

**David Jacquot**  
**Pro Se Defendant**  
**Telephone: (208) 415-0777**  
**Facsimile: (208) 263-6274**  
**Email: dave@jacquotlaw.com**

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

<b>UNITED STATES OF AMERICA,</b>	)	<b>Case # 08CR1171-W</b>
	)	
<b>Plaintiff</b>	)	<b>REPLY: Supplemental Brief</b>
	)	<b>1) Motion for Reconsideration</b>
<b>v.</b>	)	<b>Selective / Vindictive Prosecution</b>
	)	<b>2) Motion for Change of Venue</b>
<b>DAVID C. JACQUOT,</b>	)	
	)	Judge: Hon. Thomas J. Whelan
<b>Defendant</b>	)	Courtroom: 7
	)	Date: 1 June 2009
	)	Time: 2:00 p.m.

---

1 Now comes the Defendant and Replies to the Government Response to his Supplemental Brief  
2 re: Motion for Selective / Vindictive Prosecution and Change of Venue.

3  
4 The Government does not believe that the Defendant’s Supplemental Brief merits a response:

5  
6 *“The Government has reviewed Defendant’s supplemental brief and does not*  
7 *believe that any of the arguments merit a response.”*

8  
9 The Government believes that the Supplemental Brief merely repeats the same arguments  
10 previously raised:



1 Judicial Notice

2  
3 The Defendant's request for Judicial Notice is a **new issue** and **unopposed**. The Court should  
4 therefore grant all the Defendant's requests for Judicial Notice.

5  
6 **Section II**  
7 **Selective Prosecution**  
8

9 The Defendant has raised significant **new issues** in regard to his Selective Prosecution claim.  
10 These **new issues** are **unopposed** by the Government.

11  
12 **Prong 1 – Discriminatory Effect.**

13  
14 The Court's 20 April 2009 ruling found that the Armstrong decision requires there to be a  
15 traditional constitutionally protected class for a Selective Prosecution claim.

16  
17 As described in the Supplemental Brief, the Defendant must only show that **similarly situated**  
18 individuals exist and that they were **not prosecuted**. The similarly situated individuals are the  
19 Political Insiders. This group of individuals has been recognized as receiving favorable  
20 treatment by both the Congress and the President. The Defendant describes in detail how the  
21 Political Insiders are similarly situated to the Defendant and were not prosecuted. This detailed  
22 description is a **new matter** and is **unopposed** by the Government. The Court should therefore  
23 find that there are similarly situated individuals that were not prosecuted.

24  
25 **Prong # 2 – Discriminatory Purpose**

26  
27 Arbitrary Classification.

28  
29 The Defendant raises **new issues** in the Supplemental Brief regarding arbitrary classification.  
30

1 The Defendant cites authority that political affiliation has been held to be an arbitrary  
2 classification for selective prosecution purposes. Therefore the favorable treatment of Political  
3 Insiders due to their political affiliation is arbitrary. This **new issue** is **unopposed** and the Court  
4 should find that the distinction between Political Insiders and the Defendant is arbitrary.  
5

6 The Defendant also cites authority that a discriminatory effect which is severe enough can  
7 provide sufficient evidence of **both discriminatory effect and discriminatory purpose**. The  
8 invidious discrimination in favor of the Political Insiders is so severe that it has been addressed  
9 in pending Congressional Legislation and condemned by President Obama in his first thirty days  
10 in office. Since the problem is recognized as widespread and is so damaging to the rights of  
11 Ordinary Citizens it should be considered a sufficient basis for both discriminatory effect and  
12 discriminatory purpose. Again, this **new issue** is **unopposed** and the Court should find that the  
13 distinction between Political Insiders and the Defendant is arbitrary.  
14

15 Exercise of Constitutional and Statutory Rights.  
16

17 The Government has only presented legal arguments to rebut two (2) of the numerous claims of  
18 vindictive behavior. The Government claims:

19  
20 Judge Burns made no findings of bad faith and perjury

21 AUSA Devine was not government counsel in the civil case  
22

23 Both these arguments have been proven to be **false**. The standard to establish discriminatory  
24 purpose in retaliation for the exercise of constitutional rights is an **objective standard**. There is  
25 no requirement to produce any evidence of **bad faith** to establish the element of discriminatory  
26 purpose. Blackledge v. Perry 417 U.S. 21 (1974). The reason that the Supreme Court held that  
27 **no** proof of **bad faith** is required is that “*fear of vindictiveness may unconstitutionally deter the*  
28 *exercise*” of these constitutional, statutory or procedural rights. *Id.* To prevent such a chilling  
29 effect, **there must only be a showing that the prosecution was initiated in response to the**  
30 **exercise of constitutional, statutory or procedural rights**. Therefore the Government’s

1 argument that Judge Burns made no findings of bad faith or perjury is **utterly irrelevant**.  
2 Moreover, the Defendant alleges that the civil proceedings were **without merit** and the  
3 supporting **declarations were false** and not that perjury was committed. Judge Burns' ruling  
4 clearly supports the Defendant's position that the government claims were without merit and that  
5 the declarations were false. These issues are described in detail in the Defendant's Reply  
6 (Document 80). In regards to the claim that AUSA Devine was not government counsel in the  
7 civil case, that is proven to be **false** by the documents she submitted in the civil case as  
8 government counsel (Exhibits to Document 80).

9  
10 The Government has submitted **no evidence** to rebut any of the other claims of retaliatory  
11 behavior. The Court should find that the Government has prosecuted the Defendant for exercise  
12 of his constitutional, statutory, and procedural rights and/or the rights of his clients.

13  
14 **Section III**  
15 **Vindictive Prosecution**  
16

17 The Defendant raised the new issue that a claim of Vindictive Prosecution can be found in the  
18 initial charging decision. This **new issue is unopposed** by the Government and therefore the  
19 Court should find that the Vindictive Prosecution claim is allowable in this case.

20  
21 The Defendant alleged that the TRO / civil case was punitive in nature. This **new issue is**  
22 **unopposed** by the Government and therefore the Court should find that the TRO / civil case was  
23 punitive in nature.

24  
25 The Government has only presented legal **arguments** to rebut two (2) of the twenty four (24)  
26 instances of vindictive behavior described in the Supplemental Brief. The Government claims:

27  
28 Judge Burns made no findings of bad faith and perjury  
29 AUSA Devine was not government counsel in the civil case  
30

1 Both these arguments have been proven to be false as described above in Section II.

2  
3 The Government has submitted **no evidence** that rebuts **any** of the other claims of improper,  
4 vindictive, or retaliatory behavior. Therefore, based on these twenty four (24) allegations of  
5 vindictive and improper misconduct and the unchallenged supporting evidence, the Court should  
6 find **actual proof** of Vindictive Prosecution.

7  
8 If the Court fails to find actual proof of vindictive prosecution, the Court should find that the  
9 Defendant has met the burden to raise a presumption of vindictive behavior. To establish a  
10 presumption of vindictiveness all that is required is a “*mere appearance of vindictiveness.*” See  
11 United States v. Rusega-Martinez, 534 F.2d 1367 (9<sup>th</sup> Cir. 1976); United States v. Groves, 571  
12 F.2d 450, 453 (9th Cir.1978) (“*it is the appearance of vindictiveness rather than vindictiveness,*  
13 *in fact, which controls*”); See also, United States v. Burt, 619 F.2d 831 (9th Cir. 1980);and  
14 United States v. Griffin, 617 F.2d 1342 (1980).

15  
16 The Defendant need **not** show “*that the prosecutor acted in bad faith*” or that AUSA Devine  
17 “*maliciously sought*” the indictment. United States v. Groves, 571 F.2d 450, 453 (9th Cir.1978);  
18 *see also* United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir.1976). In Griffin, the  
19 Ninth Circuit held that a presumption of vindictiveness may even be inferred in the **absence of**  
20 **evidence** that the prosecution acted with a retaliatory motive in obtaining the challenged  
21 indictment. The presumption arises when the “*totality of circumstances surrounding the*  
22 *prosecutorial decision at issue suggest the appearance of vindictiveness.*” Griffin at 1347.  
23 Clearly the twenty four (24) unopposed items of evidence provided by the Defendant show a  
24 “*totality of the circumstances*” in this case that “*suggests*” the “*mere appearance of*  
25 *vindictiveness.*”

26  
27 The Defendant cited valid law that states that the **appearance of vindictiveness** is enhanced  
28 when the charges are related to a nucleus of facts. The Defendant cites Groves and other cases  
29 and describes in detail how the civil case / TRO / Receivership is “*so interrelated,*” that there  
30 never would have been the current tax return charges had it not been for the TRO/ civil case

1 investigation. The Government is using documents and computer records seized in that case.  
2 The Government did not follow any normal IRS examination or audit procedures, never  
3 contacted anyone at the law firm for an explanation. The same prosecutor here (AUSA Devine)  
4 was involved in both actions. This **new issue** is **unopposed** by the Government, therefore the  
5 Court should find that the appearance of vindictiveness exists  
6

7 The appearance of vindictiveness is enhanced when the Government **knows all the facts**  
8 **relating to second charge when the first charge is made.** See Groves at 453-4. In this case,  
9 the tax returns in question (2001 and 2002) were filed 1 to 2 years before the TRO/ Civil case.  
10 As part of this TRO/ Civil case, the Government had been looking at the Defendant's bank  
11 records, financial records and tax returns and knew this information when they filed the Civil  
12 action. This **new issue** is **unopposed** by the Government, therefore the Court should find that  
13 the appearance of vindictiveness exists.  
14

15 Once the presumption of vindictiveness has been established, a dismissal must be granted unless  
16 the Government meets the "*heavy burden of proving that... the alleged charges were not*  
17 *motivated by a vindictive motive.*" Ruesga-Martinez at 1369. This presumption sufficient for  
18 dismissal may be "*overcome only by objective information in the record.*" There is "*no*  
19 *objective information in the record*" by which the Government can meet its "*heavy burden*" of  
20 proving that the charges were "*not motivate by a vindictive motive.*" Therefore the Court **must**  
21 dismiss the indictment with prejudice.  
22

#### 23 Section IV

#### 24 Venue

25  
26 The Defendant raises the issue that the alleged criminal non-filing of 2005 and 2006 returns was  
27 excluded from the Grand Jury in an effort to manipulate venue. This is a **new issue** and is  
28 **unopposed.** The Court should rule that Government excluded the evidence of the alleged non-  
29 filing of 2005 and 2006 returns from the Grand Jury in order to improperly manipulate venue in  
30 the Southern District of California.

1  
2 Venue in the Southern District of California is improper in this case. Legislative intent shows  
3 that it was the intention of Congress that tax defendants have the “home venue option.” When  
4 Sec. 3237(b) was amended in 1966, “The Senate Report stated broadly, “to be sure that the  
5 taxpayer has the right to be tried in the district in which he resides, the bill amends present law to  
6 provide that he may elect to remove his trial to the judicial district of his residence.” S.Rep. No.  
7 1625, 89th Cong., 2d Sess. 3, reprinted in 1966 U.S.Code Cong. & Ad.News 3676, 3681. U.S. v.  
8 U.S. Dist. Court for Southern Dist. of California, 693 F.2d 68 (9<sup>th</sup> Cir. 1982). The legislative  
9 history shows that Congress intended all tax crime defendants to have the “home venue option.”  
10 See In re United States (Clemente), 608 F.2d 76 (2d Cir.1979), cert. denied, 446 U.S. 908  
11 (1980), H.R.Rep. No. 1890, 85th Cong., 2d Sess. 2; S.Rep. No. 1952, 85th Cong., 2d Sess. 1-2,  
12 reprinted in 1958 U.S.Code Cong. & Ad.News 3261, 3262.

13  
14 This Congressional intent, legislative history, and case law supporting the “home venue option”  
15 is consistent with DOJ Policy:

16  
17 *“6.01[2] Policy Considerations. It is the policy of the Department of Justice*  
18 *generally to attempt to establish venue for a criminal tax prosecution in the*  
19 *judicial district of the taxpayer’s residence or principal place of business,*  
20 *because prosecution in that judicial district usually has the most significant*  
21 *deterrent effect.”* (Note: This policy is more fully discussed in the Defendant’s  
22 Motion.)

23  
24 The Department of Justice should be held to its policy. Policy of Government agencies can be  
25 enforced against them. See United States v. National Association of Securities Dealers, Inc 422  
26 U.S. 694 (1975). (Consistent and longstanding interpretation by the agency charged with  
27 administration of an Act, while not controlling, is entitled to considerable weight) citing Saxbe v.  
28 Bustos, 419 U.S. 65 (1974); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Udall v.  
29 Tallman, 380 U.S. 1, 16 (1965). When Government policies impact the rights of individuals, the  
30 Government should be required to follow their own policies. See Morton v. Ruiz, 415 U.S. 199,

1 (1974) (Where the rights of individuals are affected, it is incumbent upon agencies to follow their  
2 own procedures. This is so even where the internal procedures are possibly more rigorous than  
3 otherwise would be required.) citing Service v. Dulles, 354 U.S. 363, 388, (1957); Vitarelli v.  
4 Seaton, 359 U.S. 535, 539-540, (1959); McDonald v. Gonzales, 400 F.3d 684 (9th Cir., 2005).

5  
6 The fact that the Government may incur additional costs in granting the venue change is  
7 irrelevant. The Senate Report stated that any additional costs of prosecution to the government  
8 under this new law would be "inconsequential." S.Rep. No. 1952, 85th Cong., 2d Sess. 1,  
9 reprinted in 1958 U.S.Code Cong. & Ad.News 3261, 3262. This is especially true when you  
10 take into the relative burden of expense and inconvenience of defendants, who are presumed to  
11 be innocent. See. U.S. v. U.S. Dist. Court for Southern Dist. of California.

12  
13 For the reasons described above and in the Defendant's other pleadings, venue should be  
14 transferred to the District of Idaho.

15  
16 **PRAYER FOR RELIEF**

17  
18 The Defendant requests the Court to:

- 19  
20 1. Reconsider and deny the Government's Motion to Quash.  
21 2. Rule that the Government has conceded the issue relating to the description  
22 of the Political Insiders Tax Problems.  
23 3. Grant all the Defendant's Judicial Notice requests.  
24 4. Rule that the Defendant has shown Discriminatory Effect by showing that  
25 similarly situated individuals are not being prosecuted.  
26 5. Rule that the Defendant has shown Discriminatory Purpose by showing  
27 arbitrary classification.  
28 6. Rule that the Defendant has shown Discriminatory Purpose by showing the  
29 decision to prosecute was based upon the exercise of protected statutory and  
30 constitutional rights

- 1 7. Dismiss the indictment with prejudice for Selective Prosecution.
- 2 8. Rule that Vindictive Prosecution claim is allowable in regards to the initial
- 3 charging decision.
- 4 9. Rule that the TRO/ civil case was punitive in nature.
- 5 10. Rule that **actual** vindictiveness has been shown.
- 6 11. Rule that based on the totality of circumstances that a mere appearance of
- 7 vindictiveness has been shown and therefore a **presumption** of vindictive
- 8 prosecution arises and the burden shifts to the Government.
- 9 12. Rule that the charges and the civil case / TRO / receivership came from a
- 10 common nucleus of facts.
- 11 13. Rule that the charges and the civil case / TRO / receivership are so
- 12 interrelated that there never would have been the current tax return charges
- 13 had it not been for the TRO/ civil case investigation.
- 14 14. Rule that the Government knew all the facts relating to the charges in this
- 15 case at the time they filed the TRO / civil case.
- 16 15. Rule that the Government has not met its heavy burden of objective facts in
- 17 the record to overcome **actual** vindictiveness.
- 18 16. Rule that the Government has not met its heavy burden of objective facts in
- 19 the record to overcome the **presumption** of vindictiveness
- 20 17. Dismiss the indictment with prejudice for Vindictive Prosecution.
- 21 18. Rule that Government excluded the evidence of the alleged non-filing of
- 22 2005 and 2006 returns from the Grand Jury in order to improperly
- 23 manipulate venue in the Southern District of California
- 24 19. Order the case to be transferred to the Federal District Court of Idaho
- 25 20. Impose other such relief that the Court feels is appropriate.

26  
27 Respectfully Submitted,

28  
29 /s/ David Jacquot

30 David Jacquot, Defendant

1 Certificate of Service

2  
3  
4  
5 IT IS HEREBY CERTIFIED THAT:

6  
7 I, David Jacquot, am a citizen of the United States and am at least eighteen years of age. My  
8 business address is 2041 Bandy Road, Priest River, ID 83856. I am the pro se Defendant in the  
9 above entitled action.

10  
11 I have caused service of:

- 12  
13 • **REPLY: Supplemental Brief Selective / Vindictive / Change of Venue**

14  
15 by filing the foregoing with the Clerk of the District Court using its ECF System, which  
16 electronically notifies the Government.

17  
18 I declare under penalty of perjury that the foregoing is true and correct on this 29 May 2009.

19  
20  
21 /s/ David Jacquot

22 DAVID JACQUOT