IN THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES,
Plaintiff-Appellee

v.

Nos. 06-10199, consolidated
with
06-10145 and 06-10201

IRWIN SCHIFF,
Defendant-Appellant

ANSWER TO ORDER TO SHOW CAUSE AND MOTION TO VACATE AND DISMISS SAID ORDER

Now comes Sheldon R. Waxman, an attorney appearing *pro se* and answers the Order to Show Cause (hereafter, "OTSC"), and moves that it be vacated for the following reasons:

INTRODUCTION

Counsel did not file Schiff's Original Appeal, nor did he file Schiff's Opening Brief. Schiff's previous counsel, Michael Nash, who Schiff discharged on June 20, 2007, did that. Counsel filed his Appearance as Schiff's attorney on June 25, 2007. On July 30, Counsel presented a Motion for Leave to File a Supplement To Schiff's Opening Brief (hereafter, "Motion"). The Motion was denied by OTSC dated, September 25, 2007, and the Supplement To Schiff's Opening Brief (hereafter, "Supplement") would not be considered by the Court.

The Court incorporated into the OTSC of September 25th, issued *sua sponte*, an allegation that Counsel should show cause why he should not be sanctioned "for

attempting to raise frivolous issues on appeal by signing the Supplemental Brief and supporting motion". A Deputy Clerk, on behalf of the Panel, signed the Order.

The OTSC part of the Order stated, among other things, that the Supplement was "frivolous" in its entirety. The OTSC did not assign any specific part or parts of the Supplement that it considered frivolous but only that it was frivolous in its entirety because of two cited cases (*In Re Becraft*, 885 F.2d 547 (9th Cir. 1989) and *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981) and, also, because of the court's authority to issue sanctions, pursuant to Rule 38 of the FRAP. See, Copy of OTSC attached hereto, as Ex. F. This Answer proposes to provide reasons why this Court should not sanction Counsel.

BACKGROUND

It is only proper that a Court that is prone to sanction an attorney should know something about him. Therefore, Counsel's Biography is attached as Exhibit A. Also, the stories of Counsel's career up to 1990 can be found in his published Memoir, "In The Teeth Of The Wind—A Study of Power and How To Fight It" (Iuniverse, 2002)—hereafter referred to as "In Teeth". The Table of Contents of the true stories is attached as Exhibit B.

Counsel graduated from DePaul University Law School in Chicago and was licensed to practice in Illinois in 1965. Among the jobs he held thereafter were with the Chicago Legal Aid Bureau, The Edwin F. Mandel Legal Aid Clinic of the University of Chicago and Staff Attorney at Argonne National Laboratory.

In 1971 he was offered and accepted an appointment to the U.S. Attorney's Office for the Northern District of Illinois as an Assistant U.S. Attorney. In that capacity, he

handled all of the usual tasks of Federal Prosecutors, including Criminal, Civil and Appeals.

In 1973 he was assigned to a high profile civil case, known in his published fictionalized version as —"The Black Messiah Murders—a Sam Cohen Case Adventure #1" (Iuniverse, 2003)—the factual story appears in Chapter 5 of Exhibit B. The Civil Rights lawsuit was filed by the family of those murdered and the survivors of those who were wounded. The FBI and one of its paid informers were named as defendants..

The lawsuit alleged that the FBI, City of Chicago Red Squad, and the County of Cook conspired to murder Chicago Black Panther Party leader, Fred Hampton. During Counsel's investigation he discovered that the allegations of murder were true and in fact were carried out as part of the FBI's Co-Intel Program, Black Messiah Subdivision. Co-Intel was part of an overall counter-intelligence program carried out all over the country by the FBI, but included many cities that had "Red Squads", to disrupt the Vietnam war protest.

Members of the FBI and the DOJ attempted to dissuade Counsel from revealing incriminating documents that proved the murder conspiracy. They attempted to entice Counsel to enter into a conspiracy to obstruct justice by withholding the damning documents. Counsel refused to do so and resigned his post in 1974.

From the date of Counsel's resignation, he became an attorney for those oppressed by a government that had overstepped the bounds of the Constitution--a champion of the downtrodden, a defender of the persecuted, and the last resort of those who have lost all hope. As a result, he became involved in many controversial cases.

These cases made him an enemy of the establishment, especially the Federal Judiciary, the DOJ, Treasury Department and the IRS.

In one of Counsel's first cases in private practice in 1975, Counsel became first involved with the Treasury Department, the Tax Division of the DOJ and the IRS. The IRS was attempting to eliminate all Independent Contractors, including lawyers, and to convert everybody into the government's payroll/withholding/employment system. The series of cases resulted from a stubborn client's resistance to the IRS attempt to intimidate him into converting his Independent Contractor telephone solicitors into payroll employees. A 10-year knock down drag out fight with the Tax Division of the DOJ—is known as the "Dema/Tabcor" litigation. See, Ex. A for Court citations to the various reported cases. Also, see Chapter 11 of Ex. B—"We Beat Them All."

The IRS program became public when a Special Hearing of the Subcommittee on the Department of the Treasury, U.S. Postal Service and General Government Appropriations of The Senate Committee on Appropriations was held in April 1976. See, Ex. C for Counsel and his client's testimony. Thereafter, the litigation continued until Counsel met with the Staff of the Joint Committee on Taxation to discuss the end of the IRS program.

The result of this meeting resulted in adoption of the "Safe Harbor Test", which protects Service Recipients from any repetition of the IRS intimidation. The litigation ended with a Judgment of the U.S. District Court that Counsel's client had acted properly in the categorizing of his Independent Contractors.

In 1978, Counsel didn't endear himself with the IRS and the Congressional establishment when he testified before The House Committee on Ways and Means. See,

Ex. D. See, also, Chapter 11, “We Beat Them All” of Ex. B. The hearing was supposedly about tax simplification but it was a sham.

Congress does not want to lose the perks they receive by manipulating the IRC. But at the time there was an outcry over IRS intimidation. Counsel was very unhappy with the income tax system, believing that raising revenue should be separated from policy matters. At the time Counsel believed that the Flat Tax was better than a National Sales Tax, but now believes anything would be better than the regressive income tax. See, Ex. B, Chapter 18, “Politics and The Flat Rate Tax.”

At the same time that Counsel was appearing in Washington on the “tax simplification” hearings, Counsel was representing an individual who was used by the federal government and the Chicago Red Squad to infiltrate anti-Vietnam war protestors. When the Chicago Daily News revealed the connections, the government left Counsel’s client “high and dry” to take the rap for an armed robbery of a Catholic Church.

This fictionalized story is retold in the published book, “Piranhas on the Loose—A Sam Cohen Case Adventure #2” (Iuniverse, 2003)—the factual story is found at Chapter 7—“The Spooks—An Untold Story of Watergate” of Exhibit B. Counsel’s successful representation was favorably decided by an honest and couragious Federal judge. See, *U.S. ex rel. Stewart v. Scott*, 501 F.Supp.53 (N.D. IL, 1979). Additional anger by the “establishment” resulted from Counsel’s representation of the defendant in that case and his failure to accept the Commutation of Sentence to Probation offered by the Governor of Illinois, James R. Thompson.

Counsel then found himself in a fantastic battle with the City of Chicago and the County of Cook when he represented an individual who was repeatedly arrested by the

police because a thief was using his identification to commit robberies with police permission. This case, also, did not endear him to the powerful political forces in Chicago because Counsel was again successful. See, *Powe v, City of Chicago and County of Cook*, 664 F.2d 639 (7th Cir. 1982). The fictionalized version of this book was recently published, "The Josephus Enigma—A Sam Cohen Case Adventure #3" (Iuniverse, 2007)—the factual story can be found at Chapter 8—"They Got The Wrong Man—There's No Out Button" of Exhibit B.

Having been blacklisted by the Feds and the City of Chicago and County of Cook, counsel decided to move out of the Chicago winters. Counsel moved to Bakersfield, California in early 1981 to prepare for trial and begin representation of a "notorious" tax protestor—Paul Bell, who was a target at the beginning of a Federal Grand Jury Investigation in Fresno. See, Chapter 12 of Ex. B, "The Iniquitous Representative of Satan and the Boys In Taft, California." In 1984 while still representing Mr. Bell in the Fresno District Court, Counsel was served with a DOJ subpoena to produce records relating to his client, Mr. Bell.

Counsel Moved to Quash the Subpoena, which was denied by the District Court. Counsel immediately appealed that decision to this Court citing the obvious 6th Amendment violation and Attorney Client Privilege. The National Association of Criminal Defense Lawyers filed an *Amicus* Brief on behalf of Counsel. This Court affirmed the issuance of the subpoena. See, *In Re Grand Jury Witnesses, Salas and Waxman*, 695 F. 2d 359 (9th Cir. 1982).

Counsel had always thought that it was forbidden to attack the lawyer because of what his client may have done. This to Counsel's knowledge had never been done before

nor since then. Upon information and belief the subpoena directed against Counsel had been personally approved by the U.S. Attorney General. This Court went along with the DOJ's divide and conquer tactic. To this day, Counsel considers that decision to have been a gross violation of the 6th Amendment's Right to Counsel. Moreover, counsel was stunned by the fact that the 6th Amendment objection wasn't even commented on by this Court.

Within a few days of this Court's decision, a SWAT team raided Counsel's house in Bakersfield late in the evening; the front door was broken into and guns were put to Counsel's head. A warrant had been issued by the District Court because delivery of the records had been delayed and Counsel was arrested without any prior notice. He was chained and spent a night in the Fresno County Jail and the next day was brought to Judge Robert Coyle's chambers where he explained the delay and was released.

Counsel was forced to decline to further represent his client for the ethical consideration that a lawyer cannot represent a client when the prosecutor prosecuting his client has personally attacked him. After the separation of Counsel from his client, Counsel moved back to Chicago where he eventually received a trial subpoena from the DOJ to testify as a prosecution witness against his former client who was representing himself. Of course, Bell was convicted.

Counsel had now seen the awesome power of the Federal Judicial Establishment and no longer believed in the rule that counsel was not attacked for what his client may have done. Nor did he any longer believe that Due Process was being followed by the Federal Courts. The innumerable laws and rules were now more important than the

Constitution. Counsel learned that the government would do anything to convict tax protestors.

Counsel attempted to foster a normal law practice in Chicago and would not be involved with tax protestors. Counsel had decided to withdraw from fighting for the rights of "tax protestor" defendants because of the intimidation to him and his family. However, Counsel had a surprise waiting for him in Chicago.

Co-extant with the case going on in Fresno, Counsel had a Civil case in Chicago where he was representing a defendant who had been sued for millions of dollars in a complicated case that had been pending in the District Court in Chicago for many years. The lawsuit alleged that the Defendant had breached a Franchise Agreement. A counterclaim had been filed on behalf of the defendant, alleging that the Plaintiff was guilty of fraud. See Chapter 9 of Exhibit B, "The Inventor and the King of the Gypsies"

An appeal had been pending for sometime in the 7th Circuit. Almost to the day of Counsel's return to Chicago, the Court of Appeals issued a decision without an Order to Show Cause, oral argument or any hearing. The decision stated that Counsel had filed a "frivolous" appeal. See, *Maneikis v. Jordan*, 678 F.2d 728 (7th Cir. 1982)—two of the judges had been on the bench for less than a week and the other sitting by designation.

Since *Maneikis*, the 7th Circuit has shown more compassion toward litigants and their attorneys accused of violations of Rule 38 of FRAP. See, *Ins. Co. of the West v. County of McHenry*, 328 F. 3rd 926 (7th Cir. 2003) where conduct was not considered to be the kind of vexatious litigation that warranted sanctions. See, also, *Williams v. Seniff*, 342 F. 3rd 774 (7th Cir. 2003) and *Flaherty v. Gas Research Inst*., 31 F. 3rd 451 (7th Cir. 1994).

The 7th Circuit Court in *Maneikis*, did what is expected will happen here, if sanctions are imposed. It made a referral to the Illinois Registration and Disciplinary Commission. Carl Rolewick, the Administrator, already had problems with Counsel because of another story—not worth taking the time to state here—involving Rolewick's unsuccessful attempts to disbar, Syed Iqbal Jaffree. That story can be located at Chapter 10 of Exhibit B, entitled, "The Wacky Packy and His Holy War."

Rolewick, who Mr. Jafree called "Rolwicked", filed a Complaint against Counsel, alleging that Counsel had violated ethical rules by filing the "frivolous" *Maneikis* appeal and sought disbarment as a punishment. Counsel was distraught and sought the aid of the best attorney he could find.

Luckily, Albert Jenner, III (now deceased), founder of the Chicago Law Firm, Jenner and Block, and one of the most powerful lawyers in the country, agreed to represent Counsel, *pro bono*. Mr. Jenner told me "they went too far." Mr. Jenner suggested that Counsel consider moving out of Chicago to some more remote location because "the powers that be are angry over your handling of the Hampton case and other things and sooner or later they will get you."

Taking Mr. Jenner's advice, Counsel moved once again to a small summer resort town on the southwestern shore of Lake Michigan, hoping to escape the wrath of the establishment for revealing the government's murder of Fred Hampton. The move to Michigan occurred while the *Maneikis* disciplinary case was still pending in Chicago.

In Counsel's Application for admission to the Michigan Bar in 1985, he recited the pendency of the disciplinary case in Chicago. The investigator who spoke to Counsel stated that the case was "silly" and that it wouldn't hold up Counsel's licensure and it

didn't. Counsel intended to stay out of trouble and start his professional life all over, as a general practitioner, and to stay away from tax protestor cases.

The disciplinary case dragged on and finally a trial was held and evidence taken. See, Ex. E, the Decision of the Illinois Registration and Disciplinary Commission's Hearing Panel. The Panel found after an examination of the evidence that Counsel "… had some reasonable basis in seeking review in the court of appeals."

Having been cleared of wrongdoing in Illinois, Counsel also believes that any Michigan Hearing Board will, if Counsel is sanctioned, reach the same result. Counsel does, however, appreciated that at least this Court has given Counsel an opportunity to respond to the allegation of "frivolousness"—something the 7th Circuit did not do.

After receiving his license in Michigan in 1985, Counsel became a member of the CJA Panel in Grand Rapids, Michigan and successfully tried several cases in the Western District of Michigan. He had previously been a Member of the Federal Defender Panel for the Northern District of Illinois, of which Court he is a Certified Trial Attorney. He also became a member of the Van Buren County, Michigan indigent criminal defense panel and has been handling felony and misdemeanor cases for the last 24 years. He has never had any difficulties with any of the judges, prosecutors, or lawyers before whom he has practiced. He turned to a life as a "country lawyer" handling the general practice cases common to rural areas.

Now it is "Déjà vu all over again." Counsel has been a longtime friend of Irwin Schiff, dating back to the early 1980's when he read Schiff's comic book, "The Kingdom of Moltz". It explained in simple terms the "money game" that is called "inflation," which in reality is debasement of the currency. Schiff visited Counsel in Chicago and

gave him the book before Counel went to California and just after Schiff was released from prison for his first tax conviction. Counsel was impressed with Mr. Schiff's sincerity but warned him about continuing his quest to fight the IRS and the judicial system.

The courts view "tax protestors" as venal, evil people who just don't want to pay their "fair share" of taxes, as if there are no other taxes besides the income tax that we all pay. But they are not as they are characterized. They just feel a need to protest the tax and spend Big Government policy that is leading us down a very deep debt road. Most whom I have met are patriotic Americans. They may have chosen the wrong way to mark their protest but they are not evil and neither is Mr. Schiff.

In late June, 2007, Counsel received a call from Mr. Schiff asking him to take over his appeal. Schiff described his situation with this Court and that Mr. Nash had refused to file arguments that Schiff felt were absolutely necessary to his appeal. Counsel felt a great deal of compassion for Schiff because of the way he was treated by Judge Dawson and because of the 16 ½ year sentence he received. Counsel agreed to represent Schiff after he discharged Mr. Nash.

When Schiff recounted the story of his trial before Judge Dawson and after eventually reviewing the almost 6,000 pages of Transcript, counsel became convinced that Schiff had not received a fair trial. One of the reasons for this was that Judge Dawson did not allow Schiff to make any defense. So Counsel requested leave to file the Supplement.

Counsel determined in good faith that a reviewing court could not determine whether Schiff was denied the right to provide a defense without knowing what that

defense would have been. If the Court said Schiff was wrong, that would be the end of it. Counsel did not fear any threat of sanctions, having the mistaken belief that this Appellate Court would be more empathetic to Schiff than was Judge Dawson.

The fact that Mr. Nash felt intimidated to put forth Schiff's defense for fear of sanctions did not deter how Counsel determined Schiff's appeal should have been argued. Counsel in his professional opinion decided it was necessary to supplement Mr. Nash's arguments. Lawyers owe their duty to their client, if the justice system is to work in accordance with the Constitution.

French attorney, Zola, did not let fear for his life deter him from defending and eventually clearing Captain Dreyfus, having made what were called "frivolous" arguments by the French judicial system. America has always been a country where lawyers had their own power in the justice system and it is because they will not be deterred by threats of "sanctions" from fully representing their clients.

After 24 years of a relatively peaceful professional life, once again Counsel has his foot in the door and again has been attacked in an attempt to thwart him and all other defense attorneys from fully representing their clients. Mr. Schiff, is viewed as a threat and an enemy of the state by the governmental establishment, although he has never done or said anything that would incite violent conduct—no bombs, no guns, no arsenal.

His words about how he interprets the law are sufficiently threatening to put him on the "get him" list. Therefore, we have here an attack on an attorney who is completely representing Mr. Schiff—using the "sanction" game. Why not just throw Schiff's books in a bonfire, as did the Nazis? It would be much more effective than jailing him.

Counsel decided at the age of 13 to become a lawyer when he heard a story from a Jewish jeweler, who had been a lawyer in Germany in the 1930's. He told Counsel that the way that the National Socialist Party (the Nazis) gained power in Germany was to: 1) change the laws, 2) replace the judges who opposed them, 3) remove Jewish lawyers and 4) remove all other lawyer who opposed them. It was a story he has never forgotten and it has guided his opposition to the corporate/government monopoly that now exists in the America.

ANSWER AND OBJECTIONS TO SPECIFICS OF COUNSEL'S ALLEGED VIOLATION OF RULE 38 OF FRAP

Rule 38 FRAP reads as follows:

"If a court of appeals determines that an appeal (not a Brief) is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

The OTSC in pertinent part states that the Motion was denied:

"…as all of the new issues (they were not "new") contained in the Supplement are frivolous (citing cases) and that an Appeal (not a Brief) is considered frivolous in this circuit when the result is obvious, or the appellant's arguments of error are wholly without merit and there is no entitlement under the Federal Rules of Appellate Procedure to file two opening briefs." See, Ex. F.

The cases cited by the Court, as a reason for the issuance of the OTSC, are inapposite to this case. The *Becraft* Court in its Order to Show Cause against Mr. Becraft provided specifications of the particular points that were considered frivolous. The OTSC contains no such specifications but states that the Supplement in its 35-page entirety is frivolous.

This makes it very difficult to be responsive to the OTSC. Mr. Becraft was issued his OTSC after the Court had ruled against his client and he reargued the same arguments

in a Petition For Rehearing that had been rejected in the original adverse decision. Therefore, it was not the original "frivolous" arguments that caused the Court difficulty. It was the fact that Becraft re-raised them. Interestingly, the Court in *Becraft* offhandedly stated that it was concerned that the threat of sanctions:

> "…may chill a defense counsel's willingness to advance novel positions of first impression. Our constitutionally mandated adversary system of criminal justice cannot function properly unless defense counsel feels at liberty to press all claims that could conceivably invalidate his client's conviction. Indeed whether or not the prosecution's case is forced to survive the crucible of meaningful adversarial testing may often depend upon defense counsel's willingness and ability to press forward with a claim of first impression. See, *U.S. v. Cronic*, 466 U.S. 648, 656 (1984). Moreover, because of the significant liberty deprivation often at stake in a criminal prosecution, courts generally tolerate arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding." In a footnote 4, the Court stated that: "We wish to emphasize that our decision in this case should not be read as authority for imposing sanctions against a criminal defense counsel for a frivolous direct appeal following conviction…."

Apparently, the fear of a possible "chill" did not apply in *Becraft* because his arguments had already been adversely ruled on in the direct appeal and that he ignored the warning (counsel was given no such warning). Mr. Becraft advanced the same arguments again in the Petition for Rehearing. Moreover, the arguments advanced by Mr. Becraft are not the same as those contained in the Supplement. Moreover, unlike in Becraft, Counsel does not have a long history of asserting "frivolous" matters, except for the *Maneikis* set-up job over 20 years ago.

The *McConnell case* is likewise inapposite. McConnell filed a civil lawsuit in which he claimed damages for false arrests that occurred 4 to 15 years before he filed his Complaint. The lawsuit was filed far beyond applicable statutes of limitation. Frivolousness was determined pursuant to a civil statute (28 USC, Sec. 1912) that imposes sanctions against counsel who "multiplies the case unreasonably and

vexatiously." The 6th Amendment Right to Counsel does not apply to civil cases. Moreover, the Court stated that:

"The absence of any argument for reversal indicates that (the attorney) knew that the part of the appeal was frivolous." Further, "…at oral argument (the attorney) was given an opportunity to state reasons why sanctions should not be imposed against him individually, as well as against McConnell. The only reason he gave was that his client requested him to pursue the appeals."

In a recent decision in this Court, *U.S. v. Kayser*, ____F.3rd____ (Docket #06-50178, May 31, 2007) this Court reversed a conviction for tax evasion because one of the instructions tendered by the defense had been erroneously excluded. The issue of instructions (which were not "stock") is one of the issues raised in the Supplement and those instructions have never been confirmed as to their validity by any Court of Appeals. As stated in *Kayser*, quoting from *U.S. v. Washington*, 819 F.2d 221, 225 (9th Cir.1987):

"…a defendant is entitled to an instruction concerning his theory of the case if the theory is legally sound and evidence in the case makes it applicable, even if the evidence is weak, insufficient, inconsistent or of doubtful credibility….When as here, factual disputes are raised, this standard protects the defendant's right to have questions of evidentiary weight and credibility resolved by the jury (citing cases)."

The *Keyser* court cited, *U.S. v. Escobar De Bright*, 742 F. 2d 1196, 1201-02 (9th Cir. 1984), where it was held that an erroneous refusal to give defendant's proposed theory of defense instruction is reversible *per se*. Schiff was not allowed a theory of defense instruction and that is not a frivolous argument?

Another part of the OTSC issued *sua sponte* refers to Schiff's Reply Brief and what parts of the Reply Brief will be "considered" responsive to the Appellee's Brief. Counsel does not know what parts of the Reply he will be allowed to argue at the oral argument. This will have to be addressed at Oral Argument, and, therefore Counsel cannot properly respond to that part of the OTSC at this time.

Furthermore, as to the Reply Brief and its "responsiveness", when I called Mr.Detterman to request his position whether he objected to the oversized Reply Brief; he stated that he objected to the size. Of course, he had not yet received the Reply. Yet after receiving the Reply, he offered no objection, nor moved to strike any of the Arguments in the Reply as being non-responsive.

This Court's Order of March 23, 2007, a copy of which is attached as Ex. G, ruled on by Peter L. Shaw, Appellate Commissioner, recites in pertinent part, as follows:

"The Court has received appellant Schiff two pro se supplemental briefs. The briefs were also served on appellant's counsel of record, Michael B. Nash, Esq. Because appellant is represented by counsel, only counsel may file motions, and this court declines to entertain the briefs. Appellant is advised that the court rarely allows supplemental briefs and that counsel has the responsibility to decide which issues will be raised on appeal. (Citing case)."

After Mr. Schiff discharged Mr. Nash for not filing his Supplemental Briefs, he retained Counsel, to revise and file the Supplement, file the Reply Brief and present Oral Argument. Mr. Schiff's belief and the belief of Counsel, according to the March 23rd Order, was that supplemental briefs **are permitted** but rarely allowed. The Supplement to the Opening Brief was not "two briefs" as stated in the Order. It was the reconfigured supplemental briefs referred to in the Order of March 23rd that was not allowed because not submitted through counsel.

Counsel's has attached as Exhibits the following: 1) Motion for Leave to File Supplement to Schiff's Opening Brief, 2.) Opposition To Defendant Schiff's Motion For Leave to File Supplemental Opening Brief, and 3) Schiff's Reply to Government's Opposition For Leave To File Supplement To Schiff's Opening Brief. See, Group Ex. H.

All of the statements Counsel made in his Motion and Reply to Opposition are hereby reaffirmed. Counsel attempted to file the Supplement to show what Schiff's good

faith beliefs were—only one of the mandatory elements of a *Cheek* defense that has to be proven by the Government. Schiff's attempts to bring that defense before the jury was thwarted by the prosecutors and Judge Dawson. Counsel analyzed the trial with the belief that the jury was not allowed to hear Schiff's defense and, therefore, this Court could not properly assess Schiff's good faith beliefs without presenting the defense that would have been made, if it had been allowed.

The Supreme Court in *Bousley v. U.S.*, 523 U.S. 614 (1998) stands for the proposition that defense counsel on appeal are required by duty to assure that "all issues should be raised unless they have been squarely rejected by the United States Supreme Court", as quoted at Section 15-824 in "Defending A Federal Criminal Case," (Federal Defenders of San Diego, Inc., 2001). There are no issues known to counsel that have been raised in either the Supplement or the Reply Brief that has been squarely rejected by the Supreme Court and, therefore, the arguments in the Supplement cannot be considered frivolous or sanctionable.

Different Court's have different definitions of frivolous, as does the dictionary, and its vagueness should be considered by this Court in that respect. The 7th Circuit defines it thusly, as quoted in Ex. E. "A suit is frivolous (once again not a Brief) if it has no reasonable basis, whether in fact or law." *Tarkowski v. County of Lake*, 775 F.2d 173, 176 (7th Cir.1985).

Webster's New Collegiate Dictionary defines Frivolous, as: "of little weight or importance; (a) lacking in seriousness; and (b) marked by levity." There is nothing in the Supplement that is frivolous under either this Court's definition, which is as being "when

the result is obvious, or the appellant's arguments of error are wholly without merit." Nor is it frivolous under any of the other definitions.

"Frivolousness" has become a vague catchall used as a technique to intimidate, squelch and dissuade defense lawyers, representing "tax protestor" types. The Government in its Opposition to Motion for Leave to File Supplement to the Opening Brief did not request sanctions of Counsel, as they could have. So the OTSC was issued *sua sponte* and the Court is proposing to sanction counsel for alleged frivolous arguments in a Brief it did not allow to be filed.

Moreover, the OTSC mislabels Schiff's Motion that is entitled as a "Motion For Leave To File Supplement to Opening Brief"—stating that it was a "Supplemental Opening Brief". Furthermore, the statement in the OTSC that "there is no entitlement under the Federal Rules of Procedure to file two opening briefs" is a misinterpretation of what was done. It was not two Opening Briefs; it was a Supplement to the Opening Brief. that the Order of March 23rd stated could be filed, if presented by counsel

This Court is free, except for a rare reversal by the Supreme Court, to do whatever it wants. This Counsel has always taken his vows to uphold the Constitution seriously and threats of sanctions will never sway Counsel from doing what is right—sanction or no sanction. The truth rules for this Attorney, whether Courts like what is being argued or not. It is the Court's duty to resolve the case. Counsel's obligation is to his client. I owe respect to the Court and have always respected Courts that show him respect and show an understanding of the difficult job that defense counsel does.

What Counsel did in filing the Supplement was in the good faith belief that it was important and germane to his client's defense on appeal and it was further permitted by

the March 23rd Order, if submitted by counsel. The imposition of sanctions may cause reluctance by CJA attorneys to accept "tax protestor" clients.

Counsel has withstood personal attacks in the past and he will survive this attempt. All of the prosecutors, judges and attorneys in Van Buren County, Michigan where I reside will vouch for my integrity, honesty, fairness, and truthfulness.

Counsel has served as a CJA attorney both in Chicago and Grand Rapids. He now represents indigent defendants as a Court appointed attorney. His remuneration is minimal, as would be verified by the 3 IRS audits in the past 5 years, the results of which were that each time money was refunded to him. Counsel mostly survives on Social Security retirement, his wife's Social Security Disability, slim book sales, and, therefore cannot afford to pay any large sanction against him.

There is no case known to counsel that delineates the standard of proof that should be used by a court in determining a "frivolousness" issue. But there must be some standard of proof and counsel recommends that the Court use "clear and convincing" as the appropriate standard. That is the same standard that is used in disciplinary cases and is, therefore, appropriate here. Clear and convincing proof has not been shown that Counsel violated FRAP Rule 38.

Moreover, by preventing Counsel from presenting the defense that Judge Dawson thwarted Schiff from presenting at the trial restricts counsel from presenting that defense to this Court to decide on the propriety of Dawson's restrictive rulings. The Supplement concisely presented Schiff's defense.

Mr. Nash alleged only in an oblique way at the end of Schiff's Opening Brief that Dawson denied Schiff Due Process, trying to skirt the "sanction" tactic he knew might be

coming, if he made the necessary arguments contained in the Supplement. In this regard, although for the issues he argued he did a good job, ultimately, he did himself a disservice. He allowed the threat of sanctions to restrict him from arguing the totality of Schiff's defense.

Moreover, an offensive "frivolous" Brief does not justify an award where Appellant's principal argument is not frivolous. *UFCW, Locals 197 & 373 v. Alpha Beta Co*., 736 F.2nd 1371 (9th Cir. 1984). The Supplement and the Opening Brief when taken together certainly have principal arguments that must override what this Court considers "frivolous" in the Supplement.

Rule 38 FRAP provides, as permissible sanctions, a judgment for "damages" and "costs" to the Appellee. All Appellee did here was file a 3 page Opposition to the Motion—an opposition that was not accompanied by a motion for sanctions. Neither damages nor costs can be very great and it would be assumed that after judgment the government would file a Bill of Costs. Sanctions can only go to the offended party. *In re Kelly*, 841 F. 2nd 908 (9th Cir. 1988).

CONCLUSION

It is "déjà vu all over again", as Yogi Berra said, and it is 23 years from *In re Grand Jury Salas and Waxman*. Nothing has changed as the same tactics are being used on Counsel now. The DOJ is going back to its old style in order to squelch the Second Tax Protest. They will once again be successful at it, as they were the first time around.

Now this Court has opted out of reviewing what it was that Schiff attempted to argue in the trial court. Counsel views this as an Appellate denial of Due Process.

Counsel's honor has been attacked and he will always defend himself with great vigor. But he knows that Disciplinary Hearing Panels comprised of lawyers have a different appreciation for unwarranted attacks on counsel.

To sanction Counsel would be a blot on the American Justice System. Tax Protestors are not greedy people who do not want to pay their "fair share". They are ordinary Americans who feel that their country has become an Empire and they chose the tax protest as their way of protesting Big Government. Therefore, Counsel is once again considered to be such a threat to the state that he must be constrained from being allowed to fully represent his client.

When lawyers are restricted from fully defending a class of defendants, considered to be enemies of the State, one is reminded of the elimination of anti-nazi lawyers in Germany during the 1930's. Due Process and Right to Counsel have been eliminated.

In his 42 years of law practice, Counsel has always upheld the finest tradition of the American legal profession—a tradition sullied by this Court's witch attempt to eliminate lawyers defending those accused of opposing the income tax because it is an unfair and unjust law. The tactic of sanctioning arguments that courts do not want to hear started in the 1980's and it has again been carried over to the present.

Whether Counsel is sanctioned or not, he will request the Clerk after Oral Argument to strike his name from role of Attorneys in this Circuit. Counsel does not wish to practice before a Court that would threaten the imposition of sanctions on him under the circumstances of this case.

WHEREFORE, it is requested that the Order to Show Cause be vacated and dismissed.

Dated: October 10, 2007

Respectfully submitted,

_____

Sheldon R. Waxman
548 Phoenix Street
South Haven, Michigan 49090
269-207-6219

APPENDIX OF 54 PAGES

Exhibit A—Biography of Sheldon R. Waxman.

Exhibit B—Table of Contents, "In The Teeth Of The Wind.

Exhibit C—Senate Committee on Appropriations Hearings on The Internal Revenue Service Administrative Practice (1975).

Exhibit D—House Ways and Means Committee Hearings on The President's 1978 Tax Reduction and Reform Proposal (1978).

Exhibit E—Hearing Before The Illinois Registration and Disciplinary Commission (1986).

Exhibit F— Copy of the OTSC of September 25, 2007.

Exhibit G—Copy of Order of March 23, 2007.

Group Exhibit H—Motion For Leave To File Supplement To Schiff's Opening Brief, Opposition To Defendant Schiff's Motion For Leave To File Supplemental Opening Brief, Reply to Government's Opposition For Leave To File Supplement to Schiff's Opening Brief.