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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>JOSEPH BUDDENBERG, MARYAM KHAJAVI, NATHAN POPE, A/K/A NATHAN KNOERL, ADRIANA STUMPO,<br><br>Defendants. | No. CR 09-263 RMW<br><br>UNITED STATES' RESPONSE TO STUMPO'S REQUEST FOR DETERMINATION ON SCOPE OF RELEVANT EVIDENCE AT TRIAL AND PROPOSED JURY INSTRUCTIONS<br><br>Date: June 7, 2010<br>Time: 9:00 a.m.<br>Court: Hon. R. Whyte |

Defendant Adriana Stumpo seeks a ruling from the Court in three areas: the relevance and admissibility of defendants' subjective intent; the relevance and admissibility of the victims' "reaction" to the defendants' conduct; and the application of the "concept of *strictissimi juris.*" As set forth in more detail below, (1) the government agrees that evidence of defendants' subjective intent is relevant, but such evidence is admissible only if it satisfies the Federal Rules of Evidence; (2) evidence of the victims' "reaction" to defendants' course of conduct is both

relevant and admissible because the statute requires the government to prove that the victims felt fear in response to the defendants' course of conduct and that their fear was reasonable; and (3) the "concept of *strictissimi juris*" is inapplicable at defendants' trial and, in any event, is adequately expressed in the Ninth Circuit's Model Jury Instructions for conspiracy.

**I. The Statute**

Defendants are charged with conspiracy to use a facility of interstate commerce to damage and interfere with the operations of an animal enterprise, in violation of 18 U.S.C. § 371, and using a facility of interstate commerce to damage or interfere with an animal enterprise, in violation of 18 U.S.C. § 43. Section 43 provides in pertinent part:

> Whoever…uses or causes to be used the mail or any facility of interstate or foreign commerce–
>
> > (1) for the purpose of damaging or interfering with the operations of an animal enterprise; and
> >
> > (2) in connection with such purpose–
> >
> > * * *
> >
> > > (B) intentionally places a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family…of that person, or a spouse or intimate partner of that person by a course of conduct involving threats, acts of vandalism, property damage, criminal trespass, harassment or intimidation

commits a federal offense. Section 43(e)(1) provides that the statute does not "prohibit any expressive conduct…protected from legal prohibition by the First Amendment to the Constitution."

**II. The subjective intent of the defendants is relevant but evidence of their intent must be admissible**

After a lengthy description of recent Ninth Circuit case law on the meaning of the term "threat," Stumpo asks this Court to rule that "the subjective intent of the defendants is relevant and admissible at trial because…such evidence is critical in determining whether their statements were or were not illegal under the AETA and/or protected by the First Amendment." Mot. at 8. That assertion rests on Stumpo's conclusion that to establish that defendant made a "threat" within the meaning of the statute, the government must show that the defendant "intend[ed] to

place a person in reasonable fear by means of threats." *Id.* Stumpo primarily relies on *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005), which interpreted a statute prohibiting "intimidation" to require proof that "the speaker subjectively intended the speech as a threat." In turn, *Cassel* relied on *Virginia v. Black*, 538 U.S. 343, 359 (2003), which held that threatening or intimidating speech or expressive conduct is protected by the First Amendment unless it amounts to a "true threat" – a term the Court in *Black* defined to mean "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."

The government agrees that to the extent that it seeks to prove that Stumpo or her codefendants violated Section 43 by "threats" or "intimidation," *Cassel* and *Black* require it to show that the defendant subjectively intended his or her speech or expressive conduct as a "true threat." But that concession is inapplicable to other conduct that may form part of a "course of conduct" in violation of Section 43, including "acts of vandalism, property damage, criminal trespass, [and] harassment." Such non-expressive conduct is not protected by the First Amendment. *See Adderly v. Florida*, 385 U.S. 39, 42-44 (1966) (statute that prohibited trespass on jail grounds did not violate First Amendment); *United States v. Griefen*, 200 F.3d 1256, 1262 (9th Cir. 2000) ("vandalism can hardly be characterized as an activity protected by the First Amendment"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) ("The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another's home or office."). Accordingly, to the extent that the government relies on non-expressive conduct to prove that defendants violated Section 43, it need not show that defendants made a "true threat."

Moreover, the government's agreement that it must prove a "true threat" when it seeks to show a "threat" or "intimidation" adds little or nothing to the government's burden of proof or the evidence that is relevant at trial, because the statute requires the government to show that defendants "intentionally place[d] a person in reasonable fear of the death of, or serious bodily injury to that person, a member of the immediate family…of that person, or a spouse or intimate partner of that person" by a "course of conduct" that may involve threats or intimidation. In

other words, to prove a violation of the statute, the government must introduce evidence of defendants' subjective intent to place a person in reasonable fear of death or serious bodily injury. That evidence will satisfy the definitions of "threat" and "intimidation" in *Cassel* and *Black*. *See United States v. Stewart*, 420 F.3d 1007, 1017 (9th Cir. 2005) (proof required by elements of 18 U.S.C. § 115(a)(1)(B) "would seem to subsume the subjective 'true threat' definition announced in *Black* and recognized by *Cassel*").

Although the government agrees with Stumpo that evidence of defendants' subjective intent is relevant to proving a violation of Section 43, all such evidence is not admissible at trial. If defendants wish to introduce evidence of their subjective intent, they must show that it is admissible under the Federal Rules of Evidence. In particular, a defendant ordinarily may introduce his or her prior statement only by showing that the statement is admissible under an exception to the hearsay rule. Defendants cannot avoid testifying by relying on otherwise inadmissible hearsay concerning their subjective intent.

Finally, Section 43's requirement that the government prove that defendants intended to put a person in fear of bodily injury or death does not preclude the government from relying on circumstantial evidence to prove defendants' intent or asking the jury to draw reasonable inferences about defendants' intent from the evidence. *See United States v. Santos*, 527 F.3d 1003, 1009 (9th Cir.2008) ("The government is not required to produce direct evidence of the defendant's intent; rather, it may provide circumstantial evidence from which the district court can draw reasonable inferences."). In other words, as in any other prosecution, evidence of defendants' actions is relevant to showing their intent.

**III. The victims' reactions are relevant to showing a violation of Section 43.**

Stumpo argues that because "the jury's task is to determine whether or not a *reasonable person* would be placed in fear of death or serious bodily injury by the defendant's alleged action…evidence of a *particular person's* fear or reaction is irrelevant and may be unduly prejudicial to the jury's determination." Mot. at 8-10 (emphasis in original). That claim rests on a misreading of the statute.

As set forth above, the government must prove that through a course of conduct the

defendants "intentionally place[d] a person in reasonable fear of the death or, or serious bodily injury." The statute thus requires the government to show that defendants' course of conduct (1) placed a person in fear and (2) that the person's fear was reasonable. In other words, the government must first show that their victims experienced the requisite fear, and the jury must then find that the victim's fear was reasonable under an objective standard. Likewise, subsection (b) of the statute, entitled "Penalties," increases the maximum sentence that a defendant may receive to five years if, among other things, "the offense instills in another the reasonable fear of serious bodily injury." Because proof of that fact increases the maximum sentence, the government must prove it to the jury at trial if it wishes to increase the maximum sentence to five years. *See Apprendi v. New Jersey*, 530 U.S. 466 (2000).

The statute therefore makes a victim's testimony relevant in two ways. First, to establish that the defendants instilled fear in the victims, the government must be able to introduce the victims' testimony as to their state of mind when confronted with the defendants' course of conduct. Second, the victims' knowledge at the time of the incident is relevant to determining whether their fear was objectively reasonable. The determination of reasonableness will depend on whether a reasonable person in the victim's position would have entertained a fear in response to defendants' course of conduct. Objective reasonableness depends on assessing all of the information in the victims' possession when the incident occurred. *See Fogel v. Collins*, 531 F.3d 824, 831 (9th Cir. 2008) ("The objective standard calls for an examination of the speech in the 'light of [its] entire factual context, including the surrounding events and reaction of the listeners.'") (quoting *United States v. Orozco-Sullivan*, 903 F.2d 1262, 1265 (9th Cir. 1990)). In *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 290 F.3d 1058, 1077-78 (9th Cir. 2002), for example, the Ninth Circuit, sitting en banc, held that information that the victims knew was relevant to determining whether certain posters constituted a true threat, because "context is critical in a true threats case and history can give meaning to the medium." The en banc court noted with approval that in *United States v. Hart*, 212 F.3d 1067 (8th Cir. 2002), the placement of Ryder trucks in the victim's driveway constituted a threat because the victim knew that Ryder trucks had been used in the Oklahoma

City bombing. *See Planned Parenthood*, 290 F.3d at 1078-79.

In short, the victims must be allowed to explain why they were afraid so that the jury can assess whether their fear was reasonable. In particular, to explain why they were in fear, the victims must be able to testify as to their knowledge of violence and other hostile and offensive conduct directed at researchers who use animals. The reasonableness of the victims' fear in response to defendants' course of conduct depends in part on their knowing that other animal researchers and research labs had been the victim of violence and threats of violence.

Allowing evidence of the victims' state of mind will not, as Stumpo asserts, cause the trial to become "a morass of evidence about what was communicated to the witness, under what circumstances it was communicated, and by what entity it was communicated." Mot. at 10. To the contrary, the witnesses will simply be asked to testify whether they were in fear and why. In any event, testimony as to the reasonableness of defendant's fear is required by the statute and therefore should be admitted so that the government can satisfy its burden of proof. *See Planned Parenthood*, 290 F.3d at 1078 (noting that "two weeks of testimony" necessary to establish context of threat).

**IV. The doctrine of *strictissimi juris* becomes relevant, if at all, only after a verdict.**

*Strictissimi juris* is a Latin phrase meaning "according to the strictest law." *See United States v. Fullmer*, 584 F.3d 132, 160 (3d Cir. 2009); *see also NAACP v. Claiborne Hardware*, 485 U.S. 886, 919 (1982) (same); Black's Law Dictionary 1462 (8th ed. 2004) (defining the term to mean "[of] the strictest right; to be interpreted in the strictest manner").[1] Stumpo asserts that "[u]nder the doctrine of *strictissimi juris*, an individual's association or agreement with other actors cannot on its own, serve as evidence of the specific intent needed to sustain a conspiracy

[1] According to a Westlaw search, the only Ninth Circuit criminal case to employ the term was *Hellman v. United States*, 298 F.2d 810, 812 (9th Cir. 1961), which addressed the sufficiency of the evidence of defendants' conviction under the Smith Act. That Act made it a crime to be a member of an organization that sought the violent overthrow of the United States. The *Hellman* court quoted the Supreme Court's decision in *Noto v. United States*, 367 U.S. 290, 299-300 (1961), for the proposition that evidence of membership in an organization "must be judged *strictissimi juris*."

conviction, when that association or agreement is founded upon a lawful purpose and is political in a way that warrants First Amendment protections." Mot. at 11. According to Stumpo, she "cannot be proven to have the specific intent requisite for conspiracy solely on the basis of the unlawful activities of her associates." *Id*. Stumpo also seeks two jury instructions that apparently seek to require the jury to follow this principle. Mot. at 17 (Instructions 5 and 6).

Stumpo's claim is without merit. First, the existing case law and the language of the statute ensures that the defendants' conviction will not rest on activity protected by the First Amendment and therefore resort to *strictissimi juris* is unnecessary. As set forth above, to prove that defendants' threatening or intimidating words or conduct violated Section 43, the government must prove that they engaged in speech or conduct that is not protected by the First Amendment. In other words, the requirement that the government must show that defendants' threats or intimidating conduct constituted a "true threat" ensures that defendants will not be convicted based on First Amendment activity and obviates the need for applying the doctrine of *strictissimi juris*. Moreover, the statute specifically provides that it cannot be construed to prohibit "any expressive conduct…protected from legal prohibition by the First Amendment." 18 U.S.C. § 43(e).

Second, when the principle of *strictissimi juris* applies, it provides a means for a court reviewing a conviction to view the evidence against a defendant, not a principle on which the jury must be instructed at trial. In *Noto v. United States*, 367 U.S. 290, 299-300 (1961), for example, the Court held that when, as in prosecutions under the Smith Act of members of the Communist Party, an organization had both legal and illegal ends, "[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 by adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." As the Seventh Circuit explained the holding in *Noto*:

> 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, and 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. Specially 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.

*United States v. Dellinger*, 472 F.2d 340, 392 (7th Cir.1972) (emphasis added); *see United States v. Sanders*, 211 F.3d 711, 722 (2d Cir. 2000) (quoting *Dellinger*).

As the court in *Dellinger* made clear, moreover, even when it applies, *strictissimi juris* does not preclude the government from seeking to prove a conspiracy by evidence that would be admissible in any other conspiracy case. The doctrine does not require evidence "so compelling that a verdict of not guilty would be perverse," and it does not "wholly depriv[e] the jury of its customary function in interpreting ambiguous statements in the light of circumstances and choosing among reasonable inferences." *Dellinger,* 472 F.2d at 393.

In *Fullmer*, the defendants were prosecuted under the prior version of Section 43. In reviewing the sufficiency of the evidence of defendants' participation in the conspiracy, the court of appeals applied "this strict standard." At the same time, however, the Third Circuit stressed that the government could rely on circumstantial evidence to show each defendant's intent and that "the government need not show that each and every member of the conspiracy committed an unlawful act in furtherance of the conspiracy's goals." Similarly, in the case on which Stumpo most heavily relies, *United States v. Spock*, 416 F.3d 165 (1st Cir. 1969), the court employed *strictissimi juris* in reviewing the sufficiency of the evidence of defendants' convictions for counseling Selective Service registrants to evade service in the armed forces of the United States. But in applying that principle, the court acknowledged that the government could prove the conspiracy by the defendants' words and actions:

> When the alleged [conspiratorial] agreement is both bifarious and political within the shadow of the First Amendment, an individual's specific intent to adhere to the illegal portions of the agreement 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.

*Spock*, 416 F.2d at 173.

Third, even if the doctrine of *strictissimi juris* is applicable at trial, it is fully captured in the Ninth Circuit Model Jury Instructions for conspiracy, and Stumpo's proposed instructions are therefore unnecessary. Model Instruction 8.16 provides that defendants cannot be convicted of conspiracy "if they simply met, discussed matters of common interest, acted in similar ways, or perhaps helped one another." Likewise, the Model Instruction states, "one who has no knowledge of a conspiracy, but happens to act in a way which furthers some object or purpose or the conspiracy, does not thereby become a conspirator. Similarly, a person does not become a conspirator merely by associating with one or more persons who are conspirators, nor merely by knowing the conspiracy exists." Instead, the jury must find that the defendants agreed "to commit at least one of the crimes alleged in the indictment."

These instructions ensure that the jury will not convict defendants of conspiracy merely because they associated with others who sought to violate Section 43 or because they may have protested the use of animals in research. Indeed, the Model Instruction makes clear that mere association is not sufficient to convict a defendant of any conspiracy and is applicable in cases where there is no evidence that "association or agreement is founded on a lawful purpose and is political in a way that warrants first amendment protection." Mot. at 17.

Dated: May 21, 2010

Respectfully submitted,

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