County, Georgia, that an acquaintance, Rodney Lough, had purchased ephedrine from a Dollar

AO 72A

General Store located in Trenton, Georgia, and, at the time of Mr. Lough's arrest, detectives found a Dollar General Store bag containing ephedrine pills, matches, and HEET® in the car in which Mr. Lough was traveling. Lough v. State, 276 Ga. App. 495, 496, 623 S.E.2d 688, 689-90 (2005).

John Doe 1 also stated in his declaration that he knew of several stores, including Hartline's Grocery and Breezy Top, which are not owned or operated by individuals of South Asian descent, where John Doe could purchase "up to 20 boxes" of pseudoephedrine "if they had them in stock." (Decl. of John Doe 1 ¶ 6.) According to John Doe 1, it was common knowledge in the methamphetamine community that during the time period at issue, "you could go to any of the local stores and get the amount of chemicals you needed." (Id. ¶ 8.) John Doe 1 states that the stores included small, locally-owned businesses and larger stores such as Food Lion, Dollar General, Family Dollar Stores, Fred's Discount Stores, Acaco, and Bell's Smokeshop. (Id. ¶ 9.)

According to Defendants, law enforcement officers received information concerning sales of ingredients used to make

AO 72A

methamphetamine by stores such as Bi-Lo, Hartline's Grocery, Sue's Market in Rising Fawn, Georgia, Tobacco and Beverage Mart, Food Lion, and various Wal-Mart stores.

D. The June 19, 2006, Hearing and the Declarations of John Does 1 and 2

The Court scheduled a hearing for June 19, 2006, at which the Court planned to hear testimony from John Does 1 and 2 so that the Court could evaluate the testimony of those witnesses. Shortly before the June 19, 2006, hearing, John Does 1 and 2, on the advice of their separate court-appointed counsel, elected to invoke their Fifth Amendment privilege against self-incrimination. John Does 1 and 2 therefore refused to testify during the June 19, 2006, hearing to support the statements that they made in their respective Declarations. Although the Court will not exclude the Declarations of John Does 1 and 2 from the record, the Court will not afford significant weight or credibility to the statements contained in those Declarations.[3]

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[3] Defendants' argument that John Does 1 and 2 did not actually invoke their Fifth Amendment privilege against self-incrimination because those witnesses did not actually take the witness stand and then invoke the privilege is disingenuous at best. It is clear from the record that John Does

AO 72A

E. The June 22, 2006, Hearing

On June 22, 2006, the Court continued its hearing concerning Defendants' Motion for Discovery or, in the Alternative, to Dismiss Based on Newly Discovered Evidence of Selective Enforcement. During the June 22, 2006, hearing, Defendants, with the Court's permission, presented John Edward Ross, the cousin of John Doe 2, as a witness. Defendants informed the Court that Mr. Ross's testimony would, in substance, be "exactly the same" as in John Doe 2's Declaration. (June 22, 2006, Hr'g Tr. at 11.)

Mr. Ross testified that he drove his cousin, John Doe 2, who did not have a driver's license, to meet with law enforcement and to make a controlled purchase of pseudoephedrine from Famous Market. (June 22, 2006, Hr'g Tr. at 9.) Mr. Ross also testified that he was a convicted felon, that he presently was serving a term of probation, and that he

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1 and 2, through counsel, clearly indicated their refusal to testify, citing their Fifth Amendment privilege against self-incrimination. The fact that counsel did not call John Does 1 and 2 to the stand to have John Does 1 and 2 invoke their Fifth Amendment privilege in open court does not affect the Court's conclusion that John Does 1 and 2 refused to testify, based on their Fifth Amendment privileges.

AO 72A

had three convictions for deposit account fraud. (Id. at 15-16, 19, 38-39.)

Mr. Ross testified that he and John Doe 2 met with law enforcement on three occasions. (June 22, 2006, Hr'g Tr. at 10.) According to Mr. Ross, the first meeting occurred at the Catoosa County, Georgia, Sheriff's Office. (Id.) The second meeting took place at a park in Ringgold, Georgia. (Id.) Finally, Mr. Ross testified that the third meeting occurred on March 29, 2005, at the Shiloh Baptist Church in Fort Oglethorpe, Georgia. (Id.) According to Mr. Ross, John Doe 2 made a controlled purchase of pseudoephedrine from Famous Market on that date, and Mr. Ross received $60 from law enforcement for his assistance. (Id. at 10, 15.)

Mr. Ross testified that on March 29, 2005, he and John Doe 2 met with law enforcement officers, specifically, GBI Special Agent Del Thomasson, an agent of the Tennessee Bureau of Investigations, and Alan Miles, a detective with the Catoosa County Sheriff's Office, to receive instructions concerning the controlled buy and for his cousin to be equipped with recording equipment. (June 22, 2006, Hr'g Tr. at 10-

AO 72A

11.) According to Mr. Ross, when he and John Doe 2 first arrived at the church, John Doe 2 "walked up to Del's truck with Del and the TBI agent, and Alan took me off to the side and me and him stood around and talked for a minute." (Id. at 11.) Mr. Ross testified that the men later met back in the truck after the recording equipment was installed in the truck. (Id.) According to Mr. Ross, Agent Thomasson was instructing John Doe 2 "on what to say and how to do it, and he told him to talk nice and be good to them." (Id. at 12.) Mr. Ross indicated that Agent Thomasson told John Doe 2 to make sure that John Doe 2 said something about a cook while John Doe 2 was in the store. (Id.) When John Doe 2 told Agent Thomasson that "he shouldn't, shouldn't do it that way," Agent Thomasson told John Doe 2 "that's the only way he could do it." (Id.) Mr. Ross testified that "right before we left, we was ready to get in the truck. [Agent Thomasson] smiled at me and [John Doe 2] and said, 'We're going to close these Indian stores down because they can't speak good English.'" (Id.)

According to Mr. Ross, the law enforcement officers turned on the recording equipment after Agent Thomasson made the alleged

AO 72A

statement about closing down the Indian stores. (June 22, 2006, Hr'g Tr. at 13.) Mr. Ross testified that Agent Thomasson later told Mr. Ross and John Doe 2 "to watch what we said and not be using vulgar language because it would be heard in court." (Id.)

On cross-examination, counsel for the Government questioned Mr. Ross about his probation status and asked whether he had missed a meeting with his probation officer that was scheduled for June 19, 2006, at 4:00 p.m. (June 22, 2006, Hr'g Tr. at 20-21.) Mr. Ross denied that he had directed his sister to lie to his probation officer by informing the officer that Mr. Ross had missed the meeting because he was in court, but did not explain why his sister would have made such a statement without direction from him. (Id. at 22.) Mr. Ross acknowledged that he was not in court at 4:00 p.m. on June 19, 2006. (Id.)

Counsel for the Government also questioned Mr. Ross concerning the sequence of events that occurred prior to John Doe 2 and Mr. Ross traveling to Famous Market on March 29, 2005. (June 29, 2006, Hr'g Tr. at 28-42.) Mr. Ross testified that Agent Thomasson made the

AO 72A

alleged statement concerning closing down the Indian stores before the law enforcement officers activated the recording equipment. (Id. at 31.) Following that testimony, counsel for the Government played a recording of the conversation that occurred after law enforcement officers activated the recording equipment. During that recording, Agent Thomasson cautioned John Doe 2 and Mr. Ross to remember that the recording was running, and to watch what they said because people would be listening to the recording some day. (Gov't Ex. 2.) The alleged statement concerning shutting down the Indian stores is not on the recording. (Id.) Counsel for the Government then cross-examined Mr. Ross concerning the discrepancies. (June 22, 2006, Hr'g Tr. at 35-37.)

During cross-examination, Mr. Ross also testified that he attributed a different statement to Agent Thomasson during his interview with counsel for the Government on June 19, 2006. (June 22, 2006, Hr'g Tr. at 39.) During that interview, Mr. Ross informed counsel for the Government that Agent Thomasson had said: "'We're going to close these Indian stores around here.'" (Id.) Mr. Ross, however, did

AO 72A

not inform counsel for the Government that Agent Thomasson had made a comment concerning the Indians "not speaking good English." (Id.)

For the following reasons, the Court finds that Mr. Ross's testimony concerning the alleged statement by Agent Thomasson concerning his plan to "close down" the Indian stores because the Indians "did not speak good English" is not credible. First, Mr. Ross's testimony is inconsistent with the tape recording played by the Government. Although Mr. Ross testified that Agent Thomasson's alleged statement concerning shutting down the Indian stores occurred just before Agent Thomasson instructed John Doe 2 and Mr. Ross to be careful what they said on the recording, and that the statement took place before the law enforcement officers activated the recording equipment, the recording and transcript tell a different story. Second, Mr. Ross gave a different version of Agent Thomasson's alleged statement to counsel for the Government during a June 19, 2006, interview. Third, Mr. Ross is a convicted felon with at least three convictions for deposit account fraud, and, as recently as July 19, 2006,

AO 72A

had lied to his probation officer--or had directed his sister to lie to his probation officer--concerning his failure to appear for an appointment with the officer. Fourth, the Court had the opportunity to observe Mr. Ross's appearance, demeanor, and manner of testifying during the June 22, 2006, hearing, all of which point to a conclusion that Mr. Ross was not giving truthful testimony concerning the statement he attributed to Agent Thomasson. Under those circumstances, the Court finds Mr. Ross's testimony concerning the statements allegedly made by Agent Thomasson not to be credible.

II. Timing of the Motion

Counsel for the Government urges the Court to deny Defendants' Motion to Dismiss, or in the Alternative, for Discovery Based on Newly Discovered Evidence because the Motion is untimely. Local Rule 12.B provides, in relevant part:

> Motions filed in criminal proceedings shall be filed with the clerk within ten (10) days after arraignment. A magistrate judge may for good cause extend the filing time for one fifteen (15)-day period. Motions requesting additional

AO 72A

> extensions of time must be presented to the judge to whom the case is assigned. To avoid waiver, pretrial matters must be raised within the time limits set forth in this rule.

N.D. Ga. L. Cr. R. 12.1B; see also Appx. C, Plan for the United States District Court N. District of Ga. for Achieving Prompt Disposition of Crim. Cases, § 4(d)(2) ("Unless an extension has been granted by the court, all pretrial motions shall be filed within 10 days after arraignment. Except for good cause the court shall not grant an extension for any motion filed pursuant to Rules 12(b)(3), 12.1, 12.2, and 41(e), Federal Rules of Criminal Procedure."). Defendants filed the instant Motion far more than ten days after arraignment, and no court expressly granted an extension of time for Defendants to file the instant Motion. Consequently, the instant Motion is untimely under the Local Rules.

Further, even if the Court considers the instant Motion as a Motion for Reconsideration of the Court's previous Order denying the previously-filed Motions to Dismiss for Selective Prosecution, the instant Motion still is untimely. The Local Rules require a party seeking reconsideration of an Order to file a Motion for Reconsideration within

AO 72A

ten days after the entry of the Order. N.D. Ga. L.R. 7.2E. Defendants filed the instant Motion far more than ten days after the Court entered its November 18, 2005, Order denying the previous Motions to Dismiss for Selective Prosecution. Consequently, the instant Motion is untimely as a Motion for Reconsideration of the Court's November 18, 2005, Order.[4]

Finally, even if Defendants base the filing of the instant Motion on newly discovered evidence, such evidence does not justify the late filing of the Motion. Indeed, all of the evidence that Defendants now seek to present in support of the instant Motion was in existence and was available to Defendants through the exercise of due diligence when Defendants filed their previous Motions to Dismiss for Selective

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[4] Defendants argue that the Court is free to revisit its rulings at any time. In the interests of finality and judicial efficiency, however, the Court ordinarily will not entertain a motion for reconsideration unless the motion is filed in a timely fashion. Here, Defendants' Motion clearly is untimely if construed as a motion for reconsideration. Further, even if the Court chose to revisit an issue based on an untimely motion for reconsideration, the Court would do so only if the Court were convinced that its previous decision was clearly erroneous or based on a clear factual or legal error. Defendants simply have not shown that their Motion presents such circumstances.

AO 72A

Prosecution. The fact that Defendants may have obtained new counsel between the denial of their previous Motions to Dismiss and the filing of the instant Motion does not justify allowing Defendants to file another Motion to Dismiss based on "new" evidence.

For those reasons, the Court concludes that Defendants' Motion to Dismiss, or in the Alternative, for Discovery Based on Newly Discovered Evidence of Selective Enforcement, is untimely. The Court therefore denies the Motion on untimeliness grounds. In an abundance of caution, however, the Court addresses the merits of the Motion in the next Part of this Order.

III. Discussion

Selective enforcement, or selective prosecution, occurs when the Government's decision to prosecute is based upon the defendant's race, religion, or another arbitrary classification.[5] United States v.

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[5] Although Defendants have styled their Motion as a "selective enforcement" motion, the same standard applies in this Circuit to evaluate the motion, whether it is styled as one for "selective enforcement" or one for "selective prosecution."

AO 72A

Armstrong, 517 U.S. 456, 465 (1996). A selective prosecution claim is not a defense on the merits to pending criminal charges, but instead is "an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." Id. at 463. The standard for proving a selective prosecution claim "is a demanding one" because such a claim "asks a court to exercise judicial power over a 'special province' of the Executive." Id. at 463-64.

In Armstrong, the Supreme Court stated that a defendant asserting a selective prosecution claim "must present 'clear evidence to the contrary'" to dispel the "presumption of regularity" supporting a prosecutor's decisions. Armstrong, 517 U.S. at 463-64. The United States Court of Appeals for the Eleventh Circuit has interpreted Armstrong to require a defendant to present clear and convincing evidence to dispel the presumption that a prosecutor has not violated the Equal Protection Clause. United States v. Smith, 231 F.3d 800, 808 (11th Cir. 2000).[6] The clear and convincing standard is a burden

[6] Contrary to Defendants' assertions, the Eleventh Circuit has instructed courts to apply the clear and convincing standard of proof when evaluating claims of selective prosecution. The Court consequently declines

AO 72A

of proof that is less than the "beyond a reasonable doubt" standard used in criminal cases but that is greater than the "preponderance of the evidence" standard used in most criminal cases. Buildex, Inc. v. Kason Indus., Inc., 849 F.2d 1461, 1463 (Fed. Cir. 1988). One court described the clear and convincing standard as requiring "evidence which produces in the mind of the trier of fact an abiding conviction that the truth of [the] factual contentions [is] highly probable." Id. (internal quotation marks omitted).

The Supreme Court has indicated that a court should hesitate to examine the decision of whether to prosecute, explaining:

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function. "Examining the basis

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to apply the preponderance of the evidence standard advocated by Defendants.

AO 72A

> of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."

Armstrong, 517 U.S. at 465 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)) (internal citations omitted).

To establish a claim of selective prosecution, a defendant must demonstrate that the federal prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose. Wayte, 470 U.S. at 608. A defendant cannot meet this burden simply by showing that a high percentage of individuals prosecuted under a particular statute belong to the same race. See United States v. Bass, 536 U.S. 862, 864 (2002) (observing, "raw statistics regarding overall charges say nothing about charges brought against similarly situated defendants"). Instead, the defendant also must show that "similarly situated individuals of a different race were not prosecuted." Armstrong, 517 U.S. at 465.

The Eleventh Circuit has interpreted Armstrong as requiring

AO 72A

defendants pursuing a selective prosecution claim "to show that their prosecution had a discriminatory effect, i.e., that similarly situated individuals were not prosecuted, and . . . to show that the difference in treatment, or selectivity of the prosecution, was motivated by a discriminatory purpose." Smith, 231 F.3d at 809. The Eleventh Circuit further describes "similarly situated" individuals for selective prosecution purposes as individuals "who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant---so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan--and against whom the evidence was as strong or stronger than that against the defendant." Id. at 810.

For the following reasons, the Court finds that Defendants have failed to establish their selective prosecution claim at this stage of the proceedings. Specifically, Defendants have presented no evidence that shows that similarly situated individuals of a different national origin

AO 72A

were not prosecuted for the same crimes that Defendants allegedly committed. As Judge Johnson noted in his Report and Recommendation addressing the previous Motions to Dismiss for Selective Prosecution:

> [W]hile defendants contend that other convenience stores in their home counties sell ingredients that could be used to manufacture methamphetamine, that is not the issue. The issue instead is whether these items were sold with knowledge or with reason to know that they would be used to manufacture methamphetamine. Defendants have not provided any evidence that the Government is aware of non-Indian convenience store owners or employees who, under circumstances similar to those alleged against defendants, sold items like pseudoephedrine, ephedrine, HEET®, matches, etc., with knowledge that these items would be used to manufacture methamphetamine and that the Government chose not to prosecute them.

(Report and Recommendation at 22-23.) Defendants simply point to statistical information indicating that although non-South Asian stores make up the vast majority of the stores in the relevant area, only one non-South Asian store was indicted in Operation Meth Merchant. Defendants further contend that certain individuals provided information

AO 72A

to law enforcement officials indicating that the individuals or others involved in manufacturing methamphetamine purchased materials from stores that are not owned or operated by individuals of South Asian descent. Defendants' information, however, does nothing to show that the non-South Asian stores sold the items at issue with knowledge or reason to know that the items would be used to manufacture methamphetamine. Under those circumstances, Defendants have not demonstrated that similarly-situated non-South Asian stores were not prosecuted.

Additionally, the Court declines to credit the testimony of John Does 1 and 2 as evidence that the Government acted with a discriminatory purpose or intent. As previously discussed, John Does 1 and 2 did not appear to testify at the June 19, 2006, hearing, and the Court therefore has had no opportunity to hear from those witnesses and to evaluate their statements. Under those circumstances, the Court declines to credit the conclusory assertions made by John Does 1 and 2 as evidence of discriminatory purpose or intent on the part of the Government or its agents.

AO 72A

Further, as noted supra Part I.E, the Court finds the testimony of Mr. Ross concerning Agent Thomasson's alleged statement that he planned to close the Indian stores down because the Indians did not speak English, not to be credible. The Court therefore cannot, and will not, accept Mr. Ross's testimony as evidence of discriminatory purpose or intent on the part of the Government.

The Court also finds that Defendants have failed to meet the standard for obtaining discovery in support of their selective prosecution claim. The Supreme Court has noted that a defendant who seeks discovery in support of a selective prosecution claim must present "'some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect and discriminatory intent.'" Armstrong, 517 U.S. at 468 (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)). "[A] credible showing of different treatment of similarly situated persons" is required to establish eligibility for discovery on the selective prosecution claim. Id. at 470. The Eleventh Circuit has explained that Armstrong's "'rigorous standard for discovery'" in aid of a selective prosecution claim 'requires some

AO 72A

evidence tending to show the existence of the essential elements of the defense, discriminatory effect and discriminatory intent.'" United States v. Quinn, 123 F.3d 1415, 1425-26 (11th Cir. 1997) (quoting Armstrong, 417 U.S. at 469-70). Thus, "[t]he threshold for showing 'some evidence tending to show the existence' of the discriminatory effect element is 'some evidence of differential treatment of similarly situated members of other races or protected classes.'" Id. (quoting Armstrong, 417 U.S. at 469-70).

The Court concludes that Defendants have not made that threshold showing. As Judge Johnson observed:

> This demanding threshold showing has not been made here. Simply pointing out that most of the individual defendants are of Indian national origin is insufficient. In any event, the defendants in Crim. Indict. No.4:05-CR-018 are Caucasian, which shows that the Government has treated similarly-situated members of other national origin in the same fashion that it has treated defendants. Moreover, no sufficient factual predicate has been laid for this Court to take the extraordinary step of ordering the prosecutor and law enforcement officers to go through their files in what would simply be a fishing expedition.

AO 72A

Additionally, it is difficult to see how the other discovery requested–issuance of Rule 17(c) subpoenas to large retailers–could establish the facts necessary for defendants to prove a selective prosecution claim. Granted, the subpoenas might show the volume of pseudoephedrine and/or ephedrine sold by these stores as well as their volume of sales of other items used to "cook" methamphetamine, such as matches, iodine, etc. However, none of that information would show that similarly-situated non-Indians who worked for these corporations (or the non-Indian corporate owners) sold those items with knowledge that they would be used to manufacture methamphetamine but were not prosecuted. The burden is upon the party seeking a Fed. R. Crim. Pro. 17(c) subpoena to show that the documents sought are, inter alia, relevant and admissible. [United States v.] Beckford, 964 F. Supp. [1010,] 1022 [(E.D. Va. 1997)]. The documents that defendants seek to obtain through such subpoenas do not appear to meet either requirement.

Finally, a defendant "is not automatically entitled to an evidentiary hearing to make the required showing. Rather, such a hearing need be held only where a defendant presents facts sufficient to raise a reasonable doubt about the prosecutor's motive." Owen v. Wainwright, 806 F.2d 1519, 1523 (11th Cir. 1986); accord Jones v. White, 992 F.2d 1548, 1572 (11th Cir. 1993); and United States v. Silien, 825 F.2d 320, 322 (11th Cir. 1987). Defendants have

AO 72A

> presented no evidence tending to show that the United States Attorney here or any of his Assistants have prosecuted this case with an invidious motive. Given the failure of proof here, defendants are not entitled to an evidentiary hearing.

(Report and Recommendation Concerning Selective Prosecution at 24-25.) Additionally, as discussed supra, the Declarations of John Does 1 and 2 and the testimony of Mr. Ross concerning an alleged discriminatory purpose on the part of the Government and its agents are not credible, and Defendants consequently cannot obtain discovery based on that evidence.

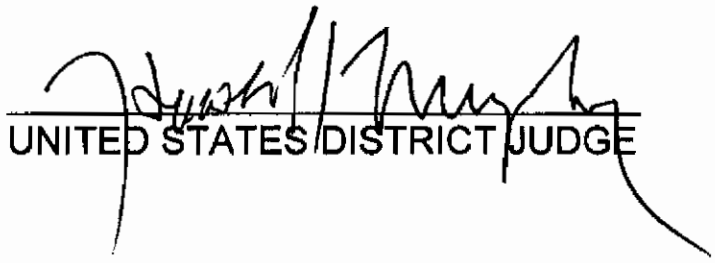
For the reasons discussed above, the Court finds that Defendants have not met their burden with respect to their selective prosecution defense or their associated requests for discovery and an evidentiary hearing. The Court therefore denies Defendants' Motion to Dismiss or, in the Alternative, for Discovery Based on Newly Discovered Evidence of Selective Enforcement, and denies any associated requests for discovery or evidentiary hearings.

AO 72A

IV. Conclusion

ACCORDINGLY, the Court **DENIES** Defendants' Motion to Dismiss or, in the Alternative, for Discovery Based on Newly Discovered Evidence of Selective Enforcement [106]/[116]/[115]. The Court **DENIES** the same Motion as adopted by Defendants in Criminal Indictment No. 4:05-CR-29-HLM [129] [131] [132] [134] [135].

IT IS SO ORDERED, this the 1st day of August, 2006.



UNITED STATES DISTRICT JUDGE

AO 72A