UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 10-20123
Honorable Victoria A. Roberts

DAVID STONE, JR., et al.,

Respondent.
_____/

MOTION FOR *VINSON-ENRIGHT* HEARING

NOW COMES Defendant, **DAVID STONE, JR.**, by his attorneys, **RICHARD M. HELFRICK** and **TODD A. SHANKER** of the Federal Defender Office and, pursuant to *United States v. Vinson*, 606 F.2d 149 (6th Cir. 1979) and *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978), moves this Honorable Court to grant a pre-trial hearing where the government must prove by a preponderance of the evidence that a conspiracy existed; that the defendants were a part of that conspiracy, if one exists; and that any statements the government intends to use as evidence are admissible against some or all of the defendants. Defendant files a supporting Brief and further states:

1. Defendant was arrested on March 27, 2010, in connection with an Indictment charging him (and eight others) with Seditious Conspiracy, Attempt To Use Weapons of Mass Destruction, Teaching/Demonstrating Use of Explosive Materials, and two counts of Carrying, Using, and Possessing a Firearm During and In Relation to A Crime of Violence.

2. On June 2, 2010, a First Superseding Indictment charged David Stone, Jr. with Seditious Conspiracy, Conspiracy to Use Weapons of Mass Destruction, Teaching And Demonstrating Use of Explosives, two counts of Carrying a Firearm During and In Relation To a Crime of Violence, two counts of Possessing a Firearm in Furtherance of a Crime of Violence, and Possession of an Unregistered Firearm. The other eight defendants were similarly charged, with three (David Stone, Sr., Joshua Stone and Joshua Clough) receiving additional charges of possessing a machinegun.

3. Counsels' analysis of the documents, tape-recordings, and photographs provided thus far by the government during the discovery process has revealed substantial questions regarding: the existence of any criminal conspiracy; the participants in such a conspiracy, if one exists; and the admissibility of out-of-court statements purported to be in furtherance of the alleged conspiracy.

4. Counsel has contacted the government regarding this Motion. The government does not concur.

WHEREFORE, Defendant moves this Honorable Court to grant a hearing pursuant to the *Vinson-Enright* line of cases in order to determine whether a conspiracy existed; if so, which defendants were a part of that conspiracy; which hearsay statements are admissible, if any, as co-conspirator statements; and finally, whether the admissibility of these statements must be limited to certain defendants.

Respectfully Submitted,

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EASTERN DISTRICT OF MICHIGAN
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UNITED STATES OF AMERICA,

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Honorable Victoria A. Roberts

DAVID STONE, JR., et al.,

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Brief in Support of Defendant David Stone, Jr.'s
Motion for *Vinson-Enright* Hearing

TABLE OF AUTHORITIES

Supreme Court

Circuit Courts

District Courts

State Courts

I.

Statement of Facts

Counsel for David Stone, Jr. have analyzed hours of audio and video recordings, documentary evidence, photographs, and statements by the accused defendants. This analysis has revealed substantial questions regarding: the existence of any criminal conspiracy; the participants in such a conspiracy, if one exists; and the admissibility of out-of-court statements purported to be in furtherance of an alleged conspiracy.

The alleged evidence reviewed by counsel thus far indicates that David Stone, Jr. failed to utter an unkind word about anyone, let alone join a criminal conspiracy to use illegal force and weapons of mass destruction against the United States government. The government alleges that all nine defendants joined the seditious conspiracy "on or about" August 16, 2008 and the conspiracy to obtain a WMD in June of 2009; and that all nine remained conspirators up to the date of the arrests. Stone, Jr. was 18 years-old on the date of the alleged formation of the seditious conspiracy. In October 2009, he and his fiancée Brittany Bryant moved into her father's home. On September 22, 2009, their son Elijah was born. The couple lived with Brittany's father until March 2010, when they obtained their own apartment in Adrian, Michigan. Shortly thereafter, Stone, Jr. was arrested in this case.

The government's evidence indicates that Stone, Jr.'s presence at militia training was sporadic at best. He was not present for the majority of the controversial speech that has been highlighted by the prosecution thus far in the case. In the rare circumstances Stone, Jr. is

heard on tape, he either talks glowingly about his newborn son or about providing for his young family - by working long hours in a brake-parts factory and caring for Elijah.

Stone, Jr. is now twenty years-old. He was home-schooled from around the age of 7 by defendant David Stone, Sr. This "schooling" usually involved Stone, Jr. being left with a Bible and an encyclopedia while his mother and Stone, Sr. worked. At age 12, Stone, Sr. adopted him. In his statement to the FBI, Stone, Jr. explained that he is a member of the Hutaree "because his father is a member." He stated that he "blows off" his father's rhetoric and notes that Stone, Sr. has talked about the "around the corner" outbreak of war with the "one world government" since 1999. Stone, Jr. Statement to the FBI, 03-27-2010, p. 2-3. Stone, Jr. stated that as he has grown older and decided to start a family, he has strayed further and further from the militia lifestyle. While acknowledging his father's animosity toward certain members of law enforcement and his persistent belief that an "Anti-Christ" government would instigate war, Stone, Jr. stated that he was unaware of any specific operation planned to harm law enforcement. He does not share the same belief system as his father, and does not want to be a part of the militia, but still attended some meetings because he did not want to "break his father's heart." Stone, Jr. Statement, p. 6, 8.

These statements are supported by other members, and contradicted by no one. For example, in Defendant Kristopher Sickles's Statement, he says that Stone, Jr. was "just kind of there," that he never gave orders and that he often left training early. Sickles Statement to the FBI, 03/27/2010, p. 7. Stone, Jr. attended meetings sporadically to make his father happy.

His primary focus was providing for his newborn son. There is simply no evidence that he knew about or agreed to participate in either a seditious conspiracy or a conspiracy to obtain weapons of mass destruction.

Furthermore, the government's evidence raises substantial questions as to whether any conspiracy existed at all. Case Agent Larsen admitted during her testimony at the detention hearing that there was no defined criminal objective – even on the day the defendants were arrested. Detention Hrg., Vol. 1, 4/27/2010, Tr. 40.

On March 13, 2010, two weeks before the arrests in this case, David Stone, Sr. addressed the Hutaree and emphasized:

> "We're not radicals, we're not skinheads – we're not doing anything illegal. We're going to keep it that way."

FBI Video/Audiotape, 3/13/2010, 1D94-98.[1]

On February 20, 2010, Stone, Sr. addressed the group at training and emphasized that no militia would start the war with the New World Order. He also conceded that the group had been "set way back" in their preparation to survive and defend in the event of war. He notified the group that "Alfie the medic" had committed suicide, and that it would take at least another year to train a replacement. FBI Audiotape, 2/20/2010, 1D84.

The great majority of the audio and video tapes portray a small, "weekend warrior"-style militia where members felt free to boast, vent, and play war games – and call it

[1] This is the FBI's identification number for this particular piece of evidence. Where such numbers are used in this Brief, they refer to this same FBI identification/numbering system.

"training." The few discussions emphasized by the prosecutors lack thought, detail, focus, gravity or agreement.

The charge of Conspiracy to Use a Weapon of Mass Destruction (hereafter WMD) is curious because there is no allegation in the indictment that any defendant ever accepted, received, or possessed a real or fake WMD, IED, or EFP. The government alleges that David Stone, Sr. *alone* "emailed" internet information about IEDs and EFPs to the undercover agent and "solicited" the construction of four IEDs "to take with them to the summit" of Militias scheduled for February 6, 2010 in Kentucky. R. 175, First Superseding Indictment, p. 8-9. However, there is no allegation that any other defendant knew about this. There is no claim that these IEDs were constructed, either actually or fictionally, and no claim that Stone, Sr. or any other defendant ever accepted, received, or possessed these IEDs. Most importantly, the government does not allege that Stone, Sr. or any other defendant requested, received or possessed a WMD, IED, or EFP after Stone, Sr.'s apparently unfulfilled request for February Militia Summit. In fact, the Indictment concedes that at the time of arrest no defendant possessed a real or fake WMD, IED, or EFP, bomb, grenade, or mine. R. 175, First Superseding Indictment, p. 4-5.

Uncharged Hutaree members who have attended trainings for the last two years were interviewed at length by the FBI. Those witnesses have publicly stated that they were not aware of any Hutaree members making threats against law enforcement during the training sessions, and that the group "couldn't have planned their way out of a paper sack." See Lee

Higgins, "Hutaree members describe FBI raid at phony memorial service in Ann Arbor," 4/18/2010, www.annarbor.com. According to these witnesses, "trying to make these bozos into a paramilitary organization is ludicrous." *Id.* As discussed below, in this unique case, a *Vinson/Enright* hearing will be the safest and most efficient method to evaluate the alleged conspiracy evidence.

II.

Introduction

Before the government can employ the co-conspirator exception to the hearsay rule, it must demonstrate—by a preponderance of the evidence—that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of that conspiracy, and that the statement in question was made in furtherance of the conspiracy. *United States v. Vinson*, 606 F.2d 149, 152 (6th Cir. 1979) (citing *United States v. Enright*, 579 F.2d 980 (6th Cir. 1978)). "This preliminary finding is the sole province of the trial judge." *Id.*; *United States v. Holloway*, 731 F.2d 378, 381 (6th Cir. 1984). In *Vinson*, the Sixth Circuit set forth alternative methods that district courts may employ to structure conspiracy trials and the introduction of co-conspirator statements:

> One acceptable method is the so-called "mini-hearing" in which the court, without a jury, hears the government's proof of conspiracy and makes the preliminary *Enright* finding(s) . . . Although this procedure has been criticized as burdensome, time-consuming and uneconomic, a trial judge, in the exercise of h[er] discretion, may choose to order the proof in this manner if the circumstances warrant.

Id. Here, the unique circumstances warrant – and indeed compel – such a hearing.

It is likely that the government will not be able to meet its burden of admissibility at trial, and the danger of a mistrial because of this failure is very real. Furthermore, the Hutaree Militia is unquestionably, at worst, a "bifarious organization," or a group that "embrace[d] both legal and [allegedly] illegal aims" in pursuing their objectives. *Scales v. United States*, 367 U.S. 203, 229 (1961). As such, the criminal intent of David Stone, Jr. and all other Defendants before the Court, "must be judged *strictissimi juris*." *Noto v. United States*, 367 U.S. 290, 300 (1961). As a result, "the evidence admissible to prove an individual's specific intent to adhere to the criminal aspects of the group is limited to three categories: (1) the individual defendant's prior or subsequent unambiguous statements; (2) the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or (3) the individual defendant's subsequent legal act if that act is 'clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." *United States v. Spock*, 416 F.2d 165, 173 (1st Cir. 1969)(quoting *Scales*, 367 U.S. at 234); *United States v. Dellinger*, 472 F.2d 340, 393 (7th Cir. 1972). A pre-trial hearing would afford the Court an opportunity to identify such evidence before trial and make appropriate rulings.

Therefore, Stone, Jr. requests that this Court order a hearing in order to evaluate the government's proof of conspiracy and make preliminary *Enright* and *Spock* findings. Alternatively, Defendant requests that this Court employ the "second method" *Vinson* authorizes and require the government to present its proposed evidence to the Court for an *in*

camera pre-trial review. *United States v. Cornelius*, No. 06-20185, 2009 WL 1585544, at *4 (E.D. Mich. June 5, 2009). In either event, Defendant also requests that the Court exclude or limit any evidence that—because of the principle of *strictissimi juris*—cannot be used by the government to show Defendant's specific intent.

III.

A Pre-Trial Hearing is Warranted and Necessary in this Case.

The preliminary finding of whether the government has met the co-conspirator exception is "the sole province of the trial judge." *Vinson*, 606 F.2d at 152; *Holloway*, 731 F.2d at 381. Similarly, the choice of which *Vinson*-approved method to employ rests solely within "the trial court's prerogative." *United States v. Robinson*, 390 F.3d 853, 867 (6th Cir. 2004). While the trial judge is free to admit hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence, the use of this method increases the danger of a mistrial. *Vinson*, 606 F.2d at 153; *see also United States v. Collins*, 927 F.2d 605 (6th Cir. 1991)(holding that district court erred by refusing to grant a mistrial after the government failed to meet its evidentiary burden for the co-conspirator exception). "It must be recognized that where the hearsay is conditionally admitted, there is built into the decision-making process a pressure to find the hearsay admissible in order to avoid the necessity of a mistrial." *Butler v. United States*, 481 A.2d 431, 441 (D.C. App. 1984).

While the Sixth Circuit has not provided a specific set of factors that trial courts are to use in determining which *Vinson* method to employ, the factors below indicate that there are a

variety of reasons why a pre-trial hearing is preferable in this particular case.

A. The Government's Evidentiary Burden of Admissibility and its Burden of Proof of Guilt

The likelihood, or lack thereof, that the government will be able to meet its burden of admissibility at trial, let alone its burden of proof beyond a reasonable doubt, is a factor to be considered. In this case, there is little to indicate that the government will be able to meet either burden, especially as to David Stone, Jr. There seems to be a dearth of evidence showing that there was ever any identifiable criminal agreement to do anything at all, much less any evidence that shows that Stone, Jr. was party to such an agreement, or that the statements the government intends to introduce were in furtherance of such an agreement.

1. There Is No Identifiable Criminal Object

Before co-conspirator statements may be admitted, the government must first establish by a preponderance of the evidence that a conspiracy existed. *Vinson*, 606 F.2d at 152. In *Yates v. United States*, 354 U.S. 298, 320 (1957), the Supreme Court distinguished "advocacy of forcible overthrow as an abstract doctrine and advocacy of action to that end." The language and reasoning of *Yates* supports the common-sense conclusion that relatively abstract conversations about New World Order takeovers and "blue helmet" invasions give little insight into whether concrete, particularized and identifiable criminal agreements to oppose the federal government by force have been made by specific individuals.

In this case, it is not at all clear what criminal object the government has identified. There are no specific plans or targets identified by the government. *United States v. Stone*, *et*

al., No. 10-20123, 2010 WL 1780355, at *8 (E.D. Mich. 2010). The facts and "plan" described in the First Superseding Indictment do not support seditious conspiracy charges, even in the light most favorable to the government. See David Stone Jr.'s Motion to Dismiss, 9/21/2010. Case Agent Larsen admitted during her testimony at the detention hearing that there was no defined criminal objective – even on the day the defendants were arrested. Detention Hrg., Vol. 1, 4/27/2010, Tr. 40. The most the case agent could offer regarding an alleged conspiracy was that "they may have been planning to do something." *Id*. at Tr. 49. The "discussions" concerning violence against police officers, while abhorrent, are merely that. Many of the statements are explicitly conditional; some are obvious fantasy; others are warped jokes; and nearly all are uttered within a hyperbolic and histrionic chamber of improvised, context-specific venting and boasting machismo. *See Stone, et al.* at *8-10. The government will have a difficult time demonstrating that there was any criminal conspiracy by even a preponderance of the evidence, much less a seditious conspiracy or a conspiracy to use a WMD beyond a reasonable doubt.

2. Stone, Jr. Did Not Agree to Participate in any Criminal Conspiracy

Merely discussing the desirability and justifiability of criminal acts does not constitute an agreement to perform such acts; perhaps more importantly, merely listening to such discussions does not a co-conspirator make. Yet further, the failure to even be present for such discussions, as was often the case with Stone, Jr., would appear to be exculpatory. The Supreme Court has explained that "to establish the [requisite] intent, the evidence of

knowledge must be clear, not equivocal . . . because charges of conspiracy are not to be made out by piling inference upon inference." *Ingram v. United States*, 360 U.S. 672, 680 (1959) (quoting *Direct Sales Co. v. United States*, 319 U.S. 703, 711 (1943)); in accord *United States v. Sliwo*, __ F.3d __, 2010 WL 348891 (6th Cir., 9/28/2010).

To prove that Stone, Jr. conspired, the government must show that he "was aware of the objects of the conspiracy, and that he voluntarily associated himself with it to further its objectives." *United States v. Warman*, 578 F.3d 320, 333 (6th Cir. 2009) (quoting *United States v. Gibbs*, 182 F.3d 408, 421 (6th Cir. 1999)). Put another way, "[s]pecific intent to join is an essential element of the crime of conspiracy." *United States v. Brown*, 332 F.3d 363, 372 (6th Cir. 2003) (citing *United States v. Elder*, 90 F.3d 1110, 1120 (6th Cir. 1996)).

Furthermore, "it is clear that it takes more than close and repeated association with those who are proved to be operating an illegal enterprise to make one a coconspirator." *Sliwo, Id.*; *United States v. Anderson*, 352 F.2d 500, 501 (6th Cir. 1965). The law of conspiracy, while broad, does not impugn individuals on the ground of guilt by association: "mere association with the members of a conspiracy without the intention and agreement to accomplish an illegal objective is not sufficient to make an individual a coconspirator." *United States v. Lee*, 991 F.2d 343, 348 (6th Cir. 1993). Additionally, mere presence is insufficient to establish participation in a conspiracy. *United States v. Paige*, 470 F.3d 603, 609 (6th Cir. 2006). Summarily, "'mere knowledge, approval of or acquiescence in the object or the purpose of the conspiracy, without an intention and agreement to cooperate in the

crime' is not sufficient to make one a conspirator." *United States v. Richardson*, 596 F.2d 157, 162 (6th Cir. 1979) (quoting *United States v. Williams*, 503 F.2d 50, 54 (6th Cir. 1974)).

Even if the government is able to identify some criminal conspiracy, there is no evidence that Stone, Jr. agreed to participate in it. Seemingly, most—if not all—of the government's evidence of Stone Jr.'s "agreement" and "knowing participation" consists of membership in the Hutaree and/or attendance at "training" sessions where a few other members engaged in controversial speech – most often, not even in his presence. As Defendant Kristopher Sickles related in his Statement, Stone, Jr. was "just kind of there;" he never gave orders and he often left training early. (Sickles Statement to the FBI, 03/27/2010, p. 7). When David, Jr. is heard on tape, he either talks about his newborn son or about providing for his young family - by working long hours in a brake-parts factory and caring for baby Elijah. He does not utter an unkind word about police, government, or anyone else, and never initiates or even joins in controversial speech or conversations. There is not any credible evidence, let alone a preponderance of the evidence, to suggest that David, Jr. joined a criminal conspiracy to use illegal force and weapons of mass destruction against the United States government.

3. <u>The Statements Were Not Made In Furtherance of the Conspiracy</u>

For statements to meet the exception, they must have been uttered "in furtherance" of the conspiracy. *Vinson*, 606 F.2d at 152; *see also Wong Sun v. United States*, 371 U.S. 471, 490 (1963)(this "very narrow exception" reaches only statements "in furtherance of

conspiracy"); *Krulewitch v. United States*, 336 U.S. 440, 443-44 (1949)(noting that the requirement that statements be made "in furtherance of the conspiracy charged" is one that "has been scrupulously observed" by federal courts). Even if there was a conspiracy among some members, the statements at issue were not made in furtherance of such an agreement. Most, if not all, of the statements were mere idle chatter; conditional bragging; improvised and context-specific venting; casual, rambling, topic-flitting conversations; or narrative declarations – none of which satisfy the "in furtherance" requirement of the co-conspirator exception. *See Warman*, 578 F.3d at 338-339 ("bragging" and "boasting" statements not admissible as being in furtherance of conspiracy); *United States v. Conrad*, 507 F.3d 424, 430 (6th Cir. 2007)("idle chatter" and "casual conversation" are not "in furtherance" of a conspiracy; convictions reversed); *United States v. Cornett*, 578 F.3d 776, 784 (5th Cir. 1999)(statements made during "diverse" conversation at bowling alley, which included references to "exotic dancers," were not in futherance of conspiracy and denied defendant his right to a fair trial); *United States v. Wilson*, 490 F. Supp. 713, 717 (E.D. Mich. 1980)(holding that narrative declarations not tending to draw listener into conspiracy or otherwise further it are not made in furtherance of conspiracy as required by the exception).

Furthermore, a few specific references to an imaginable plan of action within a much larger and more generic anti-authority diatribe should not make a sporadic statement admissible. As the Supreme Court observed in *Yates*:

> Instances of speech that could be considered to amount to 'advocacy of action' are so few and far between as to be almost completely

> overshadowed by the hundreds of instances in the record in which overthrow, if mentioned at all, occurs in the course of doctrinal disputation so remote from action as to be almost wholly lacking in probative value.

Yates, 354 U.S. at 327. While *Yates* did not specifically reference the "in furtherance" prong of F.R.E. 801(d)(2)(E), the Supreme Court's reasoning is applicable.

Here, the government has pored through hundreds of hours of tape, isolating a few series of words, and provided them to the Court as proof of "seditious conspiracy" and "conspiracy to use a WMD." In reality, the statements alleged to be made "in furtherance" of a criminal conspiracy were usually just theatrical components of some of the Defendants' bluster-filled rants about law enforcement, the "New World Order," an impending takeover by the United Nations, and the coming of the Anti-Christ.

It seems that very few, if any, of the conversations were meant to draw individuals into any criminal conspiracy. Tactics and strategy as related to specific criminal operations are not ever discussed. The statements are almost all the product of context-dependent, improvised, and hyperbolic venting or boasting, and/or subjective interpretations of prophecy. In addition, the case agent conceded that there was considerable "overlap in conversation" due to the rambunctious nature of the speech. Detention Hrg., 4/27/2010, Vol. 1, Tr. 52. It is entirely unclear which individuals even heard particular statements. This speech, while controversial and at times vile, fails to satisfy the "in furtherance" requirement. Since it is unlikely that the government will be able to meet its evidentiary burden at trial, a pre-trial hearing is preferable to the conditional admission of these and other prejudicial statements carefully culled by the

prosecution from nearly two-years worth of tapes.

B. The Potential for a Mistrial in the Event that the Government Does not Meet its Burden of Admissibility

This Court should also consider the potential for a mistrial in the event that the government is not able to meet its evidentiary burden under FRE 801(d)(2)(E). In some cases the admission of statements that are not sufficiently "connected up" by the government during trial will not require a mistrial, as the statements may not be sufficiently prejudicial, other evidence of guilt may be overwhelming, and/or the error may be cured with a jury instruction. Frankly, this is not one of those cases.

Here, the potential for a mistrial is very high. If the government does not meet its burden, a slew of hearsay statements will have been admitted. While the number and length of the admitted statements are not dispositive, they are important considerations, especially in a case where the government is relying heavily on the statements at issue to prove the elements of the offense. *See, e.g.*, *United States v. Gomez*, 810 F.2d 947, 951 (10th Cir. 1987). More importantly, the outrageous content of the statements at issue in this case involve uniquely prejudicial speech. The potential for a mistrial strongly supports a pre-trial "mini-hearing."

C. First Amendment Considerations

Because of the nature of the charge and the evidence the government intends to introduce, First Amendment considerations weigh in favor of a pre-trial *Vinson-Enright* hearing. Inadmissible hearsay that prejudices an individual is bad enough, but here there is a distinct danger that the unfair prejudice will be based upon Defendants' non-criminal and

constitutionally protected conduct. The use of such statements threatens to chill the exercise of constitutional rights. In *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the Supreme Court recognized that "[t]he chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure." *Id.* at 486. Similarly, the admission of particular pieces of evidence in a prosecution may further chill constitutionally protected conduct.

If the government is required to meet its evidentiary burden before trial, then the prosecution will also necessarily have to establish by a preponderance of the evidence that the statements it intends to admit fall outside of the protections of the First Amendment. Namely, that the charged conspiracies were intended and likely to produce imminent lawless action. See David Stone Jr.'s Motion to Dismiss, 9/21/2010 citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969) and *Baldwin v. Franks*, 120 U.S. 678 (1852), among many other cases. With a pre-trial hearing, the Court helps ensure that Defendants' constitutionally protected conduct cannot unfairly prejudice them, and that other individuals will not be adversely affected by the conditional admission.

D. <u>The Application of Atypical Standards / Doctrines</u>

In a run-of-the-mill conspiracy case it may occasionally be sensible to conditionally admit co-conspirator statements. However, in a case involving an atypical standard or doctrine, it makes more sense to err on the side of caution. This case is an example of the latter. The Hutaree is a bifarious organization, which means that the *strictissimi juris* doctrine

applies. The uniqueness of the case weighs in favor of a mini-hearing and the specific requirements of *strictissimi juris* indicate such a hearing is necessary.

A bifarious organization is one that "embrace[s] both legal and [allegedly] illegal aims" in pursuing their objectives. *Scales*, 367 U.S. at 229. The Hutaree's group training and meetings, out of which the alleged conspiracy supposedly developed, was at worst a bifarious undertaking that involved both legal and allegedly illegal purposes and conduct. *See United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir. 1973); *United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991). The government has admitted as much by acknowledging in open court that there are many members of the group who were neither arrested nor charged with a crime.

The Hutaree exercised their rights to engage in controversial speech about politics and religion, to assemble peacefully, and to bear arms. *See District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010). The only established objective of the organization was to be prepared to survive and defend themselves, their families, and their communities, in the event of chaos, disaster, or some kind of hostile takeover of the United States. Their preparation involved stockpiling food, weapons and ammunition; conducting military-like training exercises; establishing emergency contact procedures; and holding group meetings. Viewing the charges with the group's legal objectives, the Hutaree is a bifarious organization even in the darkest light.

When a defendant is charged with a conspiracy that arises out of his membership in

such an organization, the Supreme Court has held that there are important ramifications on the prosecution:

> It must indeed be recognized that a person who merely becomes a member of an illegal organization, by that 'act' alone need be doing nothing more than signifying his assent to its purposes and activities on one hand, and providing, on the other, only the sort of moral encouragement which comes from the knowledge that others believe in what the organization is doing . . . A member, as distinguished from a conspirator, may indicate his approval of a criminal enterprise by the very fact of his membership without thereby necessarily committing himself to further it by any act or course of conduct whatever.

Scales, 367 U.S. at 227-28. As such, an individual defendant's criminal intent:

> [M]ust be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share.

Noto v. United States, 367 U.S. 290, 299-300 (1961). The Seventh Circuit has explained that "the *strictissimi juris* doctrine emphasizes the need for care in analyzing the evidence against a particular defendant in a case of this type." *Dellinger*, 472 F.2d at 393. Trial courts have an obligation to apply the standard and carefully enforce its protections. *Id.*

The necessity of the *strictissimi juris* standard in this case weighs strongly in favor of a *Vinson-Enright* hearing for two other independent reasons. First, this Court has an obligation to apply the doctrine not only to ultimate sufficiency questions, but to admissibility questions as well. *Id.* That is, the Court must apply the doctrine in deciding whether the government

has shown by a preponderance of the evidence that David Stone, Jr. was a willing participant in a seditious conspiracy and a conspiracy to use a WMD. A pre-trial hearing better allows for the appropriate level of scrutiny of the government's proffer.

Second, the purpose of the doctrine is to require "specially meticulous inquiry" into the evidence so that there is not an "unfair imputation of the intent or acts of some participants to all others," *Dellinger*, 472 F.2d at 393, and so that legitimate political expression and association are not adversely affected. *Scales*, 367 U.S. at 229. Conditionally admitting the statements opens the door to precisely the unfair imputations against innocent members that the doctrine seeks to prevent, and at the same time, significantly increases the danger of chilling legitimate expression and association. On the other hand, if the government's evidence is vetted before trial, the Court will be providing the kind of vigilant protection required by the standards of the First Amendment, *strictissimi juris* and due process.

This case involves a rarely used charge and requires the application of a rarely used doctrine. That this is not by any means an ordinary conspiracy case weighs in favor of a pre-trial hearing. The fact that the doctrine of *strictissimi juris* counsels meticulousness and caution tips the scales dramatically in favor of such a hearing.

E. The Mini-Hearing As A Practical Tool for Dealing with Other Relevant Issues That Will Need to Be Addressed

The main argument against the mini-hearing method is that it can be time-consuming. *See Vinson*, 606 F.2d at 152. Balanced against this concern is the danger of mistrial, which is substantial in this case. Here, there is an additional factor that weighs against the

government's likely economy arguments: the hearing can be used as a forum to dispose of other related and relevant issues, making the method more efficient than it might otherwise be. The looming First Amendment issue as to whether the alleged conspiracies involved a clear and present danger to the United States government could be, and logically should be, addressed at such a hearing. In addition, in cases involving the prosecution of members of a bifarious organization, the First and Fifth Amendments require special evidentiary limitations. At a pre-trial hearing the trial court could determine how those limitations apply to the statements at issue in the event that some of the statements *do* pass F.R.E. 801(d)(2)(E) muster.

The First Circuit has explained that:

> When the alleged agreement is both bifarious and political within the shadow of the First Amendment . . . an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated."

United States v. Spock, 416 F.2d 165, 173 (1st Cir. 1969) (quoting *Scales*, 367 U.S. at 234). The Court went on to explain the "fundamental error" in adopting the panoply of rules applicable to an ordinary conspiracy: "the government introduced numerous statements of third parties alleged to be co-conspirators. This was improper. The specific intent of one defendant in a case such as this is not ascertained by reference to the conduct or statements of

another even though he has knowledge thereof." *Id.* (also emphasizing that "[t]he metastatic rules of ordinary conspiracy are at direct variance with the principle of *strictissimi juris*.").

The evidence that the government may use to show specific intent must be limited to the three categories established in *Spock*. If the Court grants a hearing to evaluate the government's evidence of conspiracy, it can simultaneously hear arguments on this issue and determine how best to limit and qualify the statements as required. Defendant has also filed a Motion to Dismiss based in part on First Amendment concerns. If there is no unified hearing, Defendants will likely move for a separate *Spock* hearing as well. Given the overlap of all of these issues, a *Vinson-Enright* hearing is the safest and most efficient use of judicial resources.

IV.

Conclusion

For all these reasons, David Stone, Jr. respectfully requests that this Honorable Court order a *Vinson-Enright* hearing.

Respectfully submitted,

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Dated: September 21, 2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 10-20123
Honorable Victoria A. Roberts

DAVID STONE, JR., et al.,

Respondent.
_____/

CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2010, I electronically filed the foregoing Motion and Brief with the Clerk of the Court using the ECF system, which will send notification of such filing to the following:

Sheldon N. Light
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Respectfully submitted,

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