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

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 1:07-CR-108
	)	
SHERRY PEEL JACKSON,	)	
	)	
Defendant.	)	

**MOTION TO DISMISS INFORMATION
FOR "BAD FAITH" PROSECUTION**

Comes now the Defendant, Sherry Peel Jackson ("Jackson"), pursuant to Rule 12, F.R.Cr.P., and moves this Honorable Court for an order dismissing (after discovery and hearing) the Information filed herein on the grounds that the motivating factor in bringing these criminal charges against Jackson has been an institutional desire on the part of the Government to punish her for exercising her constitutional rights, and such mandates that this Information be dismissed.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Introduction.

The First Amendment requires dismissal of a prosecution brought for the purpose of discouraging the lawful exercise of First Amendment rights. Even if the conduct charged in an Indictment or Information could be found unlawful, the Government cannot use the leverage of a criminal prosecution, even a prosecution

that would otherwise be permissible, for the impermissible purpose of discouraging the lawful exercise of First Amendment rights. Whenever there is evidence, as here, that an impermissible desire to chill the exercise of First Amendment rights is a motivating factor in a criminal prosecution brought by the Government, the Government bears the burden of proving that it would have taken the same action even without the influence of the impermissible motive. This "but for" test requires a factual determination whether, in fact, the impermissible motive is a "but-for" cause of the prosecution.

II. Relevant Facts.

Between 1988 and 1995, Jackson worked for the IRS as an agent. Sometime after leaving the employ of the IRS in 1995, she started a small accounting business.

In 2000, Jackson encountered an organization named the We The People Foundation based in Queensbury, New York. In February, 2001, this group held a convention at the Washington Marriott Hotel in Washington, D.C. Jackson gave the closing speech at this convention, and thereafter developed a relationship with that organization that lasted several years.[1]

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[1] See *In re Asbestos School Litigation (Pfizer Inc. v. The Honorable James T. Giles)*, 46 F.3d 1284, 1294 (3d Cir. 1994)("Joining organizations that participate in public debate, making contributions to them, and attending their meetings are activities that enjoy substantial First Amendment protection. See, e.g., *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 294-96, 102 S.Ct. 434, 436-37, 70

A part of the activities of We The People Foundation in the next two years involved petitioning[2] the IRS and other agencies of the federal government, and a major part of this petitioning activity concerned the federal income tax. In response to the activities of this group and Jackson:

> 39. On September 16, 2003, at a press conference held at the U.S. Treasury Building, organized by defendant U.S. TREASURY DEPARTMENT, and defendant INTERNAL REVENUE SERVICE, Mr. Terry Lemons, a senior spokesman for the IRS, stated in response to a question put to him by The New York Times as to why [federal tax officials] had not responded to [the We The People Foundation's] Petitions and questions regarding the legality of the income tax system as applied, "We are answering those petitions through enforcement actions."[3]

In the spring of 2004, the We The People Foundation announced that it and its members would be filing a "right to petition" lawsuit against officials and agencies of the federal government, including the IRS, in July, 2004. On July 19, 2004, the We The People Foundation and several hundred of its members assembled

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L.Ed.2d 492 (1981); *Buckley v. Valeo*, 424 U.S. 1, 14-25, 96 S.Ct. 612, 632-38, 46 L.Ed.2d 659 (1976); *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 466, 78 S.Ct. 1163, 1173-74, 2 L.Ed.2d 1488 (1958)").

[2] Petitioning the government for redress of grievances is an express constitutional right; see *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523 (1961); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609 (1972)("Certainly, the right to petition extends to all departments of the Government"); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 103 S.Ct. 2161 (1983); *McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787 (1985); *United States v. Hylton*, 710 F.2d 1106 (5th Cir. 1983); and *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000).

[3] This quote is from ¶ 39 of the lawsuit that is an exhibit to Jackson's attached declaration.

in Washington, D.C., for a demonstration and the filing of that lawsuit. On July 19, this lawsuit with Jackson as a named plaintiff was filed in the U.S. district court for the District of Columbia in Washington, D.C. See copy of complaint attached as Ex. 1 to Jackson's declaration in support of this motion.

In clear response to this lawsuit with Jackson as a plaintiff, on July 23, 2004, Wesley Cooper, an IRS Special Agent, applied for a search warrant to search Jackson's home located at 1560 Fieldgreen Overlook, Stone Mountain, Georgia. A few days later, that warrant was executed. These facts demonstrate that the Information filed herein against Jackson is a direct response to Jackson's activities of petitioning the government for redress of grievances. See *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979).

III. Argument.

In *Dombroski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116 (1965), the State of Louisiana charged leaders of a local civil rights movement with operating a subversive, Communist-front organization, named the Southern Conference Educational Fund, Inc. The defendants in the state criminal action sought an injunction in federal court against prosecution of those cases, and from denial of that requested injunction, the Supreme Court granted cert. The Court held that when a

state criminal prosecution threatens First Amendment freedoms, a federal court could intervene and issue injunctions to protect First Amendment rights:

> "Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."

In *Bantam-Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631 (1963), which involved Rhode Island's obscene books banning law, the Rhode Island Commission to Encourage Morality in Youth could make recommendations about what books and other materials were considered by it to be obscene. Obeying the wishes of the Commission was a sure way to avoid its wrath, and refusal could result in criminal prosecution. In holding that the Commission could be enjoined, the Court noted that "the freedoms of expression must be ringed about with adequate bulwarks" (Id. at 488), and the Commission's practice constituted a "scheme of state censorship". For this reason, the Court allowed potential criminal defendants to attack this scheme in federal court. This precedence from the Supreme Court has become the basis for subsequent decisional authorities allowing criminal defendants to assert First Amendment objections to threatened or actual criminal prosecutions.

For example, in *Wilson v. Thompson*, 593 F.2d 1375 (5th Cir. 1979), two parties were arrested by DeKalb County, Georgia sheriff deputies for simple assault. This

case languished on a "dead docket" for some time, and the defendants eventually instituted suit against the deputies. In response, state officials restored the criminal cases to the trial docket. Their suit in federal court to enjoin these prosecutions was dismissed, but that dismissal was reversed on appeal, the court holding:

> "With respect to the interests of the State, it by definition does not have any legitimate interest in pursuing a bad faith prosecution brought to retaliate for or to deter the exercise of constitutionally protected rights," Id., at 1383.
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> "As transposed to the context of a suit to enjoin criminal proceedings allegedly brought to retaliate for or to deter the pursuit of civil remedies, this formulation would require the plaintiff to show that the ***institution of the civil lawsuit was a motivating factor in the decision to bring criminal proceedings***, whereupon the burden would shift to the State to show that it would have brought the prosecution even absent the civil lawsuit," Id., at 1386. [emphasis added]
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> "The Court should consider whether the plaintiffs have shown, first, that the conduct allegedly retaliated against or sought to be deterred was constitutionally protected, and, second, that the State's bringing of the criminal prosecution was motivated at least in part by a purpose to retaliate for or to deter that conduct. If the Court concludes that the plaintiffs have successfully discharged their burden of proof on both of these issues, it should then consider a third: whether the State has shown by a preponderance of the evidence that it would have reached the same decision as to whether to prosecute even had the impermissible purpose not been considered.
>
> "It is by now well established that access to the courts is protected by the First Amendment right to petition for redress of grievances. See *NAACP v. Button*, 1962, 371 U.S. 415, 429-30, 83 S.Ct. 328, 9 L.Ed.2d 405; *California Motor Transport Co. v. Trucking Unlimited*, 1971, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642," Id., at 1387.

See also *Fitzgerald v. Peek*, 636 F.2d 943, 945 (5th Cir. 1981)("a state criminal proceeding [may] be enjoined if the plaintiff establishes that the conduct allegedly retaliated against or sought to be deterred is constitutionally protected and that the state's bringing of the criminal prosecution is motivated at least in part by a purpose to retaliate against or deter that conduct, and the state fails to show that it would have decided to prosecute even had the impermissible purpose not been considered").

Via *Bantam-Books* and *Dombroski*, supra, injunctive relief or dismissal of an indictment is warranted where the prosecution is clearly motivated by the improper purpose of interfering with a defendant's constitutionally protected, First Amendment rights. *Bantam*, 372 U.S. at 67; *Dombroski*, 380 U.S. at 490. The legal standard applicable for the "bad faith" claim under the *Bantam-Dombroski* test focuses solely on the motivation of the Government, where, as here, the claim is that this prosecution was brought to suppress the constitutionally protected First Amendment right to petition the government for redress of grievances.

Not only may Jackson make such complaints against state criminal proceedings, she may do so in federal court as well. For example, in *United States v. PHE, Inc.*, 965 F.2d 848, 853 (10th Cir. 1992), a merchant of the pornography industry, PentHouse Enterprises, was indicted as the result of a DoJ project, "Project

PostPorn," which was a multi-district effort to prosecute those in this industry despite the fact that much of the matters under investigation concerned materials protected by the First Amendment. PHE moved to dismiss the indictment returned against it, but the district court denied the motion. Asserting that it could appeal this collateral order, PHE pursued relief in the court of appeals, which stated:

> "The overarching consideration that forms the backdrop of the district court proceedings is whether the foregoing facts activate the constitutional precept that a prosecution motivated by a desire to discourage expression protected by the First Amendment is barred and must be enjoined or dismissed, irrespective of whether the challenged action could possibly be found to be unlawful. See *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed.2d 547 (1985) ('[T]he decision to prosecute may not be `deliberately based upon an unjustifiable standard' . . . including the exercise of protected statutory and constitutional rights.)'"

The Tenth Circuit reversed the district court's order and remanded for further proceedings. See also *Council for Periodical Distributors v. Evans*, 827 F.2d 1483 (11th Cir. 1987).

A "bad faith" prosecution is one instituted for the purpose of harassment or to deter the exercise of federally protected rights. The quantum of proof of guilt is irrelevant to the question of whether a defendant has been improperly singled out for prosecution because of his or her political beliefs or for other unjustifiable reasons. *U.S. v. PHE, Inc.*, 965 F.2d at 853. Furthermore, there is no need to prove that others similarly situated have not been prosecuted when a "bad faith"

prosecution is at issue. A prosecution to "chill" First Amendment activity or to punish a defendant for her exercise of other constitutionally protected rights is unlawful regardless of whether it is selective.

A prosecution brought for the purpose of suppressing protected rights is unconstitutional even if there is probable cause to prosecute the precise conduct covered by the indictment. The fact that there may be probable cause to prosecute does not answer the question whether suppression of protected First Amendment rights is a desired goal of the prosecution, and that is the critical question for purposes of the First Amendment, bad faith inquiry. The case law clearly requires dismissal of a bad faith indictment even if a conviction could be obtained. See, e.g., *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977); *United States v. P.H.E., Inc.*, supra; and *Saye v. St. Vrain Valley School Dist.*, 785 F.2d 862 (10th Cir. 1986).

Jackson is entitled to prevail if any United States' official(s) "set in motion" a criminal charging process for impermissible reasons (bad faith prosecution) and if, but for her protected activity, this criminal charge would not have been sought (selective/vindictive prosecution). The inquiry must encompass the aims of not only those involved in pursuing the prosecution, but also those involved in investigating Jackson and recommending her prosecution. For this reason, it is

irrelevant whether the Government can demonstrate a compelling interest (i.e. a good faith criminal investigation sufficiently focused on non-First Amendment Rights), because that is not an issue and is legally insufficient. An otherwise legitimate exercise of governmental power must not become the vehicle for suppressing protected speech, petitioning activities and the right to associate.

For example, in *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the Sixth Circuit found that the critical inquiry was the government agents' motivation for recommending a criminal investigation and prosecution, regardless of the good faith of the prosecutors who later agreed to prosecute, and the grand jury that indicted. Adams was a former employee of the EEOC and had brought a discrimination suit against the agency. When the Department of Justice later obtained a criminal indictment and conviction against her, she alleged that the EEOC had instigated the DOJ action, and that it had been improperly motivated in doing so. The Sixth Circuit held that if the EEOC had been improperly motivated, and if it had "induced the Department of Justice to institute a prosecution that would otherwise not have been undertaken," id., at 1146, then the indictment must be dismissed and the convictions vacated.

Similarly, in *United States v. Pascal*, 496 F. Supp. 313 (N.D.Ill. 1979), the court dismissed an indictment with prejudice when a U.S. Attorney made a decision to

indict without knowing the critical history of misconduct by the DEA. The court found bad faith based on the actions of the investigating agents. The court recognized that the governing legal standards do not permit courts simply to ignore bad faith actions by some governmental agents that precede a "final" decision to indict by other governmental agents.

The Supreme Court addressed the issue of threats of prosecution in the *Bantam Books*:

> "It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions – the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation – the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.
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> * * *
>
> "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."

Bantam Book, 372 U.S. at 67-68.

The investigation of Jackson commenced in July, 2004, about a week after she participated as a plaintiff in a lawsuit filed against the IRS, the subject of which, incidentally, was the First Amendment's right to petition the government for redress of grievances. If lawful prosecutions can be threatened or brought for an

impermissible purpose, protected rights repugnant to the Government would be suppressed. Well established First Amendment principles deny the Government this power and require dismissal of such prosecutions to prevent achievement of the impermissible goal.

In *Dombrowski*, the Supreme Court found the government's actions repugnant to the First Amendment. Dombrowski's and others' homes and offices were raided by state officials. Among the dangerous articles removed were Thoreau's Journal, a truckload of files, membership lists, subscription lists to SCEF's newspaper, correspondence, and other records. *Dombrowski*, 380 U.S. at 487 n. 4.

> "These events, together with repeated announcements by appellees that the appellant organization is a subversive or Communist-front organization, whose members must register or be prosecuted under the Louisiana statutes, have, appellants allege, frightened off potential members and contributors. Cf. *Anti-Fascist Committee v. McGrath*, 341 U.S. 123. Seizures of documents and records have paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause. *NAACP v. Alabama*, 357 U.S. 459. * * * [T]he continuing threat of prosecution portends further arrests and seizures, some of which may be upheld and all of which will cause the organization inconvenience or worse."

Dombrowski, 380 U.S. at 487-89.

> "By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. **The chilling effect upon the exercise of First Amendment rights may derive**

> **from the fact of the prosecution, unaffected by the prospects of its success or failure.** (Cites omitted).” [emphasis added]

Id. at 487.

In *P.H.E. Inc.*, supra, the Tenth Circuit articulated the following test:

> “Our inquiry must be whether, ‘as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility or punitive animus towards the defendant because he exercised his specific legal right.’ * * * The court may not permit vindictiveness to be hidden behind procedural cosmetics. The test must be pragmatic. * * *
>
> “We reiterate the First Amendment principles set out in *Dombrowski*:
>
>> “We have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. 380 U.S. at 486-87.
>>
>> * * *
>
> “As a matter of law, * * * even a good faith decision to continue a constitutionally tainted prosecution does not erase the taint when, as alleged here, the prosecution continues to utilize the fruits of the tainted behavior.”

P.H.E., Inc., at 858, 859.

The Tenth Circuit reversed and remanded to the district court holding that appellants had demonstrated either actual vindictiveness or a realistic likelihood of vindictiveness which gave rise to a presumption of vindictiveness, shifting the burden to the government “to justify its decision [to prosecute] with legitimate, articulable, objective reasons.” *P.H.E., Inc.*, at 860.

Motivation is the dispositive factor because an otherwise legitimate exercise of governmental power must not become the vehicle for suppressing protected speech, association and rightful petitions for redress of grievances.

For example, during the campaign for civil rights in the South, the Rev. Martin Luther King, Jr., and other civil rights activists frequently violated lawful regulations governing demonstrations. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307, 87 S.Ct. 1824 (1967). If lawful prosecutions could be threatened or brought for an impermissible purpose, prosecutors who believed Rev. King had violated a particular law could quite properly have demanded, as a condition of non-prosecution, that he agree not to participate in future civil rights demonstrations, even lawful and constitutionally protected demonstrations, anywhere in this country. If Rev. King agreed, protected expression repugnant to the prosecutors would be suppressed; if he refused, the prosecutors could then prosecute him as punishment for insisting on retaining his First Amendment rights, to increase pressure on him to surrender those rights in a plea bargain, or to bleed the resources necessary to exercise those rights in the future. Well established First Amendment principles deny the Government this power and require dismissal of such prosecutions to prevent achievement of the impermissible goal.

The foregoing principles merely apply a broader First Amendment rule in the context of prosecutions intended to suppress protected rights: Government may not take adverse action to penalize or discourage the exercise of First Amendment rights. In many cases, otherwise permissible government action involves "mixed motives," only one of which is an unlawful desire to discourage exercise of First Amendment rights. The First Amendment test governing "mixed motive" cases was clearly settled in *Mt. Healthy*: even if there are legitimate reasons for the action, if it would not have been taken but for an impermissible desire to discourage First Amendment rights, the action violates the First Amendment.

Under the *Mt. Healthy* test, if a defendant shows that a desire to discourage exercise of First Amendment rights was a "motivating factor" in the governmental decision to prosecute, the burden of persuasion then shifts to the government to prove that the action would have been taken even in the absence of the impermissible motive.

The "totality of circumstances" presented herein, clearly present a "realistic likelihood of vindictiveness" against Jackson. Based on the foregoing, Jackson respectfully submits that the interests of fairness and justice and the spirit and intent of the First and Fifth Amendments can only be served if this Court enters an order

dismissing the Information based on discriminatory, vindictive and retaliatory prosecution.

Whenever there is evidence, as here, that an impermissible desire to deter lawful First Amendment activities is a motivating factor in a governmental decision, the Government bears the burden of proving that it would have taken the same action even without the influence of the impermissible motive. This "but for" test requires a factual determination whether, in fact, the impermissible motive is a but-for cause of the governmental action. *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568 (1977); and *Saye v. St. Vrain Valley School District*, 785 F.2d 862 (10th Cir. 1986).

The Supreme Court and others have repeatedly ruled in analogous contexts that governmental actions can violate the First Amendment if the persons recommending those actions were motivated by a desire to discourage First Amendment rights, even if the persons who finally approved those recommendations were not impermissibly motivated.

As determined in *United States v. Raymer*, 941 F.2d 1031 (10th Cir. 1991), the inquiry must be whether, as a practical matter, there is a realistic or reasonable likelihood of prosecutorial conduct that would not have occurred but for hostility

or punitive animus towards the defendant because she exercised her specific legal rights. Id. at 1042.

It is also irrelevant to the instant matter whether certain government officials had direct knowledge of the actions of others. The Federal courts have repeatedly enjoined or dismissed prosecutions that were "recommended" or "set in motion" for bad faith reasons. *United States v. P.H.E., Inc.*, supra. Further, the record is clear that the instant prosecution is motivated by a punitive animus and bad faith desire to prevent Jackson from engaging in constitutionally protected activities.

Courts have repeatedly enjoined or dismissed prosecutions motivated by bad faith reasons even if other "untainted" participants, such as grand juries or untainted prosecutors, subsequently approved the indictment. See, e.g., *Dombrowski*, 380 U.S. at 484 n. 2 (1965) (finding bad faith based on actions of prosecutors despite untainted grand jury); *Fitzgerald v. Peek*, supra, and *United States v. Pascal*, 494 F.Supp. 313 (N.D.Ill. 1979) (finding bad faith based on actions of investigating agents despite apparently untainted prosecutors and grand jury).

In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the court found that the government agents' motivation for recommending a criminal investigation was the critical inquiry, regardless of the good faith of the prosecutors who later agreed to prosecute, and the grand jury that indicted. Adams was a former employee of the

EEOC and had brought a discrimination suit against that agency. When the Department of Justice later obtained a criminal indictment and conviction against her, she alleged that the EEOC had instigated the DOJ action, and that it had been improperly motivated in doing so. There was no suggestion that the prosecutors, the grand jury, or the petit jury had been improperly motivated in doing so. Nevertheless, the Court of Appeals held that if the EEOC had been improperly motivated, and if it had "induced the Department of Justice to institute a prosecution that would otherwise not have been undertaken," id. at 1146 (emphasis added), then the indictments must be dismissed and the convictions overturned. See also *United States v. Armstrong*, 48 F.3d 1508 (9th Cir. 1995) (en banc).

The same rule has been applied in analogous contexts. In *Saye v. St. Vrain Valley School District*, 785 F.2d 862 (10th Cir. 1986), for example, the Tenth Circuit ruled that nonrenewal of a teacher's employment contract could violate the First Amendment if the impermissible motive of the administrators who recommended nonrenewal was a "but for" cause of the adverse action, even though the board that approved the action did not have an impermissible motive:

> "The evidence * * * raises as a fact issue whether [the administrator's] decision to recommend nonrenewal **was motivated in part** by [the teacher's] [constitutionally protected] action. * * * We reject defendants' argument that [the teacher's] [protected] activity could not have been a motivating factor

> because none of the school board members who voted not to renew [the teacher's] employment were aware of [it].”

Saye, 785 F.2d at 867. [Emphasis added].

Saye expressly holds that government action can violate the First Amendment, even if all of the final decisionmaker's motives were permissible, if a key subordinate's recommendation to the final decisionmaker – though facially neutral – was impermissibly motivated. *Saye*, 787 F.2d at 867.

In reaching this conclusion, the Tenth Circuit relied upon a comprehensive and instructive Fifth Circuit ruling. In the specific portion of that ruling cited with approval by the Tenth Circuit in *Saye*, the Fifth Circuit explained that:

> “The causation issue in first amendment cases is purely factual: did retaliation for protected activity cause the termination in the sense that the termination would not have occurred in its absence? It is not necessary that the improper motive be the final link in the chain of causation: if an improper motive sets in motion the events that lead to termination that would not otherwise occur, ‘intermediate step[s] in the chain of causation’ do not necessarily defeat the plaintiff's claim.”

Professional Ass'n of College Educators v. El Paso County Comm. Coll. Dist., 730 F.2d 258, 266 (5th Cir.), cert. denied, 469 U.S. 881 (1984).

The crucial issue is whether the subordinate's response to "protected activity" was a "but for" cause of the injury. The same test has been applied in other Circuits as well. In *Cox v. Dardanelle Public School District*, 790 F.2d 668 (8th Cir. 1986), the

Eighth Circuit held that government action violated the First Amendment even though the final decisionmaker did not have an impermissible motive, because the final decisionmaker "would not have considered an adverse action" absent the bad faith of those who recommended that action. *Cox*, 790 F.2d at 676.

Similarly, in *Haimowitz v. University of Nevada*, 579 F.2d 526 (9th Cir. 1978), the Ninth Circuit reversed a trial court's grant of summary judgment premised on the proposition that the bad faith "was alleged to have occurred at the advisory level only." *Haimowitz*, 579 F.2d at 527. The *Haimowitz* trial court had believed it did not have to resolve the factual question whether the final decisionmaker "would have reached the same result" in the absence of subordinates' impermissible motivations. Id. at 530. The Ninth Circuit ruled that it was error not to have resolved that factual question:

> “The district court, and now the appellees, seek to avoid these genuine disputes by arguing that any retaliation was only at the advisory level. It is thought by the appellees that the improper bias is too far removed from the final decisionmaking to be of constitutional moment. Appellees have not cited any legal authority for their position. Rather, it appears that in cases where recommendations form the basis for the nonretention decision, this input is critical.”

Haimowitz, 579 F.2d at 530 (quoting *Bertot v. School District No. 1*, 522 F.2d 1171, 1181 (10th Cir. 1975), and *Smith v. Losee*, 485 F.2d 334, 336-40 (10th Cir. 1973).

The courts may not permit vindictiveness to be hidden behind procedural cosmetics. The test must be pragmatic. *P.H.E., Inc.*, supra.

CONCLUSION

The proper legal standard to be applied in this case is the *Bantam-Dombroski* test. Injunctive relief or dismissal of a criminal charge is warranted under this test where the prosecution is clearly motivated by the improper purpose of interfering with Jackson's constitutionally protected rights. *Bantam*, 372 U.S. at 67; *Dombroski*, 380 U.S. at 490. Here, the claim is that the prosecution was brought to suppress the constitutionally protected right to petition government for redress of grievances.

The First Amendment implications in this case are much broader than found by the Tenth Circuit in P.H.E., Inc., supra. The IRS as an institution is hostile toward the advocacy that Jackson and others advanced against it. In order to impede protected litigation activities, the IRS has abused its powers in a deliberate effort to discredit and destroy Jackson.

Based on the foregoing, Jackson respectfully submits that the interests of fairness and justice and the spirit and intent of the First and Fifth Amendments can only be served if this Honorable Court enters an order dismissing the Indictment based on discriminatory, vindictive and retaliatory prosecution.

Jackson requests, after discovery, that this court hear this motion. Jackson requests that the prosecution here produce via discovery all documents and other evidence in the Government's possession that relate to civil or criminal actions taken against the We The People Foundation, related organizations, individuals and Jackson herself.

Accordingly, after hearing, all Counts of the Information filed in this case must be dismissed.

Respectfully submitted this the 11th day of June, 2007.

/s/ *Lowell H. Becraft, Jr.*

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing MOTION TO DISMISS was formatted in Book Antigua 13 pt., in accordance with Local Rule 5.1B, and was electronically filed this day with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following Assistant United States Attorney of record:

Richard Langway, Esq.
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Dated: This 11th day of June, 2007.

/s/ *Lowell H. Becraft, Jr.*
Lowell H. Becraft, Jr.