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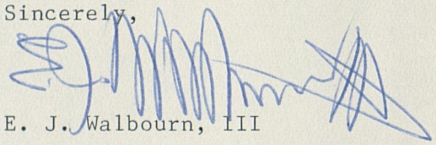
November 2, 1984

Honorable G. Wix Unthank
United States District Judge
United States Courthouse
Pikeville, Kentucky 41501

Dear Judge Unthank:

Pursuant to your request, I enclose for your use copies of the briefs submitted on behalf of German Stumbo, Kenneth Rowland, Teddy Kinney, and Mose Meade. I am in the process of locating you a copy of the brief filed on behalf of Edgar Jones and when I obtain it, I will immediately forward it to you.

Sincerely,



E. J. Walbourn, III

EJW;jb

Enclosure

No. 84-5523
No. 84-5524
No. 84-5525

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA - Plaintiff/Appellee

versus

GERMAN STUMBO,
KENNETH ROWLAND and
TEDDY KINNEY - - - Defendants/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

BRIEF FOR DEFENDANTS/APPELLANTS

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Did the Lower Court's Instruction on the Labor Activities Exemption to Hobbs Act Prosecution Deprive the Appellants of Their Primary Defense By Improperly Limiting and Incorrectly Defining the Scope of Legitimate Labor Objectives?

II. Did the Prosecutor's Deliberate and Direct Reference During Rebuttal Argument to German Stumbo's Failure to Testify Violate His Fifth Amendment Rights Under *Griffin* v. *California*, Depriving Him and His Co-Defendants of a Fair Trial?

III. Did the Swearing of the Chief Investigative Agent as an "Agent of the Grand Jury" While He Was Also Serving as the Primary Witness and the Prosecutor's Assistant Before the Grand Jury So Greatly Compromise and Impair the Ability of the Grand Jury to Function Independently That Dismissal of the Indictment is Required?

IV. Did the Inadequate and Crowded Courtroom Conditions Which Required the Appellants to Be Seated Far Away from Counsel, Rendering Meaningful Communication Between Client and Attorney Impossible During Trial Proceedings, Deprive the Appellants of Their Right to Effective Assistance of Counsel?

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STATEMENT OF THE CASE

The Appellant, German Stumbo, is a coal operator from Floyd County, Kentucky. The Appellants, Teddy Kinney and Kenneth Rowland, are coal miners from Floyd County, Kentucky, as well. Teddy Kinney was also President of Local 5967 of the United Mine Workers of America (hereinafter referred to as "UMWA"). Transcript of Trial, Volume XVI, pages 60, 70 (hereinafter designated, *e.g.*, T.T., v. XVI, pp. 60, 70). They were convicted in the United States District Court for the Eastern District of Kentucky, Pikeville Division, before Judge G. Wix Unthank of conspiring to violate 18 U.S.C. §1951 (hereinafter referred to as the Hobbs Act) and attempting to violate the Hobbs Act through extortion. Additionally, German Stumbo was convicted of violating 18 U.S.C. §844(i) by using explosives to maliciously damage or attempt to maliciously damage a bulldozer and coal auger owned by Ray-Mac Coal Company (hereinafter referred to as "Ray-Mac") a Floyd County coal mining concern. Teddy Kinney and Kenneth Rowland were acquitted of this latter charge. All three Appellants were acquitted of two other explosives violations and three other Hobbs Act counts charged in the indictment. See generally Transcript of Trial, Volume 47, pages 26-27 (hereinafter designated as, *e.g.*, T.T. 47-26-27). The Appellants appeal from all of their convictions.

The events which gave rise to this case began on February 13, 1982 at a union meeting of the members of Local 5967. Testimony, disputed by the Government, established that the members discussed and voted upon a proposal to picket Ray-Mac, which had recently started operating with non-union employees in what had long been predominantly union territory in Floyd County, Kentucky. See T.T., v. XIX, pp. 70-71; T.T. 43-116, 138.

On Monday, February 15, 1982, picketing began at the Ray-Mac site, ending in an unsuccessful attempt to persuade Ray-Mac employees and truckers to join the union. The picketing continued on Tuesday, February 16, 1982 and Wednesday, February 17, 1982, escalating into the shooting of firearms by both picketers and Ray-Mac employees. Although some equipment was damaged, most of the shooting was into the air and nobody was seriously injured. See, *e.g.,* T.T. 12-10-31.

The other acts of violence alleged against the Appellants included the destruction and attempted destruction of a Ray-Mac coal auger and bulldozer, respectively, with two home made bombs constructed of an innertube and a basketball containing dynamite on Sunday, February 21, 1982. T.T., v. XXI, pp. 39-50. Approximately one week later, an old wooden coal tipple leased by Ray-Mac was burned. German Stumbo was implicated in, but acquitted of, charges concerning this last event. T.T. 23-109-22; 47-26.

Although details concerning the Appellants' participation were unclear and disputed, the fact of the events set out above and the Appellants' general involvement in them was not seriously contested. The Appellants' chief defense at trial was that their activities were pursued to achieve the legitimate labor goal of organizing Ray-Mac's employees and were thus exempt from Hobbs Act prosecution under the holding in *United States* v. *Enmons,* 410 U. S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973). See T.T. 43-136-40. The Government's theory, on the other hand, was that the Appellants and their co-Defendants had conspired to engage in these activities at the direction and for the benefit of Edgar Jones, a major Floyd County coal operator, with the purpose of destroying Ray-Mac's ability to compete with Jones' company, JRM Mining. See T.T. 44-96-97.

Eighteen defendants were ultimately charged in a ten-count indictment. A one-week mini-hearing to determine the existence of a conspiracy for admission of co-conspirator's statements was conducted through the week of November 14, 1983. Trial by jury began on January 9, 1984 resulting in the conviction of a total of five Defendants, including the Appellants. T.T. 45, 46, 47, 48. At the mini-hearing, the Defendants, due to their large numbers, were ordered to sit in the back of the courtroom, far away from counsel. During voir dire, the Defendants were required to sit together in one corner of the courtroom, keeping the Appellants between 15 to 30 feet from their attorney. At trial, the court-ordered seating arrangement placed the Defendants hemmed in against a wall, a considerable distance from their attorney. See T.T. 5-35-37; 6-30-55. See also T.T. 43-121. These conditions made direct communication between attorney and client impossible during the mini-hearing, voir dire and trial. The court overruled defense objections to the seating arrangement and dismissed suggestions which would have, with some minor rearrangement of chairs or addition of tables, allowed the Defendants to sit next to or directly behind counsel. T.T. 6-32-38, 55. The court seemed to believe that any rearrangement would somehow upset the decorum of the courtroom. See T.T. 6-33.

One of the prosecution's chief witnesses at trial was Dennis L. McAllister, an investigative agent for the Treasury Department's Bureau of Alcohol, Tobacco and Firearms. See T.T. 16-48, *et seq.* McAllister was the chief investigative agent responsible for investigating and preparing the case for trial. T.T. 14-228. He was also a chief witness before the grand jury. T.T. 16-14-15. In addition, he served as the prosecutor's assistant during grand jury

proceedings, purportedly under Rule 6(e) of the Federal Rules of Criminal Procedure. T.T. 14-257.

In addition to all these functions and while continuing his investigation, McAllister was also somehow designated and sworn in as an "agent of the grand jury" at the request of the prosecutor. T.T. 14-257-58. As "grand jury agent" McAllister was responsible for reporting the results of his investigation to the grand jury, serving and compelling compliance with grand jury subpoenas, keeping and examining grand jury documents and otherwise assisting the grand jury in every way. Neither McAllister nor the prosecution was able to cite any legal authority for the investigator's status as "agent of the grand jury", *Id.* The Appellants strongly objected to the procedure of swearing and designating McAllister as a "grand jury agent" on the grounds that it completely compromised the grand jury's independence, making it a mere tool of the prosecutor. The Appellants' motion to strike all of McAllister's testimony on the grounds of misconduct before the grand jury was overruled. T.T. 14-261-62.

As with all of the Defendants who were convicted, the Appellants elected not to testify at trial. During its rebuttal argument, the prosecution recalled certain testimony to the effect that Edgar Jones had directed a certain group of alleged co-conspirators, including German Stumbo and Ed R. Moore to "take care of" Ray-Mac's equipment. Edgar Jones allegedly referred to this group as "the timber rats". Ed. R. Moore was unavailable to testify, having died before trial. In posing a rhetorical question during rebuttal argument as to who the "timber rats" were, the prosecutor stated:

> Who were the timber rats? Ed R. Moore, Ed Ray Moore. He is not here to tell us about it. But German is.
>
> T.T. 44-107.

With this last statement the prosecutor turned to look at German Stumbo and paused before continuing.

This comment occurred in the context of an argument in which the prosecutor repeatedly ridiculed the Appellant's defense as a smoke screen, T.T. 44-82, 88, 95, 100-02, accused the Appellant's counsel of trying to hide his clients from the jury, T.T. 44-95, and made reference to the fact that the Appellants had failed to call certain potentially helpful witnesses. T.T. 44-86. At the earliest opportunity, defense counsel moved for a mistrial on the grounds that the prosecutor's comment constituted a direct reference to German Stumbo's failure to testify, in violation of his fifth amendment rights. T.T. 44-148. The lower court tersely overruled the motion, stating that the jury had previously been directed to draw no inference from the Defendants' failure to testify. *Id.*

The evidence was conflicting and disputed as to the general purpose of the Appellants' activities during February, 1982. The defense asserted that these activities had taken place for the purpose of organizing Ray-Mac's employees, a legitimate labor goal, exempting the Appellants from Hobbs Act prosecution under the case of *United States* v. *Enmons,* 410 U. S. 396. The Appellants and the Government each submitted different proposed *Enmons* instructions, as did most of the other Defendants. The lower court rejected all proposed instructions and chose instead to formulate its own charge on the labor exemption defense. Defense counsel objected to the court's instruction as a plain misstatement of the holding of *Enmons* which prac-

tically directed a verdict against the Appellants. T.T. 41-19-31. The Government itself urged that the instruction be changed to conform with *Enmons*. T.T. 41-105-15. The court refused to make the suggested modifications and gave its labor exemption instruction virtually unchanged. T.T. 44-134-39, 150-55, 157-62.

The Appellants were each sentenced to three years imprisonment on Counts I and IV, with the sentences to be suspended on Count IV. German Stumbo was sentenced to 18 months imprisonment on Count VIII, which was also suspended. The Appellants filed their Notices of Appeal on June 18, 1984. Their appeals were consolidated by this Court's order of June 27, 1984. The appeal of their co-Defendant, Mose Meade, *United States* v. *Meade,* Court of Appeals No. 84-5511, was consolidated with this appeal by the same order for purposes of the Government's brief and preparation of the joint appendix. Pursuant to the authority of Rule 28(i) of the Federal Rules of Appellate Procedure, the Appellants, German Stumbo, Teddy Kinney and Kenneth Rowland, join in, incorporate and adopt by reference all issues raised and arguments made on behalf of Mose Meade in his brief, except Meade's Issue I relating to variance from the indictment.

I. The Lower Court's Erroneous, Prejudicial Instruction on the Labor Activities Exemption to Hobbs Act Prosecutions Deprived the Appellants of Their Primary Defense and, In Effect, Directed a Verdict Against Them By Improperly Limiting and Incorrectly Defining the Scope of Legitimate Labor Objectives, Requiring Reversal of Their Convictions.

The Appellants' primary defense at trial was based upon the United States Supreme Court case of *United States* v. *Enmons,* 410 U. S. 396, 93 S. Ct. 1007, 35 L. Ed. 2d

379 (1973), where the Court held that the Hobbs Act, 18 U.S.C. §1951, did not reach "the use of violence to achieve legitimate union objectives." *United States* v. *Enmons,* 410 U. S. at 400. See, *e.g.,* T.T. 30-81. The defense's position throughout the proceedings was that the acts alleged in the indictment, even if proven at trial, could not be prosecuted under the Hobbs Act because any such acts were directed toward the legitimate labor goal of organizing the employees of Ray-Mac.

Because the issue presented on this appeal is whether the lower court's instructions concerning the *Enmons* defense were erroneous as a matter of law, an extensive summarization of the facts is unnecessary. A brief factual overview, however, is required to put the instructions in their proper context.

The Appellants were convicted of Counts I and IV of the indictment, which alleged conspiracy and attempt, respectively, to violate the Hobbs Act. These counts alleged, in essence, that the Appellants and their co-Defendants engaged in a conspiracy to commit certain violent acts against Ray-Mac. These acts were alleged to have been committed at the bidding and for the benefit of Edgar Jones, a major coal operator in Floyd County, Kentucky, for the purpose of driving Ray-Mac, purported to be Jones' competitor, out of business. The Appellants were alleged to have conspired to commit two primary violent acts during February of 1982:

1. Shooting at and otherwise intimidating Ray-Mac employees during picketing of the Ray-Mac mine site and;

2. Attempting to blow up two pieces of mining equipment on the Ray-Mac site.

These actions, the Government contended, were intentionally directed toward the goal of depriving Ray-Mac of the right to compete with Edgar Jones and his coal company, JRM Mining.

The defense countered that the events of February, 1982 were no more than isolated instances of union violence for which Eastern Kentucky has been historically known. Specifically, the defense contended that the violence was no grand conspiracy to help Edgar Jones destroy his alleged competition, but rather was a desperate, last-ditch effort by union members and sympathizers to unionize Ray-Mac and preserve the UMWA's fading power in the depressed coal fields of Floyd County, Kentucky.

Ray-Mac was a relatively new non-union mine operating in what had for decades been predominantly union territory. The defense pointed out that the Ray-Mac principals themselves had testified that they were not in competition with Edgar Jones, who was selling a different type of coal to a completely different market. See T.T. 44-29. The defense also presented evidence that the picketing and related activities had come about as a result of a union local meeting in which the union members had voted to try to unionize Ray-Mac.

The fact that the organizing effort got out of hand and erupted into violence by both sides, the defense asserted, did not give rise to a Hobbs Act violation because *United States* v. *Enmons,* 410 U. S. 396, clearly held that violent coercive tactics directed toward a legitimate labor goal were beyond the Act's reach. This basic conflict regarding the purpose of the violence permeated the entire trial, with the Government attempting to overcome the Defendants' assertion that their objectives were not wrongful, since they

had an absolute right to organize Ray-Mac, although they pursued that right by wrongful, violent tactics.

The evidence on both sides was conflicting and hotly disputed. At the close of evidence, the Government was unable to deny that the Appellants were entitled to an *Enmons* instruction, a genuine, serious jury issue having been presented as to the Appellants' true goals and objectives. The Appellants and the Government each submitted their own widely different versions of a proposed *Enmons* instruction. The court rejected both, choosing instead to formulate its own instruction covering various aspects of the labor exemption defense. Both the Defendants and the prosecution objected to the court's instruction as being a plain misstatement of the holding in *Enmons,* each citing more or less the same grounds. The defense was undoubtedly objecting to attempt to get the full advantage of a proper *Enmons* instruction, while the Government was presumably objecting to attempt to avoid reversible error. The court disregarded all objections and gave its instruction virtually unchanged.

The court's instruction was relatively lengthy and only those sections most pertinent to this appeal will be quoted here. Among the portions of the charge which drew the most criticism from both sides were the following:

> If violence and threats honestly occur as a by-product of a legitimate labor activity, in support of a proper union objective, such acts cannot constitute the extortion defined by Title 18, United States Code, Section 1951. However, a legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception.
>
> At the time of the alleged occurrence of the event in question, several of the defendants were members of

the United Mine Workers of America and some were not. This union is a multi-level labor organization, consisting of the international union at the top, then the districts, District No. 30 for purposes of this case, and last on the lowest level, the locals, with Local 5967 in this case, consisting of the individual members of the union, and being an unincorporated association of persons primarily engaged in the coal industry. This labor organization is bound together by its agreements of association consisting of the constitution and by-laws for each level of the organization. It can act officially only through its officers, agents and members. An agent is one authorized to act for another.

The extent of the authority of an officer, agent or employee is determined either by the provisions of the constitution and by-laws together with or by actions of members at regularly constituted meetings in accordance with such constitution and by-laws.

An act of an officer, member or agent outside the scope of authority, unless acquiesced and approved by the union at the proper respective level, is not an act of a labor organization within the meaning of the *Enmons* exception.

A strike or picket line established outside the scope of authority of the labor organization or its representatives is a wildcat strike or picket line and is not the act of the labor organization or representative within the meaning of the *Enmons* exception.

. . . .

The use of firearms, firing pistols or rifles, in direction of employees of other employers, not in necessary defense of self, or associate fellow pickets to coerce and prevent such employees from working is not a legitimate labor activity within the *Enmons* exception.

. . . .

> The malicious damaging or destruction of equipment and facilities in possession or belonging to a nonunion employer by explosion and fire for the purpose of encouraging the employees of such employer to join the union is not a legitimate labor activity within the *Enmons* exception.
>
> T.T. 44-135-39.

The court's *Enmons* instruction was given in its entirety three times for three different counts and was made applicable to all five Hobbs Act counts. See T.T. 44-134-39; 150-55; 158-62 . The Appellants were convicted of Counts I and IV, both of which were accompanied in the instructions by the complete *Enmons* charge.

A. *United States* v. *Enmons* Exempts Activities Directed Toward a Legtitimate Labor Objective from Hobbs Act Prosecution, Regardless of the Violent, Coercive Tactics Used to Achieve That Goal.

United States v. *Enmons,* 410 U. S. 396, is without a doubt the leading Supreme Court case on the applicability of the Hobbs Act in the labor-management context. In *Enmons,* employees of Gulf States Utility Company were striking for a new collective bargaining agreement. The Defendants, members and officials of the employees' labor union, were indicted for extortion under the Hobbs Act for using violence—including damaging the company's transformers with rifles and blowing up a sub-station owned by the company—to force the company to pay higher wages to employees through a new agreement. The question presented was "whether the Hobbs Act proscribes violence committed during a lawful strike for the purposes of inducing an employer's agreement to legitimate collective-bargaining demands." *Id.* at 399.

In holding that the Hobbs Act did not reach "the use of violence to achieve legitimate union objectives", *id.* at 400, the Court explicitly rejected the Government contention that a Hobbs Act violation was stated when " 'wrongful' force and violence are used, even for a legal objective." *Id.* n.3. As *Enmons* makes clear, the wrongful means, such as violence on a picket line, used to reach an objective are irrelevant. In fact, the Hobbs Act is satisfied even where the means used to extort property are not necessarily illegal, as long as the objective is wrongful because the defendant has no lawful claims to the property. *Id.* See, *e.g., United States* v. *Quinn,* 514 F. 2d 1250 (5th Cir. 1975), *cert. denied,* 424 U. S. 955 (1976).

In reaching its conclusion that violence undertaken in pursuit of legitimate labor goals did not violate the Hobbs Act, the *Enmons* court relied upon:

1. Clear legislative history to the effect that the Act, "does not cover strikes or any question relating to strikes";

2. The absence of prior cases applying the Act to an *Enmons*-type fact pattern;

3. The principle that any ambiguities in the Act, as a criminal statute, must be construed in favor of lenity; and

4. The lack of any indication that "Congress intended the Act to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the states."

Id. at 404-411.

This is not to say that *Enmons* exempts from Hobbs Act prosecution violent or coercive tactics used to achieve illegitimate goals, such as personal pay-offs to union officials or imposition of unwanted, superfluous work in ex-

change for money. The Hobbs Act was enacted, in part, in reaction to the Supreme Court case of *United States* v. *Teamsters Local 807,* 315 U. S. 521, 62 S. Ct. 642, 86 L. Ed. 1004 (1942). In *Local 807,* the Court held that the Anti-Racketeering Act of 1934, predecessor to the Hobbs Act, excluded from its coverage a shakedown scheme where local union members attempted to impose unnecessary and superfluous services for money. The local union members stopped over-the-road, out-of-state trucks outside New York City, charged the owners money, drove the trucks to their destination, unloaded them, picked up merchandise for the return trip and surrendered the trucks to the out-of-state drivers where they had been stopped. This behavior was condemned in Congress as "nothing short of hijacking, intimidation, extortion and out-and-out highway robbery." 91 Cong. Rep. 11917 (remarks of Rep. Rivers), *quoted in United States* v. *Enmons,* 410 U. S. at 403.

The Hobbs Act was intended, in part, to overrule *Local 807* by making it clear that attempts to obtain so-called wages for fictitious, unwanted or superfluous services could be prosecuted as extortion under federal law. In *United States* v. *Green,* 350 U. S. 415, 76 S. Ct. 522, 100 L. Ed. 494 (1956) the Supreme Court held that a factual pattern similar to that in *Local 807* violated the Hobbs Act, demonstrating that Congress had achieved its purpose.

The *Enmons* Court recognized this background, but made clear that it was rejecting the Government's attempt to build upon *Green* and extend the Hobbs Act to the use of violence to obtain legitimate, as opposed to illegitimate, labor demands. The Court cited *United States* v. *Caldes,* 457 F. 2d 74 (9th Cir. 1972), where union officials had engaged in violence to pressure an employer to agree to a

union contract, as an example of a legitimate union objective exempt from the Hobbs Act.

The Appellants' theory of the case presented at trial comes squarely within the *Enmons* exemption. Organization of a non-union mine being a legitimate labor goal, the Appellants had every right to pursue that objective. The fact that the goal was sought through means that may have violated other state and federal laws did not make the purpose—organizing Ray-Mac—illegitimate and subject to the Hobbs Act.

Of course, the prosecution had a right to attempt to persuade the jury that unionization of Ray-Mac was not the Appellants' true goal. The jury was entitled to believe instead that the real, hidden purpose was to eliminate Edgar Jones' competition. Nevertheless, the Appellants were entitled to a correct and unambiguous instruction that the prosecution must prove, beyond a reasonable doubt, that the violence of February, 1982 was not undertaken to accomplish the legitimate labor goal of organizing Ray-Mac. As will be seen below, the trial judge completely failed to instruct the jury, in accordance with the teaching of *Enmons,* that only the Appellants' objectives were relevant to the labor exemption defense. Instead, the lower court instructed the jury, explicitly and implicitly, to find the Appellants guilty because their tactics were "wrongful". In doing so, the trial court made clear that it utterly misunderstood the holding of *Enmons.*

B. The Lower Court's *Enmons* Instruction Was So Erroneous and Misleading That It Practically Directed the Jury to Find the Appellants Guilty of Violating the Hobbs Act Regardless of Their Objectives.

Specific portions of the court's labor exemption instruction will now be examined to demonstrate how the charge

almost pre-ordained the factual finding by the jury that the Appellants' activities did not come within the *Enmons* exception.

1. USE OF FIREARMS AND MALICIOUS DESTRUCTION OF PROPERTY.

The trial court charged the jury that:

> The use of firearms, firing pistols or rifles in the direction of employees of other employers, not in necessary defense of self, or associate fellow pickets to coerce and prevent such employees from working is not a legitimate labor activity within the *Enmons* exception.
>
> T.T. 44-137.

The court then went on to describe at length its definition of "defense of self or another". *Id.*

That this charge was given over the objection of both prosecution and defense is almost incomprehensible in view of the fact that the *Enmons* defendants themselves were charged with using firearms to shoot at equipment. All of the Defendants below vigorously protested this portion of the instruction as a complete misstatement of the holding in *Enmons*. The prosecution itself asked that the court not give the instruction as written, proposing instead that the paragraph be changed to conform with *Enmons* as follows:

> The use of firearms, firing pistols or rifles in the direction of employees of other employers not in necessary defense of self or associate fellow pickets to coerce and prevent such employees from working *in order to personally benefit the defendants rather than to obtain legitimate labor goal of higher wages and benefits* is not a legitimate labor tactic within the *Enmons* exception *and a wrongful act.*

> T.T. 41-115 (emphasis added to indicate proposed changes).

The Government's proposed change was still incorrect, as it improperly limited the definition of legitimate labor goals, but reflected the holding of *Enmons* much more correctly than the trial court's version.

As the prosecution aptly observed, this portion of the court's *Enmons* instruction was clearly erroneous because it improperly shifted the focus of the jury's attention from the Appellants' legitimate goals to their admittedly wrongful tactics. Not even the United States could honestly defend the instruction as even remotely resembling what *Enmons* requires. The Appelants' trial posture was never that they had not engaged in "the use of firearms", but only that they had done so in pursuit of legitimate labor goals. These legitimate objectives included:

a) Attempting to persuade the employees of a non-union company to join the UMWA, which is protected activity under 29 U.S.C. §158(b)(7)(C). See *NLRB* v. *Drivers, Chauffeurs, Helpers, Local 639,* 362 U. S. 274, 80 S. Ct. 706, 4. L. Ed. 2d 710 (1960); and

b) Picketing to enforce area wage standards being undermined by Ray-Mac's substandard pay scale. See C. Morris, ABA Labor Law Section, *The Developing Labor Law,* 1078 (1983):

> Thus, picketing solely to maintain area wage standards is not equated with picketing for a bargaining, recognitional, or organizational objective. The Board has acknowledged that while a union normally seeks to organize the unorganized or to negotiate collective bargaining agreements, it has a legitimate interest, apart from organizing or recognition, in ensuring that

> employers meet prevailing wage scales. Otherwise, union standards could be undermined and employers paying substandard wages could gain a competitive advantage over union establishments.
>
> *Id.*, citing *Plumbers Locals 741, (Keith Riggs Plumbing)*, 137 NLRB 1125, 50 LRRM 1313 (1962); *Labors Local 107 (Texarkana Const. Co.)*, 138 NLRB 102, 50 LRRM 1545 (1962).

The Appellants were certainly entitled to exert economic pressure on Ray-Mac to achieve these goals, even if the effect on Ray-Mac hurt its business or damaged its ability to compete. See *Fur Workers Union No. 23234* v. *Fur Workers Union Local No. 72*, 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939).

Keeping in mind that only the objectives, and not the means used, are relevant to an *Enmons* defense, the fallacy of the lower court's instruction can easily be demonstrated by replacing the reference to shooting firearms with some legitimate tactic such as picketing. Thus,

> picketing to coerce and prevent employees from working is not a legitimate labor activity within the *Enmons* exception.

This statement is, of course, untrue, as the goal of any organizational or recognitional picket line is to prevent employees from working for a non-union employer.

The court followed the "use of firearms" instruction with an even more erroneous statement regarding the bombing of equipment:

> The malicious damaging or destruction of equipment and facilities in the possession or belonging to a non-union employer by explosion and fire for the purpose of encouraging employees of such employer to join the

> union is not a legitimate labor activity within the *Enmons* exception.
>
> T.T. 44-161.

Again, keeping in mind that the means used to achieve a legitimate goal are irrelevant for *Enmon's* purposes, this instruction could just as easily have simply read:

> Encouraging employees of an employer to join a union is not a legitimate labor activity within the *Enmons* exception.

Obviously, this statement is ludicrous, but is essentially no different from the instruction the court actually gave. Even more than the "use of firearms" charge, the "malicious damaging" instruction left the jury no choice but to convict the Appellants, regardless of whether the jurors believed that the objective of bombing the equipment was to encourage the Ray-Mac employees to join the union or for some other legitimate labor objective. Perhaps more than any other part of the instruction, the reference to malicious damaging highlighted the lower court's complete lack of understanding of what *Enmons* requires.

It is not clear from the record what authority or reasoning the lower court relied on in formulating these instructions. It is possible that the court believed that activities constituting an unfair labor practice under 29 U.S.C. §158 or other federal labor laws were not within the *Enmons* exception. If this reasoning were correct, *any* unfair labor practice committed by a union member could give rise to a Hobbs Act prosecution. It was this improper expansion of the Hobbs Act into the labor law arena that the Act's sponsors and the Supreme Court in *Enmons* explicitly condemned. *United States* v. *Enmons,* 410 U. S.

at 401-12. As the court held in *United States* v. *Wilford,* 710 F. 2d 439, 446 (8th Cir. 1983), *cert. denied,* 104 S. Ct. 701 (1984):

> [I]t is plain that a violation of the Hobbs Act can take place that is not at the same time a violation of the Labor Management Relations Act, *and vice versa.*
>
> . . . .
>
> A prosecutor who establishes a Hobbs Act violation has not necessarily established a violation of the Labor Act, *and a showing sufficient to support a Labor Act violation does not necessarily prove a violation of the Hobbs Act.*
>
> (emphasis added).

If the trial judge believed that a Hobbs Act violation and an unfair labor practice were co-extensive, he was plainly in error, since the *Enmons* defendants themselves were engaged in an unfair labor practice by destroying the employer's equipment. *United States* v. *Enmons,* 410 U. S. at 398. The lower court's instruction regarding malicious damaging of equipment and use of firearms was clearly erroneous and highly prejudicial, requiring reversal of the convictions.

2. SCOPE OF AUTHORITY.

The trial judge also gave a lengthy instruction to the effect that the Appellants were not entitled to an *Enmons* defense if the picketing and other activities were not authorized, approved or acquiesced in by the officials of District 30 or the International Union of the United Mine Workers of America. The court stated:

> At the time of the alleged occurrence of the events in question, several of the defendants were members

of the United Mine Workers of America and some were not. This union is a multi-level labor organization, consisting of the international union at the top, then the districts, District No. 30 for purposes of this case, and last on the lowest level, the locals, with Local 5967 in this case, consisting of the individual members of the union, and being an unincorporated association of persons primarily engaged in the coal industry. This labor organization is bound together by its agreements of association consisting of the constitution and by-laws for each level of the organization. It can act officially only through its officers, agents and members. An agent is one authorized to act for another.

The extent of the authority of an officer, agent or employee is determined either by the provisions of the constitution and by-laws together with or by action at regularly constituted meetings in accordance with such constitution and by-laws.

An act of an officer, member or agent outside the scope of authority, unless acquiesced in or approved by the union, at the proper respective level is not an act of a labor organization within the meaning of the *Enmons* exception.

A strike or picket line established outside the scope of authority of a labor organization or its representatives is a wildcat strike or a picket line and is not the act of the labor organization or representative with the meaning of the *Enmons* exception.

T.T. 44-135-36.

Taking this instruction, especially the last paragraph, literally, every wildcat strike not approved and ratified at the district and international levels could violate the Hobbs Act, even if the purpose was as clearly legitimate as, for example, to protest unsafe working conditions. Such an interpretation, of course, would have the effect of prac-

tically overruling *Enmons,* since it is not anticipated that the upper levels of a union's organization would approve of the use of violence or other unlawful tactics during a strike or picketing.

The court believed that if an act of a local was prohibited by its by-laws, or if the District or International failed to ratify the act, the local was not acting as a "labor organization" and was not protected by *Enmons.* It became evident during the Rule 30 conference that the trial judge did correctly grasp that the local's by-laws, scope of authority or agency had nothing whatsoever to do with the legitimate labor goals of the individuals acting as such. T.T. 41-110-14. As a matter of clarification, the court stated outside the presence of the jury that "whether or not the Defendants were acting within the scope of the authority of the union, has nothing to do with whether the Defendants had any lawful claim to the property they were seeking to obtain." T.T. 41-114. Nevertheless, the emphasis placed upon the scope of authority was extremely likely to mislead and prejudice the jury into believing that any strike undertaken outside the local's authority was automatically beyond the protection of *Enmons,* requiring conviction of the Defendants who were relying upon the labor exemption defense.

As the prosecution correctly pointed out in joining the defense's objection to the instruction:

> [W]e would agree with (defense counsel) that the United States and the Department of Justice is not in the business of policing all wildcat strikes. As an example of that situation, suppose a wildcat were called for the purposes of protesting a safety problem at a particular coal mine and the wildcat were called outside the scope of the authorization of the inter-

> national or local. Given the fact that the objective in that case, that being improvement of specific working conditions for the membership of that local union, may in fact be a legitimate labor exemption under *Enmons*. We would be somewhat leery of making the statement that all wildcat strikes or picket lines that are not authorized are not within the meaning of the *Enmons* exception.
>
> T.T. 41-110-11.

As was eventually brought out during the Rule 30 conference, the trial court really intended its instruction to mean that while the individual Defendants, being union members or sympathizers, could have a valid *Enmons* defense, the labor organization itself was not acting properly without authorization from the District, which fact the jury could weigh in determining what the individual Defendants' true goals were. T.T. 41-53-63, 110-15, 125-28. This meaning, however, is impossible to discern from the plain language of the instruction. All counsel were completely confused by the instruction, requiring lengthy explanations from the bench to which the jury was not privy. See T.T. 41-56-62, 110-15, 125-28. If the 15 attorneys on both sides, all of whom had thoroughly studied *Enmons,* thought that the instruction was incorect, misleading and confusing, 12 lay jurors who had heard conflicting versions of what *Enmons* meant throughout the trial would certainly misconstrue the instruction.

It must be presumed that the jurors would take the plain language of the instruction, without the benefit of the court's explanatory gloss, to mean that *Enmons* did not apply here because the International and District 30 did not approve the picketing. Although this meaning was not intended by the court or advocated by the prosecution or

defense, the instruction, by improperly engrafting "scope of authority" and "agency" principles onto the *Enmons* defense, was so misleading and prejudicial as to require a new trial.

3. LEGITIMATE ACTS WRONGFULLY PERFORMED.

The trial judge seemingly could not disabuse himself of the notion that the Defendants' means and methods must be legitimate to come within the labor activity exemption. The lower court's *Enmons* instruction went on to state that:

> If violence and threats honestly occur as a by-product of a legitimate labor activity, in support of a proper union objective, such acts cannot constitute the extortion defined by Title 18, United States Code, Section 1951. However, a legitimate act wrongfully performed may become unlawful and outside the protection of the *Enmons* exception.
>
> T.T. 44-135, 159.

The court was attempting by this instruction to convey the holding of *United States* v. *Billingsly,* 474 F. 2d 63 (6th Cir.), *cert. denied,* 414 U. S. 819 (1973), that initially legitimate goals could change to illegitimate objectives during the course of activities and therefore become outside the protection of *Enmons.* T.T. 41-15-16, 109. As the Government pointed out, however, the instruction completely failed to convey that meaning, stating instead that *Enmons* did not apply if the Appellants' acts were "wrongfully performed", that is, performed in a wrongful manner. The jury could only take this to mean that if the methods used were "wrongful", the Appellants' activities were not protected by *Enmons.*

Recognizing that the statement as written did not conform to *Enmons* the prosecution proposed the following change:

> However, a legitimate act *performed to obtain a wrongful objective* may become unlawful and outside the protection of the *Enmons* exception.
>
> T.T. 41-109-10 (emphasis added to indicate proposed change).

The judge rejected this change and gave the instruction as originally written. As with the portions discussed above, the charge erroneously instructed the jury to find the Appellants guilty if the tactics or methods they had used were found to be "wrongful".

It is difficult to conceive how a trial judge could fail to see that his instruction is erroneous when both defense and prosecution object to it on essentially the same grounds. The numerous and prejudicial errors in the court's *Enmons* instruction could easily have been eliminated if the judge had given any one of the "bare-bones" labor exemption instructions proposed by any of the Defendants. But because the lower court completely ignored the objections of counsel and insisted on giving an incorrect and misleading *Enmons* instruction which practically directed a finding of guilty, the Appellants are entitled to a new trial at which their primary defense theory can be correctly and properly presented by the court.

C. The Court's Misleading and Prejudicial *Enmons* Instruction Deprived the Appellants of a Fair Trial, Requiring Reversal of Their Convictions.

The law is well settled that an instruction in a criminal case must not be misleading or contain incorrect statements

of law. *Bollenbach* v. *United States,* 326 U. S. 607, 66 S. Ct. 402, 90 L. Ed. 350 (1946). "In a criminal case it is reversible error for a trial Judge to refuse to present adequately a defendant's theory of defense." *United States* v. *Garner,* 529 F. 2d 962, 970 (6th Cir.), *cert. denied,* 429 U. S. 850 (1976); *United States* v. *Blane,* 375 F. 2d 249 (6th Cir.), *cert. denied,* 389 U. S. 835 (1967). While an instruction must be read in its entirety, the fact that the charge contains both correct and incorrect statements still requires reversal. As the court held in *United States* v. *Walker,* 677 F. 2d 1014 (6th Cir. 1982):

> First instructing a jury in one way and then in another, as was done here, requires reversal for a new trial as has been held in numerous cases on factual situations not substantially different from the one at hand.
>
> *Id.* at 1016 n.3.

Giving an instruction which is deficient and defective in material respects has been held to be plain error. *United States* v. *Clark,* 475 F. 2d 240, 250 (2d Cir. 1973). Thus, if an instruction is either incorrect, contradictory or, at best, confusing to the jury, any conviction resting on the instruction must be reversed. See, *e.g., United States* v. *Pope,* 561 F. 2d 663 (6th Cir. 1977); *United States* v. *Carroll,* 518 F. 2d 187 (6th Cir. 1975); *United States* v. *Odell,* 462 F. 2d 224 (6th Cir. 1972); *United States* v. *Collins,* 457 F. 2d 781 (6th Cir. 1972); *United States* v. *Henderson,* 434 F. 2d 84, 90 (6th Cir. 1970). Where the instructions are likely to confuse or leave an erroneous impression in the minds of the jurors, it has been held that "we cannot ascertain and should not speculate as to the basis upon which the jury reached its conclusion of guilt." *United States* v. *Clark,* 475 F. 2d at 249.

Because the defense below was based almost entirely upon *United States* v. *Enmons,* 410 U. S. 396, it is difficult to imagine a subject on which an erroneous instruction carried greater potential for prejudice to the Appellants. The jury, throughout trial, was bombarded with conflicting defense and prosecution theories on what *Enmons* meant and how the labor activities' exemption applied to the facts presented (although the Government and defense seem to be in agreement on the errors discussed above). See generally T.T. 7, 40, 41, 44. The court's erroneous instruction came at a time when the jury was undoubtedly seeking guidance from the only presumably neutral participant, the trial judge. It can never be presumed that the jury based its finding of guilt upon its own correct interpretation of *Enmons* in spite of the court's incorrect instructions.

The *Enmons* instruction in this case was not simply misleading or erroneous. Rather, it was so completely contrary to the holding in *Enmons* that the jury, for all practical purposes, was directed to find the Appellants guilty, regardless of their legitimate labor goals. Thus, a key element of a proper finding of a Hobbs Act violation was disregarded by the court's instruction. These circumstances must necessarily lead to the inevitable conclusion that plain and prejudicial error has been committed in this case. For the reasons discussed above, the Appellants' Hobbs Act convictions should be reversed and remanded for a new trial.

II. The Prosecutor's Deliberate and Direct Reference During Rebuttal to German Stumbo's Failure to Testify Violated His Fifth Amendment Rights Under *Griffin* v. *California*, Depriving Him and His Co-Defendants of a Fair Trial and Requiring Reversal of Their Convictions.

Of the 18 Defendants indicted and tried in this case, only five were convicted. All of the Defendants who chose to testify were acquitted by the jury. In contrast, all of the Defendants who were eventually found guilty by the jury had elected to exercise their fifth amendment right not to testify. The prosecution, in its rebuttal argument, deliberately took advantage of the failure of German Stumbo to testify with the following unmistakable remark:

> Edgar told Phillip and Pearl that weekend get out of town, get you an alibi, something is going to happen and you are going to be blamed for it. I guess they are trying to blame them for it now. But the only way to stop Ray-Mac is through their equipment. And the timber rats are going to take care of it.
>
> Who were the timber rats? Ed R. Moore, Ed Ray Moore. He is not here to tell us about it. *But German is.*[1]
>
> T.T. 44-107. (Emphasis added.)

Ed Moore, a deceased alleged co-conspirator, obviously could not testify. The manifest intent of the remark was to call the jury's attention to German Stumbo's failure to take the stand and testify as to what was meant by the words "timber rats", which was Edgar Jones' purported term for the main co-conspirators. The reference was un-

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[1]What the written record fails to reflect, but which counsel will certify, is that the prosecutor, when making this last comment, turned around to look at German Stumbo and paused for emphasis before continuing. *Compare Eberhardt* v. *Bordenkircher*, 605 F. 2d 275 (6th Cir. 1979).

mistakably intended to remind the jury that German Stumbo had failed to testify and controvert the testimony that he was one of the conspiratorial "timber rats". Any reasonably intelligent juror would have completed the sentence to read "But German is, why didn't he testify."

The remark was made in the context of a rebuttal argument in which the prosecutor:

1. Repeatedly ridiculed the defense on behalf of the Appellants as a "smoke screen". T.T. 44-82, 88, 95, 100-02.

2. Accused the Appellants' attorney of trying to hide his clients from the jury. T.T. 44-95.

3. In referring to the failure of all of the Defendants to present certain witnesses to support their theory that the activities in question were directed toward the legitimate labor goal of organizing Ray-Mac, asked rhetorically, "Where are they at now. Where is Richard Trumka to come in here and stand behind these guys or Sam Church or J. B. Trout, or whoever else anybody subpoenaed in here? They are not here." T.T. 44-86.

The Appellants, at the first available opportunity, moved for a mistrial on the basis of the prosecutor's direct reference to German Stumbo's failure to testify. T.T. 44-148. No motion or objection had been made immediately because the court had ordered that there be no interruptions or objections during closing arguments. T.T. 42-29, 30. The trial court summarily overruled the motion and refused to give an immediate curative instruction, choosing to rely upon previous admonitions given on the subject and upon the court's final instructions to the jury. T.T. 44-148.

There can be no question that the prosecutor's comment was highly improper under *Griffin* v. *California,* 380 U. S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As this Court

held in *Rachel* v. *Bordenkircher,* 590 F. 2d 200 (6th Cir. 1978), referring to a prosecutor's comment that "We will never know, these men won't tell us. The only other man who could tell us [what happened before the victim was murdered] is dead and in his grave. . . .":

> It is apparent that the prosecutor calculated these remarks to create in the jurors' minds an inference of guilt based solely on petitioner's election to remain silent. Such conduct was condemned by the United States Supreme Court over 85 years ago in federal criminal cases, . . . and over 13 years ago in state criminal prosecutions . . . . We would have hoped that the condemnation it received from the Supreme Court would have been sufficient to bar such conduct from the courtroom forever.
>
> . . . .
>
> The prosecutor's comments in this case regarding petitioner's silence at trial were highly improper and constituted a flagrant violation of *Griffin.* We cannot countenance this kind of clear prosecutorial abuse of petitioner's established constitutional guarantees. In the context of this criminal prosecution, these statements constituted fundamental error.
>
> *Id.* at 202.

The Sixth Circuit has, since *Griffin* v. *California,* 380 U. S. 609, been extremely diligent in preserving the rights of criminal defendants to trials free from such improper comments on failure to testify. This Court has rarely hesitated to reverse convictions or to sustain grants of habeas corpus relief solely on the basis of *Griffin* violations. *United States* v. *Robinson,* 716 F. 2d 1095 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 722 (1984); *Hearn* v. *Mintzes,* 708 F. 2d 1072 (6th Cir. 1983); *Raper* v. *Mintzes,* 706 F. 2d 161 (6th Cir. 1983); *Eberhardt* v. *Bordenkircher,* 605 F. 2d 275

(6th Cir. 1979); *Rachel* v. *Bordenkircher,* 590 F. 2d 200; *Berryman* v. *Colbert,* 538 F. 2d 1247 (6th Cir. 1976); *United States* v. *Smith,* 500 F. 2d 293 (6th Cir. 1974); *United States* v. *Kilpatrick,* 477 F. 2d 357 (6th Cir. 1973); *Scott* v. *Perini,* 439 F. 2d 1066 (6th Cir. 1971); *Kinser* v. *Cooper,* 413 F. 2d 730 (6th Cir. 1969). Convictions have been overturned despite immediate and thorough curative instructions from the bench. *United States* v. *Kilpatrick,* 477 F. 2d 357; *United States* v. *Smith,* 500 F. 2d 293; *Berryman* v. *Colbert,* 538 F. 2d 1247. Comments on a defendant's failure to present evidence or to testify on his own behalf have been held in this Circuit to work such a manifest injustice as to require reversal despite trial counsel's failure to object. *Raper* v. *Mintzes,* 706 F. 2d 161; *Hearn* v. *Mintzes,* 708 F. 2d 1072. The prohibition applies both to direct and indirect references to a defendant's silence at trial. *Raper* v. *Mintzes,* 706 F. 2d 161.

The comment in question here was a direct, rather than indirect, reference to German Stumbo's failure to testify, as the prosecutor mentioned German Stumbo by name. An indirect reference is one in which the evidence is referred to generally as uncontradicted, leaving it up to the jury to infer that the evidence is uncontradicted only because the defendant did not testify. *Id.* Sixth Circuit cases involving direct comments include *United States* v. *Robinson,* 716 F. 2d at 1098; *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 278 (rhetorical question "who else could have testified?" would be indirect except for the fact that the prosecutor pointed at the defendant while making the comment); *Rachel* v. *Bordenkircher,* 590 F. 2d at 202; and *Berryman* v. *Colbert,* 538 F. 2d at 1249 ("Nobody was there when the robbery took place. Nobody that we can bring here to testify. The defendants here (sic), yes, but we can't get them to tes-

tify."). See *Raper* v. *Mintzes,* 706 F. 2d at 164 n.2. Indirect comments include general references to the Government's evidence as uncontradicted. See, *e.g., Hearn* v. *Mintzes,* 708 F. 2d 1072 (reference to Government's proof as uncontradicted); *Raper* v. *Mintzes,* 706 F. 2d 161 (same); *Butler* v. *Rose,* 686 F. 2d 1163 (6th Cir. 1982) (reference to failure to put on witnesses to contradict complainant's testimony); *United States* v. *Robinson,* 651 F. 2d 1188 (6th Cir.), *cert. denied,* 454 U. S. 875 (1981) (reference to Government testimony as unimpeached).

The significance of the distinction between direct and indirect comments, in terms of the standard used in appellate review, was set forth in *Raper* v. *Mintzes,* 706 F. 2d at 164, as follows:

> The rule set forth in *Griffin* applies to indirect as well as direct comments on the failure to testify. *Cases involving direct comments pose little difficulty as the Court must reverse unless the prosecution can demonstrate that the error was harmless beyond a reasonable doubt.* Cases such as the present one, involving indirect comments on the failure to testify are more troublesome. General references to evidence as uncontradicted, while not recommended, may not reflect on the defendant's failure to testify where witnesses other than the defendant could have contradicted the evidence.
>
> (Footnote and citations omitted, emphasis added).

Therefore, direct comments, unless proven harmless beyond a reasonable doubt, are *per se* reversible error. Since the comment made here was direct, German Stumbo's conviction must be reversed unless the United States could somehow establish beyond reasonable doubt that the reference

did not contribute to the conviction in any way. *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 278.

This Court has been extremely reluctant to characterize *Griffin* violations as harmless and has consistently been sensitive to the very real prejudice visited upon a defendant when the jury's attention is focused on his failure to take the stand. The most thorough Sixth Circuit discussion of the harmless error doctrine, as applied to direct *Griffin* violations, appears in *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 278-280. In that case, the prosecutor, in his closing argument, requested that the jurors ask themselves "Who else could have testified in this case?". This comment could be characterized as indirect except for the fact that the prosecutor simultaneously gestured toward the defendant. *Id.* at 278. See *Raper* v. *Mintzes,* 706 F. 2d at 164 n.2. The Court found this behavior to be a clear direct *Griffin* violation and, in discussing the harmless error doctrine, stated:

> Harmless error, in the context of a violation of a constitutional right of a defendant, is an extremely narrow standard, permitting the State to avoid the retrial of a defendant only when it can demonstrate beyond a reasonable doubt that the error did not contribute in any way to the conviction of the defendant.
>
> *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 278.

The Court discussed several ways in which a comment on a defendant's failure to testify could be held harmless:

1. If "the case against the Defendant was 'overwhelming and undisputed' ". *Id.* at 279.

2. If "whether the error could reasonably be viewed as eradicated by the rulings of the trial judge, his admonitions to counsel, and instructions to disregard." *Id.*

3. "Whether the trial was otherwise relatively error-free." *Id.*

The Court in *Eberhardt* found the brief and unrepeated nature of the prosecutor's comments to be the only factor weighing in favor of a finding of harmless error, but cautioned that:

> It only takes a single comment, however, to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of his exercise of that right.
>
> *Id.* See also *United States* v. *Smith,* 500 F. 2d at 297 ("a single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow.")

This Court also refused to apply the harmless error doctrine to direct *Griffin* violations in *Rachel* v. *Bordenkircher,* 590 F. 2d 200 and *Berryman* v. *Colbert,* 538 F. 2d 1247.

Under the guidance of *Eberhardt, Berryman* and *Rachel,* the reference to German Stumbo's failure to take the stand was clearly improper, highly prejudicial and certainly not harmless beyond a reasonable doubt. As the Government carries the heavy burden of demonstrating harmless error, an extensive review or summarization of the evidence is neither appropriate or necessary at this time. The fact that the Government has presented a strong enough case to *permit* a jury to find the Appellants guilty is never enough to render a *Griffin* violation harmless. *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 279. As the Government's evidence concerning such key elements as the existence of a conspiracy and the labor activity exemption was far from

overwhelming and never undisputed, the harmless error rule has no application here.

Griffin cases have, on occasion in this Circuit, been saved from reversal due to the trial judge's immediate and thorough curative instructions and admonitions to the prosecutor. See, *e.g., United States* v. *Burts,* 536 F. 2d 1140 (6th Cir. 1976), *cert. denied,* 429 U. S. 1044 (1977). More frequently, however, this Court has held that:

> Although we recognize that an appropriate cautionary instruction on the right of the defendant to remain silent was given, we do not feel that it could have cured the effect of the prejudicial and improper comment. . . . *Berryman* v. *Colbert,* 538 F. 2d at 1250. See also *United States* v. *Smith,* 500 F. 2d at 297 ("An error may be so prejudicial that no cautionary instruction can safely eradicate its effect.").

In *United States* v. *Kilpatrick,* 477 F. 2d at 361, the Court held:

> The District Judge did a creditable job in seeking to erase the prejudice that was visited upon Kilpatrick by the occurrences reviewed above. We have spoken on the sometime insufficiency of cautionary instructions. Notwithstanding the able efforts of the District Judge, we believe that, in total, the foregoing trial events denied Kilpatrick a fair trial.
>
> (Citations omitted).

In this case, the trial judge gave no cautionary instruction or admonition, and did not even see fit to bring the impropriety of the prosecutor's misconduct to the attention of the jury. The judge, at a bench conference, merely overruled the motion for a mistrial and chose to rely on his routine two-line general instruction on the subject, which was

as follows: "[N]o inference whatever may be drawn from the election of a defendant not to testify." T.T. 44-119. While legally correct and necessary in any trial where the defendant does not testify, this charge was wholly insufficient to erase the prejudice to the Appellants. In fact, the instruction says nothing about the impropriety of a prosecutor's comment on a defendant's failure to testify. In *Hearn* v. *Mintzes,* 708 F. 2d at 1078, this Court held that a general charge on the defendant's right not to testify was insufficient to cure a *Griffin* violation.

The third factor upon which a finding of harmless error could be based, *i.e.,* whether the trial was otherwise free from error, is patently absent. As a reading of this brief and the briefs filed on behalf of the Appellants' co-Defendants makes abundantly clear, the trial was riddled with prejudicial error which rendered it fundamentally unfair. Errors beginning with prosecutorial misconduct before the grand jury, followed by courtroom conditions violative of the Appellants' rights, through numerous evidentiary errors during trial, continuing with a constitutionally prohibited rebuttal argument and concluding with incorrect and prejudicial final instructions all combined to create, from start to finish, not a trial, but a travesty. Far from being harmless, the *Griffin* violation was part of a chain of prejudicial errors and constitutional violations, any one of the links of which could be grounds, in itself, for reversal.

Standing alone, the comment that "But German is (here to testify)" is a clear *Griffin* violation. Its prejudicial effect, however, was magnified immensely by the context of the rebuttal argument in which it was made. The prosecutor had repeatedly ridiculed the Appellants' defense as a smoke screen and submitted that defense counsel was try-

ing to hide his clients from the jury. These comments themselves tread dangerous constitutional ground as indirect allusions to the Appellants' failure to testify.

The prosecutor went on to make much of the fact that the Defendants had not called any high officials from the UMWA to testify as to the legitimacy of the organizational effort towards which the defense contended the acts of the Appellants were directed. This comment was also highly improper, as it seemed to shift the burden of proof upon the Defendants to show that their actions were in furtherance of legitimate labor goals. Obviously, the Defendants were not obliged to put on a single witness. When it wishes the jury to draw an unfavorable inference because potential defense witnesses have not testified, the Government must obtain an advance ruling from the trial court. *United States* v. *Martin,* 696 F. 2d 49, 52 (6th Cir.), *cert. denied,* 103 S. Ct. 1532 (1983); *United States* v. *Beeler,* 587 F. 2d 340, 343 (6th Cir. 1978), *cert. denied,* 454 U. S. 860 (1981); *United States* v. *Blackmore,* 489 F. 2d 193, 196 (6th Cir. 1973). Compare the comments leading to reversal in *United States* v. *Kilpatrick,* 477 F. 2d at 360 and in *Eberhardt* v. *Bordenkircher,* 605 F. 2d at 278. The total implication was obvious to any reasonably intelligent juror: "The defendants are guilty because they have chosen to hide behind a smoke screen rather than to testify and won't even call UMWA officials to say they were doing these acts for the union."

It is also significant that the comment occurred in the prosecution's rebuttal, which is the last chance for anyone to argue to the jury. As the Court held in *United States* v. *Robinson,* 716 F. 2d at 1100:

> When we consider the standards applied in *Eberhardt,* we find that in the instant case, the Government has failed to tip the scales as to defendant Thomas Robinson, Jr. While the evidence is strong as to both defendants, it is at least in part circumstantial, and no curative instruction was given at the time of the comment on Mr. Robinson's silence. Furthermore, the improper comment was made during the prosecutor's rebuttal—the final chance for either attorney to address the jury. Under these circumstances, we cannot find the error harmless beyond a reasonable doubt as to defendant Thomas Robinson, Jr.
>
> (Citations omitted).

As the trial judge in this case was unwilling to give an immediate cautionary instruction or to admonish the prosecutor in the presence of the jury, defense counsel had no chance to respond or attempt to cure the prejudicial effect of the prosecutor's comment.

Nor was the prejudicial effect of the rebuttal argument limited to German Stumbo. It is well settled in this Circuit that an improper *Griffin* reference as to one defendant necessarily implicates his co-defendants as well. *Scott* v. *Perini,* 439 F. 2d 1066; *Kinser* v. *Cooper,* 513 F. 2d 730. This principle is especially true in a conspiracy trial. As Justice Jackson said in *Krulewitch* v. *United States,* 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790 (1954):

> A co-defendant in a conspiracy trial occupies an uneasy seat. There will generally be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of the jurors who are ready to believe that birds of a feather flock together.

Teddy Kinney, Kenneth Rowland and German Stumbo were all seated together at trial; were all charged in the same counts of the indictment; were all accused of basically the same overt acts; and were all represented by the same defense counsel. Each elected not to testify. The jury would necessarily think of them as a group. The prosecution even lightheartedly referred to them as a potential basketball team. T.T. 44-101. Thus, the prejudice visited upon one of them tainted the proceedings as to all.

Because this is a direct appeal and not a habeas corpus review, the prosecutor must be held to an even stricter standard of conduct than that applied in, for example, *Raper, Hearn, Eberhardt,* and *Berryman. United States* v. *Robinson,* 716 F. 2d at 1099. Furthermore, even if the flagrant violation shown here had not risen to constitutional dimensions, this Court has in the past reversed convictions in *Griffin*-type cases as an exercise of its supervisory powers, to deter future similar misconduct by United States Attorneys. *United States* v. *Smith,* 500 F. 2d 293.

This Court should not tolerate the clear and flagrant prosecutorial abuse of the Appellants' constitutional rights established in *Griffin.* The prosecutor's comments in rebuttal constituted fundamental and highly prejudicial error, requiring reversal of the convictions of all three Appellants.

III. The Unlawful Swearing of the Chief Investigative Agent as an "Agent of the Grand Jury" While He Was Also Serving as the Primary Witness and the Prosecutor's Assistant Before the Grand Jury So Greatly Compromised and Impaired the Ability of the Grand Jury to Function Independently That Dismissal of the Indictment is Required.

Special Agent Dennis L. McAllister of the Bureau of Alcohol, Tobacco & Firearms wore many hats, to say the least, during all of the proceedings leading up to the Appellants' convictions. He was chief investigative agent on the case. T.T. 14-228. He was an assistant to the United States Attorney during the grand jury proceedings. T.T. 14-257. He was one of the chief witnesses for the Government both at trial, T.T. 16-48, *et seq.*, and before the grand jury. See T.T. 16-114, 115; Defendants, German Stumbo, Teddy Kinney, Jason Moore, Raymond Hall and Kenneth Rowland's Exhibit "3" (hereinafter referred to as Stumbo's Exhibit "3"). Finally, with no legal authority, he was sworn in by the foreman as an "agent of the grand jury". Stumbo Exhibit "3", testimony of Dennis L. McAllister, October 4, 1982, p. 23.

It is apparent that Special Agent McAllister's "office" of grand jury agent is purely a creation of government policy and prosecutive election, having no authority under Rule 6(e) of the Federal Rules of Criminal Procedure or elsewhere in the law. McAllister himself was unable to cite any legal authority for his status as a "triple agent", but stated that it was "common practice". T.T. 14-257-58.

The practice of appointing or swearing investigative agents as "agents of the grand jury" has been harshly condemned in recent opinions by federal judges as a flagrant assault upon the independence and integrity of the

jury. It is anticipated that more opinions similarly condemning such prosecutorial misconduct will be issued in the near future in currently pending cases. See Riley, 2d *Jurist Lashes U. S. Prosecutors,* Nat'l L. J., Oct. 8, 1984, at 23, col. 1. In *United States* v. *Anderson,* 577 F. Supp. 223 (D.C. Wyo. 1983) the court sustained a motion to dismiss for prosecutorial misconduct before the grand jury. One of the major instances of misconduct cited was the use of investigative agents as "special agents of the grand jury". The court said:

> Another piece of the pattern of government conduct that impaired the grand jury's ability to act independently was the extensive use of law enforcement officers as "special agents of the grand jury." The grand jury transcripts I have read do not reveal how this pooh-bah office was confered upon the agents involved. Nonetheless, various government investigative agents described themselves as "grand jury agents" during the course of interviews of potential grand jury witnesses. In these instances they identified themselves with credentials from the IRS but then hastened to explain in Mikado fashion that they were not there on behalf of the agency but on behalf of the grand jury and the U. S. Attorney.
>
> *Id.* at 232.

The court then went on to describe how one such "grand jury agent" even took it upon himself to grant informal immunity to a witness. The court continued its discussion of the grand jury agent issue, stating:

> The most important function of a grand jury is to stand between the prosecuting authorities and the suspect as an unbiased evaluator of evidence. That function cannot be maintained or understood by

> society when citizens are confronted by law enforcement agents who claim to be alter egos of the grand jury. There is a world of difference in a society of limited government between being subpoenaed to testify in confidence before a grand jury of one's fellow citizens and being interrogated in one's home by a law enforcement officer who claims not to be a law enforcement officer at the moment. A grand jury that has become identified in the eyes of lay witnesses before it with the law enforcement agencies is not functioning independently of the prosecution. Such identification can only undermine public confidence that the grand jury is performing its constitutional function to check the power of the government. It is well within a district court's supervisory powers to insure that the grand jury's integrity as an independent body is not destroyed in the public eye. Indeed, one would think that the entire issue had been finally resolved at Runnymede in 1215 A.D.
>
> *Id.* at 232-33 (citations omitted).

The court concluded by saying:

> Such a lawless procedure, like the use of law enforcement officers as "special grand jury agents" cannot help but destroy the public perception of the grand jury as an independent democratic institution protecting the constitutional rights of individuals and checking the prosecutorial power of the federal government.
>
> *Id.* at 234.

The court dismissed the indictment concluding that governmental misconduct, including the use of "grand jury agents", "combined to encroach upon the grand jury's independence and undermine the integrity of the judicial process." *Id.*

The court in *United States* v. *Kilpatrick,* 575 F. Supp. 325 (D.C. Colo. 1983) was equally explicit in its condemnation of the use of government agents as agents of the grand jury:

> Perhaps the thing which disappoints me the most is the forgetfulness of the grand jury itself in going along with having two IRS agents in charge of the IRS investigation sworn as "agents of the grand jury". Yet, I can understand, as Justice Sutherland said in *Berger* v. *United States,* that grand jurors rely on Justice Department lawyers for their legal advice. They should do this, but because I empanelled the first of these two grand juries, I know what those jurors were told, and I strongly suspect that the second grand jury was told about the same thing. I orally, and on the record, stressed that a grand jury has a duty to protect the innocent and I emphasized that a grand jury is an independent body, separate and apart from investigative agencies and that grand juries are not an arm of the prosecution but instead, they have a duty to examine the government's case carefully. I didn't tell them that they couldn't appoint IRS agents as their own "agents", because it never occurred to me that there could be such a blurring of the "investigative agency", "prosecuting attorney" and "grand juror" functions.
>
> *Id.* at 327.

The court was extensive and thorough in its excoriation of the appointment of an IRS agent as an agent of the grand jury, and only the most relevant passages will be quoted here. The court went on to say:

> I don't know how it could be any clearer than in [the prosecutor's] eyes, the agent's investigation was a combined IRS and Grand Jury investigation conducted

by a single "agent" and, of course, under Rule 6 he was the prosecuting attorney's little helper. That isn't what the stock instructions to grand jurors say should be done, and, although the government argues that other grand juries have had agents, it fails to come up with a case approving the practice and it fails to mention any case discussing the blurring of functions. The government relies on *United States* v. *Cosby,* (1979) 5 Cir., 601 F. 2d 754. There, the court itself challenged the practice of appointing an "agent of the grand jury", but it "assumed" that the practice was proper because it reversed the case on other grounds. The opinion cites several cases where "the use of third parties to assist grand juries has been considered and approved," but it is to be noted that those cases were decided before the amendment of Rule 6(e) which makes no mention of grand jury "agents" and which says that disclosure may be made to government lawyers for use in the performance of duty, and to other governmental personnel "as are deemed necessary by an attorney for the government *to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law".* The rule doesn't permit the grand jury to have an "agent", and it categorically says that Rule 6(e) permits disclosure to non-lawyers for the single purpose of assisting the "attorney for the government". The rule doesn't mix up the separate functions of prosecutor and grand jury, and with Rule 6(e) clarified, those functions cannot be blended.

My thoughts on this score are in full accord with those of the Advisory Committee, because its note to the 1972 amendment to Rule 6(e) says:

> "Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents, *and not by government prosecutors or the citizens who sit on grand juries."*

> Here, the "Grand Jury Agents" investigated and they testified, all the while being special agents of the IRS, ...
>
> I don't think that an IRS special agent can act in the combined capacity of IRS Agent, "Agent for the Grand Jury" and recipient of grand jury information supplied under Rule 6(e) for the sole purpose of helping out the prosecutor. This is a confusion not of apples and oranges. It is confusing apples, oranges and bananas.
>
> *Id.* at 329-30 (Emphasis by the court).

The court concluded its discussion by stating that the prosecutor's good intentions did not excuse the improper use of a grand jury agent:

> Good intentions or ignorance of the law don't make those errors go away. The creation of the "office" of grand jury agent is harder to excuse when the impartial jurors' "agent" is a chief investigator of the IRS case against the defendants and is receiving grand jury information under Rule 6(e) only to help out the attorney for the government charged with the supervision of presentation of the government's case to the grand jury.
>
> *Id.* at 330.

The appointment of the chief IRS investigator as a "grand jury agent" was the most significant instance of prosecutorial misconduct cited by the *Kilpatrick* court in reaching its conclusion that there had been "more than an 'adequate showing' that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury". *Id.* at 339.

It is impossible to distinguish the facts presented here from the conduct condemned in *Kilpatrick*. The grand

jury had never requested that McAllister serve as its agent. Rather, as in *Kilpatrick,* McAllister was sworn by the foreman at the request of the prosecutor, as follows:

> Mr. Self: Mr. Foreman, one further thing, because of the records of this Grand Jury, a lot of records have been obtained; I'd ask you, if you would, to make Mr. McAllister an agent of this Grand Jury for the purpose of retention of the physical documents in the course of this investigation, and for the purpose of obtaining voluntary compliance with subpoeanas (sic).
>
> (Oath administered to Mr. McAllister to serve as an Agent of the Grand Jury to assist in this Grand Jury's investigation, and retention of records)
>
> Stumbo Exhibit "3", testimony of Dennis L. McAllister, October 4, 1982, p. 23.

After he was conferred the dubious distinction of "agent of the grand jury" McAllister continued his investigation and reported his results back to the grand jury from time to time as a witness. *Id.,* January 3, 1983, June 6, 1983. The prosecutor continually made clear that McAllister's function was to assist the grand jury, despite the fact that his only legal authority for being present in the grand jury room at all was either as the prosecutor's assistant under Rule 6(e) or as a witness. *Id.,* January 3, 1983, p. 6; June 6, 1983, pp. 18-19. From the time he was sworn, McAllister continued to investigate, serve subpoenas, gather documents and otherwise obtain information to be used in the prosecution, not simply as an ATF agent, but as an agent of the grand jury. McAllister and the prosecutor clearly conveyed the impression to the grand jury that McAllister had, by virtue of his "office", risen from an ATF investigative agent or a mere witness to the status of agent of the

grand jury, and that he was conducting his investigaion as such:

> Q. 2. Mr. McAllister, are you the case agent that has been working as an agent of this Grand Jury in relation to this Grand Jury's investigation of the violence that occurred at the Ray Mac Mining Company in February and March of 1982?
>
> A. Yes sir.
>
> *Id.*, June 6, 1983, p. 1.

By this point, it can be safely assumed that the grand jury viewed McAllister not simply as another witness, but as its very own agent, conducting an investigation on its behalf. McAllister could obviously be expected to have considerable personal interest in a favorable government outcome as well. The last vestiges of the grand jury's status as an independent body had been stripped away, the prosecutive, investigative and grand juror functions having been merged into one "unholy alliance".

The propriety of the use of investigative agents as agents of the grand jury has never been thoroughly discussed, and certainly never approved, in any United States circuit court case. The Fifth Circuit, in *United States* v. *Cosby,* 601 F. 2d. 754 (5th Cir. 1979) questioned the practice, but, since it reversed on other grounds, assumed without deciding that the procedure was proper. *Id.* at 757 n.6. The court went on to say:

> Historically a bulwark of the citizen, the grand jury must not be perverted into a rubber stamp for prosecutors or investigatory agencies. The constitutional purpose of the grand jury is surely thrawted if we assume that the direction or scope of its inquiries is determined by the investigators who bring evidence to its attention.

> . . . . Even if we accept the government's contention that a sworn "agent" of the grand jury has a special role in the grand jury investigation, a proposition about which we express no opinion, the agent does not determine the actual scope of the investigation.
> *Id.* at 758-59 (footnotes omitted).

Here the prosecutor went beyond controlling the scope of the grand jury's inquiry and caused his investigator, assistant and chief witness to become inextricably linked with, if not a full-fledged member of, the grand jury.

Despite the lack of a clear appellate case on the subject, the courts in *Anderson* and *Kilpatrick* had no difficulty in discerning the clear and present danger in making an investigator an agent of the grand jury: by blurring the separate functions of investigator, prosecutor and grand jury, the jurors will be perceived, and perceive themselves, as merely an arm of the prosecution, not an independent body. Making the prosecutor's chief witness, assistant and investigator, an agent of the grand jury is perhaps the final insult to the already much-eroded concept of an independent grand jury standing as a bulwark between the Government and private citizens.

Nor can the practice of creating a "grand jury agent" be justified under the recent amendments to Rule 6(e), which permit disclosure of grand jury materials to "such government personnel as are deemed necessary to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law." Fed. R. Crim. P. 6(e)(3)(A)(ii). As the court held in *United States* v. *Kilpatrick,* 575 F. Supp. at 331:

> (I don't know how it can be argued that this language permits disclosure to IRS agents to work as "agents for the grand jury" unless it is argued that the grand

> jury is simply an arm of the prosecutor's office, and if that be the argument, almost 800 years of history is going to have to be forgotten. The document King John signed at Runnymede contains no such concept, nor does our Constitution.)
>
> . . . .
>
> (It seems pretty clear to me that the IRS agents to whom disclosure was made were hired guns of the prosecutor and the IRS—not of the grand jury.)

Rule 6(e)(3)(A)(ii) merely makes a limited provision for disclosure of grand jury materials to Government personnel to assist the prosecutor. It in no way authorizes a grand jury agent to be appointed to "assist" the grand jury, as was the obvious intent here:

> Mr. Self: Ladies and gentlemen, you all are the Grand Jury. Is there anything you want Mr. McAllister or request that he do in the course of this investigation to assist you in further preparing this case for presentation to you?
>
> Stumbo Exhibit "3", testimony of Dennis McAllister, January 3, 1983, p. 6.

Nor does it authorize the use of a "grand jury agent" to serve and enforce subpoenas issued by the grand jury at the request of the prosecutor as a subterfuge for gaining documents to be used in the case, as was done here. T.T. 14-258-60; Stumbo Exhibit "3", testimony of Dennis L. McAllister, October 4, 1982, p. 23.

The grand jury's historical and constitutional function is that of "an investigative body 'acting independently of either prosecuting attorney or judge', whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." *United States* v. *Dionisio,* 410 U. S. 1, 16-

17, 93 S. Ct. 764, 35 L. Ed. 2d 67, 81 (1973) (citations and footnotes omitted). This basic and sacrosanct constitutional purpose of the grand jury has, in recent years, been steadily eroded by practices which compromise grand jury's independence and separate identity. One experienced federal judge has even gone so far as to say:

> This great institution of the past has long ceased to be the guardian of the people for which purpose it was created at Runnymede. Today it is but a convenient tool for the prosecutor—too often used solely for publicity. Any experienced prosecutor will admit that he can indict anybody at any time for almost anything before any grand jury.
>
> Campbell, J., *Delays in Criminal Cases,* 55 F.R.D. 229, 253 (1972).

Hopefully, the pessimism expressed by Judge Campbell is not entirely justified. The grand jury can still perform the independent function it was created for, but only if courts are willing to protect its integrity from the incursions of over-reaching prosecutors seeking to misuse it. The use of investigators as grand jury agents, if permitted by this Court, can only serve to hasten the complete disappearance of the last vestiges of grand jury independence. This Court can and should exercise its supervisory powers to put a halt to this widespread, unlawful and invidious practice.

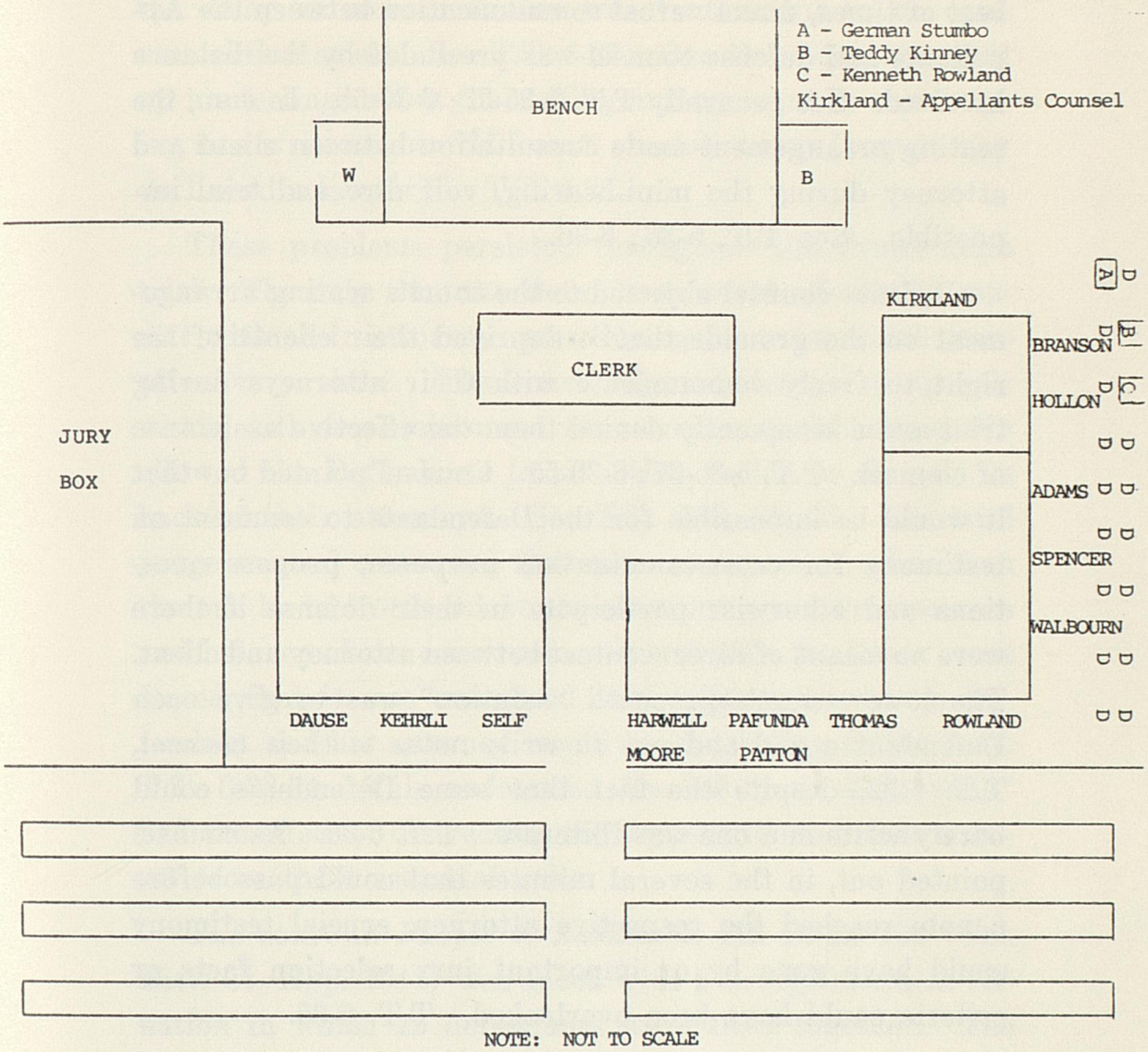
The fact that this issue is of first impression in this or any other circuit, should not make this Court hesitate to stop the use of investigative agents as "agents of the grand jury" once and for all. To preserve the rights of the Appellants to a grand jury indictment untainted by excessive prosecutorial control, whether by use of "grand jury agents" or by other unlawful means, and to serve as a

warning to federal prosecutors throughout this Circuit, this case should be remanded back to the district court with directions to dismiss the indictment.

IV. The Inadequate and Crowded Courtroom Conditions Which Required the Appellants to Be Seated Far Away From Counsel, Rendering Meaningful Communication Between Client and Attorney Impossible During Trial Proceedings, Deprived the Appellants of Their Right to Effective Assistance of Counsel, Requiring Reversal of Their Convictions.

The trial of this case involved 18 Defendants represented by 12 attorneys. One Defendant was represented by three attorneys. The Appellants' counsel, on the other hand, represented a total of five Defendants at trial.

At trial, defense counsel were seated at an L-shaped table, with counsel for the Appellants seated at the end of the "L". The court-ordered seating arrangement required that the Appellants be seated at trial in a double row behind a portion of the counsel table so that they were bunched together and always a considerable distance from their attorney. The situation at trial may be approximately represented as follows:



NOTE: NOT TO SCALE

During voir dire the distance between the Defendants and their attorneys was even greater since the Defendants were all crowded into one corner, totally away from their counsel. Counsel for the Appellants estimated that he was 15 to 17 feet from his nearest client during voir dire. T.T. 5-36. The situation was even worse during a week-long pre-trial conspiracy mini-hearing, where the Defendants were seated at the back of the courtroom. See T.T. 6-37. Even at the

best of times, direct verbal communication between the Appellants and defense counsel was precluded by the distance involved. See generally T.T. 5-35-37; 6-30-55. In sum, the seating arrangement made consultation between client and attorney during the mini-hearing, voir dire and trial impossible. See T.T. 5-36; 6-36.

Defense counsel objected to the court's seating arrangement on the grounds that it deprived their clients of the right to freely communicate with their attorneys during trial and consequently denied them the effective assistance of counsel. T.T. 5-35-37; 6-30-55. Counsel pointed out that it would be impossible for the Defendants to comment on testimony for cross-examination purposes, propose questions and otherwise participate in their defense if there were no means of direct contact between attorney and client. The lower court's proposed "solution" was to give each Defendant a pad and pen to write notes to their counsel, T.T. 6-32, despite the fact that some Defendants could barely write and one was illiterate. T.T. 6-36. As counsel pointed out, in the several minutes that could pass before a note reached the respective attorney, crucial testimony could have gone by or important jury selection facts or criteria could have been overlooked. T.T. 6-35.

In one instance, a prospective juror made a statement that seemed significant to the Appellants' counsel. When counsel looked back to gesture toward his clients to get their response or impression, he had to struggle to even see them. When counsel did get their attention, he tried unsuccessfully to mouth the problem to them. If counsel had written a note, the Appellants, when they finally got it, may not have understood the problem, requiring further hand gestures and mouthing. T.T. 6-36-37. In any event,

the delay in communication was tantamount to no communication at all. See T.T. 6-37. One Defendant summed up his feelings about the seating arrangement by commenting in a written note "If I can't sit close to my lawyer, why do I need a lawyer?". T.T. 6-38.

These problems persisted throughout the three-month trial. The only time the Defendants could effectively consult with their attorneys was during recesses, which were often very short. The court rejected defense proposals which, with some minor rearrangements, would have easily allowed the Defendants to sit either beside or directly in back of their attorneys. See T.T. 6-32, 38, 55. The trial judge seemed concerned that any arrangement other than the one he had ordered would somehow upset the decorum and balance of the courtroom. Specifically, the lower court stated that it was concerned that talking between a Defendant and his attorney would be distracting to the jury. T.T. 6-33-34. This unfounded fear of "jury distraction" had the effect of distracting the Appellants and their counsel from their essential roles.

The court in *People* v. *Zammora,* 152 P. 2d 180 (Cal. Dist. Ct. App. 1944) was faced with a nearly identical situation in which 22 defendants were tried together. The limited courtroom facilities did not permit the defendants to sit at counsel table with their respective attorneys, although defense counsel vigorously insisted that they had the right to do so. The defendants were not permitted to move about to consult with their attorneys, but could consult to a limited extent during recesses with the court's permission. *Id.* at 214. The trial court overruled all objections to the seating arrangement, stating that everything possible had been done to allow consultation without ex-

cessive disruption of courtroom decorum. *Id.* at 212-14. The California appellate court reversed and remanded for a new trial, holding that:

> To us it seems extremely important that, during the progress of a trial, defendants shall have the opportunity of conveying information to their attorneys during the course of the examination of witnesses. The right to be represented by counsel at all stages of the proceedings, guaranteed by both the Federal and State Constitutions, includes the right of conference with the attorney, and such right to confer is at no time more important than during the progress of trial. . . . The Constitution primarily guarantees a defendant the right to present his case with the aid of counsel. That does not simply mean the right to have counsel present at the trial, but means that a defendant shall not be hindered or obstructed in having free consultation with his counsel, especially at the critical moment when his alleged guilt is being made the subject of inquiry by a jury sworn to pass thereon. At such time, in order that he may have absolute freedom to assist by suggestion and information in his own defense, the accused has the right to sit with his counsel, or at least to be so situated that he can freely and uninterruptedly communicate and consult with his attorney. It is the court's duty to provide adequate quarters and facilities, which the court has the power to do without limitation.
>
> The difficulties which presented themselves to the court by reason of the large number of defendants and counsel, together with the limited courtroom space, are the result of the failure of the court to act in this regard. Under such circumstances, it is not the Constitution or the rights guaranteed by it that must yield. That a joint trial of numerous defendants speeds the wheels of justice and provides not only an expeditious

> but a less burdensome method for disposing of criminal cases furnishes no valid argument for depriving a defendant charged with crime of his right to the effective and substantial aid of counsel at all stages of the proceeding. To do that, as was said in *Powell* v. *Alabama,* 287 U. S. 45, 53 S. Ct. 55, 60, 77 L. Ed. 158, 84 ALR 527, "is not to proceed promptly in the calm spirit of regulated justice but to go forward with the haste of the mob."
>
> *Id.* at 214-15.

People v. *Zammora,* 152 P. 2d 180, is directly on point and readily applicable to the case at hand. It is also the only case the Appellants' research has uncovered which addresses a situation similar to the one below. But see generally, Annot., 85 ALR 3d 1918, §6 (1978); Annot., 5 ALR 3d 1360, §9 (1966). Although this issue appears to be of first impression in this Circuit, principles discussed in other more recent cases compel a conclusion that the lower court committed prejudicial and reversible error by ordering a seating arrangement which denied counsel unhindered access to their clients.

In *Geders* v. *United States,* 425 U. S. 80, 96 S. Ct. 1330, 47 L. Ed. 2d 592 (1976) the Supreme Court held that the trial court committed reversible error by ordering that Geders not consult with his attorney during an overnight recess between his direct and cross-examination testimony. The trial judge was concerned that the attorney would improperly coach his client during the recess. In an opinion by Chief Justice Burger, the Supreme Court held that such considerations, though sometimes valid, must give way to the defendant's right to effective assistance of counsel:

> There are a variety of ways to further the purpose served by sequestration without placing a sustained

> barrier to communication between a defendant and his lawyer. To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper "coaching," the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.
>
> *Id.* at 91.

Justice Marshall, joined by Justice Brennan, concurred, adding that:

> I do not understand the Court's observation as suggesting that as a general rule no constitutional infirmity would inhere in an order barring communication between a defendant and his attorney during a "brief routine recess." [G]eneral principles adopted by the Court today are fully applicable to the analysis of *any* order barring communication between a defendant and his attorney, at least where that communication would not interfere with the orderly and expeditious progress of the trial.
>
> Thus, as the Court holds, a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice. Such an order is inherently suspect, and requires initial justification by the Government.
>
> *Id.* at 92-93 (Marshall, J., concurring).

The *Geders* court expressly left open the question of whether an order barring consultation during a brief routine recess during trial would also be reversible error. This question was answered decisively in the affirmative by this Circuit in *United States* v. *Bryant,* 545 F. 2d 1035 (6th

Cir. 1976) where such an order effective during a one-hour noon recess was held to violate the defendant's right to assistance of counsel, requiring reversal of her conviction. *Id.* at 1036. See also *United States* v. *Allen,* 542 F. 2d 630 (4th Cir. 1976), *cert. denied,* 430 U. S. 908 (1977) where the court held that even a twenty-minute interruption of a defendant's right to consult with counsel, constituted reversible error regardless of whether actual prejudice was shown:

> We begin with the nature of the Sixth Amendment right to counsel. It is so fundamental that there should never occur any interference with it for any length of time, however brief, absent some compelling reason.
>
> *Id.* at 633.

The situation below was the converse of that requiring reversal in *Geders* and its progeny and certainly no less violative of the Appellants' sixth amendment rights. The Appellants were free to consult with their attorney during recesses, but were effectively barred by the court-ordered seating arrangement from communicating with counsel during actual voir dire and trial proceedings. The court was unclear as to its reasoning in ordering the seating arrangement, giving no better justification other than its own peculiar notions of courtroom decorum. See T.T. 6-33-34. This rationale is difficult to comprehend in light of the Appellants' fundamental right to consult with counsel at every stage of the proceedings. This right could have been preserved with extreme ease by simply switching the chairs around so a client could sit next to or directly behind his counsel or by simply adding more tables.

In *Geders, Allen* and *Bryant* the Courts found the right to consult with counsel to be so fundamental that actual

prejudice need not be shown to warrant reversal for an order interfering with that right. *United States* v. *Geders,* 425 U. S. 80; *United States* v. *Bryant,* 545 F. 2d 1035; *United States* v. *Allen,* 542 F. 2d 630. See also *Javor* v. *United States,* 724 F. 2d 831 (9th Cir. 1984) (defendant need not show actual prejudice where defense counsel slept through substantial portions of trial). Nevertheless, the prejudice is obvious when a criminal defendant's right to communicate with his attorney is interferred with and impeded, not just for twenty minutes or one hour, but for every single day of a three-month trial. During voir dire, for example, one court has held:

> [T]here is no way to assess the extent of the prejudice, if any, a defendant might suffer by not being able to advise his attorney during the impanelling of the jury. [W]e can only speculate as to what suggestions (the defendant) might or might not have made, since it would be his prerogative to challenge a juror simply on the basis of " 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another.' " *Lewis* v. *United States,* 146 U. S. at 376, 13 S. Ct. at 138.
>
> *United States* v. *Crutcher,* 405 F. 2d 239, 244 (2d Cir. 1968), *cert. denied,* 394 U. S. 908 (1969).

Counsel for the Appellants is unaware of any case in which the awkward, time-consuming passing of notes over a considerable distance has been held to be effective consultation with counsel during trial. The Appellants did not ask to be indicted and tried along with 15 other Defendants. Once the decision to proceed with this mass prosecution was made, and all motions to sever overruled, it was the court's duty to ensure that courtroom facilities were adequate to safeguard the Appellants' constitutional

rights, which could have easily been done here. Even if providing adequate courtroom facilities would have required a transfer to another division, any inconvenience that could have been caused to the court and the Government by transferring the case would have been far outweighed by the fundamental rights of the Appellants to effective assistance of counsel. In fact, the United States itself moved for a transfer to the Lexington Division when difficulties arose in impanelling a jury. T.T. 3-47.

Certainly the trial court's bizarre ideas concerning courtroom decorum and balance should never override constitutionally guaranteed rights. The court's failure to discharge its duty to provide adequate seating arrangements profoundly interferred with the Appellants' fundamental right to adequate consultation with their defense counsel. While actual prejudice need not be shown where basic sixth amendment rights are violated, the prejudice is obvious where, for each day of a major three-month trial, the Appellants were not able to meaningfully participate in their defense during trial proceedings. Because the Appellants were denied effective consultation with and assistance of counsel during the trial, their convictions should be reversed and this case remanded for a new trial, with directions that arrangements be made for direct communication between the Appellants and their attorney.

CONCLUSION

For the reasons stated in Argument III, supra, regarding the appointment of a "grand jury agent", the Appellant's convictions should be reversed and remanded to the district court with directions to dismiss the indictment for prosecutorial misconduct before the grand jury. In the alternative, for the reasons stated in Arguments I, II and IV, and for the reasons presented in the briefs submitted on behalf of the Appellants co-Defendants, the convictions should be reversed and remanded for a new trial.

Respectfully submitted,

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