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**In the Superior Court of the State of Arizona  
in and for the County of Maricopa**

State of Arizona,  
Plaintiff

v.

Derrick Raymond Thompson,  
Defendant

No. CR2016-159174-001

**Motion to remand for new finding  
of probable cause**

(Honorable Judge Sinclair)

Mr. Thompson asks this Court to issue an order remanding this case to the Maricopa County Grand Jury for a redetermination of probable cause within 15 days or dismiss the case without prejudice. U.S. Const. amend. VI, Arizona Const. Art. 2, § 4, and Ariz. R. Crim. Pro. Rule 12.9, *Corbin v. Broadman*, 6 Ariz. 436, 441, 433 P.2d 289, 294 (App. 1967). Mr. Thompson requests this order for the following reasons:

1. The state affirmatively misstated the elements of participating in a criminal syndicate in their draft indictment which read “solicited, incited or induced others . . .” when the statute reads “knowingly inciting or inducing others . . .,” appearing to insert an unnecessary solicitation element borrowed from the terrorism statute. A.R.S. § 13-2308(A)(2); *cf.* A.R.S. § 13-2308.01(A)(3) (containing the “solicit, incite or induce others” language); *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397 (App. 2009).

2. The state failed to instruct that grand jurors that speech that merely incites or induces another to commit a felony is protected speech under the First and Fourteenth Amendments unless it is like to lead to serious, imminent harm. It is simply protected speech and is not subjected to a strict scrutiny balancing test. *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969); *Francis v. Sanders*, 222 Ariz. 423, 215 P.3d 397 (App.2009); *Maretick v. Jarrett*, 204 Ariz. 194, ¶ 10, 62 P.3d 120, 123 (2003).
3. The state violated Mr. Thompson's substantial due process right not to have character evidence presented when they elicited the names of two convictions, aggravated assault and armed robbery, when they were tasked with proving that Mr. Thompson was a prohibited possessor.
4. The state misled the grand juror when Agent Kuhn testified merely that he had not located any documents showing that Mr. Thompson's rights to possess a firearm had been restored as they would also have to establish that Mr. Thompson was not intending to have his rights restored in order to satisfy the elements of attempt, which is a future crime.

## **1 Facts**

### **1.1 The FBI summary of the evidence:**

The FBI did not produce a report or summary of their evidence in this case

### **1.2 The Presentation to the Grand Jury:**

#### **1.2.1 The indictment:**

The state presented a draft indictment to the grand jurors for their consideration. Grand Jury Transcript at 6 (GJT). There is no indication that the grand jurors altered the indictment or asked for additional charges. The final, signed indictment reads

#### **Count 1**

#### **Participating in a Criminal Syndicate**

On or between January 6, 2015, and December 20, 2016 [Mr. Thompson] solicited, incited or induced others to promote or further the criminal objectives of a criminal syndicate to with: the Islamic State of Iraq and the Levant (ISIL) also known as the Islamic State of Iraq and Syria (ISIS) . . . [string citations omitted]

And, after the remainder of the indictment, is signed by the foreperson.

### **1.2.2 Agent Kuhn's training and experience**

Special Agent Kuhn of the Federal Bureau of Investigation (FBI) testified for the state and provided his training and experience with Islamic State (IS) related investigations with the National Security Squad as part of the Joint Terrorism Task Force. GJT at 7. He explained that self-radicalized "lone wolves" often respond to social media posts from the IS encouraging "attacks." GJT at 7-11. Special Agent Kuhn does not believe that these individuals coordinate or communicate with anyone about planning attacks. GJT at 11.

### **1.2.3 Targeting Mr. Thompson**

He went on to relay that the Department of Homeland Security forwarded Mr. Thompson's name to the FBI based on posts Mr. Thompson allegedly made to a public Google+ profile, a social media service and competitor to Facebook, and a YouTube account that were linked to an Internet Protocol address that Mr. Thompson allegedly paid for at his home address. GJT at 11-12.

### **1.2.4 Google+ posts and YouTube comments**

A majority of Agent Kuhn's testimony consists of the contents of the public posts and comments on a public social media profile. Agent Kuhn, believing himself an expert on IS propaganda, provided commentary and inferences about what the posts meant. For instance, Agent Kuhn stated that Mr. Thompson commented on a video titled "Islamic Caliphate Economic Prosperity and the Khilafah [Caliphate], Islamic Khilafah." The comment read "I'm going to trade school now to get beneficial knowledge so I can one day,

inshallah [God willing], “be an asset to the state.” Agent Kuhn went on to interpret this seemingly self-evident declaration:

Based on my experience, I believe Thompson was telling anyone who was reading the post that he aspired to one day be some sort of asset to the Islamic State.

GTJ at 13-14. The commentary on the posts continues in this vein for some time.

At one point, discussing a link that was posted and titled, "Mosul mosques call every man to carry a weapon and defend himself, his family, his home and his city #Iraq, #IS," Agent Kuhn interpreted this Mosul, Iraq mosque-issued statement to defenders of Iraq to mean “he was advocating for all Muslims to arm themselves.” GJT at 15.

Attempting to show the grand jurors how Mr. Thompson’s “rhetoric” was “ramping up,” and how Mr. Thompson “sees himself carrying out acts of war,” Agent Kyhn pointed the grand jurors to a December 3rd, 2016 communication where Mr. Thompson allegedly sent a private message:

Tonight I sat on my prayer rug after salat [prayer] and contemplated at times my feelings for the Daulah to be victorious becomes almost like a person that hopes his favorite football team would win and astaghfirullah [shame]. Don’t get me wrong. I stay aware of the happenings of the Burma, at least as much as possible in dar al-harb [house of war, or regions where Islamic law is not implemented]. But tonight Allah truly opened my eyes and my heart to the struggle of the mujahideen. When I began envision sleeping in the trenches, loading my magazine, making du’aa [prayer] that every bullet will be the death of one kafir [nonbeliever]. Bullets flying over my head on a daily basis and bombs killing those around me and cursing the drones and the coalition aircraft in the sky, feeling the cold of our winter and the hunger, I began to cry. This is not football game. This is not light matter. Our brothers are fighting for me right now. They are fight for my deam.

GJT at 15-16. At this point, Agent Kuhn interrupted the reading to state “these are his words,” and continued:

They left their mothers, children and warmth of their wives for make Allah word the highest. My words can't begin to explain the feeling in my heard, but I leave with this. May Allah give comfort, calmness and determination to the mujahideen. May Allah grant victory to Daulah and blacked the faces of all that oppose them.

GJT at 15-16 (errors remain unedited). Agent Kuhn said that this is an example of extreme rhetoric and of Mr. Thompson “presenting a greater threat to us.”<sup>1</sup>

### **1.2.5 Alleged attempt to commit misconduct involving weapons**

As the grand jury proceedings continue, Agent Kuhn moved to discussing Mr. Thompson's alleged google searches, e.g.

- “Can a felon have a crossbow”
- “Can a felon own a crossbow in Arizona”
- “muzzleloader”
- “Black powder inline rifles.”
- “Black powder inline rifles”
- “Felons with muzzleloader”
- “Felons with muzzleloader in Arizona”
- “Can felons legally own muzzleloading guns”
- “muzzleloading”
- “muzzleloader law ins Arizona”
- “Muszzlelader regulations by state”
- “Muzzleloader considered a firearm in Maine”
- “is muzzloader considered a firearm in Arizona”
- “can a felon have a crossbow”
- “No weapons felon prohibited”

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<sup>1</sup> Mr. Thompson is an American citizen, so there is some confusion about the us vs. them distinction in Agent Kuhn's analysis.

- “There was a search in specific about what kind of scope would he need for a shot at 300 yards” (i.e. “what kind of scope do I need for 300 yards”)

etc . . . GJT 17-18 (these searches appear to have been conducted on two days. August 14 and 15, 2016, which was not presented to the grand jurors because the witness could not recall the dates). From there the state moved to the attempted misconduct involving weapons charge and introduced the following testimony regarding Mr. Thompson’s ability to own a firearm:

Q: And during the course of this investigation, did you learn that [Mr. Thompson] has prior felony convictions.

A: Yes, Once we identified [Mr. Thompson] we learned – we conducted a criminal history check and learned that he had been convicted of aggravated assault and armed robbery.

Q: And those

A: And that was in 2005

Q: And those originated in Maricopa County

A: Yes, sir

Q: And did you located any court documents showing that his rights to possess a firearm had been restored?

A: I have not located any documentation that his rights have been restored.

GJT 19-20.

Agent Kuhn also testified about an alleged discussion of a gun between Mr. Thompson and someone who was selling a weapon. He testified that Mr. Thompson sent a message to a seller on backpage stating “I would love to get the CW9<sup>2</sup> from you but won't be in Phoenix again for a month or so. Wondering if you have other firearms. If so, I will definitely be in touch.” GJT at 21. The seller told Mr. Thompson that he did not have any other weapons for sale. GJT at 21. The seller did not have any other guns for sale and that concluded their interaction. GJT at 21.

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<sup>2</sup> A CW9 is a 9mm semi-automatic pistol that retails for under \$500.

## 2 Argument

In the course of the presentation to the grand jury, the state provided the grand jurors with an indictment that misstates the law; failed to instruct the grand jurors of the additional elements for speech crimes established under *Brandenburg*; exposed the grand jurors to Mr. Thompson’s actual convictions, when mere felon status would have sufficed; and finally, misled the grand jurors by merely stating that Mr. Thompson’s rights were not restored and not providing a discussion about how an individual restores their rights in the future.

### 2.1 The state gave the grand jurors an indictment with the wrong elements for participating in a criminal syndicate.

Affirmatively misstating the law to the grand jurors is reversible error in a grand jury proceeding. *Francis v. Sanders*, 222 Ariz. 423, 427, 215 P.3d 397, 401 (App. 2009).

During the presentation to the Grand Jurors, the state gave them a copy a draft indictment. For Count 1, Participating in a Criminal Syndicate, the indictment read that Mr. Thompson “solicited, incited or induced other to promote or further the criminal objectives of a criminal syndicate.” This statement of the elements of the offence includes an extra possible theory of prosecution, “solicitation,” which is not in the statute.

Arizona Revised Staute § 13-2308(A)(2), the section charged by the state, reads:

A person commits participating in a criminal syndicate by:

...

Knowingly inciting or inducing others to engage in violence or intimidation to promote or further the criminal objectives of a criminal syndicate;

There is no “solicitation” element in this offense. The grand jurors, presumably having been read the solicitation statute at an earlier point in time, would now believe that they have an additional theory under which to convict Mr. Thompson. GJT at 3.

Further, solicitation has been categorically removed from First Amendment protection by the United States Supreme Court, which would allow the grand jurors not to con-

sider the fact that mere incitement or inducement protected speech. *United States v. Williams*, 553 U.S. 285, 297, 128 S. Ct. 1830, 1841, 170 L. Ed. 2d 650 (2008); *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969) (Holding as unconstitutional Ohio's Criminal Syndicalism Act, which criminalized the justification of the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism').

**2.2 The state failed to instruct the grand jurors on the rule from *Brandenburg*, which categorically protects speech that incites and induces others to commit crimes in every case except those where the speech is likely to lead to serious, imminent harm.**

Prosecutors must accurately instruct jurors on the law, a task normally resolved by a reading of the statutes, including affirmative defenses, at the beginning of a grand jury session. When grand jurors ask about the law, particularly affirmative defenses, the prosecutor must accurately state the law or cause a reversible error. *Francis v. Sanders*, 222 Ariz. 423, 427, 215 P.3d 397, 401 (App. 2009).

The law in Mr. Thompson's case is unique, in that it is not a part of Arizona's statutory scheme, but is enshrined in constitutional First Amendment case law. In *Brandenburg*, the United States Supreme Court held that speech that merely incites or induces criminal conduct is categorically protected; it is not subject to any standard of scrutiny, it is not subject to any balancing test; it is simply protected speech. *Brandenburg v. Ohio*, 395 U.S. 444, 448, 89 S. Ct. 1827, 1830, 23 L. Ed. 2d 430 (1969) (Holding as unconstitutional Ohio's Criminal Syndicalism Act, which criminalized the justification of the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'); see also Thomas Healy, *Brandenburg in A Time of Terror*, 84 Notre Dame L. Rev. 655, 656 (2009).

When presenting evidence to the grand jury, the state at no time discussed the *Brandenburg* rule. The state presented Mr. Thompson's speech, Agent Kuhn's questionable



interpretations of that speech, and pointed the grand jurors to the participating in a criminal syndicate statute, which criminalizes the mere incitement or inducement of criminal activity. The issue with this presentation is that the state had not discussed all of the elements of an offense before asking a grand jury to indict. In cases where mere incitement and inducement are at issue, the state has an additional burden to prove that the speech is not categorically protected by the rule in *Brandenburg*. The state must prove, in addition to the elements of the speech crime, that the speech was also likely to produce serious imminent harm. *Brandenburg*, 395 U.S. at 447. And *Brandenburg* has stood the test of time; the 1969 decision has been upheld in *Hess v. Indiana*, 414 U.S. 105, 109, 94 S. Ct. 326, 329, 38 L. Ed. 2d 303 (1973); and *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 927, 102 S. Ct. 3409, 3433, 73 L. Ed. 2d 1215 (1982).

*Hess* is the most instructive of the cases for Mr. Thompson's situation because it deals with speech at a rally/riot. The evidence showed that more than 100 protestors had blocked traffic and refused orders to clear the street. 414 U.S. at 108-109. When police finally moved the crowd to the curb, the defendant shouted, "We'll take the fucking street later [or again]." *Id.* at 107. Hess was arrested, charged with disorderly conduct, and convicted. *Id.* at 105. The Indiana Supreme Court agreed with the trial court that his statement "was intended to incite further lawless action on the part of the crowd in the vicinity of appellant and was likely to produce such action." *Id.* at 108. The United States Supreme Court reversed, finding the speech was "nothing more than advocacy of illegal action at some indefinite future time." *Id.*

Coming out of Arizona, habeas case *McCoy v. Stewart*, 282 F.3d 626, 632 (9th Cir. 2002) held that the Arizona Court of Appeals unreasonably applied the law by upholding a conviction for participating in a criminal street gang, where the defendant 'advised a street gang who called themselves the "Bratz" or "Traviesos" on at least two separate occasions on how to operate their gang.' *Id.* at 628. The Ninth Circuit held that the evidence presented

at trial was not sufficient to uphold a conviction, the lowest bar for factual proof, i.e. the merest scintilla of the evidence standard.

Mr. Thompson's speech is protected First Amendment speech. The state presented no evidence to the grand jurors that Mr. Thompson's speech had incited any likely or imminent serious harm. Instead, the state presented a large number of public comments on YouTube and Google+ with the intent of scaring the Grand jurors into convicting Mr. Thompson of participating in a criminal syndicate bases merely on his speech, which does not even appear to advocate illegal conduct, much less advocate it to the extent that anyone would imminently act.

Without instruction on the required *Brandenburg* elements, the grand jurors had no law in front of them, except for the participating in a criminal syndicate statute, which, with its "inciting and inducing" language criminalizes a broad swath of protected speech. One possible equivalent to not introducing the test from *Brandenburg* to the grand jurors is not presenting the test for justification, or necessity, or duress, all of which are affirmative defenses. *Brandenburg's* rule however, is not a defense. It is simply a statement of the law and the minimal standard for conviction. In this respect, the state's failure to state the law went beyond failing to present an affirmative defense and more closely approaches a failure to present the basic elements of an offense. For this reason, the court should remand for a new finding of probable cause where these elements are presented.

### **2.3 The state improperly introduced the names of two of Mr. Thompson's convictions to prove that he was a felon, in violation of his due process rights under the Fifth and Fourteenth Amendments.**

Improper application of and admission of other acts evidence is a due process violation. *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997). The allegation that an individual is a felon in a misconduct involving weapons charge is uniquely prejudicial, requiring per se severance at trial and tainting any jury that hears this evidence. *State v. Burns*, 237 Ariz. 1, 14, ¶ 34, 344 P.3d 303, 316 (2015).

During presentation to the grand jury, the state introduced the actual charges underlying two felonies for which Mr. Thompson was allegedly convicted, aggravated assault and armed robbery. These two names are unnecessary to establish Mr. Thompson's felon status for the purpose of alleging a misconduct involving weapons count based on a theory that he is a prohibited possessor due to felon status. The admission of these named charges introduced other acts evidence and likely prejudiced the jurors against Mr. Thompson. Even in trial cases where possession of a weapon would be cross-admissible in separate trials, the courts have still held that failing to sever a misconduct involving weapons charge is an abuse of discretion, particularly because of the risk of prejudice. *See State v. Burns*, 237 Ariz. at 14, ¶ 36, 344 P.3d 303, 316 citing *United States v. Nguyen*, 88 F.3d 812, 815 (9th Cir.1996) (noting uniform agreement among the federal circuit courts that introduction of prior convictions creates a dangerous potential for misuse of that information by the jury).

While the issue in the present case is not severance, the logical extension of this prejudice argument is that the admission of a non-sanitized reading of two specific felonies is *ad fortiori* more prejudicial than a single, sanitized felony, which in itself is highly prejudicial information to place in front of a jury.

**2.4 The state misled the grand jurors by presenting evidence that Mr. Thompson has not *currently* restored his civil rights, when he is charged with *attempted* misconduct involving weapons, a crime involving completion of an act in the future.**

A felon who is intrigued by how to legally own a physical item that the law might regard as a weapon, e.g. a nunchaku, which is permissible for felons to own when engaged in martial arts demonstrations, but not otherwise, or a rifle or crossbow for hunting.<sup>3</sup> A felon may also want to reach out to others to discuss who they could acquire an item that is

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<sup>3</sup> See Arizona Revised Statutes § 13-3102(H): "Subsection A, paragraph 3 of this section shall not apply to a weapon described in § 13-3101, subsection A, paragraph 8, subdivision (a), item (v), if such weapon is possessed for the purposes of preparing for, conducting or participating in lawful exhibitions, demonstrations, contests or athletic events involving the use of such weapon. Subsection A, paragraph 12 of this section shall not apply to a weapon if such weapon is possessed for the purposes of preparing for, conducting or participating in hunter or firearm safety courses."

listed as a weapon at a future date. This is in part because they may not have their right to possess a weapon restored on the current date, but may seek restoration of a right in the future.

Mr. Thompson is accused with committing the current criminal act of taking a substantial step toward the possession of a prohibited weapon, while still a prohibited possessor. This is a highly unusual charge which appears a handful of times in a 50 state survey of criminal charges.

To support this peculiar charge, the state only presented evidence to the grand jurors that Agent Kuhn had not found any documents showing that Mr. Thompson's rights had currently been restored. No date was provided for the search of court records and this search does appear to have been documented in the admittedly minimal discovery. Putting aside the lack documentation, this evidence is only adequate to prove that an individual who is currently in possession of a weapon is a prohibited possessor. It is not evidence that that individual could not lawfully purchase a weapon in the future with the appropriate civil rights or that the individual cannot legally own the weapon in the present.

Attempt under Arizona law requires that

A person commits attempt if, acting with the kind of culpability otherwise required for commission of an offense, such person: . . . intentionally engages in conduct which would constitute an offense if the attendant circumstances were as such person believes them to be . . .

In the context of Mr. Thompson's searches, it appears the he believed the convicted felons may be able to hunt or legally own a specific class of weapons. This is correct under A.R.S. § 13-3102(H).

The state does not appear to have read this statute to the grand jurors or informed them of this legal protection. Further, the state presented no evidence on the question of how Mr. Thompson could go about getting his gun rights restored. A.R.S. § 13-904, 905, 906. In-

stead the state attempted to manufacture a crime where a felon can never legally possess a weapon and never has an avenue towards the restoration of their rights in the future. On these grounds, the state has not presented the relevant law on this issue of attempt, which requires proof that “the attendant circumstances were as such person believes them to be.” Here, Mr. Thompson appeared to be investigating whether a felon can possess a firearm, to which the answer is yes. The grand jurors, however, would have been unable to come to this conclusion based on the statements of the law made to them.

### 3 Conclusion

Therefore it is respectfully requested that this Court enter and order remanding this case back to the Maricopa County Grand Jury for a redetermination of probable cause.

Respectfully Submitted  
Wednesday, March 08, 2017  
Maricopa County Public Defender

By: /s/ John Champagne  
John Champagne  
Deputy Public Defender

Copy of the foregoing motion  
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