

Motion to Dismiss Indictment for Prosecutorial Misconduct

**United States v. Davis, et al. U.S. District Court, District of
Arizona**

Gerry L. Spence

May 29 1991

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May 30 1991
OFFICE OF THE CLERK
U.S. DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
DAVID FOREMAN, et al.	)	
	)	
Defendants.	)	
_____	)	
		CR-89-192-PHX-RCB
		MOTION TO DISMISS
		INDICTMENT FOR
		PROSECUTORIAL MIS-
		CONDUCT
		(Oral Argument and
		Evidentiary Hearing Requested)

COMES NOW, David Foreman, the defendant herein, by and through his attorney, G.L. Spence, and respectfully moves this Court as follows:

This motion is based on previously undisclosed facts brought to focus by the government's recent filings. These facts reveal that the government has been guilty of grave misconduct, has acted in bad faith, and has made serious misrepresentations to the court.

Together with other relief, defendant Foreman seeks a dismissal of the case, requests a hearing, and asks for oral argument on this matter.

Memorandum and Offer of Proof

I. Factual Background

At the time of the first indictment Foreman was not a defendant in the Snowbowl and Canyon Mine indictments.

At the time of the first indictment Davis, Millett and Baker, not Foreman, were charged in a separate indictment in another case before a different court. The crimes there alleged arose from the October, Snowbowl incident, the October, 1988 attempt on Snowbowl, and the September, 1988 Canyon Mine caper. A superseding indictment was returned by the grand jury in which defendant Ilse Asplund was added. The defendant Foreman was not named as a defendant or a conspirator in any of these indictments

Foreman was named in the original and first superseding indictment in this court only as a conspirator and not in substantive counts.

At the same time, Foreman, along with Davis, Millett and Baker, was named as an alleged conspirator in the original and superseding indictments before this court. Even here Foreman was not charged with the substantive crimes. The government's theory was that Foreman had joined the conspiracy to attack three nuclear plants by talking to the government's undercover agent and by allegedly providing certain funds for an unspecified purpose.

At best, the government's case against Foreman was admittedly weak.

The government's case was tenuous and, in fact, the government agents knew that Foreman was guilty of nothing. At the time of the May 13, 1989 meeting with Foreman, agent Fain discusses this matter with his brother agents:

. . . Did you hear him in there? He didn't say a word. So she just gave us a hundred dollars which is about what they did the first time, about half of what they originally . . . or what we had asked for, so . . .

A small time operation.

Yeah, real small. They, uh, they use everything that they have for, uh, you know, what they print up, what they write.

Yeah.

Fain: I mean, these people live on nothin'. And everything, I mean, this isn't much but for them it's about everything they've got. You know, they are short on material assets but they are long on dedication.

Fain: So, in actuality, we probably ought to give them their money back when this is over because *they don't really sax-what it's for*.

(laughs)

Yeah, naw, they're low budget. *I don't really look for them to be doing a lot of hurting of people*. It's just that they get everybody, you know, a few guys like this that'll . . . like *Davis* . . .

He's a *free-lancer* is what it is (inaudible word).

Fain: Yeah. That's what it is, see.

Yeah.

And so what. . . 'Cause *this really isn't the guy we need to pop, I mean, in terms of actual perpetrator. But this is the guy we need to pop to send a message. And that's all we're really doin'. And if we don't nail this guy and we only get Davis, we're not sendin' any message he hasn't predicted.*

(my emphasis)

[5/13/89 Government transcript, Tape 3 of 3, Side A.1

When Foreman began to defend himself the defects in the government's case were revealed.

Over the months that followed Foreman began to muster his forces and to defend himself. Various motions were filed and heard by the court, the defendant Foreman provided the government with his witness list and a list of exhibits, and, most important of all, Foreman asked the court for two crucial rulings: First, that Foreman's case be severed from that of the other defendants because defendant Millett had agreed to testify for Foreman. Her proffered testimony was that Foreman had nothing whatever to do with the conspiracy with which he was charged. Second, Foreman asked that the court protect the defendant from the government's use of the book *Ecodefense*. Arguments were heard on these motions and the same had not been finally disposed of by the court. Moreover, the case was set for trial in early January, 1991.

The government faced a probable acquittal if Millett testified and if prejudicial materials in *Ecodefense* were excluded.

In a fragile, illy conceived case, the government was faced with the likelihood of Foreman's acquittal if Millett testified as proffered and if the government was unable to construct a prejudicial milieu surrounding Foreman that would outrage jurors unsympathetic to the activist environmental movement. The government, therefore, undertook a and improper tactical manipulation of the grand jury process by which to shore up its already weak case against Foreman.

A Second Superseding Indictment was filed against Foreman without just cause or new facts.

On the eve of trial with the full knowledge that Foreman was prepared to defend himself, the government undertook a last gasp effort to save its case. For over a year and a half the government had contended that there were two distinct and separate alleged conspiracies: one involving the defendants Millett and Davis in the Snowbowl and Canyon Mine actions, and one involving the three nuclear facilities; the later the only action in which Foreman was supposedly involved.

These desperate actions were separate in time, without identical parties, involved different facilities engaged in different business functions, and were obviously not a part of any overall original scheme conceived by anyone.

The Second Superseding Indictment was a scheme devised to interfere with Foreman's good faith attempt to defend himself.

With no new facts, with no new witnesses, and on the eve of trial the government sought to save its case by abandoning the case it had previously contended for—a case it had represented to the court both under oath and in argument as being a good faith case founded on facts in the government's possession.

for the first time—without new or different evidence—the government alleged a global conspiracy that included Foreman as a part of a overall scheme that embraced not only an alleged conspiracy to attack the three nuclear installations with which he was originally and solely charged, but included Foreman as a part of the Snowbowl and Canyon Mine indictments in which he was previously unnamed, and, about which he had no knowledge

The Second Superseding Indictment wrongfully interfered with Foreman's defense.

Second Superseding Indictment, was meant solely as a tactical block of Foreman's ability to defend himself. Because Peg Millett would now be required to defend all of the charges brought against her in a single global indictment, she would no longer be free to take the stand and testify that Foreman was not involved in the CAP caper—the only charge that had previously been brought against him.

Moreover, by now asserting that Foreman had been involved in the global conspiracy from its beginning, the government could assert that his past gift of the book, *Ecodefense*, to a government witness constituted an overt act, thus blocking the court from protecting the defendant's * First Amendment rights

Finally, a new global indictment would force the defendants to seek a continuance with its further harassing and expense-laden effects. Especially in a case where the defendant was being defended *pro bono* Moreover, a continuance sought by the defendants would inure to the government's benefit since the government was faced with the fact that its own lawyers, Mitchell and Mathews, were leaving government service.
The defendant's attempted to government's tactic was made show the Court that the in bad faith.

The tactic was just that—a tactic—an improper devise concocted by the government to deprive Foreman of a fair trial. Foreman was now faced with the problem of demonstrating this fact to the court. To do so, Foreman advised the court in its Motion

for Production of Grand Jury Transcripts that the defendant believed the government might well be guilty of misconduct

”. . . by seeking a superseding indictment which alleges no new facts, but simply changes the nature of the charges against the defendant, for the sole purpose of defeating his right to a severance and defeating his claim for the book *Ecodefense* as protected by the First Amendment. Such a superseding indictment would be improper and subject to dismissal if the government is guilty of such misconduct.”

The defendant asked the court to review the transcripts of the grand jury proceeding to see if the grounds specified above existed.

The government’s response to Foreman’s request for a bill of particulars revealed there were no new facts.

Within the time established by the court, Mr. Foreman sought a bill of particulars by which he might be advised on what day the government alleged that Foreman entered the charged conspiracy as well as the facts supporting that conclusion, the means, signs, acts or words by which Foreman allegedly joined this global conspiracy, and the acts, if any, performed by Foreman that furthered each object of said conspiracy government responded to this request representing that its case was *based on the tapes, that defendant had always had access to the tapes, and that defendant has all the discovery in his possession upon which the government’s case is based*, which included all of the FBI 302s. Based on this representation the court overruled defendant’s motion.

On May 10, 1991, the government for the first time revealed the facts upon which it argues that Foreman entered the alleged global conspiracy.

many months defendant has, in vain, reviewed the thousands of

hours of government tapes and FBI 302s attempting to discover what possible evidence existed that would support the government’s contention that Foreman even knew of the Snowbowl and Canyon Mine capers, much less that he had entered into an agreement with anyone to join in this universal conspiracy, seemingly formed only as recently as the Second Superseding Indictment.

Not until the government filed its motion seeking the court’s advisory opinion as to what extent the government could use *Ecodefense* at the time of trial did the government reveal *for the first time* the basis of its claim that Foreman entered the new alleged all-inclusive conspiracy earlier than the Central Arizona Project action.

II. The Bad Faith of the Government is Revealed

government bases its charge against Foreman’s earlier entry into an alleged global conspiracy on facts the government knows are insufficient:

There are no tapes or other evidence showing Foreman knew of the Snowbowl or Canyon Mine capers.

Counsel for Foreman have reviewed the entirety of the tapes and the 302s provided by the prosecution. *There are no tapes known to the defendant that directly or indirectly hint that Foreman knew of the Snowbowl or the Canyon Mine actions before or during the time these incidents occurred. Nor is there evidence in any other government materials furnished during discovery that show any knowledge on Foreman's part of the existence of a conspiracy or, indeed, his knowledge as to the participants in the Snowbowl or Canyon Mine actions. Indeed, he had no such knowledge.*

— **The government admits that its evidence is contained in the discovery materials furnished defendant. This material is void of any inculpatory evidence.**

Since the government's response to defendant's motion for a bill of particulars was that "the bulk of the discovery sought was tape recorded conversations which the defendants already had, and since the government represented that "the evidence the government intends to use has been available since the onset of this case," we are justified in concluding, based on these representations, that there are no other facts except those contained in the tape recordings or in the

Moreover, the government has now furnished us with the transcripts it intends to introduce in this case. Nothing provided shows any knowledge by Foreman of the existence of any conspiracy to attack Snowbowl or Canyon Mine. There is nothing in the tapes or the government 302s showing that Foreman knew who the participants in the Snowbowl caper were, that he knew of the planned attack on the Canyon Mine, that he knew of any global conspiracy for any purpose, that, indeed, such a conspiracy existed, *and, most important of all, that he agreed to join in any such conspiracy for any purpose.*

— **The government's sole evidence concerning Foreman's entry into a global conspiracy is revealed in its request for an advisory opinion on *Ecodefense*.**

The long secreted government facts by which Foreman supposedly joined this conspiracy prior to the Canyon Mine incident and as early as July 2, 1988 was finally revealed by the government when it filed its memorandum seeking an advisory opinion from the court concerning the use of *Ecodefense* in this case.

— **The government claims that Foreman's giving *Ecodefense* to informant Frazier inscribed "Happy monkeywrenching" is both an overt act and evidences his joiner in the global conspiracy as of July 2, 1988.**

By its May 10, 1991 memorandum concerning its intended use of *Ecodefense*, the government for the first time asserts that it relies on the following alleged facts by which to draw this defendant into the alleged universal conspiracy that existed prior to the Central Arizona Project incident

1. That Foreman furnished two copies of *Ecodefense* to Frazier inscribed, "'Happy monkey-wrenching' on July 2, 1988 at the Round River Rendezvous.
2. That Millett at some unspecified time told Frazier to read the book.

3. That Foreman congratulated Frazier at the Round River Rendezvous on his lecture there and asked Frazier to help Foreman with the diesel mechanics parts for the revised edition of *Ecodefense* (See page 5 *et. seq.* of the government's memo.

No facts are shown that Foreman knew of the alleged conspiracy or agreed to enter the same, nor, in fact, that any such conspiracy even existed.

— **The foregoing are "so-what?" innocent facts unrelated to an existing conspiracy allegedly joined in by Foreman.**

That Foreman gave books away or inscribed them in his habitual manner raises no implication (1) that a global conspiracy existed, (2) that Foreman knew of any existing conspiracy of any kind, (3) that he knew of its membership, (4) that he knew of its planned activities, (5) or agreed to become a part of the same.

This government filing was an artfully disguised attempt to obtain an advisory ruling from the court that would permit the government to later argue that the court had ruled that *Ecodefense* could be used to show that by delivery of the book so inscribed, Foreman had joined in the global conspiracy at a time earlier than the CAP incident. Obviously, the delivery of *Ecodefense*, as an alleged overt act, is not admissible until it is shown Foreman was a member of the supposed conspiracy.

As the Court stated in its order-opinion,

"Here the government apparently would use the book to prove that Mr. Foreman used it as a means to advise the other alleged co-conspirators. Arguably, this could be deemed to further the conspiracy alleged or aiding and abetting the substantive offenses charged."

court obviously presupposes proof by the government of the existence of the alleged conspiracy, that Foreman had joined the same, and that the book was delivered by him for the purpose of forwarding the objects of the conspiracy.

— **The giving of a book and inscribing the same is evidence of Foreman's knowledge of the existence of a conspiracy and his agreement to join the same.**

Foreman has given hundreds of copies of *Ecodefense* away and has inscribed untold numbers of the book with this standard inscription. That he should have given such a book to a government witness can hardly be interpreted to supply the essential foundational proof that Foreman knew of a conspiracy and agreed to join it, much less that the book was delivered to forward the purposes of the conspiracy.

The allegation is that he delivered the book. If this creates criminal complicity, Foreman, as well as any other citizen, would become, *ipso facto*, a member of every conspiracy, budding or fully bloomed, known or unknown, when he delivers a copy of *Ecodefense* to anyone belonging to such conspiracy.

— **There is no evidence of a universal conspiracy or that Foreman knew of it or joined in it.**

The government is without any evidence, indeed there is none, that the alleged global conspiracy existed and that Foreman, with knowledge of the conspiracy, joined it. Absent such proof the government has no case against Foreman for any actions preceding the CAP caper (and none afterwards as the government knew when it filed its Second Superseding Indictment).

Facing the anomalous problem of proving a non-existent case against a defendant the government knows is innocent, the government was at last required to face the proposition that it has no proper evidence of Foreman's agreement to join any conspiracy. As a consequence the government has sought to involve the court in this wrongful activity by obtaining an advisory ruling by the court that *Ecodefense* may be admitted prior to proof of the existence of a conspiracy to which Foreman belonged. *The government's proffered evidence in its Ecodefense motion is entirely silent on this crucial proof.*

After a careful review of the all of the evidence supplied defendant by the government (remembering that the government has asserted its case showing when and how Foreman entered the alleged conspiracy is contained in the discovery materials already supplied the defendant) and after reviewing the facts contained in its *Ecodefense* motion we are confident in asserting that the government knows it has no proof of Foreman's joining such a conspiracy and therefore seeks to improperly shore up its non-case by the use of *Ecodefense*. The government's *Ecodefense* motion clearly provides evidence of nothing but the delivery of an autographed book to a government agent without foundation proof of (1) the existence of a conspiracy, agreement to join it, and (3) his intent to forward its an autographed book to a government agent without the requisite foundation proof of (1) the existence of a conspiracy, (2) of Foreman's agreement to join it, and (3) his intent to forward its interests by the delivery of the book to the government agent.

— **The government has intentionally misled the court in an attempt to show Foreman's joinder in the conspiracy.**

In its attempt to circumvent its problem of proof the government has intentionally mislead the court toward the view that Foreman was somehow already a member of the conspiracy.

In its memo of May 10, 1991, the government says at page 16: "Kathleen Clarke (a government cooperating witness) will testify that on May 7, 1988 an individual associated with Earth First! in Tucson, Chris Summerville, told her that she ought to read the *Ecodefense* book right away, because it tells you how to do things. Ms. Clarke was further advised that everybody involved in the 'Direct Action' group had read the book." This statement, otherwise unrelated to Foreman, is apparently offered to suggest the existence of some sort of a conspiracy at this point.

On the face of it, the hearsay statement by Chris Summerville to a government witness, assuming the statement was made, cannot constitute evidence that Foreman (1) knew of a conspiracy, (2) had joined it, (3) and that the Summerville statement was made on his behalf to forward the interests of an alleged conspiracy. The statement

of someone who has read *Ecodefense* made to another who has not can hardly be construed to provide the foundation evidence required.

The suggestion that Foreman knew of the Summerville conversation is an intentional misrepresentation by the government to the court as will be more fully explained in the next paragraph.

— **The government, at page 16 of its memo, attempts to mislead the court to the conclusion that Foreman knew of the conversation.**

At page 16 of its memo the government continues

"Kathleen Clarke later, on June 21, 1988, had another conversation with Chris Summerville at the Tucson house of David Foreman and his wife, Nancy Morton, where she was again advised to read *Ecodefense*, as it was useful in teaching a person how to sabotage equipment."

This makes it appear as if Dave Foreman is telling Ms. Clarke the above The government continues:

"The occasion for this conversation was an Earth First mailing party. Foreman, Morton and others were present on this occasion."

The government knows that the foregoing is an intentional effort to mislead the court. When the government represents to Your Honor "the occasion for this conversation was an Earth First, mailing party," at the home of Dave Foreman and his wife, Nancy Morton, the government implies that Mr. Foreman had something to do with telling Kathleen Clarke to read *Ecodefense*. That fraudulent suggestion is further buttressed by the government's statement that "Foreman, Morton and others were present on this occasion.

The truth, as the government knows, and as its own 302s reveal was that Clarke and Summerville were *outside the presence of Foreman when this alleged conversation took place*. The government's 302 setting forth the facts of this incident is attached as Exhibit A.

There is no evidence whatever that this was anything more than one citizen telling another about a book. Even the government has not dared to state that Foreman knew of the conversation, that he assented to it, that it was authorized on his behalf, that it was intended to forward some interest of a conspiracy, or that there was a conspiracy that Foreman was a member of. It was an irrelevant conversation and that's it! Yet, it is as close as the government can get to Foreman prior to the CAP incident.

Obviously, the government knows, and we now know, it has no evidence whatever establishing that Foreman entered into any conspiracy, the government is therefore required to intentionally mislead the court as above in order to keep its case breathing.

III. The Continued Conspiracy of the Government to Wrongfully Convict a Man the Government Knows is Innocent of the Charged Crimes

Summary of the government's improper conduct:

As we have seen, the agent Fain, a man the government holds out as knowing this case better than any other person on the government's team and who has spent years of his life attempting to gather a case against Foreman, a man who engineered every conceivable devise to force Foreman to incriminate himself, a man who was intimately familiar with the carryings-on of Davis and others, and who manipulated them for the sole purpose of somehow "popping" Foreman, *admitted to his fellow agents that Foreman was innocent:*

And so what. . . 'Cause this really isn't the guy we need to pop, I mean, in terms of actual perpetrator. But this is the guy we need to pop to send a message. And that's all we're really doin'. And if we don't nail this guy and we only get Davis, we're not sendin' any message he hasn't predicted.

. . .

What we have here is simply the worst case of government overreaching the undersigned has witnessed in an entire career—a case in which the government seeks to silence a citizen but has no lawful case by which to do so. As we have seen, the sad chronology of the disintegrating of the government was as follows:

1. The government filed a conspiracy charge against Foreman concerning the three nuclear plants when it knew he was not guilty of any wrongful act.
2. When that case was about to be lost, and at the brink of trial, the government wrongfully filed a Second Superseding Indictment without new facts and for a wrongful purpose—to interfere with Foreman's right to defend himself. That superseding indictment saved the government from the acquitting testimony of Peg Millett and the court's ruling on the First Amendment prohibitions of *Ecodefense*.
3. Again, on the brink of trial, and without any evidence to support their allegations that Foreman joined such a global conspiracy, the government, grossly misleading the court, seeks to solicit the Court's advisory opinion that would permit them to prejudice the jury as early on in the case as its opening statement without any foundation proof of a global conspiracy and without any proof that Foreman joined it and intended to forward a conspiratorial interest.

The government continues to knowingly build a false case and to misconduct itself.

The obvious intent of the government from the outset has been to destroy the Earth First! Movement and as all defendants in this case assert, to go to any lengths to "pop" Dave Foreman.

The government intends to convict Foreman not on the facts pled in the indictment but upon appealing to the anticipated prejudices of the jury against activist environmentalists.

— The government seeks to violate Foreman's First Amendment rights despite the court's ruling to the contrary.

As is evident from the government's recent filings, the government has no intent to try Foreman on the facts of the indictment. Instead, the government attempts to manipulate the proceeding in such a manner as to try Foreman on his *beliefs*, and on the *jury's anticipated prejudices* against those who advocate actively for the environment. The government does not intend to place before the jury a fair and honest case since it has none. Instead, by artifice and devise, it is currently in the process of attempting to obtain the defendant's conviction on prejudice. In this regard the court's attention is called to the following flood of recent filings by the government:

1. The government seeks to convict Foreman for the expression of his ideas in *Ecodefense*, as seen above, without proof that that book was used to further a conspiracy to which Foreman knowingly belonged.
2. The government seeks to convict Foreman for his ideas stated to Ed. Bradley on "60 Minutes." See page 7 of the government's memo on *Ecodefense*. (If the government is introducing the "60 Minutes" statement to show that Foreman wrote *Ecodefense*, that portion of the statement in which Foreman states, "I wrote the book," might be admissible for that restricted purpose. But the government sets out much prejudicial material obviously for the purpose of convicting Foreman for his beliefs, such as: Earth First! are warriors and that such terminology, as heard by Bradley, is "scary,"—suggesting that the jury should be afraid—and that Foreman is dangerous.)
3. The government seeks to convict Foreman for his ideas as stated on the "Today Show" and on "TBS/CNN." (See government's Second Notice of Intention of Offer Evidence dated May 14, 1991.) Such statements are protected by the First Amendment and are not material to any issue in this case.
4. The government seeks to convict Foreman not for unlawful activity, but for expressing his public views at the the Round River Rendezvous in which he warned that members of the organization might be imprisoned or die. (See page 15 of the government's memo.)
5. The government seeks to convict Foreman for what he has written and what he believes under the guise of introducing *Ecodefense* to prove that he knows

"monkeywrenching is illegal," and is obviously unnecessary of specific proof in a case such as this. (See pp 21-22 of the government's memo.) That Foreman may have advocated a violation of the law so far as some aspects of monkeywrenching are concerned, is not illegal. Mere advocacy itself does not constitute a crime.

Further, no statement of Foreman or any alleged member of the conspiracy against Foreman is admissible without the requisite proof of Foreman's membership in the conspiracy, which, of course, there is none.

6. The government seeks to convict Foreman for having edited portions of a book dealing with cutting torches without proof that he wrote the sections, that the sections were written with this alleged conspiracy in mind, or that the book was delivered to instruct the recipients of the book on how to use the torch in an illegal activity of the conspiracy that Foreman belonged to. (See pp 25-27 of the government's memo.)
7. The government characterizes the writing concerning security as the penultimate chapter in the book" saying such techniques were used by the alleged conspiracy. Whether there was a conspiracy, whether such techniques were or were not used, and if so, whether they were adopted because of the book, is utterly irrelevant to any issue in the case. Instead, government seeks to convict Foreman of crimes he did not commit on writings he may or may not have authored long before any conspiracy is alleged in this case. (See pp 28-30 of the government's brief.)
8. The government seeks to convict Dave Foreman for what he has written in the *Earth First! Journal* and elsewhere. These writing are not relevant to any stated issue in the case and are protected by every citizen's First Amendment rights. They are offered to prejudice the court and the jury.

The government attempts to prejudice His Honor under a transparent filing concerning Foreman's discharge from the Marines.

The government, in a blatant attempt to prejudice His Honor, and for no other purpose, informed the court of alleged prejudicial circumstances surrounding Foreman's discharge from the Marines in 1968—over 22 years

The government long ago advised the court that it would not use the discharge for any purpose in the trial. Now it rescinds that representation

The obvious purpose of setting out this material is to make the material available in the public record and to thereby advise the public the press, to the prejudice of the defendant, and, further, to cause His Honor to adopt unkindly feelings toward the defendant. The government has used the same technique against the undersigned counsel to cause the court to look askance at counsel, to undermine the court's respect for counsel and to thereby further prejudice the defendant. This issue will be commented on below

In regard to Dave Foreman's discharge from the Marines, whatever Dave Foreman did at the time of his discharge—he was a mere lad who believed then and who embraces extremely high moral standards being disappointed in what he encountered in the Marines, sought a discharge. *The defendant seeks leave of court to advise the court in camera concerning this matter in order to alleviate any natural residual feelings of ill-will or distrust the court might unconsciously adopt toward Mr, Foreman as a result of the government filing.*

The government attempts to set the court against defense counsel and to make the court "leery" of counsel at the outset.

The government sought from the court and obtained an order granting the government the authority to exceed the court's limitation on submissions. The government then promptly filed copies of counsel's opening statement and final argument in *Marcos*.

Counsel did not believe he would be required to fight the *Marcos* case more than once.

The transparent and utterly improper alleged purpose of the submission was to obtain a pretrial order of some kind against Foreman's lawyer. The obvious reason for the submission is to prejudice the court against counsel at the outset. Parenthetically, the undersigned has the following comments concerning the statement:

I thought the opening statement was a passable effort given the fact that the obvious tactic of the government was to interrupt my opening as often as possible in an attempt to destroy the effectiveness of my first appearance before the Jury.

The tactic was again used in the close, and again failed. jury acquitted the defendant on all counts. The Marcos case was a similar case to this in that it was one of gross government overreaching

much of the government's evidence was in. Judge Keenan himself alluded to my opening in support of certain of his observations made against the government's tactics. Both the court's later remarks and the jury's verdict of total acquittal were intentionally omitted by the government's in its submission to Your Honor.

I am sure the court has no intention of pre-trying any of the attorneys in this case nor in dictating to them how they shall present their lawful and proper defenses. I am proud of the work I have done in the various courts of this land before many great and honored judges, and it seems only fair under circumstances where I have been personally attacked, that the court grant me leave to file herein testimonials of numerous federal and state court judges who have had personal experience with me for many years to the effect that my conduct before them has been exemplary and an inspiration to the bar; that my trial tactics have been widely lauded and

imitated; that my opening and closing statements have been published in numerous authoritative legal works as illustrative of model technique; and, indeed, that as a result of hundreds of seminars across the land I have been responsible for giving assistance, encouragement, enlightenment, purpose and insight on trial technique to thousands of lawyers in this country.

For the government to file such a motion in an attempt to set the court against me prior to trial seems, to say the least, inconsistent with the highest goals of the office of the United States Attorney and is further evidence of the government's reaching and its intention of convicting Mr. Foreman by hook or crook, by hearsay or violation of First Amendment rights, by setting the court against the defendant and against his lawyer, by any means available to it—ethical, reasonable, fair, or not.

IV. Count I of the Indictment is Duplicitous and Should Be Stricken

government has always treated the Snowbowl incident and the Canyon Mine incident as a crime involving Davis, Millett and Baker, and the CAP incident as part of a separate, later alleged conspiracy involving three nuclear plants. The global theory is a last minute idea as stated in detail above adopted by the government for improper purposes. No new facts, law, or understanding of this case has caused the Second Superseding Indictment, except the improper tactics outlined above.

The government has alleged two conspiracies as one, in Count I. This is improper. The court is referred to the filing of Millett as artfully set forth by Attorney Black. His presentation on the law in this regard is adopted.

V. It is the Governments Duty to Respond Fully and in Good Faith, Absent Which Defendant is Entitled to Dismissal

defendant Foreman has filed this motion in good faith. His motion is based on the filings of the government, the pleadings, the tapes, 302s and other evidence presently before the court. Nothing outside the record has been referred to for consideration herein.

The defendant, Foreman, in good faith asserts that the government has no evidence that David Foreman joined any conspiracy, and particularly, there is no evidence of any global conspiracy, and that there is no evidence that Foreman joined the charged global conspiracy at any time, much less prior to the CAP incident.

The defendant has alleged that the entire procedure of indictments, superseding indictments, second superseding indictments, motions in *limine*, motions for advisory opinions, and the other numerous filings by the government are the government's attempt to cause Mr. Foreman to be hated, to create prejudice against him with the court and jury, and to establish a "correct judicial viewpoint" that will aid the government to convict Mr. Foreman for his ideas, his preachments, his writings, and his beliefs on activist environmentalism.

We state in good faith that the government has no case against Mr. Foreman and that there is no evidence contained in the thousands of hours of tapes and in the thousands of pages of 302s that suggests that Mr. Foreman is guilty of crime.

We have challenged the government to produce any evidence that a global conspiracy existed, and if it did, that Foreman knowingly joined and did any conscious act to forward its interests. The foregoing is sufficient for this court to require the government to fully respond, and under *United States v Kartman*, 417 F.2d, 893, 896, note 7 (9th Cir. 1969), upon the governments failure to do so, the defendant is entitled to a dismissal. The foregoing factual statement is intended by Foreman as an offer of proof. And in any event, the joinder of a defendant may be challenged based upon prosecutorial bad faith *U.S. v. Marszalkowski*, 669 F.2d 665 659 11th Cir. 982).

VI. Renewed Request for *Bourjaily* Hearing

The prosecution says the defendant has all of the evidence upon which it relies to prove the existence of this new conspiracy. We have scoured the record for evidence of the existence of that conspiracy to no avail and say in good faith to the court that none exists. The evidence cited by the government concerns a conversation by Foreman with Frazier as to Frazier's willingness to rewrite the bulldozer section of *Ecodefense* and to provide drawings therefore. That conversation had nothing to do with any alleged conspiracy. Even assuming a conspiratorial conversation occurred between Frazier and Foreman, which it did not (a copy of the government's 302 in this regard is attached as Exhibit B) a conspiracy cannot be formed between a government agent and the defendant since an agreement to form the conspiracy is not present. *United States v Sangmeister*, 685 F.2d 1124, 1126, (9th Cir. 1982).

Indeed there is no evidence of any conspiracy that included Foreman as a member. The evidence is to the contrary. Mr. Foreman has always advised people against violence, and particularly against action concerning nuclear power which he felt was passe'.

Finally, Foreman is not responsible for the acts of alleged coconspirators that were committed prior to his entry into the alleged conspiracy.

"An individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined

or after he had withdrawn from the conspiracy.” *Levine v U.S.*, 383 U.S. 265, 266, (1966) (emphasis added)

In view of the foregoing. Foreman asserts that no co-conspirator testimony is admissible against him since no conspiracy existed. The government’s intended tactic is to create innuendos of a conspiracy, to suggest culpability, to prejudice the court and the jury by improper, groundless assertions of guilt through association to create prejudice by reference to unpopular writing or speeches, and to injure the defendant by other such condemned methods. Since no conspiracy can be shown by a preponderance of evidence, no alleged co-conspirator’s testimony under *Bourjaily* is admissible (*Bourjaily v U.S.*, 483 U.S. 171, 107 S. Ct. 2775, 1987) and a *Bourjaily* hearing under the circumstances of this case should be held before trial to avoid the obvious avalanche of prejudice to the defendant Foreman. Failure to grant such a hearing under the above facts would be an abuse of discretion.

Moreover, it is a senseless waste of the precious time of court and *pro bono* counsel to go to trial in the summertime in Prescott, Arizona, for three or four months when there is, in fact, no case against defendant Foreman

The government should be required to make out a case under *Bourjaily* before the commencement of trial and, most particularly, to controvert these allegations of misconduct to satisfy the court that, indeed, a bonafide case warranting the time of court and counsel exists.

Wherefore Defendant Prays the Court as Follows:

1. That this matter be set for oral argument and evidentiary hearing prior to trial.
2. That in view of the allegations of misconduct, this court require the government to produce a *prima facie* case that the charged global conspiracy existed and that the defendant Foreman joined the same at a time which would support the charges made against him in the government s Second Superseding Indictment.
3. In the event that the court deems that such an order would unconscionably aid the defendant in preparing his defense—that is to say, that the defendant is not entitled to know the facts that will be brought against him—then the defendant requests that the court order the government to make the required showing to His Honor *in camera* and to therein satisfy His Honor that there is a *prima facie* case that the defendant joined such a conspiracy as alleged in the Second superseding Indictment.
4. That the government’s Second Superseding Indictment be dismissed with prejudice for serious prosecutorial misconduct.

5. That the indictment be dismissed for want of any evidence to establish that the defendant Foreman entered into any conspiracy at any time and forwarded the purposes thereof by any means.
6. Absent a dismissal of the case, that Count I of the government's Second Superseding Indictment be stricken as duplicitous.
7. Absent dismissal of the case, that Count I be stricken as an improper artifice of the government to interfere with. Mr. Foreman's lawful defense of the case originally made against him.
8. That the court refuse to grant the government an advisory opinion on the use of *Ecodefense*; that the court protect the defendant's First Amendment Rights to speak and write freely concerning his beliefs, his ideas and his convictions; that the court not permit this sacred right to be destroyed or abused under the artifice of a government contending for technical rules that have no application absent proof of the existence of a conspiracy in which the defendant was a knowing and voluntary member.
9. That the court order a "*Bourjaily*" hearing prior to jury selection to determine the admissibility of proffered evidence by the government. This prayer is especially mandated in view of the government's empty showing as to the evidence it contends is foundational to the existence of a conspiracy to which the defendant allegedly belonged
10. That the court permit Mr. Foreman to answer *in camera* the government's injurious filing relative to Mr. Foreman's discharge from the Marines in order to attempt an undoing of the prejudice caused by such filing
11. That the court grant undersigned counsel leave to file testimonials from various respected state and federal courts, prosecutors, and fellow attorneys concerning their experience with counsel, and that he be permitted to make other filings in order to overcome the prejudice against counsel that was intended by the government's wrongful filing against him
12. That the court order the prosecution to cease its harassments, its improper filings, its allegations made for the sole purpose of injuring the defendant and his counsel before trial, and that the government be ordered to henceforth conduct itself in accordance with proper prosecutorial standards

It is not expected that excludable delay under Title 18 U.S.C §3161(h)(1)(F) may occur as a result of this Motion or Order based thereon

DATED this 29th day of May, 1991

Respectfully submitted,
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COPY of the foregoing mailed
this 29th day of May, 1991, to
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The Ted K Archive

Gerry L. Spence
Motion to Dismiss Indictment for Prosecutorial Misconduct
United States v. Davis, et al. U.S. District Court, District of Arizona
May 29 1991

David Foreman Papers, Folder 233, Box 11. Plus,
<web.archive.org/.../www.tkb.org/documents/Cases/89-CR-192-Motion-2.pdf>
Suggested citation: Gerry L. Spence, "Motion to Dismiss Indictment for Prosecutorial
Misconduct," United States v. Davis, et al. U.S. District Court, District of Arizona,
David Foreman Papers 233, Box 11.

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