UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

NATHAN WEEDEN,

Defendant.
_____/

Case No. 2:23-CR-7

Hon. Robert J. Jonker
United States District Judge

Oral Argument Requested

DEFENDANT NATHAN WEEDEN'S BRIEF IN SUPPORT OF MOTION TO DISMISS COUNT ONE OF THE INDICTMENT OR ORDER DISCLOSURE OF GRAND JURY PROCEEDINGS

On or about June 27, 2023, a grand jury sitting in the Western District of Michigan returned a two-count indictment charging Defendant Nathan Weeden with: (1) felony "conspiracy against rights," in violation of 18 U.S.C. § 241; and (2) damaging religious property, in violation of 18 U.S.C. §§ 247(c) and 247(d)(5). (Indictment, PageID.1-4.) Specifically and in pertinent part, Count One of the Indictment accuses Mr. Weeden of conspiring with a number of referenced and unreferenced individuals to "injure, oppress, threaten, and intimidate non-white and Jewish citizens of the United States, including members and guests of the Temple Jacob Synagogue, in the free exercise and enjoyment of the right…to hold (i.e., to use) real and personal property" in the same manner as white citizens. (*Id.*, PageID.1.) The conspiracy allegedly spanned a roughly 10-day period in the fall of 2019, nearly four years prior to the return of the Indictment. (*Id.*)

According to the Indictment, the "purpose of the conspiracy" was to injure, oppress, threaten, and intimidate persons in their property right by vandalizing property associated with non-white and Jewish citizens, "to show the strength and cohesion of 'The Base,' a multi-state white supremacist organization to which Weeden and his co-conspirators belonged." (Indictment, PageID.2.) The Indictment goes on to describe a purportedly coordinated event called "Operation Kristallnacht," during which members of "The Base" supposedly vandalized synagogues in Racine, Wisconsin and Hancock, Michigan. (*Id.*, PageID.3.) The Indictment accuses Mr. Weeden of vandalizing the latter as part of the "conspiracy against rights." (*Id.*)

LAW AND ARGUMENT

In this case, the Government uses a Reconstruction Era statute[1] passed in 1870 to charge Mr. Weeden with "conspiracy against rights."[2] The Indictment returned by the grand jury, however, fails to properly allege the very conspiracy that forms the basis of that charge. Put simply, the Indictment asserts that members of The Base gathered to engage in acts of destruction. Importantly, though, except for some boilerplate language to the contrary, the Government identifies the actual purpose of the alleged conspiracy as an effort "to show the strength and cohesion of 'The Base,' a multi-state white

[1] Passed as "The Enforcement Act of 1870." *Anderson v. United States*, 417 U.S. 211, 237, 94 S. Ct. 2253, 2269 (1974). *See also*, *The Enforcement Acts of 1870 and 1871*, historical notes by the United States Senate, *available at* https://www.senate.gov/artandhistory/history/common/generic/EnforcementActs.htm (last accessed October 30, 2023.)

[2] For helpful discussions of this charge, *see* Adam G. Safwat, *Section 241 and the First Amendment: Avoiding a False Conflict Through Proper* Mens Rea *Analysis*, 43 DUKE L.R. 625 (available at https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3239&context=dlj (last accessed October 31, 2023)); Howard M. Feuerstein, Civil Rights Crimes and the Federal Power to Punish Private Individuals for Interference with Federally Secured Rights, 19 VAND. L.R., 641 (available at https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=3612&context=vlr (last accessed October 31, 2023)).

supremacist organization to which Weeden and his co-conspirators belong." (Indictment, PageID.2.) The supporting factual allegations that follow, however, fail to describe or otherwise reference any agreement to deprive any victims of their actual right to hold or use property—a fundamental requirement of the conspiracy charge, as made clear below. Accordingly, Count One of the Indictment fails to state an offense and should be dismissed.

Alternatively, should the Court find that Count One of the Indictment adequately alleges a conspiracy chargeable under 18 U.S.C. § 241, Mr. Weeden requests that the Court order production of the transcripts of relevant grand jury proceedings. Rule 6(e) permits the production of the transcript of a grand jury proceeding where "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Here, Mr. Weeden notes that there is major dissonance between the legal theory of the Indictment and the facts alleged therein. That is, while ostensibly the Government's legal theory is that members of the The Base conspired to deprive victims of their right to use or hold property, the facts *as alleged* demonstrate only an effort by the conspirators to promote the organization and "show its strength." Second, the Government's statements at the most recent status conference indicate uncertainty as to the constitutional right underlying Count One—i.e., whether the right is based in property or religious freedom. There is therefore a compelling reason to believe that the grand jury may have been given conflicting or confusing information, and a review of the transcripts is necessary for Mr. Weeden to mount an adequate defense. Mr. Weeden provides additional support for both requests for relief below.

A. Legal Standard

Mr. Weeden makes this motion under Federal Rules of Criminal Procedure 7 and 12. Rule 7 requires that the indictment be "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). Rule 12 permits a pre-trial motion to challenge insufficient indictments: "The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits . . . (v) failure to state an offense." Fed. R. Crim. P. 12(b)(3)(v).

A Rule 12 motion "permits a party to 'raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue[,]" and Rule 12(b)(3)(B) permits a court 'at any time while the case is pending . . . [to] hear a claim that the indictment or information fails to . . . state an offense.'" *United States v. Ali,* 557 F.3d 715, 719 (6th Cir. 2009) (quoting *United States v. Levin*, 973 F.2d 463, 469 (6th Cir. 1992)). "A motion under Rule 12 is therefore appropriate when it raises questions of law rather than fact." *Id*.

The Sixth Circuit has made clear that "it is axiomatic that, 'to be legally sufficient, the indictment must assert facts which in law constitute an offense; and which, if proved, would establish prima facie the defendant's commission of that crime.'" *United States v. Landham*, 251 F.3d 1072, 1079 (6th Cir. 2001) (quoting *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 177 (6th Cir. 1992)). "Whether the elements of the offense are adequately alleged in the indictment is a legal question . . . If the indictment is legally

deficient, the proper result is *dismissal of the indictment*." *Id*. at 1080 (citations omitted)(emphasis added).

B. The Indictment fails to allege that the object of the conspiracy was to deprive any victim of their right to property, a requirement under § 241.

1. Courts interpreting § 241 establish that the Government may base a violation on property rights, but § 241 does not create any independent rights.

Count One of the Indictment alleges a violation of § 241, which provides in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District *in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States*, or because of his having so exercised the same . . . They shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. § 241 (emphasis added). Notably, this statute, like others providing a cause of action related to civil rights, references and incorporates other rights—it does not, itself, establish any civil right. *Id*. (pointing to rights "secured to him by the Constitution or laws of the United States"); *United States v. Brown*, 49 F.3d 1162, 1165 (6th Cir. 1995) (under § 241, "the United States must prove that the defendant knowingly joined a conspiracy to injure, oppress, threaten or intimidate a victim with the intent to deprive him of a civil right"). To sustain a conviction under § 241, the government must identify the right allegedly violated and prove the defendant had the specific intent to interfere with that right. *United States v. Guest*, 383 U.S. 745, 760, 86 S. Ct. 1170, 1179 (1966) ("a specific intent to interfere with the federal right must be proved" (citing *Screws v. United States*, 325 U.S. 91, 106-107)).

In this case, Count One identifies the underlying right as the right to "hold, i.e., to use) real and personal property in the same manner as that right is enjoyed by white citizens, as guaranteed by Title 42, United States Code, Section 1982." (PageID.1.) The alleged violation of § 241 is therefore limited to the rights ensured by § 1982. Section 1982, in turn, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Accordingly, § 241 criminalizes a conspiracy to deprive victims' rights protected by statutes like § 1982, and § 1982 protects the rights of Jewish people, where the victims are targeted solely because of their "ethnic characteristics."[3] *Id*. Further, because the protected rights are rooted in § 1982, the scope of § 241 is limited—at least in this case—by the limitations of the property right ensured by § 1982. That is, because § 241 simply points to other rights, the scope of § 241 cannot extend beyond the predicate right. The right identified in the Indictment is the right to "hold (i.e., to use)" property. (PageID.1) This expanded property right, i.e., the right not simply to hold property but to "use it," has been confirmed by the Sixth Circuit. *See Brown*, 49 F.3d at 1167 ("[T]he 'use' of property is a protected civil right").

[3] It is not self-evident that the alleged victims in this case—Jewish congregants and their guests—are "non-white citizens" protected by this provision. But the Supreme Court has extended the protection beyond purely race-based classifications to all people who "constituted a group of people that Congress intended to protect" by passing § 1982, including Jewish people. *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617, 107 S. Ct. 2019, 2022 (1987); *see also Brown*, 49 F.3d at 1166. Further, the deprivation must be rooted in "intentional discrimination solely because of [the victims'] ancestry or ethnic characteristics." *Id*. at 617 (quoting *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613, 107 S. Ct. 2022, 2028 (1987) (quotations omitted)).

Finally, while certain rights are protected against state action alone—and actions based on those rights do not lie against private parties—rights established by § 1982 and enforced through § 241 are not among them. *Memphis v. Greene*, 451 U.S. 100, 120, 101 S. Ct. 1584, 1596 (1981) ("We have squarely decided, however, that § 1982 is directly applicable to private parties"); *cf.* 42 U.S.C. § 1983 and 18 U.S.C. § 242. Thus, the indictment has met at least some of the threshold requirements to sustain a charge under § 241. By identifying the relevant statutes and status of the allegedly victimized group, the boilerplate language in the indictment tracks the statutes and case law establishing the contours of § 241 and § 1982.

But checking the baseline boxes for a charge under § 241 is not enough. The government, through the indictment, must also set forth facts demonstrating: 1) a well-defined conspiracy to deprive victims of their protected rights, and 2) the requisite *mens rea* for the same. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 275, 113 S. Ct. 753, 763 (1993) ; *United States v. Epley*, 52 F.3d 571, 576 (6th Cir. 1995). In short, because Count One fails to meet this threshold requirement, it should be dismissed.

Cases both at the Supreme Court and in the Sixth Circuit are instructive on these requirements. Because civil rights can be enforced through a variety of statutes, civil cases provide helpful guidance in defining the outer bounds of § 241, even though that section *criminalizes* deprivation of certain rights. In *Bray*, the Supreme Court evaluated the scope of the parallel statute that provides a civil cause of action on the same basis as criminal liability under § 241. 506 U.S. 263, 275, 113 S. Ct. 753, 763 (1993). The Court said, "[I]t does not suffice for application of [the civil counterpart to § 241] that a protected right be

incidentally affected. A conspiracy is not 'for the purpose' of denying equal protection simply because it has an effect upon a protected right. The right must be '*aimed at*.'" *Id*. (quoting *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 833, 103 S. Ct. 3352, 3358 (1983)) (emphasis in original).

In *Bray*, which dealt with alleged interference of the right to interstate travel for women traveling to obtain abortions, the Court held that a defendant "must act at least in part for the very purpose of producing [the deprivation of the right]." *Id*. at 276. The Court held that it "is on its face implausible" that the defendants intended to restrict interstate travel; they cared about abortions, not whether women traveled to get them. *Id*. A showing that the defendant conspired to specifically target a constitutional right is equally necessary in the criminal context. *Guest*, 383 U.S. at 760 ("A specific intent to interfere with the federal right must be proved, and at a trial the defendants are entitled to a jury instruction phrased in those terms.").

In addition to facts alleging a specifically "aimed at" right, the Government must sufficiently allege the *mens rea*—the defendants' specific intent to deprive the victim of that right. *Bray*, 506 U.S. at 275. "Specific intent to deprive another of civil rights is an element of the offense that the government must prove beyond a reasonable doubt." *Epley*, 52 F.3d at 576. "To commit a specific-intent crime, a defendant must do more than knowingly act in violation of the law. He must also act with the purpose of violating the law. In other words, a general intent crime requires the knowing commission of an act that the law makes a crime. A specific intent crime requires additional bad

purpose." *United States v. Prabhu Ramamoorthy*, 949 F.3d 955, 961 (6th Cir. 2020) (citations and quotation marks omitted).

The statute and case law together demonstrate that to state an adequate charge under § 241, the Indictment must allege facts showing that the defendant(s) conspired to deprive the alleged victims of their constitutionally protected right to property, with the specific intent of depriving that group of the protected right, knowingly acting in violation of the law. The defendant(s) cannot simply commit acts that incidentally deprive the protect group of the civil right—the purpose of the conspiracy must be the deprivation itself. *Bray*, 506 U.S. at 275; *Guest*, 383 U.S. at 760.

2. The Government's Indictment makes conclusory claims that Mr. Weeden conspired to deprive rights, but the facts show the true purpose—promoting The Base.

As noted above, at the outset the Indictment tracks the requirements of a charge under § 241, initialing asserting that Mr. Weeden deprived protected groups of their rights under § 1982. But when the Indictment attempts to clarify the "Purpose of the Conspiracy," along with the facts purportedly supporting Count One, the Government reveals the true ends of the conspiracy it must prove Mr. Weeden joined: assuming the facts to be true, the plain reading of the indictment demonstrates that the conspiracy was ultimately intended "*to show the strength and cohesion of 'The Base*,' a multi-state white supremacist organization to which Weeden and his co-conspirators belonged." (PageID.2 (emphasis added).)

On its face, the Indictment points every allegation to this purposive clause, and the conclusion in the "Purpose of the Conspiracy" section is no simple syntactical error.

The background in the Indictment supports this ultimate purpose, alleging that the co-conspirators traded messages about "Operation Kristallnacht" where the Base would "STRIKE when the time comes" against their intended targets. (PageID.3.) After Mr. Weeden allegedly spray-painted swastikas on a synagogue, the indictment says, he messaged the group: ""I did! Went good! Got articles written!!" (*Id.*) This is not language indicating an intent to deprive anyone of a property right, but rather to "spread the word"—even if that "word" was targeted at a certain group, as alleged in the Indictment. In other words, even if The Base intended to intimidate Jewish people, members of synagogues, or other racial minorities, that is not enough. The defendant must have specifically conspired to deprive the victims of the particular right protected by § 1982. *Bray*, 506 U.S. at 275; *Guest*, 383 U.S. at 760. There are no facts in the Indictment, for example, indicating that Mr. Weeden or any other alleged member of The Base committed their misdeeds to intimidate members from gathering at a synagogue again, or to make them less inclined to "use" that property in the future. *Cf. Brown*, 49 F.3d at 1164 (after co-conspirators fired shots into a synagogue, "a member of the synagogue described the effect of the shooting as shocking, intimidating, and perceived as life-threatening").

Bray is instructive here. The Supreme Court analyzed the limitation of conspiracies that are purportedly "aimed at" certain rights, but in fact have another purpose. The Court there found that incidental interference with interstate travel—where the actual purpose was protesting abortion—was not enough to show a specific intent to interfere with a constitutional right. The Court said, "the 'intent to deprive of a right' requirement

demands that the defendant do more than merely be aware of a deprivation of right that he causes, and more than merely accept it; *he must act at least in part for the very purpose of producing it*." *Bray*, 506 U.S. at 276 (emphasis added). Here, the indictment is clear, assuming it as true: The Base acted for self-promotion, not to deprive anyone of the use of their property right *qua* property right. Just like restricting interstate travel was incidental to opposing abortion in *Bray*, the graffiti and "symbol[s] of [the] revolution" were incidental to the goal of The Base to show its purported strength.

Further, the Indictment does not demonstrate that the conspirators had the requisite *mens rea*—the intent to "act with the purpose of violating the law" of property rights. *Prabhu Ramamoorthy*, 949 F.3d at 961. Assuming without admitting the facts in the Indictment, the Base didn't care if the synagogue remained open for business—in fact, a plain reading of the goal of the conspiracy indicates that the Base would have preferred for *more* Jewish people to use the synagogue, further spreading the discriminatory message of The Base. "Got articles written!!" cannot reasonably be read to point to an intent to deprive someone of their property. That is, no reasonable reading of the facts could lead to the conclusion that the conspirators specifically intended to interfere with the alleged victims' *use* of the property; the facts show self-promotion, not larceny, conversion, or some other property-based criminal endeavor.

In sum, the Government must do more to sustain a charge under § 241. Spreading a hateful message is not enough. The conspirators must have specifically joined together for the purpose of depriving their victims of constitutionally protected rights. The Government does not allege any facts pointing to an intentional deprivation of property

rights, and it does not adequately demonstrate that the co-conspirators had the specific *mens rea* to cause an illegal deprivation. Assuming without conceding the truth of the allegations in the Indictment, the conspiracy – *as actually set forth and described* – is not a conspiracy to deprive the alleged victims of the rights guaranteed under the Constitution; the conspiracy is one to make reputational gains for The Base. The Indictment therefore fails to allege facts sufficient, as a matter of law, to sustain the charge in Count One.

C. Alternatively, the Court should order the Government to produce transcripts of the grand jury proceedings to allow Mr. Weeden to fully evaluate the legal sufficiency of Count One.

If the Court finds that the Count One of the Indictment does state a cognizable offense, Mr. Weeden respectfully moves the Court to order the Government to produce a transcript of the grand jury proceedings that resulted in the return of the Indictment. Rule 6(e) permits the production of the transcript of a grand jury proceeding where "a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). While the secrecy of grand jury proceedings is important and generally necessary, "it has been recognized that in some situations justice may demand that discrete portions of transcripts be made available for use in subsequent proceedings." *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, 219-20, 99 S. Ct. 1667, 1673 (1979).

In support of his request, Mr. Weeden first notes that there is significant dissonance between the legal theory in Count One and the facts otherwise alleged in the Indictment. That is, the legal theory supporting Count One is that The Base maintained a conspiracy to deprive victims of their right to use or hold property. But the facts as alleged

demonstrate only The Base's desire to self-promote. To be sure, when adequately alleged, the *actus reus* of vandalizing property could be evidence of the necessary *mens rea* of intending to deprive the victim of the use of the property.[4] For example, a defendant might repeatedly set fires in a building, shoot out windows, or write messages that warn users not to return. *See, e.g.*, *Brown*, 49 F.3d at 1164 (examining a charge under § 241 stemming from the drive-by shooting of a synagogue).

Conversely, in this case, the Indictment itself indicates that the alleged acts were done for the purpose of showing the strength and cohesion of The Base—not to keep anyone away. (PageId.2.) It is therefore likely that the grand jury was presented a set of facts that were shoehorned into the charge in Count One, rather than adequately being informed of the necessary finding that the defendants "aimed at" the predicate right to hold and use property. *Bray*, 506 U.S. at 275. In other words, if the Government presented the alleged *actus reus* of vandalism without presenting the required elements of intent discussed above, the grand jury would have been misled. Justice requires that Mr. Weeden be given the opportunity to review relevant portions of the grand jury transcript—perhaps after an *in camera* review by the Court—to determine whether a proper basis exists for the charge in Count One.

Secondly, the recent status conference before the Court indicates that even the Government may be unsure of the basis of Count One. At that conference, the Government provided its understanding of the elements for a charge under § 241:

[4] *See supra* n. 1, *Section 241 and the First Amendment: Avoiding a False Conflict Through Proper* Mens Rea Analysis, 43 Duke L.R. at 634-37 (describing where courts have wrongly assumed that *actus reus* satisfies the *mens rea)*.

> First is that the Defendant entered into a conspiracy to injure, oppress, threaten or intimidate the victims. Second, that the Defendant intended to interfere with the victims' exercise or enjoyment of a right that is secured or protected by the constitution. *That, in this case, would be the right to further worship*. And third, that the victim was present in any state, district or territory of the United States, which obviously the Upper Peninsula is.

(Ex. A, Stat. Conf. Tr., 11 (emphasis added).)

The Government identified "the right to further worship" as the right underlying the charge. The Court then asked the Government to clarify, because the Indictment identified "the right to hold and convey property" as the predicate right. (*Id.*) The Government then said, "That is – that's probably technically how I should have stated it, but yes." (*Id.*) While counsel is, of course, allowed to misspeak, the gap between "the right to hold property" and "the right to further worship" is not insignificant. The statutory basis predicate of the Government's § 241"conspiracy against rights" charge—§ 1982—does not reference the right to worship. 18 U.S.C. § 1982 (protecting the right to "to inherit, purchase, lease, sell, hold, and convey real and personal property"). And the right to the free exercise of religion has contours that are entirely different from that of the right to purchase, hold, etc., real and personal property. For one, protection of the free exercise of religion is protected against state and federal action, not against private party interference. *McIntire v. Wm. Penn Broad. Co.*, 151 F.2d 597, 601 (3d Cir. 1945)("we know of no federal statute which gives a cause of action against a private person who has abridged another's right to freedom of speech or to the free exercise of religion" (citing *Screws*, 325 U.S. at 91); *see also Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903 (1940) (extending the federal First Amendment rights to states).

As argued above, the object of the conspiracy, including the targeted right, is a critical element of a charge under § 241. If Government witnesses introduced varied or competing rights to the grand jury, perhaps lumped into one general "right to further worship," Mr. Weeden has a right to know about it. (See, Ex. A, Stat. Conf. Tr., 11.) The Indictment certainly did not put him on notice of any alleged deprivation of a right to worship. "[I]n some situations justice may demand that discrete portions of transcripts be made available for use in subsequent proceedings," and in a case like this, where the Government has introduced several predicate rights, justice demands disclosure of the transcripts to determine if the grand jury was misinformed. *Douglas Oil Co.*, 441 U.S. at 219-20. Mr. Weeden therefore asks the Court to order production of the transcripts pursuant to Rule 6(e)(3)(E)(ii), possibly after an *in-camera* review by this Court to limit the portions of the transcript that are available to the defendants. *Id*.

CONCLUSION

For the reasons set forth above, the Court should dismiss Count One of the Indictment for failure to allege an offense under § 241 or, in the alternative, should order production of the grand jury transcripts for review and evaluation by the defense.

Respectfully submitted,

Dated: November 2, 2023

/s/Heath M. Lynch

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