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FACTS

In *Armstrong I*,[1] 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 the United States' failure to comply with a discovery order issued by District Court Judge Consuelo Bland Marshall. In April 1992, the defendants were charged with conspiracy to distribute cocaine base (commonly known as "crack") a federal offense in violation of 21 U.S.C. §846. Some of the defendants were also charged with selling cocaine base under 21 U.S.C. §841(a)(1) and using firearms in connection with drug trafficking in violation of 18 U.S.C. §924 (c).

The charges against the defendants resulted from an investigation by a joint task force of detectives from the Inglewood Narcotics Division and agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF). The investigation led to the subsequent arrest of defendants for possessing close to 135 grams of cocaine base and multiple firearms.

Defendants Martin, Armstrong and the other three defendants sought discovery and / or a dismissal of the indictments for selective prosecution, alleging that they were prosecuted in federal court because of their race. To support the motion of discovery in the federal district court, the defendants offered a survey by the Federal Public Defender's office showing that in every case prosecuted under Sections 841 and 846, the defendants were black. The United States was unable to provide an explanation for the disparity in the numbers, but insisted that there was no racial motivation in the charging decisions. The district court disagreed and granted the defendants' motion for discovery, ordering the United States to:

> (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearm 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 to the federal court.[2]

The United States filed a motion for reconsideration of the discovery order. In support of its motion, the United States provided a list of all defendants charged with violation of Sections 841 and 846 over a three year period without any racial breakdown. The United States also provided declarations by three law enforcement officers and two Assistant United States Attorneys, who collectively gave four explanations for the racial disparity in the government's charging decisions:

> (1) Socio-economic factors result in more racial groups being involved in the distribution of certain drugs and blacks are the most active in the Los-Angeles crack area; (2) over a three-year period seven non-black, but racial minority defendants were prosecuted on federal cocaine base charges; (3) many blacks have been tried in state court for cocaine base offenses; and (4) the factors used by federal prosecutors to base their charging decisions are unidentified "race-neutral" criteria.[3]

In support of the district court's discovery decision, the defendants added to their original statistical study by submitting additional declarations and an article from the Los Angeles Times. One of the declarations was from a halfway house intake coordinator, who reported that in his experience whites and blacks dealt and used cocaine base in equal numbers. In a separate declaration, a defense attorney stated that in his experience many non-blacks were prosecuted for cocaine base offenses in state court.[4]

District Court Judge Consuelo Bland Marshall denied the motion for reconsideration, holding that because the statistical data raised a question about the motivation of the government, the United States must disclose its criteria for the charging decision. The United States refused to comply with the discovery order and the defendants moved for dismissal of the indictments as a sanction for the violation of the discovery order. The district court dismissed the indictments, but stayed the order pending appeal. The government appealed the district court's decision to dismiss the indictments as a sanction for the government's failure to obey the discovery order.

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[1] 21 F.3d 1431 (9th Cir. 1994).

[2] *United States v. Armstrong*, 48 F.3d 1508, 1511 (9th Cir. 1995)[hereinafter *"Armstrong II"*].

[3] *Id.*

[4] *Id.* at 1512.

The Ninth Circuit held in *Armstrong I* that the proper standard to obtain discovery in a selective prosecution claim was the "colorable basis" standard as articulated in *United States v. Bourgeois*.[5] *Bourgeois* held that "a defendant must present specific facts, not mere allegations, establish a colorable basis for the existence of both discriminatory application of a law and discriminatory intent on the part of the government."[6] *Armstrong I* was reviewed en banc by the Ninth Circuit in *Armstrong II*.[7]

HOLDING

The Ninth Circuit Court of Appeals affirmed en banc the district court's dismissal of the indictments. Although the court adopted the *Bourgeois* colorable basis standard, the court emphasized that the threshold for discovery is much lower than the colorable basis standard applied in *Bourgeois*. The court expressly overruled *United States v. Guiterrez*,[9] which had held that statistical disparity alone does not satisfy the discriminatory effect prong of a *prima facie* showing of selective prosecution.[10] The *Armstrong II* court held that because the threshold showing for discovery is less than that for a *prima facie* case, then "inadequately explained evidence of a significant statistical disparity suffices to show the colorable basis of discriminatory intent and effect which warrants discovery on a selective prosecution claim."[11]

ANALYSIS/ APPLICATION

The court in *Armstrong II* resolved a conflict within the the Ninth Circuit Court of Appeals between two cases that adopted different approaches to the threshold discovery showing required of a defendant in a selective prosecution claim. Both *United States v. Redondo-Lemos*[12] and *Bourgeois* follow *United States v. Wayte*.[13] *Wayte* held that selective prosecution claims should be reviewed according to ordinary equal protection standards,[14] and required a petitioner to show both discriminatory effect and motive.[15] *Bourgeois* noted that *Wayte* did not establish a discovery threshold.[16]

In dictum, the *Redondo- Lemos* court suggested that in selective prosecution claims, the defendant must present enough evidence to demonstrate a reasonable inference of discriminatory treatment.[17] The court in *Redondo-Lemos* held that in order to establish purposeful discrimination, the district court may find an intent to discriminate on the part of the prosecutor on the basis of its own day-to-day observations.[18] If the defendant raises the claim of selective prosecution, enough evidence must be presented to demonstrate a reasonable inference of discriminatory intent.[19] Once a showing of discriminatory effect has been made, the United States must be given an opportunity to present evidence to rebut the *prima facie* case.[20] This evidence consists of "overall case statistics" which both the district court and the defendant might reasonably understand and analyze.[21] If the district court finds by a preponderance of the evidence that the prosecutor's charging or plea bargaining practice has a discriminatory impact, it must determine whether the prosecution was motivated by a discriminatory purpose.[22] At this point, an *in camera* review of certain prosecution files and limited discovery by the defendant might be allowed,[23] but such an examination is only to be conducted in extraordinary situations and only when the district court has serious doubts about whether the prosecutorial decisions are being made in a discriminatory fashion.[24] Finally, the *Redondo-Lemos* court held that if the district court finds by a preponderance of the evidence that there has been intentional discrimination on the basis of a race or sex, then it may fashion the appropriate remedy.[25]

In *Bourgeois*, the defendant raised the issue of selective prosecution. The court held that 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 government actors."[26] The court explicitly stated that this standard contained a high threshold.[27] However, the *Bourgeois* court held that the "colorable basis" standard for discovery should not be so high as to require establishment of a *prima facie* case.[28]

The preliminary issue before the Ninth Circuit in *Armstrong I* was whether the *Redondo-Lemos* "reasonable inference " showing or the *Bourgeois* "colorable ba-

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[5] 964 F.2d 935 (9th Cir. 1992).

[6] *United States v. Bourgeois*, 964 F.2d 935, 939 (9th Cir. 1992).

[7] 48 F.3d 1508 (9th Cir. 1995).

[8] 964 F.2d 935 (9th Cir. 1992).

[9] 990 F.2d 472 (9th Cir. 1993).

[10] *Armstrong II*, 48 F.3d 1514 (1995).

[11] *Id.* at 1513.

[12] 955 F.2d 1296 (9th Cir. 1992).

[13] 470 U.S. 598 (1985).

[14] *Id.* at 608.

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

[16] *Bourgeois*, 964 F.2d at 939.

[17] *Redondo-Lemos*, 955 F.2d 1296 (1992).

[18] *Id.*at 1302.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Bourgeois*, 964 F.2d 939 (1992). The First, Second, Fifth, and Eighth Circuits have adopted the "*prima facie* showing"

sis" showing was the appropriate standard in determining when a defendant has made a proper showing to obtain discovery in a selective prosecution claim. The Ninth Circuit's holding in *Armstrong I*[29] resulted in the court adopting *Bourgeois'* colorable basis standard.[30] The *Armstrong I* court admitted that neither test was "easily susceptible to further definition,"[31] but determined that the colorable basis test of *Bourgeois* was more aligned with the facts in *Armstrong I*.[32] In both *Bourgeois* and *Armstrong*, the defendants were challenging their prosecutions, while in *Redondo-Lemos* the judge granted discovery based on his own suspicions. The *Armstrong I* 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."[33]

The Ninth Circuit agreed to rehear *Armstrong I* en banc, in order to clarify the meaning of the "colorable basis" standard. The court rejected *Bourgeois'* "high threshold" characterization of the colorable basis standard.[34] The *Armstrong II* court held that the "high threshold" language appears to set an artificially onerous burden on selective prosecution discovery claims.[35] The court stressed that such a reading of the colorable basis standard was erroneous and that the threshold is not as "high" as the language in *Bourgeois*.[36]

Second, the court recognized that *Bourgeois* did not adequately explain the proper showing needed under the colorable basis threshold to prove that prosecutorial conduct has a discriminatory effect and is motivated by a discriminatory purpose.[37] In order for a defendant to succeed on a claim of selective prosecution, the defendant must show that the prosecutor's selection "had a discriminatory effect and that it was motivated by a discriminatory purpose."[38] The *Armstrong II* court stated that a direct showing of discriminatory intent is not always necessary to prove a claim, and that in some situations a circumstantial showing of intent may be used.[39] *Armstrong II* found that "a circumstantial showing of intent may be based on evidence of discriminatory effects,"[40] and held that in some situations statistical disparities alone were sufficient to provide evidence of discriminatory effect and intent.[41] This holding expressly overrules *Guiterrez*. The court in *Armstrong II* concluded that "inadequately explained evidence of a significant statistical disparity in the race of those prosecuted suffices to show the colorable basis of discriminatory intent and effect that warrants discovery on a selective prosecution claim."[42]

Finally, the *Armstrong II* court recognized that *Bourgeois* did not adequately emphasize the evidentiary problems that the defendants face in attempting to prove a colorable basis claim of selective prosecution.[43] The court advised district court judges who are considering a discovery request to seriously consider the evidentiary obstacles defendants face.[44] Due to the broad discretion afforded to prosecutors in their charging decisions, it is entirely possible that the prosecutors possess the only information that would prove discrimination.[45]

Defendants attempting to make a colorable basis showing of selective prosecution are expected only to put forth evidence that is already in their possession or to make "good faith" efforts to obtain readily available evidence.[46] Defendants are not required to present sophisticated analyses or to compile facts which are not easily obtainable by them.[47] The court concluded that the colorable basis standard "ensures that the government will not be called to answer for its charging decisions as a result of frivolous and unwarranted allegations."[48] The court found that the colorable basis standard provides the government with sufficient protection against judicial scrutiny of their charging decisions. "At the same time, the standard ensures that defendants will not face unjustified hurdles at the discovery stage that will preclude them from demonstrating the existence of actual discrimination in the selection of defendants for criminal prosecution."[49]

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threshold to discovery. Under this doctrine the defendants must establish a *prima facie* case of selective prosecution before discovery of materials requested in connection with the claim can be compelled. *United States v. Parham*, 16 F.3d 844 (8th Cir. 1994). If the defendant fails to establish a *prima facie* showing, the prosecution is presumed to be constitutionally valid and undertaken in good faith. *Id.* at 846. In order for a defendant to make a *prima facie* showing of selective prosecution, the defendant must show; (1) that he has been singled out for prosecution while others similarly situated have not been prosecuted for similar conduct and (2) that the government's action in thus singling him out was based on an impermissible motive such as race, religion, or the exercise of constitutional rights. *Id.*

[29] 21 F.3d 1431 (9th Cir. 1994).

[30] *Armstrong I*, 21 F.3d at 1436.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1436.

[34] *Armstrong II*, 48 F.3d at 1513.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1513 (quoting *Wayte*, 470 U.S. at 608).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1513 - 1514.

[43] *Id.* at 1514.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1515.

[49] *Id.*

Applying the *Bourgeois* "colorable basis" test, the *Armstrong II* court found that the "defendants have presented sufficient evidence to provide a colorable basis for believing that the government has engaged in discriminatory prosecution."[50] The court also found that the defendant's statistical evidence, based on a study conducted by the Federal Public Defender's office and which suggested that blacks are disproportionately charged with federal crack offense combined with the United States' inability to offer sufficient evidence to refute the inference in response, was sufficient for the district judge in her discretion to determine that a colorable basis for selective prosecution had been shown.[51]

The court distinguished the study conducted by the Federal Public Defender from the evidence used by the defendants in *Bourgeois*.[52] In *Bourgeois*, the defendants had argued that they were entitled to discovery based on a showing that all prosecutions for firearm violations resulting from a two-day police operation involved only black defendants.[53] The district court rejected these claims on the theory that two days was too short of time to serve as a basis for showing discriminatory intent and effect.[54] In contrast, the Federal Public Defender study presented by the defendants in *Armstrong*, involved an agency that represents a significant percentage of all federal defendants and covered a significant period of time.[55] Such a study "provides a much stronger basis for reasonably inferring invidious discrimination than does an analysis of only a single, short police operation."[56]

The court cautioned district courts to afford the United States an opportunity to explain the evidence offered by the defendant.[57] "A colorable basis must still exist after all the evidence presented by both sides has been considered."[58] The court found that two declarations from defense attorneys provided additional support for the defendant's allegations that the prosecutor's charging decisions were discriminatory.[59]

Judge Wallace concurred in the judgment of the court, but was concerned about the majority's attempts to "clarify" the test stated in *Bourgeois*.[60] Judge Wallace agreed with the majority's rejection of the "high threshold" requirement of Bourgeois,[61] but disagreed that the standard was as "low" as a nonfrivolous showing.[62] Judge Wallace also disagreed with the majority's conclusion that statistical evidence might be sufficient to prove discriminatory effect and intent.[63] Judge Wallace conceded, however, that at the discovery stage, where there is enough data over a sufficient amount of time, such evidence is sufficient to establish a colorable basis claim for selective prosecution.[64]

Judge Wallace pointed out that the role of the appellate court is not to second-guess the trial court, but to ask whether the district court abused its discretion.[65] Unless the district court clearly abused its discretion in ordering discovery and dismissing the indictments, the judgment of the lower court should not be overturned on appeal. He found that in this case, the defendants provided sufficient evidence to support the district court's order and that therefore the lower court's decision should be affirmed.

Judge Rymer, along with Judges Leavy, Nelson, and Kleinfeld dissented.[66] They argued that a colorable basis had not been established.[67] To show a colorable basis, the dissent asserted that the defendants must: (1) draw a reference to a comparison group, and (2) provide evidence that others, similarly situated except for their race, have not been prosecuted.[68] Judge Rymer asserted that the majority's opinion actually "guts *Bourgeois* by holding that when a selective prosecution claim is based on race, evidence tending to show that only members of racial or ethnic minority groups have been prosecuted will suffice."[69] Judge Rymer argued that "the proper legal standard is not whether the defendant's evidence raises a question, but whether it provides a colorable basis for the existence of discriminatory effect and discriminatory intent."[70] In the absence of any evidence that the government purposefully selected these defendants for prosecution on account of their race, there is no colorable basis for the existence of discriminatory intent as a matter of law.[71]

The dissent asserted that at the discovery stage, it is the defendant's burden to provide facts that would prove both discriminatory intent and effect.[72] The dissent complained that the district court erred in two respects: (1) it shifts to the government the responsibility to dissuade public opinion, but ignored the government's submissions, and (2) the discovery ordered will not show who

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[50] *Id.* at 1515.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 1516.
[57] *Id.* at 1517.
[58] *Id.*
[59] *Id.* at 1518.
[60] *Id.* at 1520 (Wallace, J., concurring in the judgment).
[61] *Id.* (Wallace, J., concurring in the judgment).
[62] *Id.* (Wallace, J., concurring in the judgment).
[63] *Id.* at 1521 (Wallace, J., concurring in the judgment).
[64] *Id.* (Wallace, J., concurring in the judgment).
[65] *Id.* (Wallace, J., concurring in the judgment).
[66] *Id.* (Rymer, J., dissenting).
[67] *Id.* at 1522 (Rymer, J., dissenting).
[68] *Id.* (Rymer, J., dissenting).
[69] *Id.* at 1524 (Rymer, J., dissenting).
[70] *Id.* (Rymer, J., dissenting).
[71] *Id.*
[72] *Id.*

was not prosecuted, but only those defendants that were prosecuted.[73]

Additionally, the dissent argued that both the Supreme Court and the Ninth Circuit Court of Appeals have clearly distinguished between discriminatory effect and intent, thus recognizing them as two distinct elements.[74] The dissent argued that "the majority's opinion effectively collapses intent into effect by holding that both must be shown by the same, insubstantial statistic."[75]

The dissent objected most vigorously to the majority's removal of the "high threshold" standard of *Bourgeois*.[76] Judge Rymer argued that "a high threshold will discourage fishing expeditions, protect legitimate prosecutoral discretion, safeguard government investigative records, and yet still allow meritorious claims to proceed."[77] Judge Rymer argued that lowering the threshold requirement will allow frivolous claims against law enforcement to flourish,[78] and that a "high threshold" is necessary because courts are ill equipped to evaluate a prosecutor's charging decision.[79] In essence, Judge Rymer warned that allowing such claims could result in a separation of powers issue. Judge Rymer also characterized the majority's attempts to clarify the "colorable basis" standard as crafting a "new standard which is far more elusive than *Bourgeois*."[80]

CONCLUSION

Other circuits have adopted their own tests to determine whether or not a defendant is allowed discovery in a selective prosecution claim. The Third, Sixth, Seventh, Ninth, Tenth, and D.C. Circuits have also adopted the "colorable basis" standard for discovery in selective prosecution claims. In these circuits, the colorable basis standard is met by "some evidence tending to show the essential elements of the claim . . ."[81] "[S]ome evidence" means the showing must be more than frivolous and based on more than conclusory allegations.[82] The Fourth and Eleventh Circuits, on the other hand, have adopted the "nonfrivolous/ legitimate issue" threshold for discovery in selective prosecution cases. This standard requires a defendant to present "sufficient evidence to establish a 'colorable entitlement' for a selective prosecution claim or sufficient facts 'to take the question past the frivolous state and raise a reasonable doubt as to the prosecutor's purpose."[83] There is some uncertainty in the circuits applying the colorable basis standard about where the nonfrivolous/ legitimate-issue threshold lies in the discovery continuum. The Seventh Circuit has lumped both the frivolous/ legitimate-issue threshold with the *prima facie* threshold and criticized both as being too high.

The Supreme Court has granted *certiorari* to *Armstrong II*.[84] Thus the status of the colorable basis standard as articulated in *Armstrong II* is uncertain. The disagreement between the majority of the Ninth Circuit who want to protect against discriminatory enforcement of the laws, and the dissent who want to protect the law enforcement from frivolous selective prosecution claims will eventually be resolved by the High Court.

Summary and Analysis Prepared by:
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[73] *Id.* (Rymer, J., dissenting).
[74] *Id.* at 1522 (Rymer, J., dissenting).
[75] *Id.* (Rymer, J., dissenting).
[76] *Id.* at 1526 (Rymer, J., dissenting).
[77] *Id.* (Rymer, J., dissenting).
[78] *Id.* (Rymer, J., dissenting).
[79] *Id.* (Rymer, J., dissenting).
[80] *Id.* at 1526 (Rymer, J., dissenting).
[81] cite proposition from these circuits
[82] *Armstrong II*, 48 F.3d at 1512, (quoting *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990)(emphasis is original)).
[83] *United States v. Gordon*, 817 F.2d 1538, 1540 (11th Cir. 1988) (citing *United States v. Hazel*, 696 F.2d 473, 475 (6th Cir. 1983) (quoting *United States v. Larson*, 612 F.2d 1301, 1304-05 (8th Cir.), *cert. denied*, 446 U.S. 936 (1980).
[84] *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995), *cert. granted*, 116 S.Ct. 377 (1995).