UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20577-JORDAN/BROWN

UNITED STATES OF AMERICA

vs.

GREENPEACE, INC.,
d/b/a "Greenpeace USA,"

Defendant.
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**DEFENDANT'S MOTION FOR JURY TRIAL AND BRIEF IN OPPOSITION TO GOVERNMENT'S MOTION FOR NON-JURY TRIAL**

Greenpeace, Inc. ("Greenpeace"), hereby moves for a jury trial in this case and opposes the United States' Motion For Non-Jury Trial.

This is a misdemeanor prosecution, but it is also an unprecedented prosecution, one that has the potential to transform an important aspect of our nation's legal and political life. Counsel can find no other example of the Government criminally prosecuting an entire organization for the free speech-related activities of its supporters. Such an unprecedented development could significantly affect our nation's tradition of civil protest and civil disobedience, a tradition that has endured from the Boston Tea Party through the modern civil rights movement and beyond. Worse, the expressive conduct for which the Government seeks to criminally prosecute Greenpeace was, essentially, whistle-blowing -- it was aimed at publicly exposing and preventing violations of U.S. law prohibiting the importation of illegally harvested mahogany wood. This prosecution further offends the First Amendment because it is built on an obscure statute that is impermissibly vague and is of questionable applicability to Greenpeace's expressive conduct.

Finally, the serious potential statutory and regulatory consequences Greenpeace faces if convicted of these charges warrant a jury trial. Under the circumstances, Greenpeace submits to the Court that it is most appropriate to present the case to the representatives of the community who will make up a jury. A jury is called for in this circumstance, where a successful prosecution could dramatically affect Greenpeace and, more generally, redefine the relationship between the public protester and the criminal law, because "[t]he primary purpose of the jury in our legal system is to stand between the accused and the powers of the State." Lewis v. United States, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring in the judgment).

**BACKGROUND**

Greenpeace is a California nonprofit corporation operating under section 501(c)(4) of the Internal Revenue Code. The organization has more than 250,000 individual supporters in the United States. Greenpeace does not accept government or corporate money. Its genesis can be traced back to 1971. Since that time, Greenpeace has gained worldwide recognition as a movement committed to confronting environmental abuses at their source through multiple means, including non-violent actions. Often, these actions have not only stopped immediate harm to the environment, but have also played an integral part in the creation of new legislation and international agreements to stop such harms in the future – from atmospheric nuclear testing, to the exploitation of Antarctica, to the dumping at sea of radioactive waste. Perhaps the most iconic image of Greenpeace is activists in small inflatable boats, venturing into the path of large harpoon-firing ships in an effort to save a hunted whale and to inspire reforms that protect whales worldwide. These actions contributed to the International Whaling Commission moratorium on

commercial whaling, which went into effect in 1986, as well as the establishment of the Southern Oceans Sanctuary in 1994. There are many other examples of the effectiveness of Greenpeace's environmental work, but one need look no further than the action that gave rise to this prosecution.

Greenpeace's action in this case stemmed from its ongoing work to protect ancient forests, particularly the Brazilian Amazon. Destruction of these habitats threatens clean air and water, animal and plant species, and the people and cultures who depend on forests for their way of life. Large criminal enterprises, using bribery, extortion, slavery, and murder, continue to ravage the Amazon and export their contraband.

Because the United States is a party to a global agreement called the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), it is illegal under U.S. law to import into this country mahogany wood that is harvested in violation of the laws of its country of origin. [1]

Greenpeace teams in Brazil and the United States have investigated illegal harvesting of mahogany and tracked contraband into the U.S. market. Greenpeace's work helped prompt the Brazilian government, in an unprecedented decision in October 2001, to suspend Brazil's lucrative mahogany trade until reforms are undertaken to prevent further illegal destruction of the Amazon. But trafficking in illegally harvested harvested mahogany, and subsequent delivery into the United States, has continued.

In spring 2002, Greenpeace research revealed that a ship headed for Miami, the APL

[1] Engagement in trade that is contrary to the provisions of CITES violates the Endangered Species Act, at 16 U.S.C. section 1538(c)(1).

Jade, was carrying Brazilian mahogany. On April 12, 2002, several miles off the Florida coast, small Greenpeace boats bearing Greenpeace insignia neared the Jade. The boats carried Greenpeace activists whose clothing bore Greenpeace insignia. Two of the activists boarded the ship, by means of a ladder hung on its side, to alert the authorities to the contraband and highlight the failure of the U.S. government to halt ongoing smuggling. They carried a banner that read, "President Bush, Stop Illegal Logging." Other Greenpeace activists in the boats recorded the action on film and video, and Greenpeace publicized the protest through contacts with the news media.

As is standard for such actions, Greenpeace activists proceeded here with full attention to security, safety, and protection of property. The Greenpeace activists made clear by their appearance, words and actions that they were engaged in a peaceful effort, not violence. The relevant personnel on the Jade understood that what was occurring was a Greenpeace action, not an attack.

Greenpeace activists involved in this action were detained by the Coast Guard. They spent the weekend in jail. They later accepted a plea agreement and were sentenced to the time served.

Greenpeace's action in Miami, combined with related efforts from London to Madrid to Rio de Janeiro, helped prompt nations to agree in November 2002 to give mahogany even greater global protection. But instead of thanking Greenpeace for work that promotes President Bush's stated goal of stopping illegal logging, and instead of prosecuting the smugglers, the Justice Department decided to brand Greenpeace a criminal operation.

Fifteen months after the Miami arrests, on July 18, 2003, Greenpeace was indicted on one count of violating 18 U.S.C. section 2279, which prohibits persons, "not being duly authorized by law for the purpose," from "[going] on board any vessel about to arrive at the place of her destination, before her actual arrival, and before she has been completely moored," and on one count of conspiracy, under 18 U.S.C. section 371, to commit this offense. Each charge carries a maximum sentence of six months incarceration, a $10,000 fine, and five years' probation.

**DISCUSSION**

1. Jury trial as a matter of right and as a matter of discretion

The Sixth Amendment to the U.S. Constitution provides that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury …" It is settled law that "there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." Blanton v. City of North Las Vegas, 489 U.S. 538, 541 (1989), quoting Duncan v. Louisiana, 391 U.S. 145, 159 (1968). A defendant is entitled to a jury trial whenever the offense charged carries a maximum prison term of greater than six months. Id. at 542. With respect to offenses carrying maximum terms of six months or less, the court in Blanton stated that it found it "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty,'" id. at 534, but the court expressly declined to hold that such an offense "automatically qualifies as a 'petty' offense." Id. A defendant charged with a such an offense has a Sixth Amendment right to a jury trial if he or she can demonstrate that additional statutory and regulatory penalties, viewed together with the maximum authorized prison term, are sufficiently serious that they demonstrate that the

legislature considered the offense charged to be "a serious one." Id. The Court added, "In performing this analysis, only penalties resulting from state action, e.g. those mandated by statute or regulation, should be considered." Id. at 534 n. 8. [2]

The foregoing is the controlling law with respect to a defendant's Sixth Amendment *right* to a trial by jury, and Greenpeace contends that, under all the circumstances, as discussed below, it does have the right to a jury trial. But beyond what a defendant is *entitled to* pursuant to constitutional rights, this Court has the *discretion*, based on appropriate circumstances, to have this case tried before a jury. "Nothing in the Constitution … precludes the judge from granting a jury trial as a matter of discretion." Ross v. Bernhard, 396 U.S. 531, 550 (1970) (Stewart J., dissenting from a decision of the Court that found a Seventh Amendment right to jury trial in civil case). Nothing in the Federal Rules of Criminal Procedure or the Rules of this Court suggests that this Court lacks the authority to exercise discretion and conduct a jury trial here.

Federal Rule 23(a) creates a high hurdle to holding *a bench trial* in a case where the defendant is entitled to a jury trial: Trial "must" be by jury unless the defendant, the government, and the court all concur. There is no comparable provision requiring unanimity in the event the Court determines, in its discretion, that a jury trial is more appropriate to the circumstances than is a bench trial. And nothing in Federal Rule 58, entitled with "Petty Offenses and Other

[2] On the issue of whether multiple counts of petty offenses, where conviction might result in consecutive sentences leading to incarceration for more than six months, as is the case here, creates a Sixth Amendment right to a jury trial, the Supreme Court, dividing 5-4 on the issue, concluded that such multiple offenses did not automatically give rise to a jury trial right. Lewis, 518 U.S. at 330. Criticizing this holding, Justice Kennedy wrote that it was "one of the most serious incursions on the right to a jury trial in the Court's history, and it cannot be squared with our precedents." Id. at 331 (Kennedy, J., concurring in the judgment).

Misdemeanors," bars or discourages a trial court from conducting a jury trial even where a petty offense is at issue. [3]

2. Greenpeace has the right to a jury trial under the Sixth Amendment

Under Blanton, Greenpeace has a Sixth Amendment right to a jury trial if it can show that additional "penalties resulting from state action, e.g., those mandated by statute and regulation," viewed together with the maximum authorized prison term, are sufficiently serious to indicate that the offense is "a serious one." 489 U.S. at 534 and n. 8.

In this case, the defendant Greenpeace is a non-profit, advocacy corporation, not an individual. The organization, which is supported largely by contributions from individuals, faces a potential fine of $10,000 for each offense, a significant amount of Greenpeace's resources. The relevant maximum incarceration period is six months for each offense, or one year if the sentences run consecutively. However, since a corporation cannot be imprisoned, a more important measure of its potential loss of liberty is the maximum period of probation. Greenpeace faces a five year probation for each count. For a non-profit corporation which uses peaceful direct action to bring meaningful change to society, and an organization whose foes in government and the private sector have worked to undermine it, the consequences could be extremely serious. Five years of probation, not to mention a conviction in this matter, hanging over Greenpeace's head has the potential for thwarting efforts at the heart of Greenpeace's mission – at the heart of how Greenpeace brings attention to environmental crimes and

[3] See also Duncan v. State, 391 U.S. 145, 159 (1968) ("Crimes carrying possible penalties up to six months *do not require* a jury trial if they otherwise qualify as petty offenses." (citing Cheff v. Schnackenberg, 384 U.S. 373 (1966))) (emphasis added).

environmental destruction. In short, it threatens Greenpeace's very existence.

Although Greenpeace would urge this Court not to impose a probationary period or fine in the event of conviction, and Greenpeace would vigorously oppose efforts by other federal, state, or local government agencies to impose penalties on Greenpeace on account of a conviction here, Greenpeace may not be able to avoid negative consequences. Corporations and other opponents of Greenpeace can be expected to pursue complaints with government agencies, and Greenpeace may be forced to devote substantial time and resources to defend against adverse outcomes. If so, the organization would be in the serious and expensive fight for its continued existence.

A crucial component of Greenpeace's work is the exercise of its First Amendment rights to call attention to environmental problems. This very case exemplifies this principle. In an effort to help save the Amazon, Greenpeace activists engaged in a very public direct action replete with banners, photo and video documentation, and press releases. Its purpose was to send a loud and clear message to the U.S. Government: 'Seize the Jade's contraband and stop further imports of illegal mahogany." A conviction on these charges, as well as the possibility of five years' probation, would have a chilling effect on Greenpeace free speech activities, as well as free speech activities by other groups.

If Greenpeace were convicted in this case and placed on probation, it would be subject to probation office monitoring – ongoing monitoring by the government – of its activities. If Greenpeace supporters, during the probation period, engaged in civil protest actions, violations

could mount, fines could mount, and Greenpeace would be unable to carry out its mission. Even protests where no laws are broken could trigger a violation of probation hearing, under a lower required standard of proof, based on mere allegations of wrongdoing. This monitoring would chill a broad range of Greenpeace activities.

Such punishment would subject Greenpeace to restrictions never before applied to an advocacy organization based on its expressive activity. It would represent, therefore, a significant break with our nation's history of providing a role for protest and civil disobedience as part of our political life.

Thus, as serious as this case is for the Defendant, its significance goes beyond Greenpeace; it implicates the fundamental rights of all Americans to engage in peaceful protest. In America's history, non-violent protest has been central to capturing attention and bringing positive change. "There is no question that speech critical of the State's power lies at the very center of the First Amendment." Gentile v. State Bar of Montana, 501 U.S. 1030, 1034 (1991).

In 1773, American protesters boarded ships over objectionable cargo; it was called the Boston Tea Party, and it was critical to focusing objections to British rule. If African-Americans in the South had simply picketed businesses instead of staging lunch counter sit-ins and taking seats at the front of the bus, public attention might have been diverted elsewhere, and support for civil rights might have been much slower in coming.

In this nation's tradition of public protest, individual protestors have been removed, perhaps arrested, possibly charged, sometimes convicted. This has been the fate of civil rights demonstrators in the 1960's, of the numerous Americans in the 1980's who entered the grounds

of the South African embassy in Washington to protest apartheid, of ACT-UP protestors who have confronted government officials on the AIDS crisis, of anti-abortion protestors affiliated with groups like Operation Rescue, of members of the Democracy Movement who have staged protests at sea against the Cuban regime. Similarly, Greenpeace activists, including the activists involved in the instant matter, make an individual decision to engage in public actions, and they stand ready, as other American protestors have, to face the individual consequences.

Now the government wants to change this tradition and for the first time indict, and thwart the efforts of, an entire organization. This development could have major consequences. If Southern prosecutors had criminally convicted groups like the NAACP, the Southern Christian Leadership Conference, or the Student Nonviolent Coordinating Committee for civil disobedience by their supporters, the civil rights movement might have been stopped in its tracks.

Criminally convicting Greenpeace here, with the attendant risk of a probationary sentence, would thus impose serious consequences on Greenpeace and chill First Amendment rights for everyone. If such limited actions on commercial ships are subject to criminal conviction, then acts of protest in shopping malls, university buildings, hotel ballrooms, and public plazas may be next.

Given the potential for a probationary sentence alone, the penalties here are sufficiently serious that Greenpeace should be entitled to a jury trial. But the Court should consider other potential consequences of a conviction as well. In Blanton, the Court distinguished "state action" penalties, which it deemed relevant to the Sixth Amendment inquiry, from other collateral consequences deemed irrelevant by citing a law review article for the proposition that

"nonstatutory consequences of a conviction 'are speculative in nature, because courts cannot determine with any consistency when and if they will occur, especially in the context of society's continually shifting moral values.'" Id. at n. 8. By directing lower courts to consider not only statutory penalties but also regulatory penalties, and by contrasting those penalties with adverse consequences coming from "society," rather than from the Government, the court in Blanton by implication directed lower courts to consider other governmental penalties outside of those provided by the statute of conviction itself.

Here, a criminal conviction could potentially result in other governmental penalties that might dramatically affect Greenpeace's ability to operate. Non-profits are highly regulated at both the federal and state levels. In the area of state registration for permission to seek financial donations, many states require non-profit corporations to disclose certain criminal convictions for consideration in the charitable solicitation approval process. Greenpeace also operates under a federal tax exempt status under section 501(c)(4) of the Internal Revenue Code and thus is subject to scrutiny by the IRS in order to maintain this status. There is at least some potential for a criminal conviction of Greenpeace to jeopardize the organization's tax status. In 1975, the Internal Revenue Service revoked the tax-exempt status of a nonprofit organization, operating under 501(c)(4) of the Internal Revenue Code, whose members apparently were engaged in violations of law as part of antiwar protests. In issuing its ruling, the IRS stated as follows:

> Illegal activities, which violate the minimum standards of acceptable conduct necessary to the preservation of an orderly society, are contrary to the common good and the general welfare of the people in a community and thus are not permissible means of promoting the social welfare for purposes of section 501(c)(4) of the Code. Accordingly, the organization in this case is not operated exclusively for the promotion of social welfare and does not qualify for exemption from Federal income tax under section 501(c)(4).

IRS Revenue Ruling 75-384 (1975).

3. Even if the Court finds no right to a jury trial here, the Court should exercise its discretion to conduct a jury trial

As described above, this prosecution is an unprecedented effort that could change the relationship between civil protestors and the government. Moreover, this prosecution does not occur in a vacuum; it comes at a time when the Attorney General has campaigned tirelessly for greater government authority to investigate Americans and intrude on privacy without judicial approval, see, e.g., "Ashcroft again attacks Patriot Act critics," Miami Herald, Sept. 19, 2003, and when federal security officials appear to have instituted policies to keep protestors far away from Bush Administration officials at speaking engagements. See "Lawsuit Criticizes Secret Service; Anti-Bush Protesters Are Kept at Bay, Advocacy Groups Say," The Washington Post, Sept. 24, 2003, at A27. In these circumstances, with individual rights, including free speech rights, under pressure, it is wholly appropriate for this Court to empanel a jury here "to stand between the accused and the powers of the State." Lewis, 518 U.S. at 335 (Kennedy, J., concurring in the judgment). See also Baldwin v. New York, 399 U.S. 66, 72 (1970) ("The primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the Government that has proceeded against him.")

In United States v. Thomas, 574 F.Supp. 197 (D.D.C. 1983), the court granted a jury trial to a defendant charged with violating Interior Department regulations for "expressing a protest on a public matter" by placing on the sidewalk outside the White House gates a cardboard sign shaped like a Pershing missile. Id. at 198. The offense was punishable by a maximum sentence of six months imprisonment and a $500 fine. Id. The court found "special circumstances in this case because of its First Amendment implications." It stated that a conviction "could have a chilling effect on a variety of future protest actions by defendant and others." Id. More directly, the Court noted, incarceration would, for its duration, silence the defendant's protest. The court concluded that "the risk to the constitutionally protected conduct inherent in the sanction imposable for the proscribed conduct" called for trial by jury. Id. [4]

The situation here is comparable to the circumstances of Thomas. The defendant Greenpeace is on trial for speech-related conduct – for Greenpeace supporters boarding a ship with a banner calling for President Bush to work for an end to destruction of the Amazon. A guilty verdict and criminal sentence could chill or thwart speech related activities by Greenpeace and others.

Moreover, Greenpeace plans to argue in this matter several points that further implicate free speech rights. Greenpeace will contend that the government is engaged in unlawful selective prosecution based on animus against Greenpeace for successful public advocacy and action

[4] In United States v. Musser, 873 F.2d 1513 (D.C.Cir. 1989), the court indicated that after Blanton, the suggestion in Thomas that First Amendment concerns gave a defendant a Sixth Amendment jury trial right was not valid. Id. at 1516. Greenpeace does not disagree; we cite Thomas in support of our argument that First Amendment concerns are a strong ground for this Court exercising its discretion to grant a jury trial.

efforts that have thwarted Bush Administration goals. Such a motive is another reason why a jury trial is appropriate for this case. "[T]here is a need for interposing the common sense judgment of a jury between the government and the defendant where the defendant demonstrates to the trial judge that there is a reasonable probability the state is undertaking the prosecution of the petty charge or charges, out of spite or vindictiveness." United States v. Bencheck, 926 F.2d 1512, 1519 (10th Cir. 1991). Greenpeace will further argue that the statute under which Greenpeace has been charged, an 18th century relic aimed at preventing unscrupulous boarding house proprietors from luring arriving sailors to their abodes, a statute that bars the boarding of ships "about to arrive" in port, does not apply to Greenpeace's protest action three to five miles from the Miami port, and the prosecution offends the First Amendment.

In these circumstances, with such serious speech-related conduct on the line, along with the viability of Greenpeace's core operations, this Court, even if it does not find that Greenpeace is entitled as a matter of right to a jury trial should exercise the discretion it clearly has and permit Greenpeace to defend in this action before a jury.

For the foregoing reasons, Greenpeace respectfully requests that this Court deny the Government's Motion for Non-Jury Trial and grant Greenpeace's Motion for Jury Trial.

Greenpeace respectfully requests oral argument on these motions.

Respectfully Submitted,

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