

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

UNITED STATES OF AMERICA,	)	Criminal No. 4:01CR207
	)	
Plaintiff,	)	
	)	
vs.	)	Judge: LESLEY BROOKS WELLS
	)	
JAMES A. TRAFICANT, Jr.,	)	
	)	
Defendant.	)	

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**MOTION TO DISMISS CONSPIRACY COUNTS AS UNCONSTITUTIONAL  
Federal Rule of Criminal Procedure 12(b)(2)  
with  
MEMORANDUM IN SUPPORT**

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COMES the defendant in the above-entitled action, James A. Traficant, Jr., and moves this Honorable Court to dismiss Counts I, II, III, IV, and VII of Indictment no. 4:01CR207 as the conspiracy statute, 18 U.S.C. § 371, both on its face and as applied in this case, is unconstitutional for the following reasons:

- I. Defendant has been charged with the same conspiracy five times.
- II. The charge of conspiracy completely eliminates the presumption of innocence.
- III. The charge of conspiracy completely eliminates any vestige of independence left to the grand jury.
- IV. The charge of conspiracy violates separation of powers.
- V. The charge of conspiracy violates Due Process.

See Memorandum of Law, attached hereto.

WHEREFORE, defendant James A. Traficant, Jr. moves this Honorable Court to dismiss Counts I, II, III, IV, and VII of Indictment no. 4:01CR207 as unconstitutional.

Date: March , 2002

Respectfully submitted,

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James A. Traficant, Jr.  
Pro Se Defendant  
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125 Market Street  
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330-743-1914

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**MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO DISMISS CONSPIRACY COUNTS AS UNCONSTITUTIONAL  
Federal Rule of Criminal Procedure 12(b)(2)**

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**I. DEFENDANT HAS BEEN CHARGED WITH THE SAME CONSPIRACY FIVE TIMES.**

**18 U.S.C. § 371  
Conspiracy to commit offense or to defraud United States**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Conspiracy requires proof of: (1) an agreement among the conspirators to commit an offense; (2) specific intent to achieve the objective of the conspiracy; and (3) usually an overt act to effect the object of the conspiracy. United States v. Pinckney, 85 F.3d 4, 8

(2nd Cir. 1996) (citation omitted). [A] conviction cannot rest on mere speculation or conjecture. Id., at 7 (citation omitted).

Unfortunately for criminal defendants in federal courts nowadays, a “grand jury” indictment can be based on mere speculation or conjecture, as the reversal and remand in the Pinckney case proved. Worse, the speculation and conjecture is not the speculation of the members of the grand jury, it is the speculation and conjecture of the prosecutor.

It is common knowledge that indictments in federal courts are drafted by the prosecutor before they are submitted to the grand jury, which in turn merely obligingly “rubber-stamps” those indictments with no independent investigation whatsoever.

This is easily seen in Indictment no. 4:01CR207, in which the filed indictment charges the same conspiracy to violate 18 U.S.C. § 201 five times. Dividing a single offense into several counts is a violation of the Double Jeopardy Clause. United States v. Snyder, 189 F.3d 640, 646-647 (7th Cir. 1999) (citations omitted).

Knowledge of two improper purposes rather than one does not multiply the offense into two. United States v. Holmes, 44 F.3d 1150, 1155 (2nd Cir. 1995).

A wheel conspiracy involves a central “hub” figure, whose associates are the “spokes.” The spokes know that they are working for the hub. United States v. Payne, 99 F.3d 1273, 1279 n. 5 (9th Cir. 1996).

Multiplicity of an indictment is waived if not raised prior to trial. United States v. Hart, 70 F.3d 854, 859-860 (6th Cir. 1995). Hart is bad law and void as it directly contradicts U.S. Supreme Court precedent. A waiver is the intentional relinquishment or abandonment of a known right. United States v. Olano, 113 S.Ct. 1770 (1993).

Worse, notice that the prosecutor charged this defendant as the hub of a wheel conspiracy with no spokes.

It is not the function of the grand jury to selectively indict. It is the duty of the grand jury to return a true bill or remain silent.

The three elements necessary to indict for a conspiracy are:

1. The agreement is whatever the prosecutor says it is.
2. The objective is whatever the prosecutor says it is.
3. The overt act, more often than not a completely innocent act in and of itself, is assigned whatever purpose the prosecutor sees fit. See e.g., Iannelli v. United States, 95 S.Ct. 1284, 1294 note 17 (1975).

It is no wonder that a former Assistant United States Attorney (District of Columbia (1970-1982) and Miami, Florida (1982-1987)), Joseph F. McSorley, stated:

To enhance a defendant's chance of success at trial, defense counsel must weaken the government's case as much as possible before trial.

McSorley, A Portable Guide to Federal Conspiracy Law: Developing Strategies for Criminal and Civil Cases 115 (ABA 1996).

## **II. THE CHARGE OF CONSPIRACY COMPLETELY ELIMINATES THE PRESUMPTION OF INNOCENCE.**

The court also instructed the jurors of their sworn duty to safeguard the rights of persons charged with crime by respecting the presumption of innocence and by making the State meet its burden of proving guilt beyond a reasonable doubt.

Floyd v. Meachum, 907 F.2d 347 (2nd Cir. 1990)

As the Supreme Court has explained, the concept that a defendant is presumed innocent until proven guilty is not logically distinct from the rule that a defendant may be

convicted only if the prosecution meets its burden of proving guilt beyond a reasonable doubt. Taylor v. Kentucky, 98 S.Ct. 1930, 1934 (1978).

Unfortunately, a conspiracy charge requires that the defendant prove his innocence beyond a reasonable doubt.

See Goetz v. Crosson, 967 F.2d 29, 39 (2nd Cir. 1992) (Newman, J., concurring) (“[W]e might not all agree on the number of wrongful acquittals we are willing to accept to guard against one wrongful conviction.”).

See also LeRoy Pernell, The Reign of the Queen of Hearts: The Declining Significance of the Presumption of Innocence—A Brief Commentary, 37 Clev. St. L.Rev. 393, 395 (1989) (discussing the historical trail of the presumption, and comparing Blackstone’s reference to ten guilty men with that of Fortescue (twenty guilty men) and Lord Hale (five of same)); see generally Jon O. Newman, Beyond “Reasonable Doubt”, 68 N.Y.U.L. Rev. 979, 981 and notes 5-7 (1993) (Madison Lecture).

The defendant in a conspiracy charge is left with an attempt to prove a negative and to convince a jury that: (1) there was no agreement; (2) there was no objective to commit an offense; (3) that the overt act(s) did not in fact have the purpose ascribed to it by the prosecutor in the indictment.

We agree that indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable.

Dennis v. United States, 86 S.Ct. 1840, 1843 (1966)

Trying to prove a negative such as those listed in above is an almost impossible task. This is recognized universally.

When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards.

United States v. Steinberg, 525 F.2d 1126 (2nd Cir. 1975)

It's difficult, if not impossible, to prove a negative, to prove that you didn't do something.

If accused, it's very difficult to prove you did not commit the crime. Alibis are not always available.

That is why in Canada's criminal justice system there is the presumption of innocence. It recognizes that few of us ever make it through the process called life without at some point being wrongly accused of something. Fortunately, for most it may have only resulted in an unfair detention, an unjust early bedtime or an improper deprivation of supper.

To some in the criminal law world, however, it has meant spending decades in prison, bankruptcy, trying to defend themselves and occasionally execution by the state, though we legal types like to play that one down.

Gordon Cudmore, It Could Happen To You, The London Free Press, January 29, 1998, page A13.

### **III. THE CHARGE OF CONSPIRACY COMPLETELY ELIMINATES ANY VESTIGE OF INDEPENDENCE LEFT TO THE GRAND JURY.**

As the Supreme Court has noted, "the Founders thought the grand jury so essential to basic liberties that they provided in the Fifth Amendment that federal prosecution for serious crimes can only be instituted by "a presentment or indictment of a Grand Jury.'" United States v. Calandra, 94 S.Ct. 613, 617 (1974).

The ex parte character of grand jury proceedings makes it peculiarly important for a federal prosecutor to remember that, in the familiar phrase, the interest of the United States "in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 55 S.Ct. 629, 633 (1935).

The Executive Branch is the branch most likely to forget the bounds of its authority. United States v. Brown, 85 S.Ct. 1707, 1712 (1965).

Instances sometimes occur in which ministerial officers take such liberties, in endeavoring to discover and punish offenders, as are even more criminal than the offences they seek to punish.

Cooley, Constitutional Limitations, page 306, n. 2 (DaCapo Press 1972)

Of the 785 federal grand juries sitting in the United States, returning over 25,000 indictments every year (i.e., rubber stamping), there are never more than 17 “no true bills,” in which the grand jury refuses to indict.

The last year in which “no true bills” were reported, 1991, sixteen (16) “no true bills” out of a total of 25,943 “Federal Grand Jury Proceedings” (.062%) were reported. Today there is no independence of the grand jury from the prosecutor<sup>1</sup>, nullifying the grand jury protections set up by those originally oppressed by the legal system of England.

Those the grand jury refuses to indict are likely to be people the prosecutor does not want indicted. Many of the cases ending up with a “no true bill” are actually instances where a prosecutor feels the need for such backing to support his own view that further proceedings shall not be held.

Congressional Record, Extension of Remarks, Volume 123, page 21637, June 9, 1977 by Hon. Benjamin S. Rosenthal.

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<sup>1</sup> The word “prosecutor,” when our Bill of Rights was enacted and for decades afterward, did not mean government lawyer. It meant complaining witness. Until the Fifth Amendment was amended by judicial fiat in the nineteenth century and congressional enactment in the twentieth, the “prosecutor” was a private individual, not a government employee. See, e.g., United States v. Rawlinson, Fed. Cas. No. 16,213 (C.Ct.D.C. 1802).

#### **IV. THE CHARGE OF CONSPIRACY VIOLATES SEPARATION OF POWERS.**

The modern law of conspiracy was largely evolved by the judges. Krulewitch v. United States, 69 S.Ct. 716, 724 (1947) (concurring opinion).

The Constitution's division of powers among the three branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment. New York v. United States, 112 S.Ct. 2408, 2431 (1992).

[T]he government is divided into three distinct and independent branches, and . . . it is the duty of each to abstain from, and to oppose, encroachments on either. Muskrat v. United States, 31 S.Ct. 250, 252 (1911).

Separation-of-Powers was looked to as a bulwark against tyranny. United States v. Brown, *supra*, 85 S.Ct. at 1712.

#### **V. THE CHARGE OF CONSPIRACY VIOLATES DUE PROCESS.**

Few instruments of injustice can equal that of implied or presumed or constructive crimes. The most odious of all oppressions are those which mask as justice. Krulewitch v. United States, *supra*, 69 S.Ct. at 725. See also Pinkerton v. United States, 66 S.Ct. 1180, 1184-1187 (1946) (dissenting in part).

The original intent of the conspiracy laws is at loggerheads with what those same laws are used for today:

The crime of conspiracy dates back to the enactment of three statutes during the reign of Edward I. These statutes were intended to correct historical abuses of the criminal process and thus proscribed combinations to procure false indictments, to bring false appeals, and to maintain vexatious lawsuits. Under the statutes, however, the conspiracy was not complete unless the person falsely accused was actually indicted and acquitted. In 1611, the Court of Star Chamber expanded the statutory

doctrine of conspiracy and established the rule that a completed conspiracy does not require that the objectives of the agreement be attained. In Poulterers' Case, 77 Eng.Rep. 813 (1611), a group of poulterers had confederated falsely to accuse Stone of robbery. The grand jury refused to indict him, however. In Stone's subsequent suit for damages against the poulterers, the Star Chamber held that the failure to indict was no defense. The confederation itself constituted the conspiracy; success of the common plan was unnecessary. For a lucid study of the subsequent development of the law of conspiracy, see Sayre, Criminal Conspiracy, 35 Harv.L.Rev. 393 (1922).

United States v. Shoup, 608 F.2d 950, 956 note 10 (3rd Cir. 1979)

WHEREFORE, defendant James A. Traficant, Jr. moves this Honorable Court to dismiss Counts I, II, III, IV, and VII of Indictment no. 4:01CR207 as unconstitutional.

Date: March , 2002

Respectfully submitted,

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James A. Traficant, Jr.  
Pro Se Defendant  
Thomas Lambros Federal Bldg & U.S. Ctse  
125 Market Street  
Youngstown, OH 44503  
330-743-1914

**CERTIFICATE OF SERVICE**

This certifies that I have on this \_\_\_\_\_ day of March, 2002, placed a true and exact copy of the

**MOTION TO DISMISS CONSPIRACY COUNTS  
AS UNCONSTITUTIONAL  
Federal Rule of Criminal Procedure 12(b)(2)**

**with**

**MEMORANDUM IN SUPPORT**

in the U. S. Mail, first class postage prepaid, addressed to:

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James A. Traficant, Jr.