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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MOTION FOR DISCOVERY ON CLAIM OF SELECTIVE PROSECUTION AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

Greenpeace, Inc.[1] ("Greenpeace") has gained worldwide recognition for 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. Greenpeace has also worked hand in hand with various governments to help them address critical environmental concerns.

This case stems from Greenpeace's efforts, undertaken largely in conjunction with the Brazilian Government, to protect the Brazilian Amazon. After years of study in Brazil, Greenpeace determined that the biggest threat to the region stemmed from the illegal mahogany trade. Bigleaf mahogany ("mahogany"), or *Swietenia macrophylla*, is a high-value wood that has

[1] Greenpeace, Inc. is part of the global Greenpeace environmental movement, but is a separate

been subject to exploitation and illegal logging in Brazil for many years.[2] Mahogany is the only Amazonian species of wood valuable enough to bring illegal loggers into the rainforest. Those incursions are the first and critical step in the deforestation of large areas of the Amazon.

Mahogany prospectors fly over the rainforest searching for mahogany trees, which are easily identified from the air by their distinctive canopy. When a tree is spotted, its location is catalogued via global positioning systems. When enough trees have been mapped, the illegal loggers punch roads, sometimes stretching many miles into the forest, through national parks, through indigenous reserves and through private lands to get to the trees. It is the construction of roads which leads to the destruction of the rainforest and threatens the indigenous population. Once the roads are built, other loggers use them to harvest other rainforest woods. Settlements and ranching follow inevitably, leading to the clear-cutting of the remaining trees. Destruction of these habitats threatens animal and plant species, and the people and cultures who depend on these forests for their way of life.

On September 26, 2001, as a result of its exhaustive research on the ground in Brazil, Greenpeace released a report, "Partners in Mahogany Crime," exposing widespread illegalities in the mahogany trade, including logging inside the Kapayo Indian lands and the rampant use of fraudulent governmental transportation documents.

Greenpeace provided its report and accompanying documentation to the Brazilian Federal Prosecutor and to the Brazilian analog to the United States Environmental Protection Agency

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legal entity from other Greenpeace offices throughout the world.

[2] See Greenpeace, Partners in Mahogany Crime (2001), which can be found at http://archive.greenpeace.org/forests/forests_new/html/content/reports/Mahoganyweb.pdf

("EPA"), Instituto Brasilero de Meio Ambiente e dos Recursos Naturais Renovaveis ("IBAMA"). IBAMA and Greenpeace forged an alliance and together developed an action plan, which the Brazilian government called Operation Mahogany. On October 22, 2001, the Brazilian government officially froze all mahogany operations. The Brazilian Government then launched a series of dramatic field raids where heavily armed Brazilian government officials accompanied by Greenpeace activists landed in helicopters at illegal mahogany logging operations. A Greenpeace ship, the M.V. Arctic Sunrise, served as IBAMA's base of operations for the raids. The Brazilian government provided the law enforcement personnel and Greenpeace supplied the intelligence pertaining to location of the illegal operations. In the first eleven days of Operation Mahogany, seven million dollars worth of illegally cut mahogany was seized.

Over the months that followed, the raids continued, mahogany was seized, and arrests were made. However, while the moratorium and the raids improved the situation, large criminal enterprises, using bribery, extortion, and murder,[3] continued to ravage the Amazon and smuggle out their contraband mahogany. The lions' share of that mahogany was shipped to the United States.

Not only was the continued export of mahogany illegal under Brazilian law, its importation into the United States was also illegal. At that time, mahogany was listed in Appendix III of The Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"). (Mahogany has since been "uplisted" to Appendix II providing an even greater level of protection to the species). The CITES treaty was signed by the United States on

[3] Greenpeace's Amazon Forest Coordinator, Paulo Adario, has received several death threats from illegal loggers.

March 3, 1973 and entered into force on July 1, 1975. Under CITES, a State cannot import an Appendix III species unless the "Management Authority" of the State of export is satisfied and certifies that it was not acquired contrary to that State's laws for the protection of fauna and flora. A violation of this requirement would also violate the Endangered Species Act, which states, in relevant part, that:

> It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of [CITES], or to possess any specimens traded contrary to the provisions of the Convention.

16U.S.C. § 1538(c)(1). Violations of section 1538 may result in criminal penalties. 16 U.S.C. § 1540(b).

IBAMA is the CITES Management Authority for Brazil. Beginning at the October 2001 moratorium, IBAMA stopped approving the export of mahogany from Brazil. However, many shipments of Brazilian mahogany continued to be made to the United States, which has historically been its biggest consumer, in contravention of CITES and the Endangered Species Act. The U.S. Government seized some of these shipments, but a large quantity escaped detection and flowed into this country. *See Castlewood v. Norton*, 264 F.Supp 2nd 9 (D.D.C. 2003).

In addition to continuing cooperation with IBAMA, Greenpeace worked to halt illegal mahogany exports by undertaking public protest actions in various nations around the world.

In the spring of 2002, Greenpeace learned that the APL Jade was heading to the United States carrying Brazilian mahogany. On April 12th , seeking to prompt the authorities to seize the illegal cargo and to hold President Bush to his commitment to combat illegal logging, a

commitment that he made in a February 2002 speech, Greenpeace activists peacefully boarded the Jade about three to five miles off the Florida shore carrying a banner reading: "President Bush, Stop Illegal Logging."

As is standard procedure for Greenpeace, the activists here staged their protest with strong attention to safety and protection of property. The activists, including the two who actually climbed onto the Jade, wore clothing with the Greenpeace insignia and identified themselves verbally as Greenpeace members. Radio transmissions monitored at the time indicated that the crew understood that the protesters were from Greenpeace. Other activists in the Greenpeace boats were openly videotaping the scene, another indication that what was going on was a non-violent public protest action, not a criminal assault. Thirteen of the protestors were arrested. Six later pleaded guilty to a misdemeanor and were sentenced to time served.

In this and other cases, individual Greenpeace protestors have faced the same legal risks as have other social activists, from supporters of the NAACP and the Southern Christian Leadership Conference in the 1960' s to more recent protesters on issues from AIDS to immigration, labor rights to abortion to animal welfare. Misdemeanor prosecutions for trespass and related offenses are not uncommon for such activists. But Greenpeace as an organization has never been prosecuted by the U.S. Government. Indeed, Greenpeace cannot locate another case where the United States has prosecuted an organization as a result of protest activities undertaken by its supporters.

THE GOVERNMENT IS ENGAGED IN SELECTIVE PROSECUTION OF GREENPEACE

This prosecution violates the equal protection guarantee of the United States Constitution

in that Greenpeace, Inc., the organization, has been singled out for prosecution in retaliation for its criticism of the Bush Administration, that is, for the exercise of its First Amendment rights. While "the decision as to whether to prosecute generally rests within the broad discretion of the prosecutor." *United States v. White,* 972 F.2d 16, 18 (2d Cir.1992), prosecutorial discretion cannot be exercised in extra-legal fashion. It is, of course, "subject to constitutional constraints." *United States v. Batchelder,* 442 U.S. 114, 125 (1979). The equal protection component of the Fifth Amendment is one of the most important of these constraints, and thus "the decision whether to prosecute may not be based on an unjustifiable standard such as race, religion, or other arbitrary classification." *United States v. Armstrong,* 517 U.S. 456, 464 (1996) (internal quotation omitted). Prosecution based upon the exercise of protected statutory and constitutional rights falls within the category of arbitrary classification, *see United States v. Goodwin*, 457 U.S. 368, 372 (1982).

To make out a claim of selective prosecution, a defendant must provide "clear evidence" that the prosecutorial decision or policy in question had both " ' a discriminatory effect and ... was motivated by a discriminatory purpose.' " *Armstrong* at 465. The discriminatory effect prong requires a showing that "similarly situated individuals of a different [classification] were not prosecuted." *Id.* A defendant seeking to show discriminatory purpose must show " ' that the decisionmaker ... selected or reaffirmed a particular course of action **at least in part** ' because of,' not merely ' in spite of,' its adverse effects upon an identifiable group." *Wayte*, 470 U.S. at 610 (quoting *Personnel Adm'r of Massachusetts v. Feeney,* 442 U.S. 256, 279 (1979)) (emphasis supplied).

To meet the first requirement, of discriminatory effect, the defendant "must show that similarly situated individuals . . . were not prosecuted." *Id.; see also United States v. Bass,* 536 U.S. 862, 863, 122 S.Ct. 2389, 153 L.Ed.2d 769 (2002). A claimant can demonstrate discriminatory effect by naming a similarly situated individual who was not investigated or through the use of statistical or other evidence which "address[es] the crucial question of whether one class is being treated differently from another class that is otherwise similarly situated." *Chavez v. Ill. State Police,* 251 F.3d 612, 638 (7th Cir.2001).

The required elements of discriminatory motive may be demonstrated through circumstantial or statistical evidence. *See Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). There is nothing unusual in this, as federal law does not generally distinguish between direct and circumstantial evidence. *See, e.g., Desert Palace, Inc. v. Costa,*123 S.Ct. 2148, 2154 (2003). Moreover, a discriminatory effect which is severe enough can provide sufficient evidence of discriminatory purpose. *Gomillion v. Lightfoot, supra*; *Yick Wo v. Hopkins, supra.* [5]

Courts have reversed convictions obtained as the result of selective prosecution of protestors. In *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (en banc), the Seventh Circuit reversed the conviction of a draft resistance leader for selective service violations. The court was troubled by the apparent selection of the defendant for his protest activities, finding the circumstances suspect because a number of high-ranking Department of Justice officials

[5] Thus, even where "the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo v. Hopkins,* 118 U.S. 356, 373-74 (1886).

reviewed and approved the decision to bring charges. *Id.* at 622.

In *United States v. Crowthers*, 456 F.2d 1074 (4th Cir. 1972), the Fourth Circuit overturned convictions for creating a disturbance at the Pentagon during a prayer service protesting the Vietnam War. The court found an equal protection violation because the government had not prosecuted participants in sixteen other events that had the same disruptive effect as the defendants' conduct. The court stated, "In choosing whom to prosecute, it is plain that the selection is made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused." *Id.* at 1079.

What Greenpeace seeks now is discovery of the information necessary to fully confirm its claim of selective prosecution. The standard for discovery is less rigorous than the standard applied to the merits. Rather than "clear" evidence of discriminatory effect and motive (required for the merits per *Armstrong*), to obtain discovery defendants need only produce "some" evidence of discriminatory effect and intent. *See United States v. Bass,* 536 U.S. 862, 863 (2002). In *Armstrong,* the Supreme Court held that to show discriminatory effect a defendant seeking discovery must adduce "some evidence that similarly situated defendants of other races could have been prosecuted, but were not." 517 U.S. at 469, 116 S.Ct. 1480. The Court did not decide the question of what showing of discriminatory intent sufficed to support discovery.

GREENPEACE CAN SHOW EVIDENCE OF DISCRIMINATORY EFFECT

Numerous organizations similar to Greenpeace, in that they have sponsored protest activities which have resulted in the prosecution of their activists, have not been prosecuted by the Government.

As just one example, Greenpeace searched for prosecutions of Operation Rescue, an organization whose anti-abortion activists have on many occasions blocked the entrance to abortion clinics, in violation of federal laws, including the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248. Operation Rescue members have been prosecuted

under that statute. *See, e.g., United States v. Soderna*, 82 F. 3d 1379 (7th Cir. 1996); *United States v. Unterburger*, 97 F.3d 1413 (11th Cir. 1996); *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996). However, despite the fact that, according to its website, operationrescue.com, Operation Rescue is an organized political protest action group which sponsors and advertises these demonstrations, no prosecutions of the organization appear to have occurred.[6] Indeed, in one reported case where the facts reveal that the Government determined that Operation Rescue had violated FACE, the Government proceeded civilly, not criminally, which has been the traditional approach to organizations involved in protest activities. See *United States v. Operation Rescue*, 111 F.Supp 2nd 948 (S.D. Ohio 1999). Thus, Operation Rescue has not been prosecuted where its activists have illegally sought to prevent women from exercising a constitutional right; Greenpeace is being prosecuted for seeking to prevent a crime.

In another similar case in this district, the Government prosecuted members of the political action group, the Democracy Movement, in *United States v. Ramon Saul Sanchez*, Case No. 01-10050-Cr-Roettger, for violations of the conspiracy statute, 50 U.S.C. §§ 191 and 192 and 33 C.F.R. § 165.T07-013. The members of the Movement had sailed into a governmentally designated security zone to stage a demonstration against the government of Cuba. While the individuals were prosecuted, the organization was not.

The court records of this nation contain numerous other examples of individuals, associated with organizations, being prosecuted for civil protest and civil disobedience. Counsel can find no example of an entire organization facing prosecution for such an action.

Thus, Greenpeace has shown that others similarly situated to it could have been prosecuted but were not.

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[6] Greenpeace, of course, does not have the resources or access to the statistics that the Government has to verify whether any such cases have been brought.

GREENPEACE CAN SHOW EVIDENCE OF THE GOVERNMENT'S DISCRIMINATORY INTENT

In assessing whether the prosecution was brought "**at least in part"** because of Greenpeace's protected political acts, the court can look also at the evidence of discriminatory effect.

> When discussing selective prosecution, *Armstrong* speaks of both discriminatory effect and discriminatory intent. *Id.,* 517 U.S. at 468, 116 S.Ct. 1480. *Armstrong* also acknowledges the "degree of consensus" that courts of appeals have reached in establishing the requisite showing for discovery with respect to selective prosecution: " ' some evidence tending to show the existence of the essential elements of the defense,' discriminatory effect *and* discriminatory intent." *Id.* (quoting *United States v. Berrios,* 501 F.2d 1207, 1211 (2d Cir.1974) (emphasis added)). However, in discussing the discovery issue, the Court claims to address the discriminatory *effect* element only. *See id.* at 469, 116 S.Ct. 1480. Thus, it is hard to tell what evidence of *intent* a defendant must produce in order to obtain discovery. As described above, *prima facie* evidence of effect is difficult enough to adduce.

United States v. Tuitt, 68 F.Supp.2d 4, *9 (D.Mass.1999)

For this reason, the district court in *Tuitt* stated that the *Armstrong* analysis "in some ways appears to conflate the elements of effect and intent." Even so, Greenpeace has more than "some" evidence that would lead to a conclusion of discriminatory intent, apart from the evidence of discriminatory effect.

Over the past two and one half years, Greenpeace has repeatedly engaged the Bush Administration, acting to publicize the policy failures of the Administration in order to promote policy changes.

- On April 13, 2001, in the first political demonstration held in Crawford, Texas, the site of President Bush's ranch, after President Bush's inauguration, Greenpeace activists hung a

banner from the water tower in Crawford, Texas, reading "Bush: The Toxic Texan. Don't Mess with the Earth."

- On May 17, 2001, Greenpeace activists held a public protest outside the Washington D.C. residence of Vice President Cheney. They condemned the Bush administration's reliance on dirty energy technologies, and its lack of support for energy conservation and renewable energy sources. Activists built a pile of coal and lifted a banner over it which read: "Stop the Bush/Cheney Energy Scam."
- On July 14, 2001, Greenpeace activists staged a peaceful protest near Vandenberg Air Force Base in California against President Bush's support of the National Missile Defense System, and called for an end to the global arms race.
- Throughout 2002, Greenpeace was highly critical of the Bush administration's refusal to enact legislation protecting US chemical plants in the post-September 11 period. Greenpeace went public with information and research showing that numerous facilities near large urban areas were not adequately protected, and advocated the phase-out of the use of many dangerous and toxic chemicals
- Also in 2002, Greenpeace offices worldwide began to publicize the Bush Administration's ties to large multinational oil interests, especially ExxonMobil. Greenpeace activists conducted various international actions criticizing President Bush's slighting of international agreements, such as the Kyoto Protocol on global climate change, in order to maintain ties to the oil industry. Greenpeace released a report in May 2002 entitled "Denial and Deception,"

detailing ExxonMobil's ties to Bush Administration officials, and its role in influencing national governments during the Kyoto debate.

- On October 19, 2002, Greenpeace activists acted to protest against ExxonMobil for its role in formulating U.S. energy policy. Greenpeace engaged in peaceful protests aimed at temporarily shutting down ExxonMobil stations in Manhattan and Los Angeles. Greenpeace protestors chained themselves to gas pumps and hung banners, saying that if consumers truly cared about global warming, then they should not buy gas from ExxonMobil, and should call on the Bush administration to stop siding with big oil interests.
- Various Greenpeace protests took place surrounding the Kyoto Protocol, both at formal international meetings and also at US embassies and oil company offices worldwide.
- Throughout the war in Iraq, Greenpeace was highly critical of President Bush's pursuit of nuclear weapons programs while demanding Iraqi disarmament. They also criticized the Bush Administration's refusal to include the international community in the Iraq coalition. Greenpeace also accused the Bush Administration of allowing its ties to big oil dictate its foreign policy. On its website, Greenpeace stated that "Bush is trying to gain control of Iraq's oil reserves," "this war is illegal and sets a dangerous precedent," and labeled the war "hypocritical" and "unjust." Greenpeace activists also protested the Iraq war at U.S. embassies in numerous countries.
- Greenpeace officials lobbied at United Nations Security Council meetings regarding the Iraq situation in March 2003, urging members to find peaceful solutions to the conflict, and calling on members to urge the Bush Administration to not move forward with war.

- In June 2003, a small team of Greenpeace experts arrived in Baghdad to investigate the Tuwaitha Iraqi nuclear facilities, and to expose the facilities' continued radioactivity, and the danger that the nuclear facilities posed to the Iraqi people as well as US military personnel. The Greenpeace team alleged that the U.S. and United Kingdom forces had lost control of the Iraqi nuclear inventory that had been guarded for years under the Hussein regime. Greenpeace worked with local Iraqis to get the story out, and actually began a "barrel-swapping" program in Iraq, replacing leaking and rusting waste barrels with new Greenpeace barrels.

All these actions by Greenpeace highlighted the failings of the Bush Administration toward the environment and may have embarrassed the Administration. These Greenpeace actions thus may have engendered anger and frustration among Bush Administration officials toward Greenpeace. Thus the Bush Administration may have developed a strong bias against Greenpeace. Moreover, the uniqueness of this prosecution is the strongest evidence that it is selective and impermissibly motivated. This prosecution is unprecedented. It follows on the heels of Greenpeace's constant and unrelenting criticism of the Administration. That is more than sufficient to show discriminatory intent.

Thus, Greenpeace has supported its claim of selective prosecution with much more than "some" evidence of discriminatory effect and motive.

DISCOVERY IS WARRANTED

Discovery has been granted in claims of selective prosecution based on far less convincing evidence. For example, in *United States v. Jones*, 159 F.3d 969 (6th Cir. 1998), the

Sixth Circuit overturned a district court's decision and granted discovery. In *Jones,* police officers sent taunting letters to two black defendants, but not to a white defendant involved in the same conspiracy, and made a T-shirt with the black defendants' pictures, but not the white defendants. The court found that the taunting letters and T-shirt had established a prima facie case of racial motivation on the part of the investigating officers, and had set forth "some evidence" of discriminatory effect, warranting discovery. The court found that although the defendant was unable to produce "prima facie evidence" of discriminatory effect, "some evidence" was enough when coupled with evidence of discriminatory motivation. *Id.* at 977.

Similarly, in *United States v. Tuitt*, 68 F.Supp.2d 4 (D.Mass.1999), the trial court ordered that the defendant be provided discovery under far less compelling circumstances. In *Tuitt*, the defendant's attorney compared four counties within the judicial district over a four-month period and found a statistically significant difference between the crack cocaine prosecutions brought in federal court and the crack cocaine prosecutions brought in state court. *See id*. at *4. *Tuitt* held that this showing was enough to meet the *Armstrong* standard where "Defendant is simply attempting to gain discovery so that he can more adequately determine whether a selective prosecution claim might indeed be viable." *Id.* at * 11. Here a search of the entire country has not turned up any prosecutions of similarly situated organizations.

Similarly, in *United States v. Glover*, 43 F. Supp. 2d 1217 (D. Kan. 1999), the court granted discovery on a selective prosecution claim regarding imposition of the death penalty where the defense provided far less evidence on either prong of the *Armstrong* test. In *Glover*, the defendant presented some statistical evidence that over a three-and-one-half-year period, "the

Attorney General authorized a greater number of black defendants for death-penalty prosecution than white defendants." *Id.* at 1234. The court found that this evidence, coupled with evidence that two other similarly-situated defendants were not prosecuted in federal court, was enough to permit discovery. *See id*.

DISCOVERY SOUGHT

In order to confirm its claim of selective prosecution, Greenpeace seeks the following documents from the Government:

(1) All case files within the last five years in which the Government (including the Department of Justice and all United States attorneys offices) either declined prosecution or sought an indictment for violations of 18 U.S.C. § 2279, and the resolution of all such cases, including the reason prosecution was declined or instituted, as applicable; any and all reports or statistical compilations of prosecutions under this statute for the last five years.

(2) All case files within the last five years in which the Government (including the Department of Justice and all United States attorneys offices) either declined prosecution or sought an indictment of an organization which engages and/or whose supporters engage in protest activities, and the resolution of all such cases, including the reason prosecution was declined or instituted, as applicable.

(3) Any and all guidelines, regulations, policy statements, or any other writing explaining whether to institute or to decline a prosecution under 18 U.S.C. § 2279; any and all reports or statistical compilations of such prosecutions or declinations for the last five years. .

(4) Any and all guidelines, regulations, policy statements, or any other writing explaining

whether to institute or to decline a prosecution of an organization which engages and/or whose supporters engage in protest activities.

(5) Any and all writings which describe or communicate in any way the reason that this prosecution was instituted.

(6) Any and all writings relating to Greenpeace made or received during the Bush Administration by the Departments of Justice, Interior, State, Homeland Security, and Defense and their subordinate agencies and by the Environmental Protection Agency.

CONCLUSION

For all the reasons set forth in this Motion, the Government should be required to produce the discovery requested.

DATED: October 6, 2003

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Mail this 6th day of October 2003 to: Cameron Elliott, Esq., United State Attorney=s Office, 99 Northeast 4th Street, Miami, Florida 33132.

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Jane W. Moscowitz