

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

STATE OF MINNESOTA,

vs.

MONICA BICKING,
ROBERT CZERNIK
GARRETT FITZGERALD,
LUCE GUILLEN-GIVINS,
ERIK OSELAND,
NATHANAEL SECOR,
MAX SPECKTOR,
ERIN TRIMMER,

No. 62-CR-08-10515
No. 62-CR-08-10338
No. 62-CR-08-10335
No. 62-CR-08-10342
No. 62-CR-08-10345
No. 62-CR-08-10365
No. 62-CR-08-10336
No. 62-CR-08-10370

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS'
JOINT MOTION TO DISMISS FOR LACK OF PROBABLE
CAUSE AND REQUEST FOR FLORENCE HEARING**

INTRODUCTION

The State has charged each of the above-named Defendants with involvement in conspiracies to commit two felony offenses, riot with a dangerous weapon and criminal damage to property, in connection with their participation in discussions and alleged planning for political protests at the Republican National Convention in St. Paul Minnesota on September 1, 2004. In reality, this prosecution is a political persecution of the Defendants for holding controversial political opinions and seeking to express their opinions through political protest. An evidentiary hearing will demonstrate the lack of support for critical elements of the charged offenses to withstand a motion for a judgment of acquittal at trial under the applicable standards set forth in State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976). There is no evidence that

any of the Defendants ever entered into any agreement to commit the crimes charged. The various statements and discussions attributed to Defendants as part of this prosecution are constitutionally protected as part of their fundamental rights to free speech, free association and free expression.

FACTUAL BACKGROUND

The most recent Amended Criminal Complaint alleges that the Defendants in this case engaged in a Conspiracy to Commit Criminal Damage to Property in the First Degree in violation of Minn. Stat. §§ 609.175, subd. 2(3), and 609.595, subd. 1(1, 3), and Conspiracy to Commit Riot in the Second Degree in violation of Minn. Stat. §§ 609.175, subd. 2(3), and 609.71, subd. 2.¹ Eight persons alleged to be members of a group called the RNC Welcoming Committee (RNCWC) are included in the Complaint and charged with the same offense. The Complaint claims that the defendants attended numerous meetings and engaged in discussions about disrupting the RNC. It references various events over a period of about one year which appear mostly to be based on allegations by informants and undercover officers who attended meetings and posed as protesters.

The Complaint alleges that the RNCWC had plans to prevent delegates from attending the convention "by blockading streets, bridges, and freeways utilized by delegate buses and

¹ The State initially charged all Defendants with one count of Conspiracy to Commit Riot **in Furtherance of Terrorism** on September 3, 2008. Several months later (and a few days after Defendants' supporters held a protest outside a political fundraiser for the County Attorney), the prosecution filed an amended complaint which added a count of Conspiracy to Commit Criminal Damage to Property in Furtherance of Terrorism, as well as both counts without the terrorism enhancement. In April 9, 2009, after a great amount of bad publicity and resulting damage to the County Attorney's campaign for governor, the prosecution filed another amended complaint which dropped both charges that included a terrorism enhancement. This case is thoroughly political in all aspects.

dignitaries, as well as immobilizing buses." (Original Complaint at 3). There are vague descriptions of meetings and conferences organized by the RNCWC, and brainstorming of various ideas and play-acting at those meetings. Some of the ideas mentioned according to the Complaint consisted of non-violent civil disobedience, and others were inflammatory, such as "kidnaping delegates" or use of Molotov cocktails. With respect to some of the inflammatory discussions alleged, there is no allegation that any of the Defendants participated. With respect to some of the Defendants, there is no allegation that they participated in any discussions or had any plans whatsoever to participate in a riot or damage to property. There is no allegation that any Defendant planned to carry any dangerous weapon as is required for the riot charge. There is no allegation that any of the Defendants in this case ever specifically entered into any agreement with anyone else to carry out constituting riot with a dangerous weapon or damage to property.

The Complaint references searches of some of Defendants' homes where numerous legal and legitimate items of property were found, but are misinterpreted in the Complaint to be intended for illegal purposes. It also refers to a spoof video which is obviously misinterpreted as some sort of plan to commit riotous acts.

Six of the eight Defendants were arrested and held in jail two days prior to the beginning of the convention. Another Defendant was arrested on the morning of September 1, 2008, before protesting started and jailed during the protests. One Defendant was arrested during the protests, and was not engaged in any illegal activity at any time during the convention. All but one of the Defendants remained in jail during the protests underlying the alleged conspiracy.² Defendants

² With regard to the one Defendant who was not held in jail, Sheriff Robert Fletcher personally visited Defendant Monica Bicking in jail on August 31, 2008 and released her without any conditions. She was then free during the convention, did not engage in any illegal activity of

are requesting an evidentiary hearing to scrutinize the many vague, inflammatory and distorted allegations in the Complaint, and determine whether they amount to admissible evidence that can support the charges.

ARGUMENT

I. FLORENCE STANDARD

Minn.R.Crim.P. 11.03 permits the reception of evidence and cross-examination on any omnibus issue. Probable cause motions are among the omnibus issues where evidentiary hearings are permitted. Minn.R.Crim.P. 11.04, subd. 1. "In those instances where defendant's counsel is convinced that the record developed by the time of the omnibus hearing fails to demonstrate the existence of probable cause, he is free to move for dismissal pursuant to Rule 11.03." State v. Florence, 306 Minn. 442, 239 N.W.2d 892, 900 (1976). In cases where a defendant supports his motion to dismiss for lack of probable cause under Minn.R.Crim.P. 11.04, subd. 1³ by presenting witnesses subject to cross examination, the Court's decision cannot be based on "the entire record including reliable hearsay," but "with respect to any element of the offense put in issue by defense testimony, the decision will have to be based upon 'substantial evidence that would be admissible at trial' and such limited hearsay evidence" described in Rule 18.05, subd. 1. Id. "Substantial evidence' means evidence adequate to support a denial of a motion for a directed verdict of acquittal." Id. at 902 n. 21. Defendants will exercise their right

any kind, but then re-arrested when observing courtroom proceedings on September 3, 2008. The State argued for \$50,000 bail on the grounds the Bicking - whom the Sheriff had personally released during the convention - was a danger to the community.

³ The applicable Rule was 11.03 at the time that Florence was decided.

to a Florence hearing to determine whether there is admissible substantial evidence that could allow the cases against them to go to a jury on the elements of the charged offenses relating to engaging in any criminal conspiracy.⁴

Florence presents specific examples of operation of its rule which are instructive. Where a defendant offers evidence challenging the credibility of facts in the record, the trial judge should grant the motion to dismiss where the evidence "makes inherently incredible facts which appear in the record and which are necessary to establish an essential element of the offense charged." Id. at 903. In the instant case, the Defendants will demonstrate that the facts alleged by the State in its Complaint cannot be supported or are so obviously inaccurate that they do not support the elements of the offense for which they are offered. The motion must be granted "unless there is substantial evidence admissible at trial in the record which would justify denial of a motion for a directed verdict." Id.

The Minnesota supreme court set forth the hearing procedure utilized in this case to

⁴ The State might attempt to suggest that the instant motion for a Florence hearing is somehow precluded by the Court's prior denial of the motions of two Defendants to dismiss for lack of probable cause based on the face of the Complaint. The prior determinations carry no significance because they utilized a far lower standard than Florence. The denial of Defendant Guillen-Givins' motion applied a probable cause standard defined as " ... a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious person's belief." Order involving Guillen-Givins, dated October 23, 2008 (citing State v. Childs, 269 N.W.2d 25 (Minn. 1978)). A similar standard was used for Monica Bicking, and the Court specifically acknowledged that Bicking reserved her right to a Florence challenge. See Order, dated May 1, 2008, at 4. Florence "emphasize[d] that there is a distinction between a hearing to test right to detain and a hearing to determine whether a defendant should stand trial" which is "significant." 239 N.W.2d at 902. These prior motions also did not address the charge of criminal damage property and most significantly, did not include an opportunity to present evidence. Finally, the prior Court orders did not deal with the constitutional issues of free expression raised in Argument III. Judge Gearin's order expressly stated it was not addressing constitutional issues.

"protect a defendant unjustly or improperly charged from being compelled to stand trial."

Florence, 239 N.W.2d at 900. This is precisely the sort of case that Florence must have had in mind. The State has brought an extremely complex and convoluted case against the Defendants based on political motivations, and for the purposes of punishing Defendants for their political beliefs. Forcing them to stand trial on these charges would be a great injustice and a waste of scarce government resources.

II. THERE IS NO EVIDENCE OF THE CHARGED CONSPIRACIES.

Defendants will demonstrate at the hearing the lack of evidence that they personally engaged in any conspiracy to commit damage to property or riot with a dangerous weapon. A conspiracy must be established by "evidence that objectively indicates an agreement." Id. There must be proof that a defendant actually had knowledge of the conspiracy to commit the specific substantive crime charges, whereas merely associating with other involved in criminal activity and even participating in activities with them is insufficient. See Id. at 376-77. In Hatfield, the supreme court held that "where there was no evidence of a common plan, concerted conduct, or prior involvement with the alleged co-conspirator--any inference of an agreement from knowledge, standing alone, is simply not reasonable." Id. at 377. "Mere association with a person engaged in illegal activity does not make a person a conspirator." State v. Pinkerton, 628 N.W.2d 159, 164 (Minn. Ct. App. 2001). Defendants cannot be convicted of a crime based on their associations, because such a conviction would clearly run afoul of the First Amendment's guarantee of freedom of association. See, e.g., N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886, 918-19 (1982). It is also insufficient to speculate on a defendant's conversations or agreements with other alleged conspirators. See State v. Brown, 732 n.W.2d 625, 629 (Minn. 2007) McKee,

506 F.3d at 238. In the instant case, the State will only be able to provide evidence that the Defendants associated with each other, and that some of them engaged in planning regarding acts of protest that did not include damaging property or engaging in a riot with a dangerous weapon.

Under Minn. Stat. § 609.02, subd. 6,

"Dangerous weapon" means any firearm, whether loaded or unloaded, or any device designed as a weapon and capable of producing death or great bodily harm, any combustible or flammable liquid or other device or instrumentality that, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm, or any fire that is used to produce death or great bodily harm.

The following items have been held **not** to be dangerous weapons without evidence they were intended to be used as such: a paintball gun, State v. Coauette, 601 N.W.2d 443, 447 (Minn. Ct. App. 1999) review denied; a three inch folding knife, Welfare of P.W.F., 625 N.W.2d 152, 154 (Minn. Ct. App. 2001); fists, State v. Basting, 572 N.W.2d 281, 284-85 (Minn. 1997). There is absolutely no evidence that any Defendant agreed to participated, or was even present during any agreement to participate in any actions involving a dangerous weapon, or had any knowledge that anyone would be present with a dangerous weapon as required by Minn. Stat. §§ 609.175, subd. 2(3), and 609.71, subd. 2.

There is also insubstantial if any evidence of any agreement by any Defendant to commit violence to persons or property as required for riot.

Although it is possible that there was discussion about illegal activities, the Defendants in this case either were not in any way involved in such discussions or there is no evidence that any such discussion amounted to any agreement to commit any act constituting the charged offenses. Any evidence, after it is properly scrutinized by the Court, will prove to be clearly insubstantial.

III. DEFENDANTS' ALLEGED CONDUCT IS PROTECTED EXPRESSION.

The evidence against Defendants, besides failing to support a conclusion that they actually entered into any agreements to commit riot or damage to property, must further be examined in light of Free Speech protections under the Minnesota and United States Constitutions. The charges must be carefully scrutinized by the Court because they do not involve allegations of ordinary criminal activity, but occur in the context of one of our country's most highly valued and protected activities of political discussion and organizing. These activities include attending meetings, advocating protest, writing about protest, and organizing protest. The alleged acts, which occurred week or months before the RNC, are all far removed from the actual RNC protests.

The Supreme Court has made clear that it is only constitutionally permissible to prohibit political speech or advocacy that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829 (1969). In Hess v. Indiana, 414 U.S. 105, 107-08, 94 S.Ct. 326, 328 (1973), the Supreme Court held that an anti-war demonstrator's announcing, "We'll take the f* * *ing street again," after police had cleared street in question, was constitutionally protected and could not constitute a crime under applicable precedent. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 414 (1989). The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. Virginia v. Black, 538 U.S. 343, 358 (2003). "A principal 'function of free speech under our system of

government is to invite dispute. Ironically, it may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” Johnson, 491 U.S. at 408-409 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949)). The First Amendment affords protection to symbolic or expressive conduct as well as to actual speech. See e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992); Texas v. Johnson, 491 U.S. at 405-406; United States v. O'Brien, 391 U.S. 367, 376-377 (1968); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 505 (1969).

The meetings described in the Complaint, or any other evidence the State might introduce, were limited to protected political expression and advocacy. Any statements about possible actions were too distant from any action which could have occurred at the convention to reach the high constitutional threshold of inciting imminent lawlessness.

A. First Amendment Political Jurisprudential History.

This is not the first time that a prosecuting authority has sought to criminalize constitutionally protected political expression in a high profile case in connection with a national political convention. United States v. Dellinger 473 F.2nd 340 (7th Cir 1972} arose out of the 1968 Democratic Party Convention, and involved the case commonly known as the “Chicago 8.” In that case the Seventh Circuit stated:

A realistic approach compels application of a first amendment test to a statute which punishes activity leading up to and furthering a riot, for at least two reasons. One is that rioting, in history and by nature, almost invariably occurs as an expression of political, social, or economic reactions, if not ideas. The rioting assemblage is usually protesting the policies of a government, an employer, or some other institution, or the social fabric in general, as was probably the case in the riots of 1967 and, 1968 which are the backdrop for this legislation.

340 F 2d at 359.

In Dellinger, the defendants were charged with conspiracy to create a riot and several non-conspiracy counts. But the jury found all defendants not guilty of the conspiracy count. Several were found guilty of substantive charges. The Court of Appeals reversed all convictions for a series of errors in the trial.

*[L]iability for speech could not rest on guesses about the future impact of the words; the legal responsibility of the speaker should not turn "upon reasonable forecast."*⁵

In 1919 Justice Holmes, joined by Justice Brandeis, dissented from the court's affirmance of convictions for unlawful advocacy under the Espionage Act. Abrams v. United States, 250 U.S. 616 (1919). That case began the reformulation of the circumstances in which speech could form the basis for criminal charges. An often ignored element of immediacy was articulated:

While that experiment [the free marketplace of ideas] is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law than an immediate check is required to save the country. . . . Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, "Congress shall make no [law] abridging the freedom of speech."

250 U.S. at 630-621 (emphasis added).

Although penned in a dissent, these words have long outlived the majority's crabbed reading of the First Amendment. See also, Gitlow v. New York, 268 U.S. 652, 672-73 (1925) (Holmes and Brandeis, dissenting). As will be demonstrated below, the element of immediacy is

⁵ Judge Learned Hand, in a series of letters to Justice Holmes arguing against the position taken by the Supreme Court in Schenck v. United States, 249 U.S. 47 (1919), Frohwerk v. United States, 249 U.S. 47 (1919), and Debs v. United states, 249 U.S. 211 (1919). See "Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History," 27 Stan.L.R. 719 (1975)

along with intent, an integral component of the modern test to distinguish between speech which is constitutionally protected and speech which is not protected.

The Holmes/Brandeis clear and present danger test was clarified further in 1927 when Justice Brandeis, in a concurring opinion in Whitney v. California, 274 U.S. 357 (1927), joined by Justice Holmes, articulated what was to be the most influential description of the clear and present danger test. It is a description that runs directly counter to the position of the State in this case:

To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. . . . In order to support a finding of clear and present danger it must be shown, either that immediate serious violation was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.

274 U.S. at 376 (emphasis added).

As described in Whitney, the clear and present danger formula combines an incitement test with the element of immediacy first articulated by Justice Holmes in his Abrams dissent. According to Justice Brandeis, both elements must coalesce in order to constitute a clear and present danger. Id. In all other cases, the State must channel its efforts to curb the ill effects of

speech to methods that do not punish the speaker or otherwise suppress speech. Such methods would include "more speech," as well as reasonable time, place and manner restrictions.

During the 1930s and '40s, a majority of the court adopted a more protective attitude toward speech than was evidenced within earlier decisions. See e.g., Near v. Minnesota, 283 U.S. 697 (1931) (prior restraint invalidated); De Jonge v. Oregon, 299 U.S. 353 (1937) (conviction for criminal syndicalism struck down); Herndon v. Lowry, 301 U.S. 242 (1937) (conviction for attempted incitement to insurrection struck down); Bridges v. California, 314 U.S. 252 (1941) (contempt of court conviction reversed); Pennekamp v. Florida, 328 U.S. 331 (1946) (same); Craig v. Harney, 331 U.S. 367 (1947) (same). Apropos of the present proceeding, in Bridges v. California, *supra*, the court applied a version of the clear and present danger test that was virtually identical to the one articulated by Justice Brandeis in Whitney.

In Bridges, a union leader and a newspaper were convicted of contempt of court for publishing critical statements regarding the judicial handling of certain pending cases. The Supreme Court reversed, holding the statements upon which the convictions rested did not present a clear and present danger to the judicial process. The court, after assessing the development of the doctrine from Schenck to Whitney., defined clear and present danger as follows:

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. . . . For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow.

314 U.S. at 263.

The Court's approach in Herndon v. Lowry, supra, was similarly speech protective. Moreover, the court's reasoning is directly instructive to the facts of the immediate case. Herndon had been convicted of attempting to incite insurrection based on his efforts to organize a branch of the Communist Party in Alabama. There was no evidence that Herndon had advocated unlawful conduct. His conviction was based only on his organizational efforts and the potential for those organized to resort eventually to insurrection. In reversing the decision, the Supreme Court emphasized the danger to society in the law used to convict Herndon:

To be guilty under the law, as construed, a defendant need not advocate resort to force. He need not teach any particular doctrine to come within its purview. Indeed, he need not be active in the formation of a combination or group if he agitates for a change in the form of government, however peaceful his own intent. If, by the exercise of prophesy, he can forecast that, as a result of a chain of causation, following his proposed action a group may arise at some future date which will resort to force, he is bound to make the prophesy and abstain, under pain of punishment, possibly of execution. Every person who attacks existing conditions, who agitates for a change in the form of government, must take the risk that if a jury should be of opinion he ought to have foreseen that his utterances might contribute in any measure to some future forcible resistance to the existing government he may be convicted of the offense of inciting insurrection.

301 U.S. at 262.

Based on this reasoning and upon the lack of any evidence that Herndon had personally advocated insurrection or other unlawful conduct, the conviction was reversed. The court stated:

The statute as construed and applied, amounts merely to a dragnet which may enmesh any one who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others. . . . So vague and indeterminate are the boundaries thus set to the freedom of speech and assembly that the law necessarily violates the guarantees of liberty embodied in the Fourteenth Amendment.

Id., at 263-64

Although the Supreme Court affirmed convictions under the Smith Act in Dennis v. United States, 341 U.S. 494 (1951), the potential reach of Dennis was curtailed sharply by three subsequent decisions: Yates v. United States, 354 U.S. 298 (1957); Scales v. United States, 367 U.S. 203 (1961); Moto v. United States, 367 U.S. 290 (1961). All three opinions were authored by Justice Harlan. All three limited the reach of the Smith Act because of the potential for that Act to tread upon valuable First Amendment freedoms.

At issue in Yates was whether the Smith Act prohibited "advocacy and teaching of forcible overthrow as an abstract principle, divorced from any effort to instigate action to that end, when such advocacy was pursued with "evil intent". 354 U.S. at 318. The Court held that it did not. In order to establish a violation of the Smith Act it must be shown that the defendant, acting with evil intent, advocated unlawful action as opposed to advocating a belief in the abstract doctrine of overthrowing the government. Id. at 319-27. There must be an actual incitement. Id. This is so even if the incitement goes toward future conduct. In Scales v. United States, supra, the Court concluded that a person could not be convicted of violating the membership clause of the Smith Act (making membership in the Communist Party illegal) unless the government established that the defendant had the specific intent of bringing about the overthrow of the United States government through the apparatus of the Communist Party and, at the same time, was an active member of that party. 367 U.S. at 221-24.

Based on its holding in Scales, the Court reversed a Smith Act conviction in Noto v. United States, supra, since the evidence adduced at trial was not sufficient to establish that the defendant had engaged in unlawful incitement as opposed to advocacy of abstract doctrine. 367 U.S. at 296-300.

As stated in Noto, *id.*, “the mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” Noto v. United States, 367 U.S. 290, 297-298 (1951). *See also* Herndon v. Lowry, 301 U.S. 232, 259-261 (1937); Bond v. Floyd, 385 U.S. 116, 134 (1966).

The decisions in Yates, Scales and Noto were technically based upon a statutory construction of the Smith Act. That statutory construction was, however, informed by the First Amendment, and subsequent Supreme Court decisions have converted these statutory interpretations to First Amendment doctrine. Elfbrandt v. Russell, 384 U.S. 11, 15-16 (1966); Keyishian v. Board of Regents, 385 U.S. 589, 606 (1967); Law Students Research Council v. Wadmond, 401 U.S. 154, 165 (1971). Thus, under these decisions, a person may not be convicted of advocating unlawful conduct unless that person, with the specific intent of bringing about a violation of the law, advocates that action be taken to effect the violation. The culmination of this doctrinal development came in Brandenburg v. Ohio, 395 U.S. 444 (1969). Brandenburg held that neither advocacy nor assembly in order to advocate political action may be prohibited thereby expanding the scope of constitutional protection provided by Whitney v. California, 274 U.S. 357 (1927). Brandenburg, 395 U.S. at 449. The Brandenburg Court focused First Amendment analysis, not in terms of mere advocacy, but rather such advocacy’s tendency to incite imminent lawless action. *Id.* at 448-449.

In Brandenburg, a leader of the Ku Klux Klan was convicted under Ohio's criminal syndicalism statute for advocating unlawful conduct, including resort to violence and terrorism. The conviction was based on a speech which he had given at a small Klan "organizers' meeting." In the speech, the defendant stated, "We're not a revengent organization, but if our President, our

Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken. We are marching on Congress July the Fourth, four hundred thousand strong." A reporter had been invited to the rally to hear and film this announcement. During the demonstration various racial slurs about blacks and Jews were made. There was evidence that some of the Klan members were armed. The Court reversed the conviction, stating:

[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

395 U.S. at 447. In addition, the court reaffirmed as constitutional principle the Yates, Scales and Noto decisions requiring incitement and specific intent. 395 U.S. at 448.

B. Lack of Evidence of Requisite Incitement to Unlawful Conduct.

The State will not be able to produce substantial evidence that any statements or expressions of the Defendants met the high threshold for incitement directed at producing imminent lawless action required under the Constitution. A call to demonstrate against the RNC is not a call to commit a crime. Nor is rhetoric such as "Crash the Convention." A call to change the direction of the country is not a call to commit a crime. People who gather to express objection to the direction of the country, and even use strong rhetoric to rally supporters for their position are not committing a crime.

The United States Supreme Court has had several occasions to comment on similar ambiguous statements in the context of the First Amendment. In Bond v. Floyd, 385 U.S. 116 {1966}, the State of Georgia refused to seat newly elected representative Julian Bond, essentially

on the grounds that he advocated a violation of law. Among other things, he supported the Student Nonviolent Coordinating Committee (SNCC) call to action, which urged all Americans to seek alternatives to the draft and opposition to the war in Vietnam "knowing full well that it may cost their lives" 385 U.S. at 120-121. The State argued that Bond's expressions went beyond First Amendment protection, and that he counseled violations of the Selective Service laws. 385 U.S. at 132. The Supreme Court, in a unanimous opinion disagreed:

No useful purpose would be served by discussing the many decisions of this court which establish that Bond could not have been convicted for these statements consistently with the First Amendment. See, e.g., Wood v. Georgia, 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 509 (1962); Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); Terminiello v. City of Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

385 U.S. at 134.

In Watts v. United States, 394 U.S. 705 (1969), the Supreme Court reversed a conviction of a defendant for threatening the life of the President. At a rally on the Washington Monument grounds, the defendant stated he would refuse induction into the armed forces and "if they ever make me carry a rifle the first man I want in my sights is L.B.J." The Supreme Court stated that:

We do not believe that the kind of political hyperbole indulged in by petitioner fits within the statutory term. For we 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, or wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials. New York Times Co. v. Sullivan, 376 U.S. 254, 270, 4 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). The language of the political arena, like the language used in labor disputes, see Linn v. United Plant Guard Workers of America, 383 U.S. 53, 58, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), is often vituperative, abusive, and inexact.

394 U.S. 708

In Hess v. Indiana, supra., the defendant was convicted in city court in Bloomington,

Indiana of disorderly conduct. The Supreme Court reversed. The facts are set out in the opinion as follows:

The events leading to Hess' conviction began with an antiwar demonstration on the campus of Indiana University. In the course of the demonstration, approximately 100 to 150 of the demonstrators moved onto a public street and blocked the passage of vehicles. When the demonstrators did not respond to verbal directions from the sheriff to clear the street, the sheriff and his deputies began walking up the street, and the demonstrators in their path moved to the curbs on either side, joining a large number of spectators who had gathered. Hess was standing off the street as the sheriff passed him. The sheriff heard Hess utter the word "fuck" in what he later described as a loud voice and immediately arrested him on the disorderly conduct charge. It was later stipulated that what the appellant had said was "We'll take the fucking street later," or "We'll take the fucking street again."

414 U.S. at 106, 107.

In reversing the conviction, the Supreme Court relied upon the constitutional guarantees of free speech:

. . . at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time. This is not sufficient to permit the State to punish Hess' speech. Under our decisions, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969).

414 U.S. at 108.

The thrust of the complaint against the defendants is that these defendants may be found guilty of a conspiracy to riot and other acts without it being established that the Defendants possessed specific criminal intent on the part of the defendant that a riot take place. Such a contention would render Minn. Stat. §609.71, as well as Minn. Stat. §609.05, subd. 1 and 2, unconstitutional. A federal appeals court disposed of this theory of the prosecution by noting

that Congress will not be presumed to have phraseology. In United States v. Spock, 416 F.2d 165 (1st Cir. 1969), four defendants were convicted under a single count indictment charging a conspiracy to interfere with the Selective Service Act. The charge arose out of a document entitled: "A Call to Resist Illegitimate Authority" and a cover letter signed by two of the defendants and others. Various speeches, organization of mass meetings, and other acts in furtherance of the call were alleged. The convictions of Dr. Spock and defendant Michael Ferber were reversed.

After detailing the charge, the Spock stated:

Inseparable from the question of the sufficiency of the evidence to convict are the rights of the defendants, and others, under the First Amendment. We approach the constitutional problem on the assumption, which we will later support, that the ultimate objective of defendants' alleged agreement, viz., the expression of opposition to the war and the draft, was legal, but that the means or intermediate objectives encompassed both legal and illegal activity without any clear indication, initially, as to who intended what. This intertwining of legal and illegal aspects, the public setting of the agreement and its political purposes, and the loose confederation of possibly innocent and possibly guilty participants raise the most serious First Amendment problems.

416 F.2d at 169.

The Spock court noted that the defendants' rights to criticize the government's programs could not be prevented "merely because the natural consequences might be to interfere with it [the Selective Service System] or even lead to unlawful action" 416 F.2d at 170. The court relied upon Bond v. Floyd, *supra*. The court was concerned that the alleged agreement could be interpreted as advocacy of both legal and illegal activity. 416 F.2d at 173. Referring to prior First Amendment cases, the First Circuit stated:

In Scales the Court held that protection for the innocent could be adequately accomplished by requiring that the defendants' specific illegal intent be proved to

the degree demanded in Noto v. United States, 1961, 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836. "[C]riminal intent . must 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, at 299-300, 81 S.Ct. at 1522. When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that 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." Scales v. United States, 367 U.S. at 234, 81 S.Ct. at 1488.

416 F.2d at 172-173.

Spock further noted:

. . . 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. Cf. United States v. Silverman, 2 Cir., 1957, 248 F.2d 671; Enfield v. United States, 8 Cir., 1919, 261 F. 141, 143-144. The metastatic rules of ordinary conspiracy are at a direct variance with the principle of strictissimi juris.

416 F.2d at 173.

After reviewing the evidence, the court held:

The principle of strictissimi juris requires the acquittal of Spock. It is true that he was one of the drafters of the Call, but this does not evidence the necessary intent to adhere to its illegal aspects. Nor does his admission to a government agent that he was willing to do "anything" asked to further opposition to the war. Specific intent is not established by such a generalization.

416 F.2d at 178-179.

Although United States v. Dellinger, supra, was reversed for other reasons, the Dellinger court approached the sufficiency of the evidence must the same as the Spock court:

When the group activity out of which the alleged offense develops can be

described as a bifarious undertaking, involving both legal and illegal purposes and conduct, it is within the shadow of the first amendment, the factual issue as to the alleged criminal intent must be judged strictissimi juris. This is necessary to avoid punishing one who participates in such an undertaking and is in sympathy with its legitimate aims, but does not intend to accomplish them by unlawful means. Specifically meticulous inquiry into the sufficiency of proof is justified and required because of the real possibility in considering group activity, characteristic of political or social movements, of an unfair imputation of the intent or acts of some participants to all others.

472 F.2d at 392.

Referring to the Spock case, the Dellinger court stated:

We adopt the concept for application in this case because, although we are no longer concerned with the charge of conspiracy, the acts charged against individual defendants occurred in the context of a group undertaking with legal (protest of the war and expression, generally, of dissent) and allegedly illegal (violent) branches. It is our belief that this duality would usually exist in an undertaking involving activity of a group and out of which a riot arises.

472 F.2d at 393.

See also United States v. Dodge, et al., 538 F.2d 770 (8th Cir. 1976).

The United States Supreme Court has also extended the Scales and Noto doctrine to civil actions. In NAACP v. Clairborne Hardware, 458 U.S. 886 (1982), the court reversed a judgment of the Mississippi Supreme Court for damages arising out of a boycott and other activities against two corporations, their leaders and 144 individuals who participated in the boycott. The theory of the Mississippi Supreme Court was that the defendants had entered into an illegal conspiracy to use force and violence. The Mississippi Supreme Court stated: "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy." The defendants were identified as (a) "managers" -79 individuals who regularly attended meetings and 11 persons who took leadership roles; (b) 22 members of the "Black Hats" -- a special group organized to enforce the boycott and 19 individuals who were "store watchers";

and (c) 16 individuals for whom there is direct evidence of participation in violence. Charles Evers was alleged to be liable because he threatened violence. The United States Supreme Court held that the boycott was a form of speech protected by the First and Fourteenth Amendment and emphasized the importance of freedom of association.⁶

The Supreme Court held further that the right of association does not lose all constitutional protection merely because some members of the group may have participated in conduct that itself is not protected. *Id.* at 908. The Court held that even in the civil context it was addressing, the principles of strictissimi juris set forth in Scales and Noto, *supra*, apply and that liability can not be imposed based upon group associations. *Id.* 919-920. The Court rejected all efforts to base liability upon association with the group as non-permissible under the First Amendment. *Id.* at 925. It held that individuals may be held liable for the injuries they caused. *Id.* at 926. Turning to the question of the liability of defendant Evers, the court noted:¹⁶

While many of the comments in Evers' speeches might have contemplated

⁶ Quoting from NAACP v. Clairborne Hardware, *supra*:

As we so recently acknowledged in Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley, 454 U.S. 290, 205, “the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.” We recognize that “by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.” *Ibid.* In emphasizing “the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues, *Id.* at 195, we noted the words of Justice Harlan, writing for the Court in NAACP v. Alabama ex rel Patterson, 357 U.S. 449, 460:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group associations, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

458 U.S. at 907-908.

"discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the Sheriff could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

458 U.S. at 927.

In spite of the above characterization of Evers' speeches, the court held that his speeches failed the tests of inciting imminent lawlessness under Noto, Whitney v. California, and Brandenburg, supra, as despite his words evidence did not establish that the speech authorized, ratified, or directly threatened acts of violence. The court concluded its discussion of Evers' alleged liability for the acts of others as follows:

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence -- apart from the speeches themselves.

Id. at 933.

If Charles Evers' emotionally charged rhetoric is constitutionally protected, as it is, then it seems superfluous to comment that an invitation by words and writing to come to St. Paul, Minnesota to demonstrate displeasure over issues associated with the Republican convention can hardly form the basis of a criminal prosecution. The charges against the defendants do not allege that the speech engaged in by them was made under circumstances whereby violations of the law would be the immediate result of the speech. In Epton v. New York, 390, U.S. 29, 30 (1968), Justice Stewart stated, in his concurrence of certiorari denial, that a State cannot convict a man of

criminal conspiracy without first demonstrating some constitutionally unprotected overt act in furtherance of the alleged unlawful agreement.

The cases make clear the meaning of "imminence" or "immediate." In Brandenburg, the defendants called for a rally at a date in the future. In Hess, the defendant's statement amounted to "nothing more than advocacy of illegal action at some indefinite time in the future" (414 U.S. at 108). In Herdon v. Lowry, *supra*, the Supreme Court struck down Georgia's insurrection statute because the State, under the Georgia statute, was not required to show that the Defendant's statements caused an actual insurrection. See also, National Association for the Advancement of Colored People, et al. v. Clairborne Hardware Co., *supra*, 458 U.S. at 928. The Complaint in the instant case, rather than alleging immediacy, describes alleged events remote in time to occurrences on the Street during the Republican National Convention.⁷

CONCLUSION

Defendants urge the Court's careful scrutiny of the spurious and politically motivated charges against them. The evidence fails to support the allegations of any conspiracy to commit criminal damage to property or riot with a dangerous weapon, and the charges further violate Defendants' fundamental constitutional rights to freedom of speech, freedom of expression, and freedom of association. Neither the Complaint on its face nor the evidence that can be presented justify requiring a trial in this case. Defendants request dismissal of the Complaint.

⁷ Whereas there is ample federal case law setting forth the First Amendment protections for political speech, there are not cases interpreting corresponding provision of the Minnesota Constitution, Article I, Section 3. Although the state supreme court has declined to apply greater protection under the State Constitution for freedom of speech in other contexts, see e.g. State v. Wicklund, 589 N.W.2d 793, 800 (Minn. 1999), it did not foreclose the possibility of greater protections in other circumstances. Id. at 803. Defendants assert their position that greater protection is appropriate in cases of political advocacy and organizing.

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Jordan S. Kushner, MN ID 219307
431 S. 7th Street, #2446
Minneapolis, MN 55415
612-288-0545

Attorney For Luce Guillen-Givins

Larry B. Leventhal, MN ID 62534
319 Ramsey Street
St. Paul, MN 55102
612-333-5747

Attorney For Max Spector

John Bachman, WI ID 1022480
P.O. Box 477
Eau Claire, WI 54702-0477
(715) 839-1040

Attorney for Garrett Fitzgerald

Bruce Nestor, MN ID 0318024
3547 Cedar Avenue South
Minneapolis, MN 55407
612-659-9019

Attorney for Monica Bicking

Robert Kolstad, MN ID 258994
1005 W. Franklin Avenue #3
Minneapolis, MN 55405
612-721-3425
Attorney for Nathanael Secor

Ted Dooley, MN ID 189583
Peter J. Nickitas MN ID 212313
1595 Selby Avenue
St. Paul, MN 55104
612-325-8433
Attorney for Erik Oseland

Barbara Ann Nimis, MN ID 235428
350 River Road, P.O. Box 50812
Mendota, MN 55150
(651)452-1474

Attorney for Eryn Trimmer

Travis Snider, MN ID 270842
1005 W. Franklin Avenue, #3
Minneapolis, MN 55405
612-872-1200

Attorney for Robert Czernik

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