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 TO DISMISS

NOW COMES Defendant, **DAVID STONE, JR.**, by his attorneys, **RICHARD M. HELFRICK** and **TODD A. SHANKER** of the Federal Defender Office and, pursuant to Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, moves this Honorable Court to dismiss counts 1-7 in the First Superseding Indictment. 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. Even when construed in the light most favorable to the government, all counts premised on seditious conspiracy and conspiracy to use weapons of mass destruction (hereafter WMDs) fail to allege facts sufficient to support the charges or to establish a clear and present danger. *Baldwin v. Franks*, 120 U.S. 678 (1852); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

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

WHEREFORE, Defendant moves this Honorable Court to dismiss counts 1-7 in the First Superseding Indictment.

Respectfully Submitted,

Legal Aid & Defender Association
FEDERAL DEFENDER OFFICE

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Dated: September 21, 2010

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
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UNITED STATES OF AMERICA,

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v.

Case No. 10-20123
Honorable Victoria A. Roberts

DAVID STONE, JR., et al.,

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BRIEF IN SUPPORT OF
MOTION TO DISMISS

TABLE OF AUTHORITIES

Supreme Court

Circuit Courts

District Courts

STATEMENT OF FACTS

In the "General Allegations" section of the First Superseding Indictment, the government characterizes the Hutaree as "an anti-government militia organization which advocated and prepared for violence against local, state, and federal law enforcement." R. 175, First Superseding Indictment, p 2. According to the government, "[t]he Hutaree's goals included opposing by force the authority of the Government of the United States and preventing, hindering, and delaying by force the execution of United States law, including federal laws regulating the sale, purchase, receipt, possession, and use of firearms and destructive devices." R. 175, First Superseding Indictment, p. 2. Further, the government alleges that "Hutaree identifies as its enemy a group it calls 'the Brotherhood,'" which it believes is a part of the "New World Order." R. 175, First Superseding Indictment, p. 3. According to the government, "the Brotherhood" includes: "(A) federal law enforcement agencies and their employees, and (B) state and local law enforcement agencies and their employees, whom the HUTAREE deems to be 'foot soldiers' of the federal government." R. 175, First Superseding Indictment, p. 3.

In the actual charge of seditious conspiracy, which includes a section titled "The Means And Methods Used to Further The Objects of the Conspiracy," the government lays out the specific facts it contends warrant the charge. R. 175, First Superseding Indictment, p. 5-10. The government alleges that:

* All nine defendants joined the seditious conspiracy "on or about" August 16, 2008;

all nine joined the conspiracy to use a WMD in June 2009; and all nine remained conspirators up to March 29, 2010.

* Hutaree members "discussed" a "variety" of violent acts which would "draw the attention of law enforcement or government officials" and "prompt a response by law enforcement." These discussions included talk of "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 then attacking the funeral procession motorcade with weapons of mass destruction."

* The Hutaree "planned... the killing of an unidentified member of local law enforcement" and to "attack law enforcement vehicles during the funeral procession with homemade mortars, IEDs, and EFPs."

* The Hutaree "believed" such an engagement would be a "catalyst" for a widespread uprising by others against the United States government.

* On January 9, 2010, David Stone, Sr. and Joshua Stone "planned and announced a covert reconnaissance exercise for April 2010," in which "innocent civilians... could be killed."

* On February 9, 2010, David Stone, Sr. "identified law enforcement officers in a specific community near his residence, and one officer in particular, as potential

targets of attack."

R. 175, First Superseding Indictment, p. 5-9.

The charge of conspiracy to use a WMD references the General Allegations and the Seditious Conspiracy charge, but does not allege an overt act. R. 175, First Superseding Indictment, p. 10-12. There is no allegation anywhere in the Indictment that any defendant ever accepted, received, or possessed a real or fake WMD, EFP, or IED. The government does allege 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 the 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 February 6, 2010. In fact, the Indictment concedes that at the time of arrest no defendant possessed a real or fake WMD, IED, or EFP. R. 175, First Superseding Indictment, p. 4-5.

LAW AND ARGUMENT

I.

Brandenburg Applies To The Charges of Seditious Conspiracy And Conspiracy to Use a WMD. Because There Is No Claim That The Conspiracy Was Intended And Likely to Involve Imminent Lawless Action Against the Government of the United States or Use of a WMD, Counts 1-7 Must Be Dismissed.

"[W]henever the fundamental rights of free speech and assembly are alleged to have been invaded," the clear and present danger test "requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-844 (1978). A legislature's declaration that certain types of speech or thought are inherently harmful criminal acts "cannot limit judicial inquiry when First Amendment rights are at stake" in the application of the statute; to be sure, "the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute." *Id.* at 843.

In this context, the government's allegations must establish: a) that the defendant specifically intended to bring about the precise harm articulated in the statute; and b) that there was "a clear and present danger," which the Court has defined as "imminent lawless action" against the United States. *Hartzel v. United States*, 322 U.S. 680, 686-687 (1944); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). "Statutes affecting the right of

assembly, like those touching on freedom of speech" must be applied to "observe the established distinctions between mere advocacy and incitement to imminent lawless action." *Brandenburg*, 395 U.S. at 449, n. 4.

"The question in every case is... a question of proximity and degree," i.e. whether "a present conflagration" in accord with the charged offenses is imminent. See *Schenk v. United States*, 249 U.S. 47, 57 (1919); *Gitlow v. New York*, 268 U.S. 652, 673 (1925)(J. Holmes, dissenting); *Brandenburg*, 395 U.S. at 449. That said, "the degree of imminence" of the evil at issue must be "extremely high" before utterances lose the protection of the First Amendment. *Bridges v. California*, 314 U.S. 252, 263 (1941)(reversing defendant's convictions).

Since Section 2384 has no overt act requirement, seditious conspiracy is essentially a thought crime. And because these defendants are charged with a conspiracy where the predicate crime was neither attempted nor completed, as applied, Section 2384 is being definitively used to prohibit an alleged thought crime. So too, the conspiracy to use a WMD charge relies exclusively on the seditious conspiracy allegations. The WMD count alleges no overt act, and the Indictment contains no allegation that defendants ever possessed any WMDs, real or bogus. Again, an alleged thought crime. As a result, these statutes must be interpreted and tempered "with the commands of the First Amendment clearly in mind." *Watts v. United States*, 394 U.S. 705, 707 (1969). Courts "must interpret the language Congress chose 'against the background of a profound national

commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" *Watts*, 394 U.S. at 708 citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In sum, a statute, as applied, may only criminalize expression when the speech, thought, and/or assembly is directed to inciting or producing imminent lawless action in accord with the charged offense, and is likely to produce or incite such action. *Brandenburg*, 395 U.S. at 449; *United States v. Rahman*, 1994 WL 388927, *1-2 (S.D.N.Y. 1994).

In a previous filing before this Honorable Court, the government erroneously claimed that *Brandenburg*'s imminence requirement applied only to statutes criminalizing "advocacy" and "not conspiracies." R. 138, Government Reply to Response, p. 1-3, 5/3/2010 citing *United States v. Williams*, 553 U.S. 285 (2008) and *United States v. Rahman*, 189 F.3d 88 (2nd Cir. 1999). The government is mistaken, as it is confusing two distinct issues: (1) whether a statute is facially unconstitutional (i.e. overbroad or vague); and (2) whether a statute is constitutionally deficient *as applied*. The Court in *Williams* held only that the statute was not facially overbroad or vague. *Williams*, 553 U.S. at 288. And in *Rahman*, the constitutional claim on appeal did not involve *Brandenburg* or a lack of imminence. *Rahman*, 189 F.3d at 116-117.

Most importantly, the government overlooks the fact that **prior** to Rahman's trial for seditious conspiracy, the district court judge specifically held that the *Brandenburg*

test would indeed have to be met to avoid dismissal of charges in the indictment. *United States v. Rahman*, 1994 WL 388927, *1-2 (S.D.N.Y. 1994). Judge Michael Mukasey held: "It is both possible and permissible to charge that criminal statutes were violated entirely by means of speech... if that speech was intended and likely to generate imminent criminal action by others. *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969)." *Id.*

The Rahman defendants never argued that the conspiracy lacked imminence under *Brandenburg* – not at trial and not on appeal. To be sure, there was no straight-faced lack-of-imminence argument that could have been mustered by Rahman or his co-defendants. Unlike the present case, the charges in *Rahman* alleged that the conspirators had already committed criminal and lethal overt actions in furtherance of their criminal conspiracy. *Rahman*, 189 F.3d at 129. At the time of the indictment in *Rahman*, the defendants had already significantly aided, abetted and assisted in the February 1993 bombing of the World Trade Center - causing six deaths and substantial destruction; they had planned the Spring 1993 campaign of attempted bombings of bridges and tunnels in New York City; recruited sufficient participants to carry out the plan; rented a "safehouse" to build the bombs; completed an elaborate diagram of the "bombing plan;" reconnoitered the potential targets of the bombs by driving through and videotaping the tunnels and discussing the structure of the tunnels with an engineer; purchased what they believed to be the necessary components for the bombs, including oil, fertilizer, timers, and barrels in which to mix the explosives; attempted to find stolen cars in which to carry

the bombs; obtained a submachine gun to assist in carrying out the plan; and even began constructing the bombs and mixing the explosives. The conspirators had already attempted to murder Hosni Mubarak when he was present at the United Nations in New York City, and had successfully murdered Meir Kahane, a rabbi and leader of a small radical group opposed to any Arab presence within the biblically defined borders of Israel. *Rahman*, 189 F.3d at 103, 107-108, 111, 129. In a word, *Rahman* is inapposite.

As noted throughout this Brief, the Supreme Court has repeatedly held that even where a statute is content-neutral, and prohibits criminal acts "without any reference to language itself," when a defendant's First Amendment rights are implicated, the government must establish that there is "a clear and present danger" of "imminent lawless action." *Landmark Communications*, 435 U.S. at 843; *Brandenburg*, 395 U.S. at 449; *Hartzel*, 322 U.S. at 686-689; *Bridges*, 314 U.S. at 263; *see also Herndon v. Lowry*, 301 U.S. 242, 258 (1937).

In *Hess v. Indiana*, the Supreme Court utilized the *Brandenburg* standard to hold that a "content-neutral" disorderly conduct statute, as applied, violated the defendant's right to freedom of expression where it was used to punish mere spoken words. *Hess v. Indiana*, 414 U.S. 105 (1973). Whether the speech that was punished involved "advocacy" played no part in the decision. In fact, the Court emphasized that Hess' loud proclamations that the demonstrators would "take the fucking street later" did not amount to advocacy. Nonetheless, the Court held that the disorderly conduct statute was

unconstitutional as applied to Hess because there was "no rational inference from the import of the language" that his words were "intended to produce or likely to produce *imminent* disorder." *Hess*, 414 U.S. at 108-109.

Furthermore, *Brandenburg* explicitly overruled *Whitney v. California*, 274 U.S. 357, 371-372 (1927), a case upholding a state syndicalism provision that was for all intents and purposes a seditious conspiracy statute. *Brandenburg*, 395 U.S. at 449. The indictment in *Whitney* alleged that defendants were "combining with others in an association for the accomplishment of the desired ends through the advocacy **and use of criminal and unlawful methods**," or as the Court described it, a "criminal conspiracy" to "menac[e] the peace and welfare of the State." *Whitney*, 274 U.S. at 371-372 (emphasis added).

As Justice Louis Brandeis stated in his famous concurring opinion in *Whitney*, which would become the basis for the *Brandenburg* opinion: "[A statutory declaration] does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. . . . Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature... In order to support a finding of clear

and present danger, it must be shown that immediate serious violence was to be expected[.]" *Whitney*, 274 U.S. at 378-379, J. Brandeis, concurring.

In sum, the government's reliance on *United States v. Rahman*, 189 F.3d 88 (2nd Cir. 1999) as a vehicle to avoid *Brandenburg* is severely misguided. The district court judge in *Rahman* and a long line of Supreme Court cases have firmly established that *Brandenburg* applies to the conspiracy charges in this case. Similarly, the government's comparison of the facts of the *Rahman* case to that of the Hutaree Militia is far-fetched. The Superseding Indictment makes no allegation that the charged conspiracies were intended and likely to generate imminent criminal action against the United States government, or anyone else, and contains no facts to support such an assertion. As a result, defendant respectfully requests that this Honorable Court dismiss counts 1-7.

II.

Even In The Light Most Favorable to The Government, The Facts Alleged Are Not Sufficient to Support the Charges of Seditious Conspiracy or Conspiracy to Use A WMD.

The seditious conspiracy statute provides that:

> 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 WMD provision prohibits a conspiracy to "use" a WMD against

any person or property within the United States. 18 U.S.C. §2332a(a)(2).

When a statute proscribes acts which implicate freedom of expression, such legislation "'must be taken to use its words in a strict and accurate sense.'" *Hartzel*, 322 U.S. at 686 quoting *Abrams*, 250 U.S. at 627 (J. Holmes, dissenting). A legislature's declaration that certain types of speech or thought are inherently harmful criminal acts "cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications*, 435 U.S. at 843. "[T]he judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute." *Id.*

"To be convicted under Section 2384, one must conspire to *use* [illegal] force, not just to *advocate* the use of force." *Rahman*, 189 F.3d at 115. Furthermore, the government must prove that the defendants acted with the specific intent to engage in the conduct proscribed by the statute. *United States v. Rahman*, 854 F. Supp. 254, 260 (S.D.N.Y. 1994). "Proof of such animus is crucial... because without it the defendants would be shown merely to have engaged in conduct that conflicted incidentally with some policy of the United States." *Id.* at 260.

The government's theory of seditious conspiracy in this case is that the defendants agreed "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." First

Superseding Indictment, R. 175, p. 6, 6/2/2010.[1]

Over 150 years ago, in *Baldwin v. Franks*, the Supreme Court defined specifically these very terms under a prior sedition statute (Section 5336, 18 USC §6). *Baldwin v. Franks*, 120 U.S. 678, 693 (1852). In doing so, the Court emphasized the important distinction between a conspiracy to overthrow or levy war against the government and an agreement to oppose by force its authority:

> It cannot be claimed that Baldwin has been charged with a conspiracy to overthrow the government, or to levy war, within the meaning of this section; nor is he charged with any attempt to seize the property of the United States. All, therefore, depends on that part of the section which provides a punishment for 'opposing' by force the authority of the United States, or for preventing, hindering or delaying the 'execution' of any law 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.

The Court then construed the statutory requirements of a conspiracy to hinder execution of the law:

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[1] In the original Indictment, the government charged defendants with conspiring to "levy war against the United States." Indictment, R. 4, p. 3, 3/29/2010. The government has now abandoned this theory in the First Superseding Indictment.

> [A]s to the second clause, the offense consists in preventing, hindering, or delaying the government of the United States in the execution of its laws. This, as well as the other, 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. Because the acts of force described in the charging document were not alleged to be in opposition to the United States government "while [it was] actually engaged in an attempt" to assert its authority or enforce the laws of the United States, the Supreme Court held that these charges were insufficient as a matter of law. *Id*. at 693-694.

Similarly, in *Anderson v. United States*, the Eighth Circuit dismissed seditious conspiracy charges because the facts pled indicated that the intended employment of force "was to be in a manner and for a purpose not within the statute." *Anderson v. United States*, 273 F. 20, 25-27 (8th Cir. 1921). Relying on the Supreme Court's definitive construction of the same statutory language in *Baldwin*, the Eighth Circuit found that the force to be exerted "was not against those whose duty it should be to execute the laws [of the United States], and while attempting to do so." *Anderson*, 273 F. at 26.[2]

In *Herndon v. Lowry*, the Supreme Court reviewed the application of a state "insurrection" statute similar to the seditious conspiracy provision at issue in the instant case. The Court again emphasized the importance of specificity in the construction of

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[2] In *Anderson*, the alleged means and methods of the seditious conspiracy were the employment of labor strikes, sabotage of machinery, and obstruction of military enlistment. *Anderson*, 273 F. at 24-25.

statutes which implicate speech and association in their application:

> [W]here the statute merely prohibits certain acts involving danger of substantive evil, without any reference to language itself, and it is sought to apply its provisions to language used by the defendant for the purpose of bringing about the prohibited results... [and] it [is] contended that the statute cannot be applied to the language used by the defendant because of its protection by the freedom of speech or press, it must necessarily be found [by the court]... whether the specific language used involved such likelihood of bringing about the substantive evil as to deprive it of constitutional protection.

Herndon v. Lowry, 301 U.S. 242, 258 (1937).

In *Herndon*, the defendant was charged with an attempt to induce "combined resistance to the lawful authority of the state with intent to deny, defeat, and to overthrow such authority by open force, violent means, and unlawful acts." *Herndon*, 301 U.S. at 245. This particular wing of the Communist party urged "overthrow" of "class rule" via a forceful "confiscation of the landed property of white landowners and capitalists for the benefit of negro farmers" and establishment of a unified "Black Belt" of government in "all districts of the South." *Id.* at 251-252. In addition, the group envisioned an "ultimate ideal" of "National Rebellion" wherein they would "wrest the negroes' right of self-determination" from "American imperialism" through "successful revolutionary struggle." *Id.* at 253.

In assessing the doctrines of the party, the Supreme Court first emphasized that the documentary evidence did not indicate an intent to incite forcible subversion of "the lawful authority of the State" of Georgia. *Herndon*, 301 U.S. at 253. "The power of a state to abridge freedom of speech and assembly is the exception rather than the rule" and

the act of "penalizing" speech must, therefore, "find its justification in a reasonable apprehension of danger to *organized government*." *Id*. at 258 (emphasis added). The Court distinguished the confiscation of land from individuals and the future threat of violence against government at some indefinite time (as part of the group's "ultimate ideal"). *Id*. at 260-261, 263. The Court found that the insurrection statute, as construed and applied at defendant's trial, violated Herndon's First Amendment rights to freedom of speech and association because there was no "clear and present danger of forcible obstruction of a particular state function." *Id*. at 261.

In *Hartzel*, the Supreme Court reversed convictions under the Espionage Act for "willful obstruct[ion]" of recruitment and enlistment, "willful attempt" to cause mutiny and disloyalty in the United States military, and conspiracy to commit these substantive offenses. *Hartzel*, 322 U.S. at 681-682, 687. The Court found that there was insufficient evidence of the defendant's specific intent from which a jury "could infer beyond a reasonable doubt that he intended to bring about the specific consequences prohibited by the Act." As a result, the evidence was insufficient as a matter of law to even submit the "clear and present" danger question to the jury. *Id*. at 687-689. The Court underscored the fine line between "thoughtlessness, carelessness, and... recklessness," "immoderate and vicious invective," and a criminal state of mind. *Id*. at 689. Only the latter is prohibited, and even then, only when the defendant has a specific intent to achieve the "specific consequences" described by statute. *Id*.

Even if the alleged facts in the First Superseding Indictment are accepted as true, they do not support the charges of seditious conspiracy or conspiracy to use a WMD. First, the alleged "discussions" about harming members of law enforcement are clearly constitutionally protected. The bulk of the alleged actions described in the Indictment are indistinguishable from that of any other local militia group. Indeed, if the ominous cloud created by the charge of seditious conspiracy is removed from the equation, then the trainings, firearms, and reconnaissance exercises become far less suspect, and in fact, appear to be a patriotic exercise of rights guaranteed by the United States Constitution. As this Honorable Court emphasized, "[t]here is no evidence that the Defendants could not legally possess weapons." *United States v. Stone, et al.*, 2010 U.S. Dist. LEXIS 42834 at *31 (E.D. Mich. 2010). The militia training that involved the possession of weapons was not only lawful, it was an exercise of the participants' constitutional rights under the First and Second Amendments. See *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008); *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

Second, the indictment lacks any factual allegation that the charged conspiracies created a "clear and present danger" – i.e. that the defendants' speech, thoughts, and associations were directed to inciting or producing imminent lawless action and were likely to produce or incite such action. *Brandenburg*, 395 U.S. at 449; *Herndon*, 301 U.S. at 258; *Hartzel*, 322 U.S. at 681-682, 687-689.

Third, the allegations regarding the defendants' "discussions" and "plan" do not

mention any attack on *federal* law enforcement officers. In fact, when the allegation of an actual "plan" is finally made, it involves "local law enforcement... in a specific community near [Stone, Sr.'s] residence." R. 175, First Superseding Indictment, p. 7-9. Of course, this claim hardly constitutes a sufficiently alleged or substantial "plan." Case Agent Larsen even 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.

There are no facts alleged supporting a conspiracy to "oppose by force the authority" of the "United States" government or to use WMDs. As this Honorable Court has previously noted: "Discussions about killing local law enforcement officers - and even discussions about killing members of the Judicial Branch of Government - do not translate to conspiring to overthrow, or levy war against the United States Government." *Stone, et al.*, 201 U.S. Dist. LEXIS 42834 at *26-27. The indictment does not suggest any way in which an attack on police officers "could have furthered the goals of a seditious conspiracy beyond the statement that the defendants thought it did. That is not enough." *Rahman*, 854 F.Supp. at 254. See R. 175, First Superseding Indictment, p. 7 (alleging the Hutaree "believed... such an engagement would be a catalyst for a more widespread uprising against the United States" by others). Similarly, the allegation that a single defendant unsuccessfully tried to "solicit" 4 IEDs from an undercover agent to take to a Militia meeting in Kentucky, fails to establish a conspiracy to obtain a WMD, or any

conspiracy at all, let alone a conspiracy to *use* a WMD.

Fourth, the alleged conspiracies against law enforcement do not in any way fit the specific allegations the government is making under §2384 in the First Superseding Indictment. In other words, there is no alleged "plan" to "resist some positive assertion of authority by the government" as required by the Supreme Court. *Baldwin*, 120 U.S. at 693. There is no allegation that the defendants planned any "forcible resistance of the authority of the United States while endeavoring to carry the laws into execution." *Id.* Any force to be exerted, was "not against those whose duty it should be to execute the laws [of the United States], and while attempting to do so." *Anderson*, 273 F. at 26.

Similarly, with regard to the WMD charge, there is no allegation that any defendants ever accepted, received, or possessed a fake or real 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" four IEDs to take 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. As a matter of law, a criminal agreement between a single defendant and an undercover agent cannot constitute a conspiracy. *United States v. Barger*, 931 F.3d 359, 369 (6th Cir. 1991). Furthermore, there is no claim that the IEDs solicited by Stone, Sr. were constructed, either actually or fictionally, and no claim that Stone, Sr. or any other defendant ever accepted, received, or possessed these IEDs. Significantly, 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 the 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. R. 175, First Superseding Indictment, p. 4-5. The government does not allege or provide any facts indicating the charged conspiracy to use a WMD created a clear and present danger. In fact, the WMD charge (R. 175, p. 10-12) fails to allege an overt act in furtherance of the conspiracy, such as actually acquiring real or fake WMDs, as required by law. *United States v. Bin Laden*, 91 F.Supp.2d 600, 612-613 (S.D.N.Y. 2000).

Summarily, even in the light most favorable to the prosecution, the current Indictment fails to articulate facts sufficient to support the charges that the defendants joined a criminal conspiracy to oppose the United States government with illegal force and WMDs, let alone a conspiracy creating a clear and present danger. Likewise, the charge fails to allege any facts indicating there was an agreement to oppose by force an actual exercise of authority by federal law enforcement or to delay by force the execution of United States law.[3] As a result, the charges of seditious conspiracy, conspiracy to use a WMD, and all other charges relying on the existence of the alleged seditious conspiracy

[3] It is curious that the Indictment contains an alleged murder plan involving the use of non-existent WMDs against law enforcement, but no corresponding charge of conspiracy to commit murder. An objective reader of the charging document might logically infer that *if* there was any actual "seditious conspiracy" and/or "conspiracy to use WMDs," its execution was far from imminent. See *Brandenburg*, 395 U.S. at 449.

must be dismissed.

CONCLUSION

Defendant David Stone, Jr. respectfully requests that this Honorable Court dismiss counts 1-7.

Respectfully submitted,

Legal Aid & Defender Association
FEDERAL DEFENDER OFFICE

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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
Joseph Falvey
Jonathan Tukel
Assistant U.S. Attorneys

Respectfully submitted,

Legal Aid & Defender Association
Federal Defender Office

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