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21 F.3d 1431 (9th Cir. 1994)
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FACTS

The United States appealed the dismissal of indictments against defendants Christopher Armstrong, Aaron Hampton, Freddie Mack, Shelton Martin, and Robert Rozelle. The indictments were dismissed as a sanction for violating a discovery order issued by District Court Judge Consuelo Bland Marshall.

A joint task force of Inglewood Narcotics Division detectives, the Bureau of Alcohol, Tobacco, and Firearms (ATF), and three confidential informants infiltrated a drug distribution ring. The arrest, made in conjunction with the investigation, snared the defendants with close to 135 grams of cocaine base (commonly known as "crack") and multiple firearms. A federal grand jury returned indictments against all the defendants for conspiracy to distribute cocaine base under 21 U.S.C. § 846. Some of the defendants were also charged with substantive cocaine base violation, 21 U.S.C. § 841(a)(1), and use of a firearm in connection with drug trafficking under 18 U.S.C. § 924(c).[1]

The discovery order had been issued upon the motion of defendant Shelton Martin, in which all defendants joined. Martin sought discovery or dismissal, alleging that the government was prosecuting him under the federal statutes rather than the more lenient state statutes because of his race. The government opposed the motion, and a hearing was conducted on the issue. At the hearing, the defendants offered as their only evidence an affidavit from a paralegal employed by the Federal Public Defender. The affidavit asserted that every defendant represented by the Federal Public Defender's Office who was prosecuted under 21 U.S.C. § 841 and /or § 846 was African-American. The government claimed that the affidavit alone was insufficient to demand for force discovery. Judge Marshall disagreed and ordered the government to:

> (1) provide a list of all cases from the prior three years in which the government charged both cocaine base and firearms offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the U.S. Attorney's Office for deciding whether to bring cocaine base cases federally.[2]

The government filed a motion to reconsider the discovery order. At a hearing on the motion, the government offered the sworn statements of a Drug Enforcement Administration (DEA) agent, an ATF agent, an Inglewood narcotics officer, and two Assistant United States District Attorneys stating that:

> (1) the Office of the Federal Public Defender represented at least five non-black cocaine base defendants during the relevant time period; (2) the government prosecuted many non-black cocaine base defendants during 1991, the period at issue in the report prepared by the paralegal employed by the Office of the Public Defender; (3) the county district attorney's office prosecuted many black cocaine base offenders; (4) the government based its decision to charge on the existence of federal firearms and narcotics violations that met the guidelines of the United States Attorney's Office, the strength of the evidence, the deterrence value, the federal interest, the suspect's criminal history, and other race-neutral criteria; and (5) socio-economic factors account for the prevalence of drugs in certain communities, as illustrated by

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[1] Under 21 U.S.C. § 841(b) (1988 & Supp. III 1991), persons selling 50 grams or more of a mixture or substance containing cocaine base in violation of 21 U.S.C. § 841(a) must be imprisoned for at least 10 years and no more than life. Conspiracy, governed by 21 U.S.C. § 846, imposes the same penalty range as the § 841(a) violation. 18 U.S.C. § 924(c) imposes an additional, consecutive 5-year sentence without parole for the usage or carrying of a firearm during and in relation to any drug trafficking crime, as well as mandating longer sentences for repeat violations and more dangerous weaponry. California law, on the other hand, provides for a 3-5 year sentence for cocaine base offenders, Cal.Health & Safety Code § 11351.5 (Deering 1993), and if firearms are involved, also provides for a 2-4 year sentence. *Id.* § 11370.1.

[2] *United States v. Armstrong*, 21 F.3d 1431, 1433 (9th Cir. 1994).

> black gangs in [the] south-central Los Angeles area predominantly controlling the supply of cocaine base.[3]

In response to the government's motion to reconsider the discovery order, the defendants submitted a newspaper article from the *Los Angeles Times* and two declarations by defense attorneys. The newspaper article contended that blacks commit disproportionately more cocaine base offenses than other racial groups. The first defense attorney's declaration summarized a conversation she had had with a halfway house coordinator. In the conversation, the coordinator concluded that, based on his experience, the number of white and minority cocaine base addicts and dealers is approximately the same. The second defense attorney's statement declared:

> (1) [H]e has represented only blacks in federal court on cocaine base charges; (2) he has never heard of non-blacks being prosecuted in federal court on cocaine base charges; and (3) in his conversation with unnamed state court judges, prosecutors, and defense attorneys, he has come to believe that the state prosecutes many non-black cocaine base offenders in state court.[4]

At the conclusion of the hearing, the district court denied the motion to reconsider the discovery order. The government notified the court of its intention to appeal the denial of the motion and the issuance of the discovery order. The district court dismissed the indictments against all of the defendants as a sanction for violating the discovery order, but stayed the dismissals pending an appeal to the Ninth Circuit.

The government appealed the district court's finding that the affidavit from the Public Defender's Office and a chart showing that all cocaine base prosecutions in a one year period involved black defendants established more than a mere allegation of discriminatory intent. On this proof the district court had granted discovery in the selective prosecution claim.[5]

HOLDING

The Ninth Circuit Court of Appeals reversed the district courts finding, and in so doing sustained the "judicial suspicion" test articulated by *United States v. Redondo-Lemos*[6] but abolished the *Redondo-Lemos* "reasonable inference" standard in favor of the "colorable basis" standard of *United States v. Bourgeois*.[7] "[T]o obtain discovery on a selective prosecution claim, a defendant must present specific facts, not mere allegations, which establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government."[8]

ANALYSIS/ APPLICATION

Both *Bourgeois* and *Redondo-Lemos* follow *United States v. Wayte*.[10] *Wayte* held that selective prosecution claims should be reviewed according to ordinary equal protection standards which require a petitioner to show both discriminatory effect and discriminatory motive.[11] Nevertheless *Bourgeois* notes that although "[t]he *Wayte* majority solidified the elements of a meritorious selective prosecution claim, [it] did not set out a discovery threshold."[12] Both *Redondo-Lemos* and *Bourgeois* represent the Ninth Circuit's attempt to address the threshold showing a defendant must make in order to obtain discovery when the defendant makes a selective prosecution claim. *Armstrong* provided the Ninth Circuit with the opportunity to resolve the conflict between *Redondo-Lemos* and *Bourgeois*.

Redondo-Lemos outlined a four-step process for discovery on a claim of selective prosecution. First, a prima facie showing of wrongful discrimination must be made. This requirement is met if "the district court develops a suspicion of unconstitutional conduct on the basis of its own day-to-day observations," or upon the defendant presenting "enough evidence to demonstrate a reasonable inference of invidious discrimination."[13] The second step affords the prosecutor the opportunity to rebut the prima facie showing with "overall case statistics" to which both the district court and the defense can have ac-

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[3] *Id.*

[4] *Id.* at 1434.

[5] *Id.* at 1436.

[6] 955 F.2d 1296 (9th Cir. 1992) (holding that in cases where the defendant first raises a claim of selective prosecution, he must present enough evidence to demonstrate a reasonable inference of invidious discrimination).

[7] 964 F.2d 935 (9th Cir. 1992).

[8] *Id.* at 939.

[10] 470 U.S. 598 (1985).

[11] *Id.* at 608-609.

[12] *Bourgeois*, 955 F.2d at 939.

[13] *Armstrong*, 21 F.3d at 1434 (quoting *Redondo-Lemos*, 955 F.2d at 1302).

cess.[14] Third, if the district court, after reviewing the rebuttal evidence, finds discriminatory impact by a preponderance of the evidence, it must determine whether the prosecutor's charging decision was based on a discriminatory motive.[15] It is at this point that there may be a "possibility of discovery by the defense."[16] Certain prosecution case files may be subject to in camera review, and there may be limited discovery by the defense. Finally "[i]f, once the district court examines discriminatory motive and listens to government rebuttal evidence, the court finds by preponderance of the evidence intentional discrimination based on a suspect classification, it may fashion an appropriate remedy."[17]

In *Bourgeois*, the defendant, rather than the court, raised the issue of selective prosecution and sought discovery. The *Bourgeois* court held that a defendant could obtain discovery only by presenting "specific facts . . . which establish a colorable basis for the existence of both discriminatory application of the law and discriminatory intent on the part of the government."[18] Reviewing *Redondo-Lemos* and *Bourgeois*, the *Armstrong* court identified the question before it as whether to apply the *Redondo-Lemos* judicial suspicion test, its reasonable inference test, or the *Bourgeois* colorable basis test. It immediately eliminated the suspicion test because the record revealed no possibility that the trial judge granted discovery on the basis of her own day-to-day observations.[19] The *Armstrong* Court found that the trial court's decision to grant discovery rested on the evidence presented by the defendant, and thus its decision "relied on the reasoning of *Bourgeois* in analyzing the defendant's evidence, not its own day-to-day observations."[20] Thus the court concluded, "we must choose between the *Redondo-Lemos* 'reasonable inference' test and the *Bourgeois*' colorable basis test.'"[21]

The court candidly admitted that neither test was "easily susceptible to further definition," but decided that it would be more appropriate to apply the colorable basis test. *Armstrong* was more analogous to *Bourgeois* because the defendants in both *Armstrong* and *Bourgeois* were challenging the prosecutions, while *Redondo-Lemos* rested on a judge's suspicion.[22] Thus the court held that "*Bourgeois* is the law of [the Ninth Circuit] regarding the test for determining whether to grant a defendant's motion for discovery on a selective prosecution claim."[23]

Applying the *Bourgeois* colorable basis test, the *Armstrong* court found that "the district court abused its discretion in concluding that the defendant's evidence provided a colorable basis to believe that discriminatory application of a law existed."[24] The court also found that the defense's proffer of a paralegal's affidavit and the two sworn statements of the defense attorneys did not constitute a colorable basis for a finding of discrimination. "The first affidavit demonstrate[d] only that others have been prosecuted, not that others similarly situated have not . . . ."[25] Defendants must provide a colorable basis for believing that others similarly situated have been prosecuted. The paralegal's affidavit did "not speak to whether the Federal Public Defender had other cases involving white defendants that did not close during that period."[26] And it did not speak to the cases of non-indigent defendants with sufficient resources to retain their own attorneys.[27]

The court found the two affidavits from the defense attorneys equally flawed. The basis for this finding was that the statements were hearsay, and that they "fail[ed] to indicate whether the magnitude of the sales is similar to those of the defendants in this case. "[28]

Judge Reinhardt dissented, charging that the majority had exceeded the scope of review, applied the threshold showing of *Bourgeois* too harshly, and erred in finding that the defendants had not met the threshold showing.[29] Moreover, he said new evidence supported the district court's order.[30]

Judge Reinhardt *Bourgeois* cites for the proposition that "we review the district court's decision to order discovery for *abuse of discretion*."[31] In arguing that appellate courts should reverse trial courts' decisions to grant discovery only upon a clear showing of error, Judge Reinhardt noted that district judges are in the best position to safeguard the rights of criminal defendants. "District judges are uniquely situated to observe possible discrimination in the government's charging decisions" and have "more

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[14] *Id.*
[15] *Id.* at 1434.
[16] *Id.* at 1435.
[17] *Id.*
[18] *Bourgeois*, 955 F.2d at 939.
[19] *Armstrong*, 21 F.3d at 1435.
[20] *Id.*
[21] *Id.* at 1436.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1438.
[25] *Id.* at 1436.
[26] *Id.* at 1437
[27] *Id.* at 1437.
[28] *Id.* at 1437.
[29] *Id.* at 1439.
[30] *Id.* at 1445.
[31] *Id.* at 1439.

experience with the policies and practices of the United States Attorney in their district" than do either the appellate courts or individual defendants.[32]

Upon review of the majority's analysis and application of *Bourgeois* and *Redondo-Lemos*, Judge Reinhardt found "[t]he effect of the majority's decision is to create three highly artificial categories of cases."[33] At one extreme are cases governed by *Bourgeois*, where "a district judge completely ignores his or her own experience and observations and makes clear on the record that the discovery order is based *solely* on the submission of the parties."[34] At the other extreme are the cases governed by *Redondo-Lemos*, where "a district judge develops a suspicion of discriminatory conduct based purely on his own day-to-day observations and orders discovery or a hearing without any prompting by the parties."[35] And the third category of cases was "in between these extremes . . . [where] a district judge's decision to order discovery is based in part on the evidence submitted by the parties and in part on the judge's own personal experience, observations, and suspicions."[36]

Judge Reinhardt found *Armstrong* to be an example of a case between the two extremes. In a footnote, he quoted the trial judge as she granted discovery: "[T]hat is the problem I think that needs to be addressed, because we do see a lot of the[se] cases and one does ask why some are in state court and some are being prosecuted in Federal court, and if it's not based on race what's it based on?"[37]

Judge Reinhardt found error even if the district court judge did not rely on his or her own day-to-day observations and focused only on the defendant's evidence. Assuming "that people of *all* races commit *all* types of crime," Judge Reinhardt found the public defender's office study sufficient to raise a strong inference of invidious discrimination.[38] While the flaws of the study make it "insufficient to support an ultimate showing of unconstitutional selective prosecution, the facts set forth are nonetheless more than enough to support a finding of a colorable basis for the claim that discrimination exist."[39] He also found that the majority impermissibly ignored the two declarations by the defense attorneys. "In other contexts in which a party bears a lighter burden of proof than a preponderance of the evidence, the law has held that the lesser quantum of evidence required also entails looser requirements regarding the *admissibility* of that evidence."[40]

And finally, Judge Reinhardt pointed to new evidence that was not before the district court and thus was not in the record for review. He took judicial notice of Richard Berk and Alec Campbell's *Preliminary Data on Race and Crack Charging Practices in Los Angeles*.[41] Judge Reinhardt found:

> [T]he Berk study reached some alarming conclusions, which are consistent with the defendant's position here. Like the Federal Public Defender study, the Berk study found that, over a nearly two-year period, the United States Attorney did not charge even a single white person with sale of crack cocaine. By analyzing state data, however, the Berk study also refuted the majority's implicit assumption that non-blacks simply do not commit these crimes. Indeed, the data showed that the Los Angeles County District Attorney charged over two hundred whites with sale of cocaine base during this period.[42]

Judge Reinhardt concluded that the "[t]he Berk study . . . will certainly provide enough of an additional 'colorable basis' to support discovery if and when the defendants file a renewed or amended motion following remand."[43]

CONCLUSION

As noted earlier, the Ninth Circuit has agreed to rehear this case en banc. Thus the application of *Armstrong* is uncertain. Nevertheless it is clear that to obtain discovery on the issue of selective prosecution, a defendant must show specific facts to provide a colorable basis of malicious intent and disparate application of the law by the government. Just how specific the facts and how colorable the basis must be will be determined upon rehearing.

Summary and Analysis Prepared by:
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Note: United States v. Armstrong, 21 F.3d 1431 (9th Cir. 1994), was reversed March 2, 1995 by *United States v. Armstrong*, U.S. App. LEXIS 4040 (9th Cir. 1995). A discussion of the rehearing will be forthcoming in Volume 2 of the *Race and Ethnic Ancestry Law Digest*.

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.* at 1439.
[36] *Id.* at 1440.
[37] *Id.* at 1440-1441 n2.
[38] *Id.* at 1443.
[39] *Id.*
[40] *Id.* at 1444.
[41] 6 Fed. Sentencing Rep. 36 (1993).
[42] *Armstrong*, 21 F.3d at 1445.
[43] *Id.* at 1446.