IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN – SOUTHERN DIVISION

Case No 1:20-CR-183-RJJ

THE UNITED STATES OF AMERICA,

Plaintiff,

HON. ROBERT J. JONKER

V

ADAM FOX, et al.

Defendants.

DEFENDANT ADAM FOX'S MEMORANDUM IN SUPPORT
MOTION FOR SPECIAL JURY INSTRUCTION
BASED ON *BRANDENBURG v OHIO*

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Now Comes Defendant Adam Fox, by and through Counsel, Christopher M. Gibbons of the Law Offices of Gibbons & Boer, and requests this Honorable Court to grant the Defendant a special jury instruction based on *Brandenburg v Ohio*, 395 U.S. 444 (1969) In support thereof the Defendant states the following:

GENERAL INTRODUCTION AND OVERVIEW

The five defendants in the present action, Adam Fox, Barry Croft, Kaleb Franks, Daniel Harris and Brandon Caserta are charged with conspiracy to kidnap the sitting Governor of Michigan, Gretchen Whitmer, in violation of 18 United States Code 1201(a). In addition, Adam Fox, Barry Croft and Daniel Harris are charged with conspiracy to obtain a weapon of mass destruction in violation of 18 United States Code 2332(a)(2)(A) and (C). Barry Croft and Daniel Harris are charged with possession of an unregistered firearm as an "Unregistered Destructive Device" under 26 United States Code 5845 5845(a)(8) and(f)(1)(A). Harris, individually, is charged with an additional firearms offense, i.e., possession of a shotgun with a barrel less than 16 inches in length. The Superseding Indictment advances that the charged activity was made all in furtherance of a collective agreement to kidnap the Governor of Michigan. (ECF No 172)

Documents, recordings, reports, and records produced by the Government in support of these charges, to date, exceed a terabyte of content, including but not limited to over 250 hours of CHS recordings, over 1100 hours of recorded surveillance and thousands of pages of social media content including but not limited to what appears to be over 400,000 direct electronic messages.

The evidence advanced against the Defendants consists of recordings of meetings, conversations during car travel, and telephone conversations. In addition there are social media posts, direct messages (both encrypted and un-encrypted), surveillance videos, and photographs. This massive body of recorded and written communication contains primarily speech that is

protected by the First Amendment. Certainly, it contains speech and exchanges of ideas that express "anti-government" and "anti-authoritarian" sentiments. It contains advocacy for actions both legal and illegal. In contains discussions of the Defendant's political and ideological convictions, and at times, it contains vulgar, offensive, or satirical communications reflecting these political views. This is all speech and association that is protected by the First Amendment.

The Government will assert that these records *also* contain speech that is "integral to criminal conduct" i.e. speech in furtherance of a *conspiracy* to kidnap and to acquire a weapon of mass destruction. Speech that is integral to the commission of a crime falls outside of the protections of the First Amendment. It is permissible for the Government to use evidence of speech alone as the basis of a conspiracy charge. [1]

Under traditional laws of conspiracy the Government must prove an agreement between all of the defendants to kidnap the Governor of Michigan and prove the existence of a "substantial overt act" made in furtherance of the alleged conspiracy. An overt act may itself be absolutely legal. *Yates v United States* 354 U.S. 298 (1957). In addition, the overt act need only be committed by one member of the alleged conspiracy to convict the other defendants of the conspiracy *Fiswick v United States*, 329 U.S. 211 (1946). In 1949, Supreme Court Justice Robert H. Jackson stated in a concurring opinion:

> The modern crime of conspiracy is so vague that it almost defies definition. Despite certain elementary and essential elements, it also, chameleon-like, takes on a

[1] It is undisputed that the Defendants did not engage in an attempted act of kidnapping. It is also undisputed that the Defendant's did not actually acquire or attempt to use or detonate a weapon of mass destruction in furtherance of an attempted act of kidnapping. The Superseding Indictment alleges that the Defendants conspired to commit these crimes. In contrast, the defendants in *United States v. Wright*, 747 F.3d 399 (6th Circuit 2014). were arrested after they placed inert explosives at the base of a bridge along Route 82 in Brecksville, Ohio and attempted to detonate them. They had purchased the inert "bomb" from an undercover FBI agent. Unlike the defendants in *Wright*, the evidence here does not include actions which unequivocally reveal the intention of the Defendants to commit the acts charged by the Government.

> special coloration from each of the many independent offenses on which it may be overlaid. It is always "predominantly mental in composition" because it consists primarily of a meeting of minds and an intent.

Krulewitch v United States, 336 U.S. 440 at 446 (1949)

This case presents a complex mixture of social and political speech and advocacy for action in the indefinite future (both legal and illegal) that is protected by the First Amendment. In addition, the Government alleges that portions of that speech are integral to a conspiracy that falls outside of the protections of the First Amendment. There is also the "chameleon-like" nature of the law of criminal conspiracy where otherwise legal conduct can become an "overt act." While the First Amendment does not shield the Defendants from prosecution it does demand the imposition of higher standards of scrutiny before guilt of a crime may fairly be determined. This is particularly true when the primary evidence of an alleged conspiracy is a mixture of political speech, social speech and association. Speech on public issues "occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection". *Connick v Meyers,* 461 U.S. 138, 145 (1987)

The protections of the First Amendment entitle Defendant Adam Fox to a jury instruction on the *Brandenburg* imminence standard, and the heightened *Strictissimi Juris* [2] standard for sufficiency of the evidence. *Brandenburg* requires the Government to show that the conduct and speech engaged in by Defendant Adam Fox would likely have resulted in imminent lawless action or violence. Speech and association that discuss or even favors a violation of the law at a remote time in the future falls under the protection of the First Amendment.

LAW AND ARGUMENT

BRANDENBURG OVERVIEW

[2] *Strictissimi Juris* will be addressed in a separate motion and memorandum in support filed contemporaneously with this motion.

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

After over two centuries of judicial refinement the United States Supreme Court in 2012 provided a practical summary of the acknowledged exceptions to the First Amendment:

> Instead, content-based restrictions on speech have been permitted, as a general matter, only when confined to the few "'historic and traditional categories (of expression) long familiar to the bar". Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called "fighting words," child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent, although a restriction under the last category is most difficult to sustain. These categories have a historical foundation in the Court's free speech tradition. The vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules.

United States v. Alvarez, 567 U.S. 709, 717-718 (2012) (*citations omitted*). It is within the tension between the right to freely associate and speak and the historically acknowledged exceptions to these rights that the present case against these five defendants exists. As a result, the Defendants are entitled to a greater of level of scrutiny to prevent the abridgment of their First Amendment rights. The cornerstone of this principle was outlined in *Brandenburg v Ohio* 395 U.S. 444 (1969).

In *Brandenburg* an Ohio leader of the Ku Klux Klan was convicted under a proscriptive Ohio statute for advocating violence against African Americans. The statements made by Brandenburg were to a small group of about 12 people and were filmed by a reporter. Brandenburg was encouraging "revengence" against African Americans and Jewish Americans at an indefinite future time. It is notable that Brandenburg's conviction was based on the Courts review of the film footage. Appearing in the film were other items entered into evidence by the State of Ohio

including a pistol, a rifle, a shot-gun, ammunition, and a red hood. *Id* at 445 The Supreme Court held that even advocacy directed at inciting the use of force or lawless action is protected by the First Amendment unless it is likely to cause *imminent* lawless action.

The *Brandenburg* court described speech protected by the First Amendment as "...speech which our Constitution has immunized from governmental control." (*id* at 448) A *Brandenburg* jury instruction is unusual because the factual circumstances under which it applies rarely end in a criminal indictment. *Brandenburg* arises when speech and association are the primary basis for a criminal or civil action against a defendant.[3] The *Brandenburg* decision represented a shift toward the expansion of the protections of the First Amendment after several decisions upholding the State's ability to proscribe political speech, for example. making advocacy for communism illegal.

In 2015, the Sixth Circuit Court of Appeals decided a complex First Amendment case, *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015). The Sixth Circuit held that even though the *Bible Believers* message was inherently offensive, it nevertheless was speech protected by the First Amendment. The Court held that the *Brandenburg* test precludes speech from being sanctioned unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) *the imminent use of violence or lawless action* is the likely result of his speech. (*id* at 246) (emphasis added)

***BRANDENBURG* AND CONSPIRACY**

In, 2011, *Brandenburg* was raised by defendants charged with conspiracy in the Sixth Circuit in *United States v Stone* (See Exhibit A *Magistrates Report and Recommendation on*

[3] *Brandenburg* is applied in civil cases. See *Nwanguma v. Trump*, 903 F.3d 604 (6th Cir. 2018).

Motion to Dismiss Jan 12, 2011). In that case, the Government indicted a group of nine individuals, primarily members of the Stone family, with seditious conspiracy and conspiracy to obtain and use a weapon of mass destruction. The defendants in *Stone* filed a motion to dismiss the indictment based on the argument that the indictment itself did not meet the *Brandenburg* standard that imminent lawless action would likely occur because of the statements and actions of the defendants.

In *Stone* the defendants were members of a self-styled Militia called "Hutaree." The Hutaree believed that all State and Federal Law enforcement officials were engaged in overreaching control and referred to them as "The Brotherhood". The Hutaree discussed in detail a plan to target and kill a local law enforcement officer, attack the officers who attended his funeral, and then engage in armed combat the Federal law enforcement. The Hutaree defendants were also accused of attempting to obtain a weapon of mass destruction, via email, in preparation for this event.

The Court in *Stone* initially held that *Brandenburg* did not apply stating that the defendants were charged with *conspiracy to use* violence, as opposed to *advocacy for the use of* violence. The *Stone* Court relied heavily on *United States v Rahman,* 189 F. 3rd 88 (2nd Cir., 1999) to support the conclusion that *Brandenburg* simply does not apply to a conspiracy case. This reasoning is flawed.

As a first step, the reasoning of the *Rahman* Court must be considered in the context that it was made. The *Brandenburg* standard was raised in a post-conviction facial challenge to the federal seditious conspiracy statute as unconstitutional. *Brandenburg* had not been raised by the *Rahman* defendants at trial and they did not request that the jury be instructed on the *Brandenburg* imminence standard. At the time of the *Rahmen* Court's opinion the defendants had already been convicted of a conspiracy that had resulted in multiple convictions. Convictions that included

conspiracy to murder the President of Egypt, attempted bombing (of the World Trade Center), two counts of attempted murder, one count of murder, two counts of assault on a Federal Officer, and three counts of the use of a firearm in relation to a crime of violence. *Id* at 103. The defendant's guilt of the conspiracy and the actual resulting violence and damage had been established. In short, the conspiracy had advanced far beyond speech and otherwise legal conduct. *Brandenburg* had absolutely no application under the facts before the *Rahman* Court because violence had, *in fact*, already occurred, so the question of imminence was moot.

The *Rahman* Court, however, held that one must *conspire* to use force or violence to violate the federal seditious conspiracy statute, as opposed to *advocate* for use of force or violence, which would be protected by the First Amendment. *id* at 115. Following this line of reasoning, other courts, like the Court in *Stone,* concluded that the *Brandenburg* standard simply does not apply to *any* allegation of conspiracy, because conspiracy and advocacy are two different types of expression[4] It is irrational to apply a subjective label like "advocacy" as the determining factor for whether speech is protected by the First Amendment or whether *Brandenburg* should be employed. For example, if John Smith stands up on a public street on a soapbox and shouts "Hey! Let's burn our draft cards!" he has engaged in "advocacy", so his speech protected by the First Amendment. However, if John Smith attends a back-yard barbeque and says to his friends, "Hey, Let's burn our draft cards" his speech if alleged to be conspiratorial is unprotected by the First Amendment. Both are political expressions, and outside of a conspiracy framework, both would be legal.

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[4] It is worth noting that the entire line of cases cited by the Magistrate in *Stone* involved conspiracies that had advanced well beyond mere speech including a Florida conspiracy actively selling botulism as a beauty product and a prosecution against the Gambino/Gotti crime organization in New York. See *United States v Livdahl* 459 F. Supp 2nd 1255 (SD Fla. 2005) and *United States v Dellacroce*, 625 F. Supp 1387 (E.D.N.Y 1986) respectively.

It is important to note that the Supreme Court has not confined the application of *Brandenburg* to "advocacy" only. In 1973 in *Hess v Indiana* the defendant was convicted of disorderly conduct after shouting "We will take the fucking street later" as the police were clearing a demonstration from a Chicago Street. The Supreme Court held that his speech was not advocacy, and still applied the *Brandenburg* standard, reversing the defendant's conviction for disorderly conduct.

> ...the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action. And since there was no evidence, or rational inference from the import of the language, that his words were intended to produce, and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had a tendency to lead to violence.

Hess v. Indiana, 414 U.S. 105, 108-109 (1973) [5]

In addition, it is both illogical and arbitrary to permit the indictment alone, which charges a conspiracy, to be the dispositive factor in whether *Brandenburg* applies. This is especially true when one understands that *Brandenburg* is not an avenue to constitutional immunity from prosecution but rather it calls for the imposition of a higher evidentiary standard to protect the lawful exercise of speech and association from erosion. This is the distinction that differentiates the proposed application of *Brandenburg* in this case from the treatment of *Brandenburg* in *Rahman* and its progeny.

[5] In addition, the *Hess* Court applied *Brandenburg* not to determine if a statute was unconstitutional on its face, but rather if the application of an otherwise constitutional statute (disorderly conduct) was unconstitutional as it was being applied. In this case the Defendant is not challenging as unconstitutional either of the statutes in question, rather he is raising the First Amendment implications of their application in this case.

The allegation of conspiracy alone should not strip away the protections of the First Amendment, particularly when the primary basis for the alleged conspiracy is speech with little or no other illegal conduct. It is of note that the Magistrate in *Stone,* indicated

> To be sure, if the government is unable to prove that defendants conspired to actually use force, *Brandenburg* would be applicable. And defendants are entitled to have the jury properly instructed that they may "not be convicted on the basis of [their] beliefs or the expression of them-even if those beliefs favored violence."

United States v. Stone, 2011(Exhibit A) Adam Fox asserts that the point to be drawn from *Brandenburg* is that its application is triggered by the presence of constitutionally protected activity. The line of inquiry should not be the label applied to the underlying criminal charge i.e. sedition, disorderly conduct, or conspiracy, rather it should be nature of the conduct alleged and whether it falls within the orbit of the First Amendment,

In 1951, Supreme Court Justice William O. Douglas recognized the inherent danger in the notion of an alleged conspiracy involving speech alone. In a dissenting opinion, when the Supreme Court upheld the convictions of individuals teaching and distributing communist texts under the Smith Act[6], Justice Douglas described treating speech as the equivalent of an overt act in a conspiracy as a "vice" and further stated:

> The doctrine of conspiracy has served divers and oppressive purposes and in its broad reach can be made to do great evil. But never until today has anyone seriously thought that the ancient law of conspiracy could constitutionally be used to turn speech into seditious conduct. Yet that is precisely what is suggested. I repeat that we deal here with speech alone, not with speech plus acts of sabotage or unlawful conduct. Not a single seditious act is charged in the indictment. To make a lawful speech unlawful because two men conceive it is to raise the law of conspiracy to appalling proportions.

Dennis v. United States, 341 U.S. 494, 584 (1951)

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[6] The Smith Act prohibited membership in the Communist Party and was found to be unconstitutional six years later in 1957.

When speech and association are the primary foundation of a criminal conspiracy charge, as they are in this case, the Jury should be instructed on the *Brandenburg* imminence standard. This requires the Government to prove that imminent violence or unlawful action is likely to occur because of the defendant's speech and conduct. This is particularly true when the charge is conspiracy standing alone without other violent action.

In this case it is undisputed that the defendants discussed political and social reform, and discontent with their respective State governments. The Governor of Michigan was a point of discussion because she was, and is, a political figure. Accepting the indictment, on its plain assertions as true, the Defendants are being accused of conspiring to commit a crime that was political in nature, designed to make a broader political statement. Because the Government alleges that the defendants' political convictions contributed to their motive in the Superseding Indictment (i.e. referencing their political movement and militia affiliations) and the Government's use of clandestine recordings of the Defendants speech, social media, and text messages as the evidentiary framework for the alleged criminal conspiracy, it should trigger the strictest levels of constitutional scrutiny.

The Government will certainly assert in response that the Defendants in this case did more than "just talk." The Government will assert that they also held meetings, participated in trainings, and engaged in the reconnaissance the Governor's vacation home from public roads. The Government will assert that these actions amounted to overt acts in furtherance of a criminal conspiracy. The Government has produced hundreds of hours of recorded communications, and hundreds of thousands of communications over social media and cell phones. This is all speech in one form or another. Taking the Superseding Indictment, on its face, this group of defendants is, at a minimum, engaging in a mixture of protected legal activity and allegedly unprotected illegal

activity. The Supreme Court describes this as a "bifarious" group, a group engaged in both legal and illegal purposes and conduct, and its activities fall within the shadow of the First Amendment. *United States v. Montour*, 944 F.2d 1019 (1991). Again, respect for the First Amendment requires the imposition of the highest, and most cautious legal standards when adducing the facts when determining guilt.

To be clear, Defendant Adam Fox does not contend that the application of *Brandenburg* prohibits the Government from charging a crime that has been committed through statements. Rather, Defendant Fox asserts that the application of *Brandenburg* raises the Government's burden to include evidence that establishes beyond a reasonable doubt that violence or criminal action was imminent.

The District Court in *Stone* ultimately dismissed the conspiracy charges against the Hutaree defendants on directed verdict following the trial. The District Court specifically noted:

> The Government has consistently maintained that this case is not about freedom of speech or association, but about the specific acts of violence alleged in the Indictment. The Court relied upon these representations in denying Defendants' pre-trial motions for a jury instruction on the *Brandenburg* case, and the heightened *strictissimi juris* standard for sufficiency of the evidence. However, much of the Government's evidence against Defendants at trial was in the form of speeches, primarily by Stone, Sr., who frequently made statements describing law enforcement as the enemy, discussing the killing of police officers, and the need to go to war.

United States v. Stone 2012 (See Exhibit B *Order Granting Judgments of Acquittal)*

While it must be inferred, it seems the District Court in *Stone* was indicating that if the Court had been aware that the evidence in the case was primarily speech, and not the alleged acts of violence, it would have granted the request for a jury instruction on the *Brandenburg* imminence standard. As it stood the Court in *Stone* found there was insufficient evidence submitted to support

the conspiracies alleged and the Court dismissed the seditious conspiracy and the weapons of mass destruction charges.

Like *Stone*, the evidence in this case consists almost exclusively of political and social speech between the Defendants and government actors[7], i.e. text messages, phone calls, and audio recordings of training events and conversations in vehicles. The fact that the primary basis of the conspiracy indictment is speech and otherwise legal conduct does not preclude the Government from advancing their case, however, it does place the matter entirely in the orbit of the First Amendment of the Constitution. As a result, the Defendants respective individual guilt or innocence should be determined only under the most rigorous constitutional standards.

RELIEF REQUESTED

Wherefore, Defendant Adam Dean Fox requests that this Honorable Court grant the Defendant a special jury instruction regarding the *Brandenburg* standard[8] and require that the Government prove that violent or unlawful action was imminent in order to support a conviction of guilt for conspiracy to commit kidnapping in violation of 18 USC 1201(a) and for conspiracy to use a weapon of mass destruction in violation of 18 USC 232a(2)(A) and (C).

Dated July 11, 2021

Respectfully Submitted,

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[7] Including, but is not limited to, at least six confidential human sources and two undercover employees working for the Government.

[8] Defendants attached proposed instruction was adapted from the US Department of Justice Criminal Tax Manual Jury Instruction No. 374

Exhibit A

United States v Fox
1:20-CR-183-RJJ
Hon. Robert J. Jonker

LexisNexis

User Name: Christopher Gibbons
Date and Time: Sunday, July 11, 2021 11:26:00 AM EDT
Job Number: 148057595

Document (1)

1. *United States v. Stone, 2011 U.S. Dist. LEXIS 20136*

Client/Matter: -None-
Search Terms: Stone Brandenburg conspiracy
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > 6th Circuit

United States v. Stone

United States District Court for the Eastern District of Michigan, Southern Division

January 12, 2011, Decided; January 12, 2011, Filed

CASE NO. 2:10-CR-20123

Reporter
2011 U.S. Dist. LEXIS 20136 *; 2011 WL 795104

UNITED STATES OF AMERICA, Plaintiff, v. DAVID BRIAN **STONE**, et al., Defendants.

Subsequent History: Adopted by, Motion denied by *United States v. Stone, 2011 U.S. Dist. LEXIS 20104 (E.D. Mich., Mar. 1, 2011)*

Prior History: *United States v. Stone, 2011 U.S. Dist. LEXIS 342 (E.D. Mich., Jan. 4, 2011)*

Core Terms

Indictment, **conspiracy**, conspired, charges, seditious, imminent, defendants', allegations, advocacy, motion to dismiss, violence, hinder, armed, oppose, indictment alleges, lawless, weapons, Counts, alleged **conspiracy**, **conspiracy** statute, **conspiracy** charge, overt act, RECOMMENDATION, fails, law enforcement officer, mass destruction, use force, accomplishing, as-applied, convicted

Counsel: **[*1]** For David Brian **Stone**, also known as, RD, also known as, Joe Stonewall, also known as, Captain Hutaree, Defendant (1): William W. Swor, LEAD ATTORNEY, Detroit, MI; Richard M. Helfrick, Federal Defender Office, Detroit, MI.

For David Brian **Stone**, Jr, also known as, Junior, Defendant (2): Federal Defender, LEAD ATTORNEY, Richard M. Helfrick, Todd Shanker, Federal Defender Office, Detroit, MI.

For Joshua Matthew **Stone**, also known as, Josh, Defendant (3): James C. Thomas, Plunkett Cooney, Detroit, MI.

For Tina Mae **Stone**, Defendant (4): Michael A. Rataj, Detroit, MI.

For Joshua John Clough, also known as, Azzurlin, also known as, Az, also known as, Mouse, also known as, Jason Z Charles, Defendant (5): Randall C. Roberts, LEAD ATTORNEY, Ann Arbor, MI.

For Michael David Meeks, also known as, Mikey, Defendant (6): Mark A. Satawa, LEAD ATTORNEY, Kirsch & Satawa, Southfield, MI.

For Thomas William Piatek, Defendant (7): Arthur J. Weiss, LEAD ATTORNEY, Farmington Hills, MI.

For Kristopher T Sickles, also known as, Pale Horse, Defendant (8): Henry M. Scharg, LEAD ATTORNEY, Northville, MI.

For Jacob J Ward, also known as, Jake, also known as, Guhighllo, also known as, Nate, Defendant (9): Christopher M. **[*2]** Seikaly, LEAD ATTORNEY, Southfiled, MI.

For United States of America, Plaintiff: Jonathan Tukel, LEAD ATTORNEY, Christopher Graveline, United States Attorney's Office, Detroit, MI; Joseph Falvey, Julie A. Beck, Ronald W. Waterstreet, Sheldon N. Light, LEAD ATTORNEYS, U.S. Attorney's Office, Detroit, MI.

Judges: PAUL J. KOMIVES, UNITED STATES MAGISTRATE JUDGE. JUDGE VICTORIA A. ROBERTS.

Opinion by: PAUL J. KOMIVES

Opinion

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION TO DISMISS (docket #198, joined in by docket #200, 201, 203, 205, 207, 210, 212, and 214)

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I. RECOMMENDATION: The Court should deny the motion of defendant David **Stone**, Jr., joined in by the remaining defendants, to dismiss the Indictment (docket #198, joined in by docket #200, 201, 203, 205, 207, 210,

212, and 214).

II. REPORT:

A. *Background*

On March 29, 2010, the Grand Jury returned a multi-count **[*3]** indictment against nine defendants: David Brian ***Stone***, David Brian ***Stone***, Jr., Joshua Matthew ***Stone***, Tina Mae ***Stone***, Joshua John Clough, Michael David Meeks, Thomas William Piatek, Kristopher T. Sickles, and Jacob J. Ward. The Grand Jury returned a First Superseding Indictment on June 2, 2010. In general, the Indictment alleges that defendants are members of the "HUTAREE," characterized as an anti-government organization. Count One of the Indictment charges all nine defendants with seditious ***conspiracy*** in violation of *18 U.S.C. § 2384*. Count Two charges all nine defendants with ***conspiracy*** to use a weapon of mass destruction in violation of *18 U.S.C. § 2332a(a)(2)*. Count Three charges defendants David Brian ***Stone*** and David Brian ***Stone***, Jr., with teaching or demonstrating the use of explosive materials in violation of *18 U.S.C. § 842(p)(2)*. Counts Four and Five charge all nine defendants with carrying, using, or possessing a firearm during and in relation to a crime of violence in violation of *18 U.S.C. § 924(c)(1)*. Counts Six and Seven charge two additional *§ 924(c)* counts against all defendants except for defendants Tina Mae ***Stone*** and Piatek. Counts Eight and Nine charge defendant **[*4]** David Brian ***Stone*** with possession of a machine gun in violation of *18 U.S.C. §§ 922(o)*, *924(a)(2)*. Counts Ten and Eleven charge the same against defendant Joshua ***Stone***, and Count Twelve charges the same against defendant Clough. Finally, Counts Thirteen through Fifteen charge defendants David Brian ***Stone***, David Brian ***Stone***, Jr., and Joshua ***Stone*** with possession of an unregistered firearm in violation of *26 U.S.C. §§ 5841*, *5861(d)*, *5871*.

The focus of the instant motion is the seditious ***conspiracy*** charge alleged in Count One. In this count, the government charges that defendants "knowingly conspired, confederated, and agreed with each other and with other persons known and unknown to the Grand Jury, to oppose by force the authority of the Government of the United States, and to prevent, hinder, and delay by force the execution of United States law, including federal laws regarding the sale, purchase, receipt, possession, and use of firearms and destructive devices." 1st Superceding Indictment, Count One, ¶ 2 [hereinafter "Indictment"]. The Indictment then alleges the means and methods used by defendants to further the objects of the ***conspiracy***. Specifically, the Indictment alleges that **[*5]** "[t]he HUTAREE's general plan was to commit some violent act to draw the attention of law enforcement or government officials, in order to prompt a response by law enforcement," such as by killing a law enforcement officer. *Id.*, ¶ 3. The Indictment further alleges that once such a law enforcement response had been provoked, "HUTAREE members would retreat to one of several 'rally points' where the HUTAREE would conduct operations against the government and be prepared to defend in depth with trip-wired and command detonated anti-personnel IEDs [(improvised explosive devices)], ambushes, and prepared fighting positions." *Id.*, ¶ 4. Such a confrontation, the Hutaree believed, "would be a catalyst for a more widespread uprising against the United States Government." *Id.* The Indictment alleges that the "conspirators planned and trained for armed conflict against local, state, and federal law enforcement" through numerous means, including acquiring weapons, engaging in military-style training, planning the execution of a law enforcement officer, obtaining information about and materials for the construction of IEDs, engaging in reconnaissance exercises and planning for the killing of anyone **[*6]** who happened upon their exercises, and attempting to initiate a Hutaree protocol to engage law enforcement in an armed conflict following the arrest of several Hutaree members. *Id.*, ¶ 5. The weapons of mass destruction, explosive device, and *§ 924(c)(1)* charges alleged in Counts Two through Seven are derivative of the seditious ***conspiracy*** count alleged in Count One.

On September 21, 2010, defendant David Brian ***Stone*** filed this motion to dismiss Counts One through Seven of the First Superseding Indictment. The motion has been joined in by all defendants. Defendants argue that the government's allegations fail to set forth a valid charge of seditious ***conspiracy*** or ***conspiracy*** to obtain a weapon of mass destruction, and that the application of the seditious ***conspiracy*** statute to these defendants is unconstitutional under the *Free Speech Clause of the First Amendment*. The government filed a response to the motion on November 5, 2010. The government argues that the First Superceding Indictment is facially valid and that defendants' arguments go to the factual sufficiency of the charges, a matter inappropriate for resolution on a pretrial motion to dismiss. Defendants filed a reply on November **[*7]** 19, 2010. For the reasons that follow, the Court should deny defendants' motion to dismiss. [1]

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[1] The parties have thoroughly briefed the issues before the

B. *Legal Standard*

Rule 12(b) provides, in relevant part, that "[d]efenses and objections based on defects in the indictment or information" must be raised prior to trial through a motion to dismiss. Fed. R. Crim. P. 12(b)(2). However, it is well established that "[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits." Costello v. United States 350 U.S. 359, 363, 76 S. Ct. 406, 100 L. Ed. 397, 1956-1 C.B. 639 (1956). A court may not pre-try the case, and an indictment is not subject to dismissal on the basis that the evidence supporting the indictment is insufficient or on the basis that the government will not be able to prove its case at trial. *See* United States v. Powell, 823 F.2d 996, 1000-01 (6th Cir. 1987). **[*8]** "Generally, the strength or weakness of the government's case, or the sufficiency of the government's evidence to support a charge, may not be challenged by a pretrial motion." United States v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994). "An indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true." Id. (citing United States v. Sampson, 371 U.S. 75, 78-79, 83 S. Ct. 173, 9 L. Ed. 2d 136 (1962).

"'An indictment is generally deemed sufficient "if it states the offense using the words of the statute itself, as long as the statute fully and unambiguously states all the elements of the offense.'" United States v. Middleton, 246 F.3d 825, 841 (6th Cir. 2001) (quoting United States v. Monus, 128 F.3d 376, 388 (6th Cir. 1997). In determining whether the indictment is sufficient, a court considers "first, whether the indictment 'contains the elements of the offense charged and fairly informs a defendant of the charges against which he must defend, and second, [whether it] enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense.'" Id. at 841-42 (quoting Monus, 128 F.3d at 388) (alteration in original); *see also*, **[*9]** United States v. Schaffer, 586 F.3d 414, 422 (6th Cir. 2009). More specifically, "[a] ***conspiracy*** indictment is valid if it embraces the essential elements of the ***conspiracy*** charged, adequately apprises the defendant of the charges so that the defendant may intelligently prepare his or her defense and provides protection against future prosecutions." United States v. Craft, 105 F.3d 1123, 1127 (6th Cir. 1997).

C. *Analysis*

As the above standard indicates, the question before the Court is limited. The question is not whether the government will be able to prove a valid case at trial. The only question before the Court is whether the allegations in the Indictment, taken as true, are sufficient to plead the crimes charged and apprise the defendants of the nature of the charges. As restated in their reply, defendants argue that the seditious ***conspiracy*** charge fails on three grounds: "The acts of force that comprise the plan alleged in the Indictment as the means to accomplish the charged objective: (1) do not involve force against the United States government; (2) do not involve the use of force 'while the United States government was [to be] actually engaged in an attempt' to assert its authority **[*10]** or enforce its laws; and (3) do not purport to involve 'imminent lawless action' against the United States." Reply, at 1-2. The first two arguments go to the sufficiency of the Indictment under the seditious ***conspiracy*** statute, while the third raises a First Amendment challenge to the charge.

1. *Sufficiency of the Indictment*

a. Seditious ***Conspiracy*** *Charge Under § 2384*

The seditious ***conspiracy*** statute provides, in its entirety:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 2384. The elements of the offense, as charged in the Indictment, are simply (1) a ***conspiracy***, (2) to either (a) oppose by force the authority of the United States government or (b) prevent, **[*11]** hinder, or delay the execution of any law of the United States. *See* United States v. Khan, 461 F.3d 477, 487 (4th Cir. 2006). Defendants do not argue that the Indictment fails to charge the ***conspiracy*** element; rather, they contend

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Court, and this recommendation on defendants' dispositive motion is subject to *de novo* review by the District Judge, *see* 28 U.S.C. § 636(b)(1). Thus, as is my usual practice in cases of dispositive motions referred to me, I submit this Report on the basis of the parties' briefs.

that the Indictment fails to properly allege that they conspired either to oppose by force the authority of the United States government or to prevent, hinder, or delay the execution of any laws of the United States.

Defendants first argue that although the Indictment alleges generally "a ***conspiracy*** to oppose by force the United States government," the actual "manner and means describe a local plot, involving a local officer, and a local battleground." Reply, at 2. Because "[s]edition against the United States is not a local offense," *Pennsylvania v. Nelson, 350 U.S. 497, 505, 76 S. Ct. 477, 100 L. Ed. 640 (1956)*, defendants argue, the Indictment fails to allege a violation of *§ 2384*. [2] The Court should disagree. It is true that the initial step in defendants' alleged plan was the assassination of a local law enforcement official. This first step, however, is alleged to have been a means toward the group's ultimate goal of provoking an armed confrontation with local and federal law enforcement **[*12]** officials. And there can be no doubt that conspiring to deliberately provoke an armed conflict with federal law enforcement officials constitutes a ***conspiracy*** to "oppose by force the authority" of the United States and to "by force . . . prevent, hinder, or delay the execution of any law of the United States." *18 U.S.C. § 2384*. It may be that the evidence at trial will establish nothing more than a local plot against local law enforcement officials, but the indictment alleges more than this. "Of course, none of these charges have been established by evidence, but at this state of the proceedings the indictment must be tested by its sufficiency to charge an offense." *Sampson, 371 U.S. at 78-79*.

For this reason, *Baldwin v. Franks, 120 U.S. 678, 7 S. Ct. 656, 30 L. Ed. 766 (1887)*, and *Anderson v. United States, 273 F. 20 (8th Cir. 1921)*, **[*14]** upon which defendants rely, are inapposite. [3] In *Baldwin*, the defendant was charged with conspiring to deprive "a class of Chinese aliens" of various rights and privileges, and "by force and arms" driving them from their residences. *Baldwin, 120 U.S. at 680-81*. Turning first to the prong of the sedition statute which prohibits ***conspiracy*** to oppose by force the authority of the United States, the Court explained that this provision

> implies force against the government as a government. To constitute an offense under [this] clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of the law is not enough; there must be an attempt to prevent the actual exercise of authority.

Id. at 693. The defendant had not violated this clause, the Court held, because his "force was exerted in opposition to a class of persons who had the right to look to the government for protection against such wrongs, not in opposition to the government while actually engaged in an attempt to afford that protection." *Id.* Turning to the provision of the statute prohibiting ***conspiracies*** to prevent, **[*15]** delay, or hinder the execution of the laws, the Court explained that this "means something more than setting the laws themselves at defiance. There must be a forcible resistance of the authority of the United States while endeavoring to carry the laws into execution." *Id.* Again, the Court found that the statute was not satisfied because the defendant's ***conspiracy*** was "for the ill

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[2] The modern seditious ***conspiracy*** statute set forth in *§ 2384* was first enacted at the onset of the Civil War. Similar to *§ 2384*, that statute made it a crime, *inter alia*, for "two or more persons" to "conspire together to overthrow, or to put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the **[*13]** United States." ***12 Stat. 284 (July 31, 1861)***. The statute was expanded, but retained this language, in an effort to enforce the *Fourteenth Amendment* during Reconstruction. *See 17 Stat. 13 (Apr. 20, 1871)*. In 1909, as part of a general reorganization of the criminal code, the prior statute was repealed and replaced with the language of the rule as it stands today in *§ 2384*, with the exception of the applicable penalty. *See* 35 Stat. 1089, 1153 (1909), codified at *18 U.S.C. § 6 (1940 ed.)*. Finally, as part of another restyling and reorganization of Title 18, the provision was moved without alteration to its current location in *§ 2384*. *See* Pub. L. No. 80-772, 62 Stat. 808 (June 25, 1948). Thus, with the exception of two amendments to the penalty provision, *see* Pub. L. No. 84-766, 70 Stat. 623 (July 24, 1956); Pub. L. No. 103-322, § 330001(N), 108 Stat. 2148 (Sept. 13, 1994), *§ 2384* has remained unchanged since its codification in Title 18 in 1909. Because there is a dearth of case law applying *§ 2384*, both defendants and the government rely on cases applying the predecessor statutes, which contained the identical language.

[3] In their argument with respect to the sufficiency of the Indictment, defendants also rely on *Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937)*. That case did not involve the federal seditious ***conspiracy*** statute, but rather a state law, and the issue in that case was whether the defendants' convictions could be sustained under the *First Amendment*. *Herndon* is therefore addressed below, in connection with defendants' *First Amendment* argument.

treatment itself, and not for hindering or delaying the United States in the execution of their measures to prevent it. His force was exerted against the Chinese people, and not against the government in its efforts to protect them." *Id. at 693-94*.

Here, unlike *Baldwin*, the government has alleged a ***conspiracy*** to oppose by force the United States "government as a government" or delay, **[*16]** hinder, or prevent the "authority of the United States while endeavoring to carry the laws into execution." The government does not allege that defendants merely conspired to violate the law or "set□ the laws themselves at defiance." If the Indictment alleged only that defendants conspired to murder a local law enforcement official, this case would be akin to *Baldwin.* But the Indictment here alleges more, namely, that this was merely a first step designed to provoke a confrontation with local and federal law enforcement officials for the very purpose of engaging them in an armed conflict and preventing the execution of federal law. *See Baldwin, 120 U.S. at 693-94* ("[I]f in [the government's] efforts to carry the treaty into effect they had been forcibly opposed by persons who had conspired for that purpose, a state of things contemplated by the statute would have arisen."). If the evidence at trial does not establish this second goal of the ***conspiracy***, then *Baldwin* will require that defendants be acquitted. At this stage of the proceedings, however, the Indictment alleges facts beyond those in *Baldwin* which, if proved at trial, will establish "a state of things contemplated by the **[*17]** statute."

For the same reason *Anderson, supra*, is inapposite. In *Anderson*, the defendants were charged with and convicted of, *inter alia*, seditious ***conspiracy*** for conspiring to prevent, hinder, or delay the execution of various laws, including the Congressional declaration of war on Germany and related laws relating to conscription. *See Anderson, 273 F. at 22-24*. The indictment charged that the conspirators: prepared and circulated a newspaper calling for strikes and an overthrow of the capitalist system; distributed and read a book advocating the temporary disabling of machinery; distributed various other books calling for sabotage or an overthrow of the capitalist system; circulated a newspaper article critical of the war and advising that any members of the organization joining the military forces would be expelled from the organization; and published a song critical of military enlistment. *See id. at 24-25*. The court, relying on *Baldwin*, explained that to be sufficient the indictment must "charge that the purpose of the ***conspiracy*** was the exertion of force against those charged with the duty of executing the law of the United States, or the language used in the count must be such **[*18]** that from it the inference reasonably follows that that was the purpose and object of the ***conspiracy***[.]" *Id. at 26*. Applying this rule, the court found the indictment insufficient, because as alleged the "force was to be exerted, not against those whose duty it should be to execute the laws, and while attempting to do so, but its application was to be made against industrial and commercial interests by lawless acts during strikes for the purpose of accomplishing alleged socialistic ends in the overthrow and destruction of the present civil compact." *Id. at 26-27*. As explained above, however, unlike in *Anderson* the indictment here charges that defendants conspired to provoke a confrontation with federal officials and use force against them when they attempted to enforce federal law. Thus *Anderson*, like *Baldwin*, is inapplicable here, at least at this stage of the proceedings.

In short, the question before the Court is not whether the government must prove that defendants conspired to oppose by force the United States government as the government, or to prevent, delay, or hinder the execution of federal laws by force. *Baldwin* makes clear that it must do so. Nor is the question whether **[*19]** the government will ultimately be able to prove its case at trial. The only question before the Court is whether the Superceding Indictment, on its face and taken as true, alleges that the defendants committed a ***conspiracy*** as defined by *§ 2384*. For the reasons explained above, the Court should conclude that the Superceding Indictment does so. *See Reeder v. United States, 262 F. 36 (8th Cir. 1919)* (indictment sufficient under seditious ***conspiracy*** statute which alleged that the defendants conspired "by force to procure arms and ammunition, and to arm themselves with the same, and while armed to offer individual and combined resistance to the authority of the United States and to the enforcement an execution of said act of Congress, proclamation, and regulations . . . ."); *Wells v. United States, 257 F. 605 (9th Cir. 1919)*.

*b. **Conspiracy** to Use a Weapon of Mass Destruction Under § 2332a*

Defendants' challenge to the weapons of mass destruction charge is, for the most part, derivative of their challenge to the seditious ***conspiracy*** charge. Defendants do also argue with respect to this charge

that "there is no allegation that any defendants ever accepted, received, or possessed a fake or real **[*20]** WMD, IED, or EFP." Def.s' Br., at 18. Noting that the government alleges only that defendant David **Stone**, Sr., solicited four IEDs from an undercover agent, and that there is "no allegation that any other defendant knew about this," defendants argue that the Indictment fails to allege a **conspiracy**. However, defendants fail to explain why the indictment must allege that they knew about defendant David **Stone**, Sr.'s activities. All that is required is that they agreed to possess WMDs. To be sure, if the only evidence that the government can present at trial is that David **Stone**, Sr. solicited WMD material without the knowledge of the other defendants, the proof would be insufficient. However, the Indictment alleges an agreement by defendants, and thus properly charges a **conspiracy** regardless of whether the other alleged conspirators knew of David **Stone**, Sr.'s activities. Further, "'it is well settled that in an indictment for **conspiracy** to commit an offense in which the **conspiracy** is the gist of the crime, it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the **conspiracy**.'" *United States v. Abdi, 498 F. Supp. 2d 1048, 1056 (S.D. Ohio 2007)* **[*21]** (quoting *United States v. Branan, 457 F.2d 1062, 1064 (6th Cir. 1972)*).

Defendants also argues that the Indictment is insufficient because it "fails to allege an overt act in furtherance of the **conspiracy**, such as actually acquiring real or fake WMDS, as required by law." Def.s' Br., at 19. The Indictment does allege, however, that defendant David **Stone**, Sr., attempted to acquire WMDs or WMD material. Even assuming that the government is required to show an overt act to prove a **conspiracy** to violate *§ 2332a*, that requirement is not onerous. The government need show only that "a member of the **conspiracy** did some act in furtherance of the alleged **conspiracy**." *United States v. Stone, 323 F. Supp. 2d 886, 890 (E.D. Tenn. 2004)*. "The overt act . . . may be that of only a single one of the conspirators and need not itself be a crime," *Braverman v. United States, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L. Ed. 23, 1942 C.B. 319 (1942)*, and "it suffices if . . . the act further[s] the criminal venture." *United States v. Alvarez, 610 F.2d 1250, 1255 n.5 (5th Cir. 1980)*. In short, "[a]n overt act is *any* act performed by *any* conspirator for the purpose of accomplishing the objectives of the **conspiracy**." *United States v. McKee, 506 F.3d 225, 243 (3d Cir. 2007)* **[*22]** (emphasis added). Here, the Indictment's allegations that David **Stone**, Sr. attempted to obtain WMD material allege an act, performed by one of the alleged conspirators, for purpose of accomplishing the objectives of the **conspiracy**, to wit, the use of WMDs. Defendants have cited, and I have found, no cases suggesting that this conduct cannot constitute an overt act merely because defendant David **Stone**, Sr. was unsuccessful in his efforts or because defendants did not ever actually possess a WMD or WMD material. *See United States v. Blackwell, 954 F. Supp. 944, 958 (D.N.J. 1997)* ("As long as the act follows and tends toward the accomplishment of the plan or scheme and is knowingly done in furtherance of some object or purpose of the **conspiracy** charged in the indictment, it satisfies the overt act requirement."). Accordingly, the Court should deny defendants' motion to dismiss on this basis.

2. *First Amendment*

Defendants also contend that the seditious **conspiracy** statute violates the *First Amendment* as applied to the circumstances alleged in the indictment. In support of this argument, defendants rely primarily on **Brandenburg** *v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)* (per curiam). In that case the defendant, **[*23]** a leader of a Ku Klux Klan group, was convicted under an Ohio statute for advocating the duty and necessity of crime, violence, or sabotage as a means of accomplishing political reform. *See id. at 444-45*. The Court found the conviction improper under the *First Amendment*, holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id. at 447*. Relying on **Brandenburg**, defendants argue that the indictment fails to allege that the defendants' **conspiracy** incited or was likely to produce *imminent* lawless action. The government responds that **Brandenburg** is inapplicable here, because the Indictment does not allege mere advocacy, but an actual **conspiracy** to use force. The Court should conclude that **Brandenburg** is inapplicable here. If the Court rejects this recommendation, the Court should nevertheless conclude that **Brandenburg** does not entitle defendants' to dismissal at this stage of the proceedings.

a. **Brandenburg** *is Inapplicable*

With respect to the **[*24]** applicability of **Brandenburg**, the government has the better argument. In *United*

States v. Rahman, 189 F.3d 88 (2d Cir. 1999), the court considered a facial challenge to the constitutionality of § 2384. The court found **Brandenburg** inapposite, noting that unlike the state statute in that case, "[t]o be convicted under Section 2384, one must conspire to *use* force, not just to *advocate* the use of force." Id. at 115. The court also found support for this conclusion "in a number of the Supreme Court's more recent First Amendment decisions," which "make clear that a line exists between expressions of belief, which are protected by the First Amendment, and threatened or actual uses of force, which are not." Id. (citing Wisconsin v. Mitchell, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 388, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982); Watts v. United States, 394 U.S. 705, 707, 89 S. Ct. 1399, 22 L. Ed. 2d 664 (1969)). Defendants argue that "[a]ny comparison between the instant case and *Rahman* is far-fetched," Reply, at 7, because *Rahman* was a facial challenge and there was no dispute regarding imminence. Imminence was, however, an issue, because the court was considering a facial **[*25]** challenge to the statute. If an imminence requirement applied, the Court would not have been able to uphold the facial validity of the statute, regardless of the particular circumstances of the crime at issue there. And in any event, even if the result is not directly controlling, the reasoning of the Second Circuit is equally applicable here: the point of **Brandenburg** is that the government may not constitutionally proscribe mere advocacy without a showing of imminence, but **Brandenburg** says nothing about speech which goes beyond mere advocacy and constitutes an actual **conspiracy** to use force. As the Second Circuit explained:

> Numerous crimes under the federal criminal code are, or can be, committed by speech alone. . . . Various [statutes] criminalize **conspiracies** of specified objectives. . . . All of these offenses are characteristically committed through speech. Notwithstanding that political speech and religious exercise are among the activities most jealously guarded by the First Amendment, one is not immunized from prosecution for such speech-based offenses merely because one commits them through the medium of political speech or religious preaching. Of course, courts must be vigilant **[*26]** to insure that prosecutions are not improperly based on the mere expression of unpopular ideas. But if the evidence shows that the speeches crossed the line into criminal solicitation, procurement of criminal activity, or **conspiracy** to violate the laws, the prosecution is permissible.

Rahman, 189 F.3d at 117.

Rahman, furthermore, does not stand alone. A number of courts have recognized this distinction between mere advocacy or **conspiracy** to advocate, which is subject to the **Brandenburg** test, and **conspiracy** to engage in otherwise unlawful, unprotected conduct, which is not subject to the **Brandenburg** test. *See, e.g.*, United States v. Bell, 414 F.3d 474, 482 n.8 (3d Cir. 2005) (emphasis added) ("**Brandenburg** clearly does not apply to the kind of unprotected or unlawful speech or speech-acts (e.g. aiding and abetting, extortion, criminal solicitation, **conspiracy**, harassment, or fighting words) at issue . . . here."); *United States v. Livdahl, 459 F. Supp. 2d 1255, 1268 (S.D. Fla. 2005)* (**Brandenburg** inapplicable to charge of **conspiracy** to commit mail and wire fraud by introducing misbranded drugs into the market, because "[u]nlike the appellant in **Brandenburg**, defendant is *not* charged [with] **[*27]** mere advocacy of unlawful conduct."); United States v. Sattar, 395 F. Supp. 2d 79, 102 (S.D.N.Y. 2005) ("**Brandenburg** and its progeny are not applicable here, where Abdel Rahman was found to have participated in the Count Two **conspiracy** to murder, rather than having merely engaged in advocacy. **Brandenburg** analysis does not apply to unlawful speech-acts such as **conspiracy** or aiding and abetting."), *aff'd*, 590 F.3d 93 (2d Cir. 2009); United States v. Dellacroce, 625 F. Supp. 1387, 1391 (E.D.N.Y. 1986) ("Nor does Count One charge, in alleged violation of the First Amendment, simply an agreement to advocate or to assemble to advocate crimes. **Brandenburg** . . . is thus not pertinent. The charge is that defendants conspired to do something against the law, that is, to participate in the conduct of an enterprise through a pattern of racketeering activity.").

In short, in a case such as this "it is not the 'speech that is made criminal, but rather the agreement, and whether the overt act is constitutionally protected speech would be irrelevant." United States ex rel. Epton v. Nenna, 446 F.2d 363, 368 (2d Cir. 1971) (citing Yates v. United States, 354 U.S. 298, 77 S. Ct. 1064, 1 L. Ed. 2d 1356 (1957)); *see also*, United States v. Rahman, No. S3 93 Cr. 181, 1993 U.S. Dist. LEXIS 14362, 1993 WL 410449, at *6 (S.D.N.Y. Oct. 13, 1993) **[*28]** (explaining, in the context of counsel's request for appointment under the CJA, that under the seditious **conspiracy** statute "it is not the motive that is the

gravamen of the crime; it is the means. Which is to say, it is not advocacy that is sought to be punished here; it is the use of force.").

Defendants argue that, notwithstanding the Second Circuit's opinion in *Rahman*, "prior to Rahman's trial for seditious ***conspiracy***, the district judge specifically held that the ***Brandenburg*** test would indeed have to be met to avoid dismissal of charges in the indictment." Def.s' Br., at 6-7 (citing *United States v. Rahman, No. S3 93 Cr. 181, 1994 U.S. Dist. LEXIS 10151, 1994 WL 388927, at *1-*2 (S.D.N.Y. July 22, 1994)*). Even if such a holding could survive the Second Circuit's reasoning on appeal in *Rahman*, it is not the case that Judge Mukasey "specifically held that the ***Brandenburg*** test would indeed have to be met to avoid dismissal of charges in the indictment." In denying the defendants' motions to dismiss, Judge Mukasey did cite ***Brandenburg*** for the proposition "that speech may sound constitutionally protected does not mean that it is, if that **[*29]** speech was intended and likely to generate imminent lawless action by others." *1994 U.S. Dist. LEXIS 10151, [WL] at *2*. This was made only as a "[f]urther" reason for rejecting the defendants' motion, after the principal one recognized by Judge Mukasey-namely, that the speech at issue was simply not protected by the *First Amendment*. As Judge Mukasey observed, "that speech-even speech that includes reference to religion-may play a part in the commission of a crime does not insulate such crime from prosecution. '[S]peech is not protected by the *First Amendment* when it is the very vehicle of the crime itself.'" *1994 U.S. Dist. LEXIS 10151, [WL] at *1* (quoting *United States v. Rowlee, 899 F.2d 1275, 1278 (2d Cir. 1990)* (internal quotation omitted) (giving the federal ***conspiracy*** statutes as an example)). Because "[t]he gist of the crime of ***conspiracy*** is agreement to violate the law," it is "both possible and permissible to charge that criminal statutes were violated entirely by means of speech." *1994 U.S. Dist. LEXIS 10151, [WL] at *1-*2*. Although Judge Mukasey cited to the permissibility under ***Brandenburg*** of punishing speech likely to generate imminent criminal action by others as an additional basis for rejecting the defendants' motion to dismiss, nothing in his opinion suggests **[*30]** that he viewed ***Brandenburg*** as requiring a showing of imminent lawless action with respect to the seditious ***conspiracy*** charges.

Nor do the other cases upon which defendants rely support their position. For example, in *Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937)*, the defendant was charged under a state statute forbidding incitement or attempted incitement to insurrection by violence, by virtue of his membership and leadership position in the Communist Party. The Court found that the defendant's conviction violated his freedom of speech. None of the reasoning employed by the Court, however, suggests that imminence must be shown in a case involving ***conspiracy***, which was not charged in that case. For example, the Court first explained that "[i]f the evidence fail[ed] to show that [the defendant] did so incite, then, as applied to him, the statute unreasonably limits freedom of speech and freedom of assembly. . . ." *Id. at 259*. Finding the evidence so lacking, the Court reversed the conviction. The Court explained that

> [i]n its application the offense made criminal is that of soliciting members for a political party and conducting meetings of a local unit of that party when one of the doctrines **[*31]** of the party, established by reference to a document not shown to have been exhibited to any one by the accused, may be said to be ultimate resort to violence at some indefinite future time against organized government.

Id. at 260. The Court further explained that "[t]he statute, as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others." *Id. at 263-64*. That is not the case here. Defendants are not charged with mere membership in an organization whose doctrines include resort to violence at some indefinite future time, nor are they charged with merely affecting the future conduct of others through their words. Rather, they are charged with an actual agreement to commit actual acts of violence.

Hartzel v. United States, 322 U.S. 680, 64 S. Ct. 1233, 88 L. Ed. 1534 (1944), is likewise inapposite. In that case, the defendants were convicted under statutes prohibiting willful obstruction of the recruiting and enlistment service of the United States and the willful attempt to cause insubordination, disloyalty, mutiny and refusal duty in the **[*32]** military and naval forces of the United States, based on their publication and dissemination of three pamphlets to various persons and organizations, among whom were individuals available and eligible for recruitment and enlistment in the military and naval forces of the United States as well as individuals already members of the armed forces. The Court, however, did not consider the

constitutionality of these statutes. On the contrary, the Court observed that "[n]o question is here raised as to the constitutionality of these provisions or as to the sufficiency of the indictment returned thereunder." *Id. at 686*. Rather, *Hartzel* discussed the sufficiency of the evidence presented to establish the defendants' guilt. In ruling on this issue, the Court did observe that, because the statute touched on speech, a necessary element was whether the speech created "a clear and present danger that the activities in question will bring about the substantive evils which Congress has a right to prevent." *Id. at 687*. The Court, however, never addressed whether the evidence presented at trial satisfied this element, instead holding only that the government had failed to establish that the defendants **[*33]** specifically intended to interfere with recruitment and enlistment or to cause insubordination, a statutory element of the offense. *See id. at 687-89*. And, as with *Herndon* and ***Brandenburg*** but unlike here, the speech at issue involved only advocacy and could not be construed as involving ***conspiracy*** to actually commit unlawful acts.

Finally, *Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973)* (per curiam), does not compel a different conclusion. In that case, the defendant was convicted under a content-neutral disorderly conduct statute. The defendant was at an antiwar demonstration, to which the police responded. When the police forced the crowd out of the street and on to the curb, an officer heard the defendant say, "We'll take the fucking street later." Based on this utterance, the defendant was arrested and charged with disorderly conduct. After rejecting other bases for sustaining the defendant's conviction, the Court explained that the conviction could not be sustained under ***Brandenburg***. The Court explained that because "the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any **[*34]** action," *id. at 108-09*, and in any event even if it did advocate, at worst it merely advocated nothing more than "illegal action at some indefinite future time." *Id. at 108*. *Hess*, like ***Brandenburg***, therefore involves mere advocacy, not ***conspiracy*** to actually commit an unprotected, unlawful act. [4]

In short, each of the cases relied upon by defendants involved, in one form or another, mere advocacy of violence or unlawful conduct. None involved a **[*35]** ***conspiracy*** to actually engage in violence or other unlawful conduct, a distinction which the courts have found dispositive. To be sure, if the government is unable to prove that defendants conspired to actually use force, ***Brandenburg*** would be applicable. And defendants are entitled to have the jury properly instructed that they may "not be convicted on the basis of [their] beliefs or the expression of them-even if those beliefs favored violence." *Rahman, 189 F.3d at 118*. However, ***Brandenburg*** does not require that, if the government is able to prove such a ***conspiracy***, it must also prove that the conduct agreed to by members of the ***conspiracy*** was imminent.

*b. Even If Applicable, **Brandenburg** Does Not Require Dismissal*

If the Court rejects this recommendation and concludes that ***Brandenburg*** does indeed require the government to establish imminence, the Court's conclusion would obviously change the nature of the government's burden at trial. Such a ruling, however, would not entitle defendants to dismissal at this stage of the proceedings. As explained above, in resolving defendants' motion to dismiss the Court may consider only the Indictment; it may not pierce the Indictment and consider **[*36]** the facts which defendants contend will or will not be shown at trial. Defendants' as-applied challenge under ***Brandenburg***, however, requires the Court to delve into these very facts. Simply put, the government and defendants have starkly different views not only on the existence and nature of the alleged ***conspiracy***, but also on how far along the alleged conspirators were in preparing to effectuate their plans. Such evidence directly bears on whether the ***conspiracy*** threatened imminent violence or lawless action. In other words, defendants' as-applied challenge "depends on factual assertions about the circumstances surrounding the offense that are interwoven with evidence about

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[4] In their reply brief, defendants rely on the Supreme Court's decision in *Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002)*, which quoted *Hess* for the proposition that "[t]he government may not prohibit speech because it increases the chance of an unlawful act 'at some indefinite future time.'" *Id. at 253* (quoting *Hess, 414 U.S. at 108*). *Ashcroft*, however, actually undercuts defendants' argument. After quoting *Hess* and ***Brandenburg*** for the imminence requirement, the *Ashcroft* Court notes that the case before it involved "no attempt, incitement, solicitation, *or* ***conspiracy***." *Id.* Thus, the *Ashcroft* Court itself recognized the distinction discussed above between mere advocacy of illegal action and ***conspiracy*** to actually commit an unlawful act.

whether he committed the crime the Indictment has charged." *United States v. Poulin, 588 F. Supp. 2d 58, 61-62 (D. Me. 2008)* (rejecting as-applied *First Amendment* challenge raised in motion to dismiss); *see also, United States v. Pope, 613 F.3d 1255, 1261-62 (10th Cir. 2010)* (internal quotation omitted) (rejecting pre-trial as-applied *Second Amendment* challenge to firearms charge, explaining that the defendant "contends the statute is unconstitutional only in light of the facts surrounding the commission of the **[*37]** alleged offense, the very facts a court may *not* consider before trial."); *United States v. Coronado, 461 F. Supp. 2d 1209, 1217-18 (S.D. Cal. 2006)* (rejecting as premature as-applied *First Amendment* challenge brought in a motion to dismiss the indictment); *cf. United States v. McDermott, 822 F. Supp. 582, 591-94 (N.D. Iowa 1993)* (accepting as true and in the light most favorable to the government the allegations in the indictment in rejecting the defendant's as-applied *First Amendment* challenge brought in a motion to dismiss).

Here, the Indictment alleges that defendants, in addition to conspiring to use force to hinder the execution of the laws, actually trained for such a confrontation and acquired weapons and explosives or explosive device components in furtherance of their goals. The Indictment also charges that one conspirator, upon learning of the arrest of other members of the group, actually implemented the ***conspiracy***'s plans by alerting other members of the group, arming himself, proceeding to a pre-determined rallying point, and engaging in a stand-off with law enforcement officers. These allegations, taken as true and construed in the light most favorable to the government, **[*38]** suggest that violence or other lawless action was, in fact, imminent. Thus, even if the government must show imminence under ***Brandenburg***, the Indictment is not subject to dismissal at this stage of the proceedings.

D. *Conclusion*

As noted above, the question before the Court is limited. The Court is not now called on to determine whether the government will be able to prove a valid case at trial, or whether it will be able to show that defendants engaged in conduct unprotected by the *First Amendment*. The only question before the Court is whether the allegations in the Indictment, taken as true and viewed in the light most favorable to the government, are sufficient to plead the crimes charged under the *First Amendment* and the relevant statutes, and apprise the defendants of the nature of the charges. For the reasons explained above, the Court should conclude that the First Superceding Indictment is sufficient. Accordingly, the Court should deny defendants' motion to dismiss the Indictment.

III. NOTICE TO PARTIES REGARDING OBJECTIONS:

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of **[*39]** a copy hereof as provided for in *FED. R. CIV. P. 72(b)*. Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985)*; *Howard v. Secretary of Health & Human Servs., 932 F.2d 505 (6th Cir. 1991)*; *United States v. Walters, 638 F.2d 947 (6th Cir. 1981)*. Filing of objections which raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of Health & Human Servs., 931 F.2d 390, 401 (6th Cir. 1991)*; *Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987)*. Pursuant to *E.D. Mich. LR 72.1(d)(2)*, a copy of any objections is to be served upon this Magistrate Judge.

Within fourteen (14) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be not more than five (5) pages in length unless by motion and order such page limit is extended by the Court. The response shall address specifically, and in the same order raised, each issue contained within the objections.

/s/ Paul J. Komives

PAUL J. KOMIVES

UNITED STATES MAGISTRATE JUDGE

Dated: **[*40]** 1/12/11

Table1 (*Return to related document text*)

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III. NOTICE TO PARTIES REGARDING OBJECTIONS

Table1 (*Return to related document text*)

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Exhibit B

United States v Fox
1:20-CR-183-RJJ
Hon. Robert J. Jonker

LexisNexis

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Document (1)

1. *United States v. Stone, 2012 U.S. Dist. LEXIS 41434*

Client/Matter: -None-
Search Terms: Stone Brandenburg conspiracy
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	Court: Federal > 6th Circuit

United States v. Stone

United States District Court for the Eastern District of Michigan, Southern Division

March 27, 2012, Decided; March 27, 2012, Filed

Case No: 10-20123

Reporter
2012 U.S. Dist. LEXIS 41434 *; 2012 WL 1034937

UNITED STATES OF AMERICA, Plaintiff, v. DAVID BRIAN ***STONE***, ET AL., Defendants.

Prior History: *United States v. Stone, 2012 U.S. Dist. LEXIS 37127 (E.D. Mich., Mar. 20, 2012)*

Core Terms

conspiracy, seditious, Indictment, oppose, law enforcement, killing, funeral procession, uprising, conspiring, ***conspiracy*** charge, explosive, rally, Defendants', federal government, forcibly, mass destruction, attended, training, training session, police officer, attacking, charges, retreat, join, federal law enforcement, anti-government, weapons, infer, beyond a reasonable doubt, circumstantial evidence

Counsel: **[*1]** For David Brian ***Stone***, also known as RD, also known as Joe Stonewall, also known as Captain Hutaree, Defendant: William W. Swor, LEAD ATTORNEY, Detroit, MI; Mark A. Satawa, Kirsch & Satawa, Southfield, MI; Richard M. Helfrick, Todd Shanker, Federal Defender Office, Detroit, MI.

For David Brian ***Stone***, Jr, also known as Junior, Defendant: Federal Defender, Richard M. Helfrick, Todd Shanker, Federal Defender Office, Detroit, MI; William W. Swor, Detroit, MI; Mark A. Satawa, Kirsch & Satawa, Southfield, MI.

For Joshua Matthew ***Stone***, also known as Josh, Defendant: James C. Thomas, Plunkett Cooney, Detroit, MI; Mark A. Satawa, Kirsch & Satawa, Southfield, MI; William W. Swor, Detroit, MI.

For Tina Mae ***Stone***, Defendant: Michael A. Rataj, William W. Swor, Detroit, MI.

For Joshua John Clough, also known as Azzurlin, also known as Az, also known as Mouse, also known as Jason Z Charles, Defendant: Randall C. Roberts, LEAD ATTORNEY, Ann Arbor, MI.

For Michael David Meeks, also known as Mikey, Defendant: Mark A. Satawa, LEAD ATTORNEY, Kirsch & Satawa, Southfield, MI; Arthur J. Weiss, Farmington Hills, MI; William W. Swor, Detroit, MI.

For Thomas William Piatek, Defendant: Arthur J. Weiss, LEAD ATTORNEY, **[*2]** Farmington Hills, MI; Mark A. Satawa, Kirsch & Satawa, Southfield, MI; William W. Swor, Detroit, MI.

For Kristopher T Sickles, also known as Pale Horse, Defendant: Henry M. Scharg, LEAD ATTORNEY, Northville, MI; William W. Swor, Detroit, MI.

For Jacob J Ward, also known as Jake, also known as Guhighllo, also known as Nate, Defendant: Christopher M. Seikaly, LEAD ATTORNEY, Southfiled, MI.

For United States of America, Plaintiff: Christopher Graveline, Julie A. Beck, LEAD ATTORNEYS, Jonathan Tukel, Sheldon N. Light, United States Attorney's Office, Detroit, MI.

Judges: Honorable Victoria A. Roberts, United States District Judge.

Opinion by: Victoria A. Roberts

Opinion

ORDER GRANTING DEFENDANTS' MOTIONS FOR JUDGMENT OF ACQUITTAL ON COUNTS 1-7

I. INTRODUCTION

This matter is before the Court on Defendants' motions for judgment of acquittal pursuant to *Rule 29 of the Federal Rules of Criminal Procedure*. Each Defendant filed an individual motion. The Government filed a response in opposition to Defendants' motions (Doc. 761). A hearing was held on March 26, 2012.

The Court considered the parties' arguments and reviewed the evidence offered at trial. Defendants' motions are **GRANTED**.

II. BACKGROUND

Defendants are charged with: (1) **[*3]** Seditious ***Conspiracy*** (*18 U.S.C. § 2384*); (2) ***Conspiracy*** to use Weapons of Mass Destruction (*18 U.S.C. § 2332a(a)(2)*); (3) Use and Carrying of a Firearm During and in Relation to a Crime of Violence (*18 U.S.C. § 924(c)(1)*); and (4) Possessing a Firearm in Furtherance of a Crime of Violence (*18 U.S.C. § 924(c)(1)*). In addition, Defendants David ***Stone***, David ***Stone***, Jr., and Joshua ***Stone*** are charged with weapons-related offenses.

Trial began at the beginning of February. The Government's proofs closed on March 22, 2012; the following day Defendants filed Motions for Judgment of Acquittal and concurrences in each others' Motions. Defendants move for acquittal on the ***conspiracy*** charges (Counts I and II), as well as the charges dependent on the existence of the ***conspiracies*** (Counts III-VII). On March 25, the Government responded. The Court heard arguments on March 26.

III. ANALYSIS

A. Standard of Review

Rule 29(a) of the Federal Rules of Criminal Procedure allows defendants to move for a judgment of acquittal at the close of the prosecution's case. It reads:

> **(a) Before Submission to the Jury.** After the government closes its evidence or after the close of all the evidence, the court on the defendant's **[*4]** motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

In reviewing a *Rule 29* motion, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)*. Though the Court may "draw reasonable inferences from basic facts to ultimate facts," *see id.*, it must be mindful that "charges of ***conspiracy*** are not to be made out by piling inference upon inference." *Ingram v. United States, 360 U.S. 672, 680, 79 S. Ct. 1314, 3 L. Ed. 2d 1503, 1959-2 C.B. 334 (1959)* (quoting *Direct Sales Co. v. United States, 319 U.S. 703, 711, 63 S. Ct. 1265, 87 L. Ed. 1674 (1943)*).

B. *Conspiracy* Law and the *First Amendment*

In order to sustain a conviction for ***conspiracy***, the Government must prove that each Defendant: (1) agreed to violate the law; (2) possessed the knowledge **[*5]** and intent to join the ***conspiracy***; and (3) participated in the ***conspiracy***. *See United States v. Sliwo, 620 F.3d 630, 633 (6th Cir. 2010)*; *see also* Sixth Circuit Pattern Jury Instructions §§ 3.01A, 3.03 (To prove a ***conspiracy***, the government must show that (1) two or more individuals conspired to commit the crime; and (2) that each defendant voluntarily joined the ***conspiracy***, knowing of its main purpose and intending to help advance its goals.). In addition, a ***conspiracy*** requires a specific plan. *See Pinkerton v. United States, 145 F.2d 252, 254 (5th Cir. 1944)* (holding that a criminal ***conspiracy*** requires (1) an object to be accomplished; (2) a plan or scheme embodying means to accomplish that object; (3) an agreement by two or more defendants to accomplish the object; and (4) an overt act, where applicable); *see also United States v. Bostic, 480 F.2d 965, 968 (6th Cir.1973)*.

"The elements of a ***conspiracy*** may be proven entirely by circumstantial evidence, but each element of the offense must be proved beyond a reasonable doubt." *United States v. Wexler, 838 F.2d 88, 90 (3d Cir. 1988)* (citations omitted). Indeed, it is common for a ***conspiracy*** to be proved by circumstantial evidence; a **[*6]** criminal agreement is rarely explicit. Thus, in the absence of "proof of a formal agreement among the conspirators . . . a tacit or mutual understanding . . . is sufficient to show a ***conspiracy***." *United States v. Lee, 991 F.2d 343, 348 (6th Cir. 1993)*. "One of the requisite elements the government must show in a ***conspiracy*** case is that the alleged conspirators shared a 'unity of purpose', the intent to achieve a common goal, and an agreement to work together toward the goal." *Id.* (citation omitted). "In the absence of evidence of these essential factors, a guilty verdict on a ***conspiracy***

charge cannot be sustained." *Id.*

The issue of guilt or innocence in a ***conspiracy*** is always an individualized inquiry. *Kotteakos v. United States, 328 U.S. 750, 772, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)* ("Guilt with us remains individual and personal, even as respects ***conspiracies***. It is not a matter of mass application."). The government must prove the intent of each individual conspirator to enter into the ***conspiracy***, knowing of its objectives, and agreeing to further its goals. *See* Sixth Circuit Pattern Jury Instruction § 3.03. Consistent with these principles, it is useful to note that there are two distinct intents required to **[*7]** prove the crime of ***conspiracy*** — the basic intent to agree, which is necessary to establish the existence of the ***conspiracy***, and the more traditional intent to effectuate the object of the ***conspiracy***. *United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*; Sixth Circuit Pattern Jury Instruction, Committee Commentary 3.03; 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 12.2 (2d ed. 2011).

Where a ***conspiracy*** implicates *First Amendment* protections such as freedom of association and freedom of speech, the court must make a "specially meticulous inquiry" into the government's evidence so there is not "an unfair imputation of the intent or acts of some participants to all others." *United States v. Dellinger, 472 F.2d 340, 392 (7th Cir. 1972)*. It is black-letter law that "[a] defendant cannot be convicted of ***conspiracy*** merely on the grounds of guilt by association, and mere association with the members of the ***conspiracy*** without the intention and agreement to accomplish an illegal objective is not sufficient to make an individual a conspirator." *Lee, 991 F.2d at 348*. Likewise, mere presence at the scene does not establish participation in a ***conspiracy***. *United States v. Paige, 470 F.3d 603, 609 (6th Cir. 2006)*.

The **[*8]** Government has consistently maintained that this case is not about freedom of speech or association, but about the specific acts of violence alleged in the Indictment. The Court relied upon these representations in denying Defendants' pre-trial motions for a jury instruction on the ***Brandenburg*** case, and the heightened *strictissimi juris* standard for sufficiency of the evidence (Docs. 610, 618). However, much of the Government's evidence against Defendants at trial was in the form of speeches, primarily by ***Stone***, Sr., who frequently made statements describing law enforcement as the enemy, discussing the killing of police officers, and the need to go to war. Indeed, at oral argument on March 26, 2012, the Government asked the Court to find the existence of a seditious ***conspiracy*** based primarily on two conversations involving ***Stone***, Sr., and others — the first on August 13, 2009, and the second on February 20, 2010.

Additional evidence the Government relies on includes Defendants' participation in various military-style training exercises, anti-Government literature found in some of the Defendants' homes, and guns and ammunition collected by various Defendants. But, none of these things **[*9]** is inherently unlawful. While this evidence may provide circumstantial proof that some of the Defendants planned to do something unlawful, the Indictment sets forth a specific plot to draw law enforcement to Michigan from around the country by killing a member of local law enforcement. The Indictment alleges the Defendants would then attack the funeral procession and retreat to "rally points" to conduct operations against the government with the intent that these operations would be a catalyst for a more widespread uprising between the Hutaree and the Federal Government.

Because the Government's proofs consist overwhelmingly of speech and association, the Court takes particular care to analyze the evidence against each defendant to determine whether it is capable of convincing beyond a reasonable doubt. *See Dellinger, 472 F.2d at 393*.

C. Count I- Seditious *Conspiracy*

1. Seditious *Conspiracy* Requires that Acts of Force be Directed Specifically at the Government of the United States

Count One of the Indictment charges Seditious ***Conspiracy***, *18 U.S.C. § 2384*. Under that statute:

> If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, **[*10]** conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or

both.

18 U.S.C.A. § 2384.

Specifically, the Government charges Defendants with conspiring to "oppose by force the authority" of the United States Government. Essential to that charge, Defendants must have agreed to oppose some positive assertion of authority by the United States Government; mere violations of the law do not suffice. Baldwin v. Franks, 120 U.S. 678, 693, 7 S. Ct. 656, 30 L. Ed. 766 (1887).

In *Baldwin*, the Supreme Court discussed what must be proven to convict a defendant of seditious ***conspiracy***. The defendant was charged with seditious ***conspiracy*** for conspiring with others to unlawfully arrest and expel a group of Chinese citizens from a California town where they lawfully resided. 120 U.S. at 681. The defendant and his coconspirators violently removed the **[*11]** Chinese citizens from their homes and businesses and forcibly placed them on a steam-boat that was departing the town. *Id.* The Supreme Court held that these facts could not support a charge of seditious ***conspiracy*** because the force was exerted against the Chinese citizens, and not against the government in its efforts to protect them. Id. at 694.

In reaching its conclusion, the Supreme Court made clear that to be convicted of seditious ***conspiracy***, one must specifically oppose by force the government of the United States while it is exerting its authority. The Court stated:

> All, therefore, depends on that part of the section which provides a punishment for 'opposing' by force the authority of the United States . . . . This evidently implies force against the government as a government. To constitute an offense under the first clause, the authority of the government must be opposed; that is to say, force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority.

Id. at 693. Because Baldwin's ***conspiracy*** was for "ill treatment itself," and "not for hindering **[*12]** or delaying the United States in the execution of their measures to prevent it," the charge could not stand. Id. at 694.

In *Anderson v. United States*, the Eighth Circuit applied *Baldwin* and dismissed a seditious ***conspiracy*** charge where the force sought to be exerted was "not against those whose duty it should be to execute the laws." 273 F. 20, 26 (8th Cir. 1921). Defendants were charged with seditious ***conspiracy*** for conspiring to prevent, hinder and delay by force, various laws of the United States, including the congressional declaration of war with Germany, and laws relating to conscription. Id. at 22-23. In furtherance of the seditious ***conspiracy***, the Indictment alleged that the defendants circulated books and periodicals calling for strikes and the overthrow of the capitalist system and criticizing the war and individuals who joined the armed services. Id. at 24-24.

Relying on *Baldwin*, the Court stated that for the Indictment to sufficiently charge seditious ***conspiracy***, the purpose of the ***conspiracy*** must be "the exertion of force against those charged with the duty of executing the laws of the United States . . . ." Id. at 26. The court then held that the Indictment was insufficient **[*13]** because the "force was to be exerted, not against those whose duty it should be to execute the laws, and while attempting to do so, but its application was to be made against industrial and commercial activities by lawless acts during strikes for the purpose of accomplishing alleged socialistic ends . . . ." *Id.*

The law is clear that seditious ***conspiracy*** requires an agreement to oppose by force the authority of the United States itself. It must be an offense against the Nation, not local units of government. *See* Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 505, 76 S. Ct. 477, 100 L. Ed. 640 (1956) ("Sedition against the United States is not a local offense. It is a crime against the Nation." (citation and quotation marks omitted)). Any overt act in furtherance of seditious ***conspiracy*** must further a common plan to oppose the United States by force; otherwise, "the seditious ***conspiracy*** statute would expand infinitely to embrace the entire agenda of anyone who violated it . . . ." United States v. Rahman, 854 F. Supp. 254, 260 (S.D.N.Y. 1994); *see also* Haywood v. United States, 268 F. 795, 800 (7th Cir. 1920) ("[The seditious ***conspiracy*** statute] should not be enlarged by construction.").

The discussions of seditious **[*14]** ***conspiracy*** in Baldwin and Anderson are important to this case; while the Government presented evidence of vile and often hateful speech, and may have even shown that certain Defendants conspired to commit some crime - perhaps to murder local law enforcement — offensive speech and a ***conspiracy*** to do something other than forcibly resist a positive show of authority by the Federal Government is not enough to sustain a charge of

seditious ***conspiracy***. A ***conspiracy*** to murder law enforcement is a far cry from a ***conspiracy*** to forcibly oppose the authority of the Government of the United States.

As explained more fully in Subsection 3 below, the evidence is not sufficient for a rational factfinder to find that Defendants came to a concrete agreement to forcibly oppose the authority of the Government of the United States as charged in the Indictment; that would be an agreement to retreat to rally points after drawing federal law enforcement from across the country to Michigan to engage in a large-scale uprising or "war" with these agents.

2. The Seditious *Conspiracy* Charge in the Indictment Contemplates a Widespread Uprising Against the United States Government

As the basis for the charge of seditious **[*15]** ***conspiracy***, the Indictment alleges a multi-step plan intended to catalyze an uprising against the United States Government. Second Superseding Indictment (Doc. 293), Count 1, pp. 6-7. The first step of the general plan was to commit a violent act to draw the attention of law enforcement. Among the acts the Indictment alleges members of the Hutaree discussed include: killing a member of law enforcement after a traffic stop; killing a member of law enforcement and his or her family at home; ambushing a member of law enforcement in a rural community; luring a member of law enforcement with a false 911 emergency call and then killing him or her; and killing a member of law enforcement and attacking the funeral procession with weapons of mass destruction. *Id.* p. 6. Although all of these acts are alleged, by the end of the hearing on March 26, 2012, the Government focused the Court's attention on attacking a funeral procession as the plan of the ***conspiracy***.

The second step alleged in the Indictment is that once violent action had been taken and a response by law enforcement provoked, Hutaree members would retreat to one of several rally points. *Id.* p. 6-7. Third, the Hutaree would defend **[*16]** their position and conduct operations against the government. *Id.* Fourth, and lastly, according to the Indictment, the Hutaree intended that this engagement would be a catalyst for a more widespread uprising against the United States Government. *Id.* p. 7.

At the hearing, the Government argued that the final step of the plan - the intent that the Hutaree's engagement with law enforcement would be a catalyst for a more widespread uprising against the United States Government — was non-essential to sustain a charge of seditious ***conspiracy***. The Government said that what's essential to the plan is triggering a response from law enforcement from all across the country, which the Hutaree believed would necessarily include representatives of the federal government. The government says sufficient evidence was presented to establish this ***conspiracy***. The Government says that because members of the Hutaree believed that state and federal law enforcement are inherently connected, an attack on a funeral procession of law enforcement from all over the United States would constitute opposition by force to the authority of the United States Government.

The Government's current position is not in accord **[*17]** with the Indictment or a previous order of this Court, where Magistrate Judge Komives recognized that this last stage - the uprising against the Government of the United States — was a necessary element of the alleged seditious ***conspiracy***. In rejecting Defendants' argument that the Indictment should be dismissed because the alleged ***conspiracy*** involved "a local plot, involving a local officer, and a local battleground," Magistrate Komives wrote:

> It is true that the initial step in defendants' alleged plan was the assassination of a local law enforcement official. This first step, however, is alleged to have been a means toward the group's ultimate goal of provoking an armed confrontation with local and federal law enforcement officials. And there can be no doubt that conspiring to deliberately provoke an armed conflict with federal law enforcement officials constitutes a ***conspiracy*** to "oppose by force the authority" of the United States and to "by force . . . prevent, hinder, or delay the execution of any law of the United States." *18 U.S.C. § 2384*. It may be that the evidence at trial will establish nothing more than a local plot against local law enforcement officials, but the indictment **[*18]** alleges more than this.

Komives R&R (Doc. 269 pp. 6-7), *adopted* Doc. 297. He concluded that "[i]f the \evidence at trial does not establish this second goal of the ***conspiracy***, then *Baldwin* will require that defendants be acquitted." *Id.* p. 9.

The Court need not decide whether a ***conspiracy*** to attack the funeral procession of a local law enforcement

officer would be within the ambit of the seditious ***conspiracy*** statute, though; as explained in greater detail below, the Government did not provide sufficient proof of the existence of any ***conspiracy*** at all.

In addition, the Government's Trial Memorandum (Doc. 734) seeks to substantially alter the Government's theory of the case from that charged in the Indictment. The Government says it is not certain whether the Hutaree intended to initiate the conflict, or simply engage in it once it was initiated by others. On the other hand, the Indictment describes a specific plan that was to be *initiated by* members of the Hutaree. The Hutaree's "general plan" was to commit some violent act to provoke a response from law enforcement. After the violent act, the Hutaree planned to attack the funeral procession, and then retreat to a "rally point." From there, **[*19]** they would defend against the government. This engagement would serve as a catalyst for a more widespread uprising against the United States Government.

As Defendants pointed out on March 26th, the Government insisted at the bond hearing in April 2010 that the Hutaree intended to commit an imminent violent act that could result in deaths to civilians. Further, the Court pointed out on March 26, 2012, that the Government said in its opening statement that the Hutaree had a specific plan to attack a funeral procession to draw the attention of law enforcement. The Government has consistently maintained that the Hutaree had a plan to take affirmative violent action; indeed, Count I of the Indictment contemplates a plan that was to be initiated by the Hutaree.

Nowhere does the Indictment say that the Hutaree simply intended to engage in a conflict once it was initiated by other forces.

The prosecution is not "free to roam at large — to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial . . . ." *Russell v. United States, 369 U.S. 749, 768, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962)*. If the Government now admits that the plan alleged in Count I of the Indictment did not exist, then **[*20]** Defendants must be acquitted. The inescapable conclusion of such a tactic is that the Government recognizes that its proofs at trial failed to establish the plan described in the Indictment, so it is attempting to formulate an alternative theory of criminal liability. The Government appears to be attempting to broaden the charges contained in Count I; yet, "after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone v. United States, 361 U.S. 212, 215-16, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960)*. This is because defendants are entitled to have fair notice of the criminal charges against them so that they can prepare a defense. *United States v. Combs, 369 F.3d 925, 935 (6th Cir. 2004)*.

Defendant's relied upon the Government's theory of the case as set forth in the Indictment to formulate their defenses. The Government cannot now say that the alleged plan set forth in Count I is irrelevant. Any amendment to the Indictment can only be made by the grand jury. *Russell, 369 U.S. at 770*.

3. The Evidence Against Defendants is Insufficient to Sustain the Charge

i. David *Stone*, Sr.

The Government's strongest case is against David ***Stone***, Sr.; however, even the **[*21]** evidence against ***Stone*** is not enough to sustain the seditious ***conspiracy*** charge. First, it is well-settled that a defendant cannot be convicted of conspiring with someone working on behalf of law enforcement, even if that person is working undercover. *See, e.g., United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984)* ("[P]roof of an agreement between a defendant and a government agent or informer will not support a ***conspiracy*** conviction."). While a government agent may serve as a link between ***Stone*** and other conspirators, there must be "genuine conspirators" apart from ***Stone*** himself. *See United States v. Rogers, 118 F.3d 466, 478 (6th Cir. 1997)*.

Essential to the seditious ***conspiracy*** charge is evidence of an agreement between David ***Stone*** and the coconspirators to spark an uprising with federal law enforcement after attacking a funeral procession. While the record contains evidence that ***Stone*** may have wanted to engage in a war with the federal government and/or "the Brotherhood," it is totally devoid of an agreement to do so between ***Stone*** and the other Defendants.

The Government summarized the evidence against ***Stone*** in its Response to Defendants' Motions for Judgment of Acquittal **[*22]** and reiterated some of this evidence at the hearing on the motion. (Doc. 761). The bulk of this evidence includes training sessions where

various explosive devices and firearms were used and where ***Stone*** makes anti-Government statements. For example, on October 18, 2008, ***Stone*** mentions "rally points" and a desire to "kill." On December 8, 2008 ***Stone*** tells Murray in an email to "stand ready" to go to war against the ATF if the ATF "pushes further." Likewise, on December 20, 2008, ***Stone*** refers to one of his guns as a "cop killer." On August 27, 2009, ***Stone*** says a shape charge would definitely take out a convoy. While vile, all of this speech is protected by the *First Amendment*.

The Court is aware that protected speech and mere words can be sufficient to show a ***conspiracy***. In this case, however, they do not rise to that level. ***Stones***' statements and exercises do not evince a concrete agreement to forcibly resist the authority of the United States Government. His diatribes evince nothing more than his own hatred for — perhaps even desire to fight or kill — law enforcement; this is not the same as seditious ***conspiracy***.

At the hearing, the Government contended that the ***conspiracy*** evolved on **[*23]** August 13, 2009 when ***Stone***, Joshua ***Stone***, and others plotted an attack on "the Brotherhood," consisting of all law enforcement, local and federal; they discussed killing a local police officer and attacking the funeral procession. ***Stone*** states that in three days 1,000 members of law enforcement would converge for the funeral, and that he would need mortars. This "plan" is utterly short on specifics. Further, it is a stretch to infer that other members of the Hutaree knew of this plan, and agreed to further it. More importantly, though, is that the alleged plan makes no reference to a widespread uprising against the United States Government. That ***Stone*** may have had some vague belief that local police officers were members of the "Brotherhood," and were, therefore, somehow connected with federal agents is of no consequence. *See Rahman, 854 F. Supp. at 259-60* (holding that whether Defendant subjectively believed murder of Israeli citizen would further seditious ***conspiracy*** was irrelevant, because the law of seditious ***conspiracy*** has objective limits).

The next time ***Stone*** mentions "rally points" is on August 22, 2009; then he tells the other Defendants if the Government starts backing them **[*24]** in with swine flu vaccinations, they have a "rally point." This is obviously insufficient to establish an agreement between ***Stone*** and others to forcibly oppose the authority of the United States Government.

On September 13, 2009 ***Stone*** tells Murray that the Hutaree's goal "is to go to war." He mentions killing police officers and their families and says that fifteen or twenty members of the Hutaree would be ready to pull the trigger. While these statements are offensive and disturbing, the Indictment alleges a specific agreement to forcibly oppose the United States Government — not to go on a shooting rampage, not to go to war with police officers in general. Moreover, a desire or goal to go to war on the part of ***Stone*** alone is not enough to sustain the ***conspiracy*** charge against him; the Government needs to show ***Stone*** agreed with at least one other person to carry out the goal. It did not.

Stone again mentions going to war on February 6, 2010 while attempting to attend a militia summit. He also makes a vague reference to getting to "the feds" and the Hutaree's intention to oppose the Brotherhood. Again, absent more concrete evidence of an agreement to spark the uprising central to the **[*25]** seditious ***conspiracy*** charge, ***Stone***'s remarks during the road trip evince little more than ***Stone***'s distrust of the federal government and desire to fight against it.

That others in the car did not explicitly oppose ***Stone***'s remarks does not convince the Court that there was a specific agreement to oppose the United States Government while that Government exercised its authority, and in the manner specified in the Indictment. This would require too many inferences. While it is often necessary to make certain inferences from circumstantial evidence in ***conspiracy*** cases, the plethora of inferences the Government asks this Court to make are in excess of what the law allows. But, the Government crosses the line from inference to pure speculation a number of times in this case. Charges built on speculation cannot be sustained.

Finally, on February 20, ***Stone*** engages in a conversation with Meeks, Sickles, Piatek, Joshua ***Stone***, and Clough about killing police officers. ***Stone*** again brings up the idea of murdering an officer and attacking the funeral procession. Nothing resembling an agreement to spark an uprising with the Federal Government is reached during this conversation. Defendants toss out **[*26]** ideas of ways in which to kill police that are often incredible; more importantly, they never come to a consensus or agreement on ways in which to oppose federal agents by force. ***Stone*** even states, "there's a hundred and one scenarios you can use." This back and forth banter, like the other anti-government speech and statements evincing a desire — even a goal — to kill police, is simply insufficient to

sustain the seditious ***conspiracy*** charge; it requires *an agreement and plan of action, not mere advocacy* or hateful speech.

ii. Joshua *Stone*

The Government calls Joshua ***Stone*** a central figure in the seditious ***conspiracy***. Evidence of this is woefully lacking. Much of the evidence against Josh ***Stone***, like many of the Defendants, involves his mere presence at the scene while David ***Stone*** rants about going to war and killing police. His presence at the scene and association with the Hutaree do not make him guilty of joining any ***conspiracy***, let alone a seditious ***conspiracy***. Nor does his failure to actively disagree transform him into a seditious conspirator.

Joshua ***Stone*** was present at and participated in the August 13, 2009 and February 20, 2010 conversations, but no agreement was reached on **[*27]** those occasions and nothing in the record suggests that a prior agreement to forcibly oppose the United States Government was reached.

The other evidence against Josh ***Stone*** suggests he had familiarity with firearms and explosive devices, participated in trainings, and shared his father's hatred of the government. But none of this is inherently unlawful. The evidence is not sufficient to sustain the charge that Josh ***Stone*** was somehow preparing to act unlawfully —specifically to engage in an uprising against the Federal Government — pursuant to an agreement to do so.

iii. Tina Mae *Stone*

The Government says that Tina Mae ***Stone*** joined the Hutaree in August, 2009, when she was ***Stone***, Sr.'s girlfriend, and that she soon became an "active, engaged, and vocal member." The Government says that she was party to a discussion on January 9, 2010, regarding planning for the upcoming trip to Kentucky. She heard ***Stone***, Sr. discuss how the Hutaree needed to be aware that the ATF were all over Kentucky. In addition, she accompanied ***Stone***, Sr. to a meeting with the UCE at the undercover warehouse in Ann Arbor on January 14, 2010. There, while ***Stone***, Sr. and the UCE discussed explosives, Tina ***Stone*** inquired **[*28]** whether she needed to buy more coffee in metal cans so that they could be used to make explosively formed projectiles ("EFPs"). She also joked that she would take one for the team and drink more wine, presumably so that the bottles could be used to make explosives. The Government's response brief states that Tina "played an active, unhesitant, and continuing role in obtaining materials to use in building EFPs — wine bottles, street signs, and cans."

The Government stated at the hearing that Tina ***Stone***'s agreement to oppose the government of the United States by force can be inferred from her statements regarding coffee cans and wine bottles, and the fact that she apparently did not object to statements ***Stone***, Sr. made while she was in his presence. Tina ***Stone***'s counsel, though, pointed out that she only attended one Hutaree training session, on August 22, 2009, and did not attend any of the three that occurred between that date and the arrest of the Hutaree members. Counsel also maintained that Tina ***Stone*** never collected materials for use in making explosives. Further, counsel pointed out that Tina ***Stone*** was not even present on the two occasions in which ***Stone***, Sr. allegedly discussed **[*29]** his plan to attack a funeral procession.

The evidence against Tina ***Stone*** is minuscule. There is no evidence that she was aware of any plan by ***Stone***, Sr. to attack law enforcement vehicles and to revolt against the federal government. Further, even if the plan did exist, there is no evidence that Tina ***Stone*** agreed to it, knowing of its objective. That Tina ***Stone*** made a joke about drinking more wine, and inquired whether she should buy more coffee in metal cans, does not support a reasonable inference that she agreed to oppose by force the authority of the United States. "[C]onjecture and surmise regarding what a defendant may have intended or known is insufficient to support a conviction" in a ***conspiracy*** case. *United States v. Coppin, 1 F. App'x 283, 291 (6th Cir. 2001)*.

iv. David *Stone*, Jr.

The Government's primary evidence against ***Stone***, Jr. is that he participated actively in the training sessions, attending eight over the course of the investigation. The Government says he was also familiar with explosives, as shown by his role in a demonstration during the June 13, 2009 training. The Government says he was "party to" discussions of the so-called April Op, and that "if he had not had **[*30]** conflicting plans, he would likely have been a part of the core group of Hutaree members who were elected for the February 6, 2010 trip to Kentucky."

The Court cannot infer from ***Stone***, Jr.'s mere presence at training sessions that he agreed to a plan to oppose

by force the authority of the United States. Counsel pointed out at the hearing that there are many perfectly legal reasons why ***Stone***, Jr. could have attended the training sessions. The fact that ***Stone***, Jr., and other Defendants attended training sessions, is not evidence of any agreement at all, let alone an agreement to oppose the United States by force. Moreover, the fact that ***Stone***, Jr., and other Defendants did not openly disagree with the hateful, anti- government speech of ***Stone***, Sr., is not evidence that they agreed with him, or that a plan existed to oppose the United States government by force. ***Stone***, Jr., does not utter hateful words on any of the hours of tape the Government introduced into evidence. Most importantly, ***Stone***, Jr. cannot be convicted based on his association with ***Stone***, Sr.

The Government failed to produce evidence of any agreement, and any intent on ***Stone***, Jr.'s part to further or join a ***conspiracy*** to **[*31]** oppose by force the authority of the United States Government. Accordingly, the seditious ***conspiracy*** charge against him must be dismissed.

v. Michael Meeks

Of the many Hutaree trainings/meetings outlined in the Government's response, Meeks was present at less than ten. Again, ***Stone***, Sr. does most of the speaking. Meeks chimes in at times with comments such as "the Judicial system must die" and "Whack the cops who are trying to kill ya." ***Stone*** refers to Meeks as a "heavy gunner." Meeks was present during the February 20, 2010 training where ***Stone*** makes remarks about attacking a funeral procession for the second and final time. However, as already noted, during this training the Defendants present were tossing around ideas; no concrete agreement was reached or otherwise evidenced. Moreover, Meeks barely spoke.

This is the extent of the Government's evidence against Meeks. Meeks mere presence, association with the Hutaree, and off-the-cuff remarks are insufficient evidence of his intent to join a ***conspiracy*** to oppose the United States by force. Further, there is no evidence of his knowledge that the ***conspiracy*** involved doing anything more than killing police officers.

vi. Kristopher Sickles

As **[*32]** Sickles' counsel pointed out at the hearing, Sickles attended only five Hutaree trainings. Notably, almost an entire year passed between his first training in September 2008 and his second in August 2009. During the February 20, 2010 training where the group discusses killing police officers, Sickles — far from agreeing to an attack on a funeral procession followed by a retreat to rally points to engage in combat with federal law enforcement — suggests sneaking into officers' homes and poisoning their milk. While this comment — whether serious or not — is vile, it is protected *First Amendment* speech. It is also evidence that Sickles did not, in fact, agree to any plan to attack a funeral procession, retreat to rally points, and go to war with the Federal Government.

vii. Thomas Piatek

The Government calls Thomas Piatek a "dedicated member of the Hutaree," and a "trusted member of the core group." He attended training sessions, and was present on June 13, 2009, when certain Defendants are said to have demonstrated an explosive device. Witnesses at trial said that Piatek expressed hatred for cops, and considered the Hutaree as family. He traveled with other Defendants on the aborted trip **[*33]** to Kentucky on February 6, 2010. The Government says he expressed approval after ***Stone***, Sr. gave an anti-government speech in the van. In addition, the Government says Piatek had the largest arsenal of weapons and ammunition of any member of the Hutaree, and that he possessed anti-government literature, and military and explosives manuals.

Counsel for Piatek states that he was not present for the only two conversations the Government identified in which ***Stone*** discusses attacking the funeral procession of a law enforcement officer. Therefore, even if some plan existed, there is no way to infer that Piatek was aware of it, or that he took the next step of agreeing to further it. Counsel also claims that Piatek slept through ***Stone***'s speech in the van on February 6, 2010.

None of the guns or literature Piatek possessed is illegal. Nor was it illegal for him to attend the Hutaree training sessions. There is no evidence that he was aware of any plan by ***Stone***, Sr. to forcibly oppose the authority of the United States. Mr Piatek was not even present on the two occasion in which ***Stone***, Sr. discussed his "plan." The Government has not presented nearly enough evidence for a rational trier of fact **[*34]** to infer that Mr. Piatek was aware of any plan, or that he agreed to further it, knowing of its objective.

4. The Piling of Inferences is Insufficient to Sustain the Charge

While a defendant's participation in a ***conspiracy*** may certainly be inferred from the surrounding circumstances, *Paige, 470 F.3d at 609*, to sustain the seditious ***conspiracy*** charge fashioned by the Government, the Court would have to "pil[e] inference upon inference." *Ingram, 360 U.S. at 681 (1959)* (quoting *Direct Sales, 319 U.S. at 711*) (reversing two defendants' convictions for ***conspiracy*** to evade payment of federal taxes where the Court would have to pile "inference upon inference" to conclude that defendants knew of the tax liability and intended to evade that liability); *see also Wexler, 838 F.2d at 91* ("In a series of cases, this court has been obliged to overturn ***conspiracy*** convictions because the defendant was not proven to have knowledge of the illegal objective contemplated by the ***conspiracy***. The inferences rising from 'keeping bad company' are not enough to convict a defendant for ***conspiracy***."); *Coppin, 1 F. App'x at 289* ("[E]vidence . . . which requires conjecture and inference upon inference, is insufficient **[*35]** to sustain a conviction for ***conspiracy***.").

It is telling that in an investigation that spanned nearly two years, there were only two brief instances in which the alleged plan to kill a member of local law enforcement and attack the ensuing funeral procession was mentioned. Furthermore, the evidence of the necessary next step — a retreat to rally points from where the larger uprising would occur — is wholly lacking. The Government did produce some evidence of so-called rally points, but failed to produce evidence of the uprising that would follow. For example, in a conversation from August 22, 2009, ***Stone*** Sr. mentions that if the Government "start[s] backing us in with vaccinations, we have a rally point." But, this scenario concerning vaccinations is not mentioned in the Indictment. More importantly, ***Stone*** Sr. never discusses any plan about the uprising against the United States that the Government says in the Indictment would ensue after the Hutaree retreated to the rally point; it appears from the evidence that such a plan did not exist.

What the Government has shown, instead of a concrete agreement and plan to forcibly oppose the authority of the Government, is that most — if not **[*36]** all — of these Defendants held strong anti-Government sentiments. But the Court must not guess about what Defendants intended to do with their animosity. "The government is required to present evidence of the defendant's intent, knowledge of and agreement to join a ***conspiracy***." *Coppin, 1 F. App'x at 291*. "Absent such evidence, the government's case will not succeed merely because there is something 'fishy' about the defendant's conduct." *Id.*

The Government's case is built largely of circumstantial evidence. While this evidence could certainly lead a rational factfinder to conclude that "something fishy" was going on, it does not prove beyond a reasonable doubt that Defendants reached a concrete agreement to forcibly oppose the United States Government. "Although circumstantial evidence alone can support a conviction, there are times that it amounts to only a reasonable speculation and not to sufficient evidence." *Newman v. Metrish, 543 F.3d 793, 796 (6th Cir. 2008)* (collecting cases); *see also Wexler, 838 F.2d at 90* ("The elements of a ***conspiracy*** may be proven entirely by circumstantial evidence, but each element of the offense must be proved beyond a reasonable doubt."). This is one **[*37]** of those times. The Court is limited by what inferences reason will allow it to draw. It stands to reason that most, if not all, of these Defendants had a strong dislike —perhaps hatred — of the Federal Government and law enforcement at every level. One could also reason that certain defendants wanted to harm or kill law enforcement agents. The evidence certainly suggests that ***Stone*** strongly believed in the idea of a need to go to war with certain enemies, including "the Brotherhood."

But, the Court would need to engage in conjecture and surmise to find sufficient evidence that Defendants "shared a 'unity of purpose', the intent to achieve a common goal, and an agreement to work together toward the goal." *Wexler, 838 F.2d at 90* (addressing one of the requisite elements in any ***conspiracy*** case). "In the absence of evidence of the[ ] essential [***conspiracy***] factors, a guilty verdict on a ***conspiracy*** charge cannot be sustained." *Id.* This is especially true here, where the specific goal contemplated by the Indictment — a massive uprising against federal law enforcement after a funeral procession has been attacked — is referenced (and only vaguely) by ***Stone***, Sr. alone.

Tellingly, the testimony **[*38]** of Agent Huag is critical to the Government's case. Agent Huag admitted on the stand that over the course of his investigation of the Hutaree, the group never had: a date, time, target or plan for any attack. Vague anti-government hate speech simply does not amount to an agreement as a matter of

law. The Court would need to infer and speculate not only that the other Defendants were aware of ***Stone***'s desire to spark a war with the federal government, but that an agreement to do so in the manner alleged in the Indictment was reached. Reason will not allow such an incredible inference on this record.

D. Count II- *Conspiracy* to Use Weapons of Mass Destruction

Defendants are charged with ***conspiracy*** to use weapons of mass destruction in violation of *18 U.S.C. § 2332a(a)(2)*. The allegations of Count II of the Indictment specifically incorporate the factual allegations of Count I. In addition, the Indictment states that Defendants "conspired to use, without lawful authority, one or more weapons of mass destruction, specifically explosive bombs, explosive mines, and other similar explosive devices, against persons and property within the United States, that is, local, state, and federal law enforcement **[*39]** officers and vehicles owned and used by local, state, and federal law enforcement agencies." Second Superceding Indictment p. 11.

The essence of a charge of ***conspiracy*** is an agreement, as explained above. For the same reasons the Court does not find the existence of an agreement with respect to Count I, the Court cannot find that the Government proved an agreement among the Defendants to use weapons of mass destruction in the manner described in the Indictment, beyond a reasonable doubt.

E. Count III - Teaching and Demonstrating Use of Explosives, Destructive Devices, and Weapons of Mass Destruction

Defendants ***Stone***, Sr. and ***Stone***, Jr. are charged in Count III of the Indictment with teaching and demonstrating use of explosives, destructive devices, and weapons of mass destruction, in violation of *18 U.S.C. § 842(p)(2)*.

At the hearing on March 26, 2012, the Government conceded that Count III is derivative of Counts I and II. Because the Court finds that Counts I and II must be dismissed, Count III is also dismissed.

F. Counts IV through VII - Related Weapons Offenses

Counts IV through VII charge weapons offenses related to the alleged seditious ***conspiracy*** and ***conspiracy*** to use weapons of **[*40]** mass destruction. Defendants are charged with use and carrying of a firearm during and in relation to a crime of violence in violation of *18 U.S.C. § 924(c)(1)* (Counts IV and VI), and possessing a firearm in further of a crime of violence (Counts V and VII).

These charges are dependent upon the existence of the ***conspiracies*** charged in Counts I and II. Accordingly, they are dismissed.

IV. CONCLUSION

The Court **GRANTS** Defendants' motions for judgment of acquittal on Counts I through VII. Trial will proceed with Counts VIII, IX, and XIII against ***Stone***, Sr., and Counts X and XV against Joshua ***Stone***.

IT IS ORDERED.

/s/ Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: March 27, 2012

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Exhibit C

United States v Fox
1:20-CR-183-RJJ
Hon. Robert J. Jonker

PROPOSED *BRANDENBURG* INSTRUCTION

FIRST AMENDMENT

The First Amendment does not provide a defense to a criminal charge simply because the individual uses words to carry out his or her illegal purpose. Speech which incites imminent lawless activity is not protected speech under the First Amendment. Speech which merely discusses or favors law violations in the remote future are protected by the First Amendment.

.

If you find that the defendant's speech was both intended by him and tended to produce or incite a likely imminent kidnapping or use of a weapon of mass destruction then his speech is not protected by the First Amendment.

If, however, you find that a defendant's speech was limited to speech about violations of the Federal Laws against Kidnapping and the Use of Weapons of Mass Destruction which merely favor a violation of the law at a remote time in the future and were not intended to produce imminent lawless action then his speech is protected by the First Amendment, and it cannot be a basis for a guilty verdict.