IN THE

United States Court Of Appeals

FOR THE THIRD CIRCUIT

No. 15-4053

UNITED STATES OF AMERICA,

v.

BINYAMIN STIMLER,

Defendant-Appellant.

On Appeal from the United States District Court
For the District of New Jersey

BRIEF FOR THE APPELLANT

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JURISDICTION

This is an appeal from the United States District Court for the District of New Jersey's final Judgment and Sentence entered on December 17, 2015. DDE 397; JA 103.[1] Appellant Binyamin Stimler was found guilty of conspiracy to kidnap and attempted kidnapping (18 U.S.C. §§ 1201(c), 1201(d)) on Counts One and Five of a superseding indictment in the District of New Jersey in *United States of America v. Epstein, et al.,* Case No. 14-287 (FLW). He was sentenced to serve 39 months' imprisonment and two years supervised release, and ordered to pay a special assessment of $200. DDE 397; JA 103. A timely Notice of Appeal was filed on December 23, 2015. DDE 402; JA 1. The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. Jurisdiction of this Court rests on 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether Rabbi Stimler was entitled to a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure.

2. Whether Rabbi Stimler, who was prosecuted for conduct that was a sincerely held religious observance, was entitled under the Religious Freedom Restoration Act ("RFRA") to a separate trial because he was not named as a defendant in Counts 2 and 3 of the superseding indictment and seriously

[1] "DDE" refers to the docket entry number in the District Court's docket. "JA" refers to the Joint Appendix.

prejudicial evidence of conversations unknown to him were to be presented in a lengthy joint trial.

3. Whether RFRA permits a "sting" and criminal prosecution for conduct that is a sincerely held religious observance without proof that the "sting" and criminal prosecution further a compelling governmental interest and constitute the least restrictive means of achieving that interest.

4. Whether RFRA permits exclusion of evidence of a defendant's religious motivation in a criminal prosecution for conduct that is an encouraged religious observance.

5. Whether the District Judge responded correctly when the jury inquired during deliberations whether failure to intervene when someone is being confined constitutes kidnapping.

Pursuant to Federal Rule of Appellate Procedure 28(i), Rabbi Stimler also adopts and incorporates herein the Questions Presented in the briefs of Appellants Epstein and Goldstein insofar as they apply to his conviction.

RELATED CASES

On September 11, 2014, a superseding indictment was filed against Mendel Epstein, Martin Wolmark, Jay Goldstein, David Epstein, Mordechai Eichenthal, and Binyamin Stimler. DDE 134; JA 172. Defendant Wolmark has pleaded guilty and is serving a 38-month term of imprisonment. Defendant Eichenthal was

granted a severance. DDE 205; JA 141. Defendants Goldstein and Epstein have also appealed their sentences. DDE 404 and 405, JA 2 and 3. Those appeals (Case Nos. 15-4094 and 15-4095) are consolidated with that of Appellant Binyamin Stimler. Counsel is not aware of any other related or pending proceedings in this Court.

STATEMENT OF THE CASE

Pursuant to Federal Rule of Appellate Procedure 28(i), Appellant Binyamin Stimler adopts and incorporates herein the relevant facts in the record and the procedural history in the Statement of the Case of the Brief of Appellant Mendel Epstein. The specific relevant facts that relate uniquely to Rabbi Stimler's Questions Presented are detailed at pp. 13-24 of this Brief.

The rulings presented for review in this Brief are (a) the District Court's denial of Rabbi Stimler's motions for a judgment of acquittal under Rule 29 (DDE 283, 291, 370; JA 4860, 4871, 4918), (b) the District Court's denial of Rabbi Stimler's motions for relief under the Religious Freedom Restoration Act, including his motion for a severance of his trial (DDE 194, 270; JA 4, 424-45, 1045-1053, 1087), (c) the District Court's restriction of any evidence that Rabbi Stimler and other defendants were motivated by religious observance (DDE 270; JA 4, 1053-87), and (d) the response given by the District Judge to a jury question during the jury's deliberations. DDE 334; JA 4607-12, 4853.

Appellant Stimler also adopts and incorporates by reference all contentions of Appellants Epstein and Goldstein insofar as they affect his conviction.

SUMMARY OF ARGUMENT

1. The trial record contained no evidence that would satisfy a reasonable juror beyond a reasonable doubt that Rabbi Stimler knew on October 9, 2013, "that he was involved in an illegal venture" or that he had a "unity of purpose" with alleged co-conspirators who were attempting a kidnapping. He joined the group that traveled to Edison, New Jersey, in order to perform a notarial service ("eid") that he had performed many times before – signing a Jewish divorce document ("get") in a distinctive calligraphy. He believed that this would free a chained woman ("agunah") to remarry and have children. He was neither promised nor received any payment for this service; it was performed by him exclusively as a religious observance ("mitzvah"). No evidence supports the conclusion that he knew before he entered the Edison warehouse that there would be coercion or violence of any kind. The District Court erred in denying motions for a judgment of acquittal filed by Rabbi Stimler (a) at the conclusion of the prosecution's case, (b) at the conclusion of all the evidence, and (c) after the jury's verdict.

2. Rabbi Stimler filed a motion before the trial began asserting rights under the Religious Freedom Restoration Act ("RFRA"). His co-defendants joined in Rabbi Stimler's assertion of rights under RFRA. An individual who demonstrates

that his exercise of religion is substantially burdened by governmental action such as a criminal prosecution is entitled under RFRA to a judicial determination regarding the effect of the prosecution "to the person." In the present case, the District Court erroneously denied Rabbi Stimler's contention that forcing him to defend himself in a lengthy trial at which much evidence not pertaining to him would be presented to the jury did not serve a "compelling governmental interest" and was not the "least restrictive means of furthering that compelling governmental interest." The District Court failed to consider the effect on Rabbi Stimler as an individual "person." RFRA was also violated in the trial that resulted in the convictions before this Court because (a) the District Court failed to require the prosecution to justify the "sting" and the subsequent criminal prosecution under the two-pronged RFRA standard and (b) the District Court totally barred presentation to the jury of the defendants' religious motivation for their conduct.

3. The FBI "sting" that generated this criminal prosecution exceeded constitutional limits and resulted in convictions that must be vacated as "outrageous." The government not only created the wholly fictional offense directed at the Orthodox Jewish community's frustration over an intractable religious problem, but it "trolled" among Orthodox Jewish organizations and rabbis until it found Rabbis Wolmark and Epstein as vulnerable targets. FBI agents then actively promoted and encouraged the fictional attempted kidnapping.

Moreover, the means used by the FBI to persuade Rabbi Epstein included fabrication of a false religious-marriage document ("ketubah") and repeated fraudulent representations to the Beth Din of America, a highly respected rabbinic tribunal with unimpeachable integrity. The ultimate product of these fraudulent FBI representations to the Beth Din of America was a baseless ecclesiastical contempt judgment against a nonexistent husband endorsed by the rabbi who is the chief justice of the rabbinical court. These forged and fraudulent documents were employed by the FBI to persuade Orthodox Jewish rabbis that they should act to resolve a true religious crisis.

4. During its deliberations, the jury sent to the Court several questions that appeared to focus on Rabbi Stimler. One of the questions asked by the jury was whether an accused's failure to intervene to prevent a kidnapping was sufficient to make him a party to the criminal offense. Rather than telling the jury that, under governing applicable law, mere presence and inaction is insufficient for a criminal conviction of either a conspiracy or an attempt to commit kidnapping, the District Judge erroneously distinguished between the Counts in which Rabbi Stimler was not charged (which alleged actual kidnappings) and the Counts in which he was charged (which alleged conspiracy and attempt). This implied to the jury that Rabbi Stimler could be found guilty because he was present and failed to

intervene. The Court's response, to which defense counsel objected, prejudiced the jury against Rabbi Stimler and produced a verdict that must be vacated.

ARGUMENT

INTRODUCTION

Religious belief and observance are at the heart of this case. For no reason other than religious observance, Appellant Binyamin Stimler – a psychotherapist who is also a part-time rabbi – agreed that he would perform an essentially notarial service in a Jewish divorce ritual that was, in reality, an FBI "sting." The FBI created an intricate plan to induce rabbis to believe that an undercover FBI agent was an Orthodox Jewish woman who was unable to remarry and have a family (an "agunah") unless the rabbis interceded and permitted physical coercion to be used, if necessary, against a husband (who did not truly exist) to authorize the writing of a Jewish religious divorce document ("get"). In an elaborate scenario designed to persuade rabbis that violence was necessary, the FBI forged a Jewish marriage contract and deceived the unsuspecting Beth Din of America, the leading American Orthodox rabbinic tribunal, into (a) serving religious summonses to a fictional "husband" and (b) issuing a rabbinic contempt decree signed by the rabbi who is the chief justice of the Beth Din of America. The FBI then exhibited these falsely obtained and forged documents to persuade Orthodox rabbis that a real religious crisis warranting extreme measures was before them.

The convictions that are before this Court on these appeals result entirely from the FBI "sting." The superseding indictment on which the three appellants were tried included three kidnapping Counts relating to incidents between 2009 and 2011 when recalcitrant husbands who had refused to authorize the writing of a "get" were allegedly assaulted. The jury returned "not guilty" verdicts as to all defendants named in two of these Counts, and the prosecution withdrew the other Count (the ***only*** such allegation in which appellant Stimler was charged) after presenting to the jury the lurid testimony of one witness to an assault allegedly committed on a recalcitrant husband in 2011.

Appellant Stimler was enlisted, with no payment or promise of payment, to join a group of Orthodox Jewish men who traveled on October 9, 2013, to Edison, New Jersey, in order to secure a "get" from a man who the FBI's agents portrayed as living in South America after he had abandoned his wife without giving her the divorce document that would have enabled her to remarry. Because he had expertise in signing such a Hebrew-language religious document as a witness ("eid") in scribal script, Rabbi Stimler was asked to be available to perform this essentially notarial task on the New Jersey site if and when the husband authorized a scribe to write the "get." There is not a shred of evidence that Rabbi Stimler was asked to engage in any violence or was told that others would be engaging in violence.

The husband did not exist, and the purported "victims" of the recalcitrant husband's refusal – the "agunah" and her brother – were FBI personnel who were trained as actors. Traditional Jewish religious sources – including Maimonides' Code of Jewish Law and some contemporary rabbinic authorities – contemplate that a rabbinic court may resort to physical coercion, if necessary, to compel a recalcitrant husband to authorize the writing and delivery of a "get." The objective of the FBI's "sting" was to apprehend rabbis who were prepared to sanction violence, if necessary, in order to force a recalcitrant husband to authorize the writing of a "get" for a woman who, if she failed to receive such a document, would be unable to remarry under Jewish Law and would remain an "agunah" (chained woman). [2] The prosecution acknowledged not only that Rabbi Stimler

[2] The intractable problem of releasing "agunot" from their bonds has been the subject of voluminous scholarly study. The Second Edition of the *Encyclopedia Judaica* devotes 11 pages to the subject of "Agunah" and describes the history of the problem presented under Jewish Law by absent or recalcitrant husbands. It declares that "[f]inding a way for permitting an *agunah* to remarry is deemed a great *mitzvah*," citing the Twelfth Century rabbinic authority Asheri, 51:2. 1 Encyclopedia Judaica, "Agunah," pp. 510-520 (2d ed. 2007). See also Bleich, Contemporary Halakhic Problems, Vol. 1, pp. 150-159 (1977) ("The Agunah Problem" and "Refusal To Grant a Religious Divorce"). Maimonides' Code of Jewish Law authorizes the physical beating of a husband who, in defiance of the order of a rabbinic court, refuses to authorize the writing and delivery of a "get." *Mishneh Torah, Gerushin* 2:20. Rabbinic courts in Israel are authorized by law to imprison men who refuse, contrary to rabbinic directive, to authorize the writing and delivery of a divorce document. In the United States the "agunah" problem has led to the enactment of two New York laws designed to remove the "barrier to remarriage" created by a spouse's refusal to give or receive a "get." New York Domestic Relations Law §§ 253, 236B(5)(h).

was not asked to engage in any violence in Edison, but also that he had not engaged in any violence in a 2011 incident specified in Count Four of the superseding indictment – a Count that was dismissed at the close of all the evidence. At Rabbi Stimler's sentencing, the District Judge said, "No one will ever suggest that Rabbi Stimler in some way touched these two individuals and participated in that way at all." Sentencing Transcript, December 15, 2015; JA 5025.

Much of the trial related to meetings that FBI undercover agents had with co-defendant Rabbi Epstein and others during which violence was discussed. The FBI agents videoed and recorded these preparatory meetings. Rabbi Stimler did not participate and was not involved in these meetings or in any planning for the trip of October 9 to Edison.

Nor did anyone suggest that Rabbi Stimler had any involvement whatever in counts of the indictment that related to events in 2009 and 2010 when recalcitrant husbands were, according to their trial testimony, assaulted by men other than Rabbi Stimler in order to coerce them to authorize the writing and delivery of a "get." Rabbi Stimler was not alleged to have participated in any of these events or to have known that they occurred before, during, or after the events. The jury returned verdicts of "not guilty" on Counts Two and Three that charged the other defendants on trial with actual assaults against recalcitrant husbands. Count Four,

which alleged violence against a recalcitrant husband in 2011 in Brooklyn, named Rabbi Stimler, but that Count was dismissed by the prosecution at the conclusion of the evidence. The District Judge and the prosecutor acknowledged that evidence relating to that Count indicated that Rabbi Stimler had not personally participated in any violence in 2011. JA 4998, 5025, 5082.

Rabbi Stimler was found guilty ***only*** because he joined the group that was, pursuant to the FBI's "sting," filmed in a warehouse in Edison on October 9, 2013. He was arrested by the FBI on the scene.

I.

RABBI STIMLER SHOULD HAVE BEEN GRANTED A JUDGMENT OF ACQUITTAL UNDER FRCP 29 BECAUSE NO REASONABLE JUROR COULD CONCLUDE BEYOND A REASONABLE DOUBT THAT HE HAD THE KNOWLEDGE AND INTENT REQUIRED TO BE GUILTY OF CONSPIRACY OR ATTEMPT TO KIDNAP

STANDARD OF REVIEW

In *United States v. Tyson*, 653 F.3d 192, 199 (3d Cir. 2011), this Court defined the evidentiary standard to be employed by the District Court and by this Court when considering a Rule 29 motion (emphasis added):

> The evidence is insufficient to sustain a conviction ***if a rational trier of fact could not have found proof of guilt beyond a reasonable doubt.***

See *United States v. Brodie*, 403 F.3d 123, 133 (3d Cir. 2005), quoted with approval in *United States v. Bencivengo*, 749 F.3d 205, 210 (3d Cir. 2014). See

also *United States v. Boria*, 592 F.3d 476, 480 (3d Cir. 2010); *United States v. Smith*, 294 F.3d 473, 476 (3d Cir. 2002); *United States v. Wolfe*, 245 F.3d 257, 262 (3d Cir. 2001).

This Court has also articulated a rigorous evidentiary standard in conspiracy prosecutions before an alleged conspirator who happens to be present when an offense is committed may be found guilty. In *United States v. Caraballo-Rodriguez*, 726 F.3d 418, 433 (3d Cir. 2013) (en banc), this Court held that an alleged conspirator may not be found guilty without proof beyond a reasonable doubt that he "knew that he was involved in an illegal venture." In *United States v. Korey*, 472 F.3d 89, 93 (3d Cir. 2007), this Court said that "[o]ne of the requisite elements the government must show in a conspiracy case is that the alleged conspirators shared a 'unity of purpose,' the intent to achieve a common goal, and an agreement to work together toward the goal."

* * * *

The "available evidence" in this record relating to the Superseding Indictment's allegations in Counts One and Five that Binyamin Stimler committed conspiracy to kidnap and/or attempted kidnapping does not support a conclusion that he was guilty of joining a conspiracy or an attempt to kidnap. Even if all the evidence is considered in the light most favorable to the prosecution, no ***reasonable*** juror could conclude ***beyond a reasonable doubt*** that Rabbi Stimler

"knew that he was involved in an illegal venture" and "shared a 'unity of purpose'" with other defendants who are alleged to have conspired to kidnap and engaged in attempted kidnapping.

Rabbi Stimler was arrested on the evening of October 9, 2013, at the warehouse in Edison, New Jersey. The record regarding his presence at that location on October 9 establishes that he was there in order to sign a "get" that would free an "agunah," not that he had a criminal intent to join "an illegal venture" or had any "unity of purpose" with individuals who have been charged with conspiracy and attempted kidnapping.

A. Rabbi Stimler Was Not Involved or Named in Filmed and Recorded Conversations Preparatory to the "Sting."

It is undisputed that Rabbi Stimler was not present and did not participate or even know of the discussions or meetings that preceded October 9, 2013. His name was never mentioned in any conversation the FBI agents had with any of the other defendants. FBI Undercover Agent Weisman (the fictional wife) testified that the first time she saw Rabbi Stimler was after his arrest. JA 937-38. FBI Undercover Agent Weis (the fictional wife's fictional brother) did not hear the name "Stimler" before the arrest on October 9, 2013. JA 1162-63.

B. Rabbi Stimler's Prospective Role as a Witness Was Different from the Roles of the "Muscle Men."

There is no evidence or any suggestion in any of the recorded discussions preceding October 9, 2013, that the witness ("eid") who would perform the notarial task of signing the prospective "get" would be compensated for that service or would be asked to perform any violent or other illegal act. To the contrary, Rabbi Epstein said on August 14, 2013, in a recorded conversation with the FBI undercover agents in their first face-to-face meeting that a scribe ("sofer" in Hebrew) and two witnesses ("eidim" in Hebrew) would be needed. JA 940-42. He then separately described four or five "muscle guys" who would also be needed. JA 943-43.

Agent Weisman testified that there was no discussion regarding the witnesses ("eidim") who were to sign the "get," but there ***was*** discussion of the additional "muscle guys." JA 945. Agent Weis corroborated this discussion. JA 1163-65. Agent Weis also testified about a meeting with Rabbi Epstein on his porch in which Rabbi Epstein distinguished between the four "muscle men" and the two witnesses. JA 1163.

When the subject of cost was raised by Agent Weis, Rabbi Epstein advised that it was going to cost $10,000 for the Beth Din and $50,000 or $60,000 for the "muscle guys." JA 952, 1166. No one suggested that the witnesses who were to

sign the "get" would be paid anything. JA 952. At the time of the sentencing of Rabbi Epstein, the District Judge, observing that Rabbi Stimler's counsel were present, stated that she "accept[ed] that Rabbi Stimler was taking no money." JA 4976.

C. Rabbi Stimler's Conduct on the Evening of October 9, 2013, Was Consistent With Innocence.

The evidence in the record relating to Rabbi Stimler's conduct on October 9, 2013, does not support a finding beyond a reasonable doubt that he had any knowledge or "unity of purpose" with an attempted kidnapping or a conspiracy to kidnap.

(a) ***He entered separately from most of the "muscle guys"*** **–** The videotape of the warehouse demonstrates that Rabbi Stimler did not enter the warehouse with most of the "muscle guys" who then had a discussion in the warehouse with Undercover Agent Weis regarding possible violence. Rabbi Stimler first entered five to six minutes after the "muscle guys" had entered. JA 1168.

(b) ***He was not wearing a mask when he entered*** **–** Nor was Rabbi Stimler wearing a mask or covering his face when he entered. Undercover Agent Weis testified that he was wearing a "hoody" – i.e., a sweatshirt with a head-covering and sunglasses. JA 1168-69, 1173. FBI Agent Blessington later testified that the

sunglasses were prescription sunglasses (JA 1258-59), indicating that they were not part of a disguise.

(c) ***He went directly to the kitchen*** **–** Rabbi Stimler is shown in the videotape as going to the back room where the men's room and kitchen were located. JA 1170, GX11f. Although he emerged at times, there is no evidence that he participated in or heard any conversation suggesting violence, and Agent Weis testified that he did not "recall discussing violence with Rabbi Stimler." JA 1174. At most, he testified that Rabbi Stimler was "standing nearby" when there was talk of violence, but he did not "know who was listening and who heard anything." JA 1175.

(d) ***He did not cover his face until later*** **–** The videotape demonstrates that Rabbi Stimler did not cover any portion of his face with a balaclava (hooded stocking) until 14 minutes after the tape began – long after the "muscle men" and the undercover agent had initially entered. JA 1172-74. Rabbi Stimler saw no reason to cover his face until he had been in the warehouse for a period of time and saw that others were wearing masks. [3]

(e) ***He was arrested separately from the "muscle guys"*** **–** FBI

[3] The Supreme Court held in *Rosemond v. United States*, 134 S. Ct. 1240 (2014), that to be convicted as an aider-and-abettor a defendant must have advance knowledge of the intended commission of the crime and an opportunity to "withdraw from the enterprise." 134 S. Ct. at 1249. Having entered the warehouse without advance knowledge, Rabbi Stimler had no opportunity to withdraw even if he saw others in the group wearing masks.

Agent McCaffery testified that Rabbi Stimler was arrested in the kitchen, not in the company of the "muscle guys" who were arrested in the central area of the warehouse. JA 1231-32, 1247. The implements to be used in writing the "get" were found in the kitchen, and the scribe and the other witness were arrested there. Rabbi Stimler was waiting in the kitchen to participate in the innocent notarial act of witnessing the "get" once the nonexistent husband authorized it.

(f) ***He did not search the premises with a flashlight*** **–** In his opening statement, the prosecutor asserted that "other kidnap members, including Binyamin Stimler, walked around the perimeter with flashlights to check to see who was around." (JA 508). One FBI agent testified that an individual with a "larger frame" was shining a flashlight on the "fence line" of the warehouse property. JA 1224-26. Another FBI agent testified that when walking to the entrance of the warehouse two individuals were "shining flashlights along the fence." JA 1206, 1209, 1211-12, 1217-18. In the prosecutor's summation he asserted that Rabbi Stimler was the unidentified individual who was using a flashlight to search the premises. JA 4587. In fact, no flashlight was found on the scene when the FBI arrested everyone at the warehouse and conducted a thorough search. One headlamp was found, but it was worn by alleged co-conspirator Potash and was never in Rabbi Stimler's possession. JA 4395-401, Digital Addition to Appendix, GX 11a at 15:15-16:10. Nor did Rabbi Stimler have a cell phone when he was arrested – another

hypothesis suggested by the FBI as a source of light. No reasonable juror could have concluded beyond a reasonable doubt that Rabbi Stimler – not specifically identified by either FBI witness – searched the premises with a flashlight. In fact, he walked innocently, with no flashlight, from the rear parking lot where the driver had parked the van to the entrance of the warehouse.

Rabbi Stimler did not engage in any conduct that demonstrated criminal intent to join a conspiracy to kidnap. His intent was only to be on the scene so that a valid "get" could be written and delivered.

D. Rabbi Stimler Has the Distinctive Qualifications Required by Jewish Law To Be a Signing Witness ("Eid") on a "Get."

Rabbis Goldstein, Ralbag, and Jachter testified that a "get" is valid under Jewish Law only if it is handwritten by a scribe in special calligraphy for the particular named husband and wife and is signed by two qualified witnesses who write their names in the distinctive "get" calligraphy. JA 744-45, 1870, 3633.

(a) Rabbi Ralbag testified that he knows Rabbi Stimler to be a qualified "eid" (witness), and has seen his name signed on "gittin" (plural of "get"). JA 1870.

(b) Rabbi Naftali Stolman testified that Rabbi Stimler had the necessary qualifications to be a witness and had signed on other "gittin." He also testified that Rabbi Stimler had signed as a witness on "gittin" when Rabbi Stolman was the

other witness. JA 3739. The "gittin" that were witnessed by Rabbis Stolman and Stimler were not "forced gets." JA 3744.

(c) Rabbi Stimler's supervisor at the Interborough Developmental and Consultation Center, Marlene Akerman, also testified that she knew that Rabbi Stimler participated as a witness at "gittin." She would permit him to leave early in order to do so. JA 3954-55. These did not involve a recalcitrant husband. *Id*.

Rabbis Goldstein and Ralbag testified that it is a "mitzvah" (religiously obligatory good deed) to participate in the freeing of an "agunah." JA 706, 1878. In Rabbi Ralbag's experience even husbands who are initially recalcitrant often agree, with no actual or threatened violence, to authorize a "get" when they are confronted. JA 1869. Rabbi Stimler's participation as a witness to a "get" that would free an "agunah" is proof only that he was motivated by a religious desire to fulfill a "mitzvah."

E. Character Witnesses Testified that Rabbi Stimler Is Peaceful and Non-Violent and Has a Reputation in Various Communities, Including His Multi-Ethnic Workplace, For Peacefulness and Non-Violence.

Four witnesses testified to their personal opinion of Rabbi Stimler's character trait of peacefulness and non-violence and to his reputation in various communities for peacefulness and non-violence.

(a) Rabbi Stolman, who lives in Brooklyn and is familiar with the Orthodox

Jewish community there, testified that Rabbi Stimler – who he has known for 18 years since they studied together at the rabbinical school – is "a very peaceful person" and that he has a reputation for being "a very peaceful person." JA 3740.

(b) Betsy Littman, who has known Rabbi Stimler for 30 years, testified that he is "a very peaceful person, very calm, very non-violent." JA 3937. In the Kensington section of Brooklyn where he lives Rabbi Stimler has the reputation, according to Ms. Littman, as "a very peaceful and non-violent person." JA 3938. Her opinion is that Rabbi Stimler "would never engage in any violent acts" and she added, in terms that apply particularly to the allegation that he agreed to participate with others planning violence, that he would not join others engaging in violent acts. JA 3939.

(c) Leonard Teller, who has known Rabbi Stimler since childhood and was the match-maker who introduced Rabbi Stimler to his wife, testified that Rabbi Stimler is "absolutely" a peaceful and non-violent person. Teller also described the reputation Rabbi Stimler has in his congregation is as a teacher of peacefulness and non-violence. JA 3945-50.

(d) Rabbi Stimler's supervisor at work, Ms. Akerman, also testified from her daily "interaction" with him at his place of employment, that Rabbi Stimler is "extremely conciliatory and engaging and non-violent or aggressive." JA 3955-56. She testified that her staff (approximately 70 employees servicing "a wide variety

of diverse population and multiple languages") viewed Rabbi Stimler as "an extremely peaceful, engaging, compassionate individual." JA 3957. She summarized it with the Hebrew phrase "rodef shalom" – someone who "pursues and runs after peace." *Id.*

F. Rabbi Stimler Did Not Participate In or Witness the Violence Alleged in Paragraphs 7a and 7b of the Conspiracy Count.

Count Four of the Superseding Indictment charged Rabbi Stimler with participating in an assault on Usher Chaimowitz, a recalcitrant husband, in August 2011. That Count was dismissed by the prosecution at the conclusion of the case (DDE 316), but the District Court permitted the jury to hear and consider the evidence of Menachem Teitelbaum, a roommate of the recalcitrant husband, and of Rabbi Aryeh Ralbag, who had been asked to provide a report to an Israeli rabbinic court regarding the validity of that religious divorce. JA 4116, 4124-25.

The record unequivocally establishes that Rabbi Stimler was not a participant in any of the violence that preceded the writing and signing of the Chaimowitz "get." Menachem Teitelbaum testified in extensive detail regarding the men who, he said, broke into the small room where he and Chaimowitz were asleep on the early morning of August 22, 2011. JA 1390-1404, 1714-17. [4] At no

[4] Although the prosecution listed Chaimowitz, the recalcitrant husband, as a prospective government witness, it did not call him to testify. The District Judge

point in his testimony did Teitelbaum identify anyone resembling Rabbi Stimler as one of the men. On account of his size (he weighs 350 pounds), Rabbi Stimler is not someone who would be overlooked in a small room had he been present. He would have been "the elephant in the room."

Rabbi Stimler's absence during the alleged violence is proved by more than Teitelbaum's failure to describe anyone of his size as an assaulter. Teitelbaum was also asked whether any of the assailants had facial hair. He replied that there was one man with a "white beard," and another individual (a co-defendant whose trial was severed), who covered part of his beard. JA 1392, 1714-16. Teitelbaum identified no assailant with a long brown beard. Rabbi Stimler has a long brown beard.

Moreover, Rabbi Ralbag testified on the basis of recollection refreshed from his notes that he was told that four individuals – Abraham Goldstein, Abraham Goldstein's brother, Simcha Bulmash, and Dov Heiman (David Hellman?) – broke into the room where Chaimowitz was sleeping. JA 1807-08, 1812-13, 1888. No one identified Rabbi Stimler as breaking into the room or being present in the small room during the alleged assault.

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denied defense requests for a "missing witness" instruction on the ground that the defense could have called Chaimowitz as a defense witness. JA 4089-92.

G. <u>Rabbi Ralbag's Testimony Regarding a Statement Allegedly Made to Him by Rabbi Stimler Was Significantly Impeached on Cross-Examination.</u>

Rabbi Ralbag identified the second signature on the Chaimowitz "get" as being Rabbi Stimler's. JA 1819. On cross-examination, Rabbi Ralbag testified that omission from the text of the Chaimowitz "get" of two Hebrew words ("omed hayom") indicated that the "get" was written and signed outside the presence of the husband. JA 1872. Although Rabbi Stimler was at the location where the Chaimowitz "get" was ***written*** on August 22, 2011, he neither witnessed nor participated inthe violence described by Teitelbaum.

Rabbi Ralbag initially testified that, according to his notes, Rabbi Stimler had made a statement indicating that he was present when Chaimowitz initially refused to authorize a "get" and then changed his mind. JA 1820. The weight to be accorded to Rabbi Ralbag's testimony regarding this statement was substantially reduced by the following acknowledgements he made during cross-examination:

(a) that there was no transcript of the testimony given by the witnesses who appeared before Rabbi Ralbag (JA 1880),

(b) that the witnesses were not shown the summary that Rabbi Ralbag wrote of their testimony (JA 1892),

(c) that the testimony was taken in the Ralbag dining room and was interrupted by telephone calls made to Rabbi Ralbag during the proceeding (JA 1879),

(d) that Rabbi Ralbag's personal memory of what Rabbi Stimler actually said before him was only "general" (JA 1881),

(e) that Rabbi Ralbag's inquiry was directed not to whether there was violence during the Chaimowitz "get" but to "the writing of the get and the signing of the get" (JA 1882-83), and

(f) that Rabbi Stimler may have told Rabbi Ralbag what he had heard from others rather than what he personally observed. JA 1883-85. Rabbi Ralbag acknowledged that he did not ask Rabbi Stimler whether his report regarding Chaimowitz's conduct before he authorized the "get" was what he "heard from the husband or . . . what others told you the husband said" (JA 1884). Rabbi Ralbag testified specifically on this point: "If this was told to him by someone else, and he just repeated to me what someone else said, or he said it because he heard it himself, that wasn't the focus of my questioning, and, therefore, I didn't question Rabbi Stimler: Did you hear this from someone else or were you there present when the husband said it." JA 1885.

No reasonable juror could have concluded beyond a reasonable doubt from Rabbi Ralbag's testimony and cross-examination that Rabbi Stimler participated in or personally witnessed any coercion relating to the Chaimowitz "get."

II.

THE CONVICTIONS VIOLATED THE RELIGIOUS FREEDOM RESTORATION ACT

STANDARD OF REVIEW

This Court reviews *de novo* a District Court's construction and application of a federal statute. See *Seamans v. Temple Univ.*, 744 F.3d 853, 859 (3d Cir. 2014) ("Questions of statutory interpretation are also subject to de novo review."), quoting *Fraser v. Nationwide Mut. Ins. Co.*, 352 F.3d 107, 113 (3d Cir. 2003).

A District Court's denial of a criminal defendant's motion for severance is, in the absence of an applicable federal statute, reviewed for abuse of discretion. *See United States v. Lore*, 430 F.3d 190, 205 (3d Cir. 2005); *United States v. Urban*, 404 F.3d 754, 775 (3d Cir. 2005).

* * * * *

This is a highly unusual criminal prosecution because the conduct of all defendants was, in whole or in part, attributable to their religious observance of the Jewish "mitzvah" of relieving the plight of an "agunah." The prosecution did not contend that this was a spurious or fabricated justification. It is, beyond any

question, a long-standing principle of Judaism, a universally recognized religion. The government's argument is only that if a religious ground motivated the defendants, that religious observance was overridden and superseded by the neutral federal law prohibiting attempted kidnapping and conspiracy to kidnap.

It was obligatory for the prosecution and the District Court to address the protection afforded to religious observance by federal law – specifically the Religious Freedom Restoration Act ("RFRA"). For the reasons discussed below, the conviction of Rabbi Stimler must be vacated because the District Court failed to comply with RFRA (a) by denying a separate trial to Rabbi Stimler, who had no pecuniary motive and who had not participated in any violence against recalcitrant husbands, (b) by failing to require the prosecution to demonstrate a "compelling governmental interest" in conducting an elaborate "sting" to apprehend rabbis, (c) by permitting the criminal trial to proceed even though the "sting" and the subsequent criminal prosecution were not the "least restrictive means" of achieving a "compelling governmental interest," and (d) by excluding evidence at the trial of the defendants' "exercise of religion" – *i.e.*, their motivation to assist in securing a Jewish divorce that would alleviate the plight of an "agunah."

RFRA defenses were raised before and during trial. The District Judge rejected all of them, and her opinion on the subject of RFRA is reported as *United States v. Epstein*, 91 F. Supp. 3d 573 (D.N.J. 2015).

A. The Religious Freedom Restoration Act Limits the Federal Government's Authority To Initiate and Pursue Criminal Prosecutions.

The Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1 *et seq.*, prohibits the federal government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the federal government agency "demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RFRA has been successfully invoked to bar a federal criminal prosecution at its inception. The Supreme Court in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), approved an injunction against criminal prosecution of a defendant organization that had a valid RFRA defense.

Following the Supreme Court's *O Centro* decision, the Court of Appeals for the Ninth Circuit considered, on its merits, the RFRA claim of a Native American church that criminal prosecution would substantially burden its religious obligation to use marijuana in a religious ceremony. The Ninth Circuit directed that declaratory and injunctive relief be granted in favor of the church. *Oklevueha Native American Church of Hawaii, Inc. v. Holder*, 676 F.3d 829 (9th Cir. 2012). In *Guam v. Guerrero*, 290 F.3d 1210 (9th Cir. 2002) – a decision that preceded the Supreme Court's *O Centro* ruling – the Ninth Circuit considered the validity of a

motion to dismiss an indictment that allegedly violated RFRA. Although the Ninth Circuit in *Guerrero* ultimately rejected the RFRA claim on its merits, its consideration of the claim at the pretrial motion-to-dismiss stage supports the principle that the effect of a criminal prosecution on religious exercise must be judicially weighed prior to trial, during trial, and after a jury verdict.

B. The District Court Rejected Rabbi Stimler's Pretrial RFRA Claim on the Erroneous Ground That It Was a Claim of "Innocence" That Could Not Be Invoked Before Trial.

Rabbi Stimler was found guilty by the jury after a lengthy trial in which the jury heard (a) lurid testimony regarding beatings imposed on recalcitrant husbands in 2009 and 2010 and (b) recorded statements of potential violence made by co-defendant Rabbi Epstein in meetings with undercover FBI agents that Rabbi Stimler did not attend. It was undisputed that Rabbi Stimler was not present at any meetings in advance of the trip on October 9, 2013, and that he was not asked to commit any violent act. Many days of the lengthy trial that resulted in the convictions being appealed did not concern Rabbi Stimler and were totally irrelevant to his guilt or innocence. Had he been tried separately in a short trial relating only to his presence during the FBI's "sting," the jury's verdict regarding Rabbi Stimler might well have been different.

Before trial, Rabbi Stimler moved under RFRA for dismissal and, alternatively, for a severance of his trial on the ground that forcing him to endure a lengthy trial with highly prejudicial evidence regarding events that did not involve him would, in violation of RFRA, impermissibly burden his exercise of religion and was not the least restrictive means of furthering a compelling governmental interest. DDE 159; JA 244-45, 248-263. In support of the motion, he submitted a declaration by a leading rabbinic authority (also a graduate of the Harvard Law School) that an "eid" to a "get" that frees an "agunah" performs an affirmative religious "mitzvah" (positive commandment), and that performance of this religious observance is burdened by subjecting the "eid" to a prosecution and to a lengthy criminal trial at which much prejudicial evidence that does not relate to his own conduct is presented. DDE 159-3; JA 266-270. The Declaration of Rabbi Yitzchok Breitowitz established that it is a "mitzvah" – an affirmative religious obligation – under Jewish Religious Law and tradition to assist in the freeing of an "agunah" who is "chained" and unable to remarry because her husband is violating the directive of a rabbinical court to give her a "get."

The government's response was that notwithstanding its religious context, this prosecution was no different than any other criminal case and that "there is not a single case in any jurisdiction that says that in a criminal case the Court can go behind the allegations of the indictment and conduct what is in effect a preliminary

hearing to determine the validity of the government's charges." JA 395. The District Judge denied the pretrial RFRA motion on the ground that "your arguments all go to his innocence." JA 425.

After the initial motions were denied, they were renewed with the support of a second affidavit. DDE 219, 219-1; JA 280-285. The renewed motion was also denied. JA 1052-53, 1087.

C. RFRA Requires That Defendants Whose Conduct Is Sincerely Motivated by Religious Exercise Be Treated Differently From Defendants Who Have No Religious Support for Allegedly Criminal Conduct.

RFRA explicitly declares in Section 2000bb-1(c) that an individual with a religious right recognized by RFRA "may assert that violation as a claim ***or defense*** in a judicial proceeding and obtain appropriate relief against a government." (Emphasis added.) The Supreme Court held in its unanimous *O Centro* opinion that an individual asserting a right under RFRA is entitled to have an individual determination made regarding the "application of the burden ***to the person***." (Emphasis added.) 546 U.S. at 430-431. At the very least, the words "to the person" in RFRA require a court to weigh the consequences of the government's proposed action against the effect on the "exercise of religion" of each ***individual defendant***. See *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) ("RFRA contemplates a 'more focused' inquiry and requires the Government to

demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."), quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

If Rabbi Stimler and co-defendants were motivated, in whole or in part, to participate in the conduct generated by the FBI's "sting" in order to perform the "mitzvah" of freeing an "agunah," RFRA precludes prosecuting them as if they had no religious motivation and as if they sought to kidnap an individual and hold him for a monetary ransom. The protection granted by RFRA for religious exercise would be nugatory if the defendants' religious motivation were deemed totally irrelevant. RFRA requires that any prosecution for conduct resulting from the "exercise of religion" acknowledge the religious motivation and establish that it must be overridden by a "compelling governmental interest."

To be sure, an insincere assertion of religious motivation cannot provide immunity from criminal laws. If a claim of religious belief is spurious and has no basis in a universally recognized religion's observance, courts may pierce the assertion of religious conviction. See, *e.g.*, *Theriault v. Silber*, 453 F. Supp. 254 (W.D. Tex. 1978); *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978); *Theriault v. Carlson*, 495 F.2d 390 (5th Cir. 1974). But in this case, an affidavit submitted to the District Court (JA 281-84), as well as trial testimony (JA 1891-92), supported

the defendants' assertions that even extreme measures, including assault, were permissible under contemporary Jewish Law as well as pursuant to authoritative pronouncements made centuries ago to resolve the plight of an "agunah." [5] In light of this essentially undisputed proof that the defendants had such sincere beliefs, the prosecution had to establish to the satisfaction of the District Court and by evidence presented to the jury that a "compelling governmental interest" trumped this religious observance.

D. The Defendants' RFRA Rights Were Violated by This Criminal Prosecution.

This prosecution grew out of an FBI "sting" aimed at rabbis and others who were motivated in substantial part by the desire to engage in a commendable objective ("mitzvah") defined by Jewish Religious Law – freeing an "agunah" who was unable to remarry because a recalcitrant husband refused to authorize a "get." Criminal prosecution of defendants who were engaged in performance of a religiously encouraged duty obviously burdens the exercise of religious observance. Not only were the defendants subjected to the severe burden of a

[5]The defendants' goal was not to engage in kidnapping but rather to convince the recalcitrant spouse to grant the religious divorce. Jewish Law may permit extreme measures, but that does not mean that the defendants intended to resort to violence. Mere confrontation of a recalcitrant husband is frequently sufficient to persuade him to authorize a "get."

lengthy public jury trial, but they have been sentenced to long prison terms that are already being served while this appeal is pending.

All courts, including the United States Supreme Court, agree that RFRA grants even greater protection for religious exercise than the Supreme Court had recognized under *Sherbert v. Verner*, 374 U.S. 398 (1963), before it decided *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2772 (2014), where the Supreme Court rejected the contention that "RFRA did no more than codify this Court's pre-*Smith* Free Exercise Clause precedents."

Under the terms of RFRA the federal government may pursue a criminal or civil proceeding that will substantially burden religious exercise only if government counsel establish ***both*** that the burden thereby imposed on the exercise of religion "is in furtherance of a compelling governmental interest" and that the government has chosen "the least restrictive means of furthering that compelling governmental interest."

The RFRA restriction against unjustified burdens on religious exercise was interpreted broadly by the Supreme Court of the United States in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). The Court's majority opinion assumed that a governmental interest in guaranteeing cost-free access to certain

contraceptive methods was "compelling," but it determined that the government's means was not the "least restrictive." 134 S. Ct. at 2779-2783.

The two-pronged RFRA test was applied by the Court of Appeals for the Ninth Circuit in cases testing whether prosecutions under the Bald and Golden Eagle Protection Act (16 U.S.C.§ 668(a)) could be maintained against defendants who claimed that they took bald eagles without a permit for religious-observance purposes. *United States v. Friday*, 525 F.3d 938 (9th Cir. 2008); *United States v. Hugs*, 109 F.3d 1375 (9th Cir. 1997). The Court of Appeals for the Tenth Circuit considered a similar RFRA contention in three cases that were consolidated for *en banc* consideration in *United States v. Hardman*, 297 F.3d 1116 (10th Cir. 2002). In its *Hardman* decision the Court upheld the RFRA claim of one Native American and remanded the other two cases for a determination by the District Courts on the "least restrictive means" prong. Following a District Court ruling that the permit process was not the "least restrictive means" (606 F. Supp. 2d 1308 (D. Utah 2009)), the Court of Appeals held that the regulatory scheme "is the least restrictive means of forwarding the government's compelling interests." 638 F.3d at 1295. Had the Tenth Circuit affirmed the District Court's conclusion, it would have vacated the defendant's conviction.

Disagreeing with the Ninth and Tenth Circuits, the Court of Appeals for the Fifth Circuit held in *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465 (5th

Cir. 2014), that the Interior Department's permit system, enforceable with criminal penalties, for protecting bald eagle feathers did not satisfy the "least restrictive alternative" component of RFRA's two-part test. [6]

These reported precedents establish that once a criminal defendant demonstrates that a criminal prosecution would substantially burden his or her exercise of religion, the prosecution may not proceed against ***the particular named defendant*** as it would proceed criminally against a defendant who is not motivated,

[6] Consideration of RFRA claims made by criminal defendants has not been limited to Native Americans charged with violating the Bald and Golden Eagle Protection Act. *United States v. Bauer*, 84 F.3d 1549 (9th Cir. 1996) – decided before the Supreme Court's ruling in *O Centro* – concerned the prosecution of Rastafarian defendants charged with conspiracy to manufacture and distribute marijuana. The Ninth Circuit applied RFRA – which was then viewed as a "new" statute (84 F.3d at 1557) – to the defendants. It did "not exclude the possibility that the government may show that the least restrictive means of preventing the sale and distribution of marijuana is the universal enforcement of the marijuana laws," but it added that "[u]nder RFRA, however, the government had the obligation, first, to show that the application of the marijuana laws to the defendants was in furtherance of a compelling governmental interest and, second, to show that the application of these laws ***to these defendants*** was the least restrictive means of furthering that compelling governmental interest." 84 F.3d at 1559 (emphasis added). The Supreme Court in its subsequent *O Centro* opinion confirmed the validity of the Ninth Circuit's approach in *Bauer*. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-431 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened."). See also *United States v. Christie*, 2013 WL 6860818 (D. Hawaii Dec. 30, 2013), 2013 WL 6860822 (D. Hawaii Dec. 30, 2013); *United States v. Martines*, 903 F. Supp. 2d 1061 (D. Hawaii 2012); *United States v. Forchion*, 2005 WL 2989604 (E.D. Pa., July 22, 2005).

in whole or in part, by religious conviction. Prosecutors must satisfy the District Court that the decision to file criminal charges, as well as the nature of the evidence that is admitted and excluded, further a compelling governmental interest and are also the "least restrictive means" of furthering that interest. See Davidson, "United States v. Friday and the Future of Native American Religious Challenges to the Bald and Golden Eagle Protection Act," 86 Denv. U. L. Rev. 1133 (2009); "The First Amendment and Eagle Feathers: An Analysis of RFRA, BGEPA, and the Regulation of Indian Religious Practices," 55 S.D. L. Rev. 528 (2010).

The District Judge failed to require the prosecutors to carry the burden imposed by RFRA. Initiating a "sting" to lure these defendants and prosecuting them while excluding all evidence of their religious motivation neither furthered a compelling governmental interest nor satisfied the "least restrictive means" standard. [7]

[7] If deterrence of possible future efforts to use violent means to coerce recalcitrant husbands to authorize the writing of a "get" were, indeed, a "compelling governmental interest," this conduct could readily have been deterred by less restrictive means than the elaborate, expensive, and morally dubious "sting" utilized by the FBI. Had the Office of the Attorney General of the United States or the Offices of the United States Attorney for the District of New Jersey (or the Eastern or Southern Districts of New York) issued a public statement warning that anyone who used force or attempted to use force to coerce a "get" would be prosecuted in a federal criminal prosecution, the conduct described in the Superseding Indictment would have been effectively deterred. It was not necessary to fabricate an "agunah" and her brother, conjure up a nonexistent recalcitrant husband, deceive the Beth Din of America, and forge religious documentation to

E. <u>The Exclusion of All Evidence Regarding the Religious Motivation of Rabbi Stimler and Other Defendants Violated RFRA.</u>

The prosecution repeatedly made the curious assertion that it was improper to defend against the Superseding Indictment by demonstrating the religious motivation of the defendants, including that of Rabbi Stimler, who had no pecuniary motive. The prosecutors claimed in a 5-page letter that presenting evidence of religious motive was equivalent to seeking "jury nullification." [8] DDE 322; JA 5095. The same contention was made orally by the prosecutor in an objection to the concluding sentence of the opening statement by Rabbi Stimler's counsel. JA 182-83.

Proof of Rabbi Stimler's religious motivation was not a call for "jury nullification." It was a lawful expression of the right protected by RFRA. Excluding proof of religious motivation violated RFRA because it enabled the government to win a criminal conviction even if the defendants' motive was primarily or exclusively to engage in the "exercise of religion" protected by RFRA. The prosecution never proved that there was a "compelling interest" that justified

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deter otherwise law-abiding rabbis who believed they were performing a commendable religious service.

[8] One can wonder why a New Jersey, jury with miniscule Jewish representation would accept the beliefs of Orthodox Jews living in Brooklyn that recalcitrant husbands were "blameworthy" as grounds for "nullifying" a criminal kidnapping law.

creating a "sting" with a fictional "agunah" and a nonexistent husband to apprehend Orthodox Jews who were seeking to perform a "mitzvah." Nor did the prosecution demonstrate that this law-enforcement technique was the "least restrictive alternative" that the government could devise to achieve its interest.

The District Court barred every effort by the defense to introduce evidence of the religious motivation of Rabbi Stimler and Rabbi Epstein. JA 4, 57, 1087. In a bench conference during the defendants' opening statements, the prosecutor declared, "It's the government's position that it is not going to be a defense in this case that the defendants believed their conduct to be permitted or even encouraged under halachic law." JA 552. The District Court excluded all evidence of religious motivation and explained, "I honestly believe that if there is not a RFRA claim here, there is no relevance to the argument that they had an honestly held belief." JA 554. This was the rationale for excluding all evidence relating to the defendants' religious motive.

The same restriction applied to defense summations. Rabbi Stimler's attorney was not permitted to argue that his motive was to achieve a "get" and free an "agunah" rather than to join a conspiracy to commit a kidnapping. JA 4446-47. Counsel's general concluding request for a verdict of not guilty was characterized repeatedly by the prosecutor as "a clear request for jury nullification." JA 4449, 4451-52.

Over defense objection, the jury was instructed that "an individual's religious beliefs, even if sincerely held, cannot absolve him of liability for any of the offenses charged in the indictment if the Government proves beyond a reasonable doubt all of the elements of those offenses." JA 4138. This total embargo on all evidence of the religious motive that explained Rabbi Stimler's presence in Edison on the evening of October 9, 2013, was, in effect, a directed verdict of guilty by the District Judge and a clear violation of RFRA.

An accused should be permitted under RFRA to present evidence of his or her religious motivation to explain conduct that appears to be criminal. According to a report in *The Washington Post* of August 3, 2016 (page B1-http://goo.gl/Zr5Zxnz) and a report in the *Loudoun Times-Mirror* (http://goo.gl/G02ECF) a priestess of the Santerian faith was tried in the Circuit Court of Loudoun County, Virginia, on misdemeanor charges of animal cruelty for having decapitated roosters as animal sacrifices. *State v. Carrion*, Loudoun County Circuit Court, No. 00029189-00. Compare *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). An expert in the Santerian faith testified at her trial, as did she. Evidence regarding her religious observance and its relation to the allegedly criminal conduct was not excluded.

No "sting" was conducted in Virginia to lure Santerians into violations of local statutes prohibiting animal cruelty. The defendant in the Loudoun County

case was permitted to present evidence regarding her religious observances. She was found guilty and given a suspended sentence after a non-jury trial. By contrast, the defendants in the present case were lured into commission of an attempted kidnapping, denied an opportunity to explain the religious motivation for their actions, and sentenced to long prison terms.

With respect to the limitation imposed by the District Court on proof of religious motivation, we also adopt and incorporate by reference, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, the argument in the Brief for Rabbi Epstein that discusses how this restriction, even apart from RFRA, violated the defendant's rights to a fair trial.

III.

THE FBI'S "STING" WAS UNCONSTITUTIONALLY OUTRAGEOUS

STANDARD OF REVIEW

In deciding whether a prosecution is "outrageous," this Court "review[s] the District Court's factual findings for clear error, and give[s] plenary review to its legal conclusions." *United States v. Dennis*, 2016 WL 3457652 (3d Cir. June 24, 2016); *United States v. Christie*, 624 F.3d 558, 572 (3d Cir. 2010).

* * * *

A. The Government's Conduct Was an Egregious Violation of Due Process Standards.

A fundamental flaw in this prosecution requires dismissal of all charges against defendants who were convicted of participation in the trip to Edison, New Jersey, generated by the FBI's "sting." Following the jury verdict, Rabbi Stimler moved for dismissal of all charges because the FBI's "sting" – the ***only*** charge on which guilty verdicts were returned and many pleas were entered – violated fundamental fairness standards that were articulated by this Court in 1978 and were repeated recently by Judge Ambro in his separate opinion in *United States v. Dennis,* No. 14-3561, 2016 WL 3457625 (3d Cir. June 24, 2016).

In *United States v. Twigg*, 588 F.3d 373 (3d Cir. 1978), this Court vacated convictions because it found that the conduct of the DEA "reached 'a demonstrable level of outrageousness'" that should not be countenanced by a court. The Court relied on Judge Hastie's decision in *United States v. West*, 511 F.2d 1083, 1085 (3d Cir. 1975), which reversed a conviction described by Judge Hastie in terms that fit this case: "[I]t puts the law enforcement authorities in the position of creating a new crime for the sake of bringing charges against a person they had persuaded to participate in wrongdoing."

The Ninth Circuit had reached a similar result in *Greene v. United States*, 454 F.2d 783 (9th Cir. 1972), because a combination of factors led the Court to

conclude that the government had "become enmeshed in criminal activity, from beginning to end." 454 F.2d at 787. The Ninth Circuit held that the government's "*creative* activity" (emphasis original) was "more intense and aggressive" than in "numerous entrapment cases we have examined." *Id.*

In this case the FBI agents (a) concocted a hypothetical crime, (b) forged a religious marriage certificate, (c) made repeated phony representations so as to induce the Beth Din of America, a respected religious institution, to issue three summonses to a fictional nonexistent "husband," (d) fraudulently induced the Beth Din of America to issue a contempt citation signed by a rabbi who is the chief justice of that ecclesiastical court, (e) brandished these false documents while "trolling" in rabbinic waters until they found vulnerable rabbis, (f) rejected a rabbi's initial suggestion that there was no need for violence because the recalcitrant husband could be "paid off," (g) exploited the rabbi's religious convictions by exaggerated false emotional displays, (h) selected a location for an attempted kidnapping, and (i) encouraged and participated in preparation for violence and attempted kidnapping.

In these circumstances the government conduct that produced the jury's guilty verdict was "outrageous," and fundamental fairness requires that any conviction resulting from it be vacated.

B. The Government's Conduct in This "Sting" Was More Outrageous Than Its Conduct in "Reverse Sting Stash House" Cases That Have Resulted in Recent Dismissals of Criminal Charges.

The *Chicago Tribune* of January 29, 2015, reported: "Federal prosecutors in Chicago have quietly dropped narcotics conspiracy charges against more than two dozen defendants accused of ripping off drug stash houses as part of controversial undercover stings that have sparked allegations across the country of entrapment and racial profiling." The full article in the *Chicago Tribune* and a similar report in the *New York Times* appear at DDE 370-75; JA 5103.

One similar prosecution recently reached this Court in *United States v. Dennis*, 2016 WL 3457652 (3d Cir. 2016). While the majority opinion reversed the conviction because refusal of an entrapment instruction was error, Judge Ambro warned of the consequences when "the power to create crimes is employed without constraints." The Eighth Circuit in *United States v. Combs*, 2016 WL 3595641(8th Cir. July 5, 2016), recently rejected a challenge to an ATF "reverse sting" because, on the record in that case, the defendant "was part of . . . an established home-invasion robbery crew" and the "sting" was designed to "facilitate commission of an offense by a pre-existing robbery crew." Hence the ATF conduct did "not shock a universal sense of justice."

The Eighth Circuit did note, however, that "our cases have left open the possibility that, in rare instances, the investigative methods employed by law enforcement could be 'so outrageous that due process bars the government from invoking the judicial process to obtain a conviction,'" quoting *United States v. King*, 351 F.3d 859, 867 (8th Cir. 2003). The Court also relied on the Supreme Court's observation in *United States v. Russell*, 411 U.S. 423, 432 (1973), condemning government actions "violating that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause."

In *United States v. Black*, 733 F.3d 294 (9th Cir. 2013), the Ninth Circuit rejected an "outrageous government conduct" challenge to a "reverse sting operation" that the ATF created to ensnare individuals who were willing "to carry out an armed robbery of a (fictional) cocaine stash house." 733 F.3d at 297-298. In the *Black* case, the ATF hired a confidential informant who was assigned to "try and find some people that . . . are willing to go commit a home invasion." 733 F.3d at 299. That assignment paralleled the assignment of the undercover FBI agents in this case – to try and find "some people" who are willing to commit a kidnapping in order to secure a get for an "agunah."

The efforts made by the ATF to find a suitable target and the false representations made to the target when one was identified are comparable to the conduct of the FBI in this case. See 733 F.3d at 298-301. The Ninth Circuit noted

that the ATF operation differed in two respects from the usual law enforcement tactics that have been held reasonable: *First*, "[t]he crimes of conviction . . . resulted from an operation created and staged by ATF. Most of the hard evidence against the defendants consisted of words used at meetings . . . . [D]efendants were responding to the government's script." 733 F.3d at 303. *Second*, "how the government recruited these defendants. ATF was not infiltrating a suspected crew of home invasion robbers, or seducing persons known to have actually engaged in such criminal behavior. Rather, ATF found Simpson by 'trolling for targets.'" *Id*.

These two distinctions from usual law-enforcement tactics were present in this case. The operation was "created and staged" by the FBI, and the "hard evidence" (emphasized over and over by the prosecution's presentation of Rabbi Epstein's words on videotape) "consisted of words used at meetings" which were responses to "the government's script." And, as clearly emerged from the trial testimony, the FBI Agents "trolled for targets." They were not "infiltrating a suspected crew" of kidnappers. They went first to ORA, then to the Beth Din of America, then to Rabbi Wolmark, and they finally contacted Rabbi Epstein.

The Ninth Circuit in *Black* articulated standards for determining whether government conduct in such a "sting" should be considered "outrageous" and require a fundamental fairness reversal of a conviction. Application of those standards – set out at pages 303-310 of the *Black* opinion – warranted the Ninth

Circuit's affirmance of the conviction of defendants charged as a result of the *Black* "sting." In this case application of the same standards requires reversal:

(1) There was no "individualized suspicion" when the "sting" began of one or more defendants. Rabbis Wolmark and Epstein were discovered only after the unfruitful ORA and Beth Din of America probes.

(2) The principal target – Rabbi Epstein – had no "criminal background or propensity" and the FBI learned of his involvement in other alleged kidnappings ***after*** it first contacted him.

(3) The government "approached the defendant initially" and "proposed the criminal enterprise."

(4) The government "encouraged [the] defendant to participate in the charged conduct" and exerted "pressure or concern" by exploiting Rabbi Epstein's religious convictions regarding a desperate "agunah."

(5) The "duration of the government's participation in [the] criminal enterprise" was not "short-term government involvement" but extended from "start to finish."

(6) There was "particularly offensive conduct taken by the government" in creating a false religious wedding contract and in lying to a religious judicial body to obtain a rabbinic order that appeared to warrant extraordinary relief.

The standards articulated in the recent Ninth Circuit opinion in *Black* are substantially identical to those applied by this Court in *Twigg.* If those standards are applied to the facts of this case, the FBI's "sting" must be held to have crossed the constitutional line.

A final factor that makes the "sting" in this case particularly reprehensible is the government's exploitation of the defendants' religious obligations. The FBI counted on the religious observance of Orthodox Jews when it approached Rabbis Wolmark and Epstein (as well as ORA and the Beth Din of America) and sought to lure them into the commission of an offense. The FBI knew that Orthodox Jews – and particularly rabbis familiar with the centuries-old Jewish problem of "agunot" – would be susceptible to the pleas of a woman who could not marry and have children. In *Twigg* and *Black* and in all reported "outrageous government cases" the motivation for the conduct that produced a conviction was pecuniary – the target found by the government agents managing the "sting" succumbed to the government agents' suggestion in order to make money. In the present case, the principal motivation of all defendants who were ensnared by the "sting" was the religious obligation to free an "agunah."

C. The Motion for Acquittal on Grounds of "Outrageous Government Conduct" Was Timely Because Relevant Facts Were Not Known Before Trial.

When the "outrageous" character of the government's conduct is known by the defendants before trial, this Court has held that a motion based on outrageous government conduct is waived if not made before trial. See *United States v. Salahuddin*, 765 F.3d 329, 350 (3d Cir. 2014); *United States v. Pitt*, 193 F.3d 751, 760 (3d Cir. 1999); see also *United States v. Mausali*, 590 F.3d 1077, 1080-81 (9th Cir. 2010). But the decisions requiring the motion to be made before trial have been limited to situations in which the facts constituting "outrageousness" were known to the defendant before trial. *Salahuddin*, 765 F.3d at 350 ("Cooper has presented no explanation or excuse for his failure to present these arguments prior to trial. He had sufficient opportunity to do so, as the evidence upon which he now relies in support of these claims was available to him well before trial."); *Pitt*, 193 F.3d at 760 ("[T]he necessity for the pretrial motion to dismiss is obvious unless the evidence supporting the claim of outrageous government conduct is not known to the defendant prior to trial."); *Mausali*, 590 F.3d at 1081 ("Defendant has offered no explanation whatsoever, and we find none in the record. Defendant knew of the factual basis supporting his claim at least six months before trial began, when the indictment issued.")

Detailed facts regarding this "sting" first emerged at trial. At trial, the defense learned details of the origin of the "sting" and the convoluted route by which the FBI undercover agents found Rabbis Wolmark and Epstein. Trial testimony showed that the FBI agents went searching for a rabbi whom they could ensnare with their concocted story, first probing ORA and then the Beth Din of America. Not until Special Agents Weisman and Weis testified did the full picture emerge of the repeated efforts by FBI Agents Weisman and Weis to persuade Rabbi Epstein that the situation was dire. The full picture of the FBI agents' "over involvement" in creating and executing the attempted kidnapping was not known by defense counsel before the facts emerged during trial.

Moreover, the acquittal of all defendants on Counts 2 and 3 and the dismissal of Count 4 justifies closer examination of the "sting," which is the only factual basis for the guilty verdicts on Counts 1 and 5. Before trial it was assumed (a) that the husbands who, according to the prosecution, had actually been kidnapped were credible, and (b) that the prosecution could prove that Rabbi Epstein had been guilty of prior kidnappings. Hence the contention that the "sting" was "outrageous" had much less force than after a jury verdict that rejected the testimony of the recalcitrant husbands and found Rabbi Epstein not guilty of

Counts 2 and 3.[9] The jury apparently did not believe prosecution witnesses Markowitz and Bryskman, who were recalcitrant husbands allegedly assaulted. It would similarly have disbelieved Usher Chaimowitz if the prosecution had ventured to put him on the witness stand.

Following the jury verdict, the relevant issue is not whether the FBI had some legitimate basis for seeking to lure into a fictional attempted kidnapping an individual who had engineered or participated in three earlier kidnappings – which is how the charges looked before trial. It is, rather, whether an elaborate FBI

[9] The prosecutor's opening statement asserted that the conspirators had committed kidnappings in 2009, 2010, and 2011, and were subsequently caught in 2013 by an FBI "sting." See JA 496:

> You are going to hear as part of this conspiracy in 2009, the defendants and their co-conspirators lured a man named Israel Markowitz from Brooklyn, New York. They grabbed him, they tied him up and they threw him in a car, and beat him until he did what they wanted him to do. You are going to hear in 2010 the defendants and their co-conspirators lured a man named Yisrael Bryskman from Brooklyn, New York, to Lakewood, New Jersey. They grabbed him, they handcuffed him, and they beat him until he gave them what they wanted. You are going to hear in 2011 the defendants and their co-conspirators broke into the apartment of two men, Usher Chaimowitz and Menachem Teitelbaum. They grabbed them. They tied them up, and they beat them both until Chaimowitz gave them what they wanted. And you are going to hear in 2013, the defendants and their co-conspirators planned to kidnap an undercover FBI Agent in connection with this FBI operation.

The government's dismissal of Count 4 and the jury's verdict on Counts 2 and 3 eradicated the purported three-year justification for the "sting."

"sting" that ensnared rabbis with unblemished past histories violates principles of fundamental fairness.

IV.

THE DISTRICT JUDGE'S ERRONEOUS RESPONSE TO A JURY QUESTION PLAINLY DIRECTED TO THE EVIDENCE REGARDING RABBI STIMLER PREJUDICED THE JURY'S VERDICT

STANDARD OF REVIEW

If an instruction or failure to instruct "involves a matter of law," this Court's review is "plenary." *United States v. Wright*, 921 F.2d 42, 44 (3d Cir. 1990).

* * * *

On April 16, 2015 – the third day of its deliberations – the jury sent in Note #3 (DDE 334, JA 4853). It stated:

> Judge Wolfson, We need clarification on the kidnapping charge. If you know that someone is being confined against their will and they do not intervene, does that fulfill element #1 of kidnapping.

After in-chambers discussion with counsel, during which Mr. Stern, Rabbi Stimler's attorney, maintained that the proper response should be "No," the Court responded to the jury in writing as follows (DDE 334, JA 4954):

> I have interpreted your question as to referring to the kidnapping counts 2 and 3. If that is accurate, then the answer to your question is no. If, however, you are inquiring about any other count, please so indicate, so that I may more fully consider your question and answer appropriately.

This response erroneously implied to the jury that a defendant could be found guilty of conspiracy to kidnap (Count 1) and attempted kidnapping (Count 5) if he did not "intervene" to prevent a kidnapping, although a similar failure to "intervene" could not be the basis for a guilty verdict on charges (Counts 2 and 3) alleging actual kidnappings. The jury may have implemented this erroneous statement of the law. While acquitting all defendants on Counts 2 and 3 it found Rabbi Stimler guilty on Counts 1 and 5 – possibly because it concluded that he had failed to "intervene."

The error in the Court's response is manifest, and it was noted on the record by Rabbi Stimler's counsel. JA 4608-09. An accused who stands by and does not "intervene" when a crime is being committed is not guilty of the crime. His passive presence is not sufficient to make him criminally liable for conduct committed by others. *E.g.*, *United States v. Mercado*, 610 F.3d 841, 846 (3d Cir. 2010) ("Neither mere presence at the scene of the crime nor mere knowledge of the crime is sufficient to support a conviction."); *United States v. Garth*, 188 F.3d 99, 113 (3d Cir. 1999); *United States v. Dixon*, 658 F.2d 181, 189 (3d Cir. 1981), quoted in *United States v. Soto*, 539 F.3d 191, 194 (3d Cir. 2008).

The Court's response, insofar as it concerned Counts 2 and 3, was plainly correct. Count 5 alleged no actual kidnapping but only participation in a "sting" being performed by law-enforcement agents. An accused's failure to "intervene"

with an ***attempted kidnapping*** cannot make him ***more*** culpable than if there had been a real kidnapping. The same is true of the conspiracy alleged in Count 1. If a conspirator to a real kidnapping is not guilty if his only participation in the conspiracy is a failure to "intervene" in an actual kidnapping, it follows, *a fortiori*, that he cannot be found guilty of conspiring to attempt a kidnapping simply because he is present and fails to "intervene."

Rabbi Stimler's attorney noted his objection on the record, stating that the correct answer to the jury's question as to all counts should be either "No" or "No, there is no duty to intervene or rescue." JA 4609. Counsel added that "[a]t the very least" the "language specifying Counts 2 and 3" should be removed because the jury would "draw an inference" from that language. *Id.* All other defense counsel joined in the objection, two counsel making specific reference to the difference between Counts 2 and 3 on the one hand and Counts 1 and 5 on the other. JA 4609-10.

The jury appears to have drawn precisely the erroneous inference that Mr. Stern and other defense counsel had noted. The jury understood the Court's response as meaning that they could find all defendants not guilty on Counts 2 and 3 but could find Rabbi Stimler guilty on Counts 1 and 5 if he failed to "intervene" to prevent an attempted kidnapping.

The error was particularly prejudicial with respect to Rabbi Stimler. Which defendant could be viewed as having done nothing more than failing to "intervene?" Only Rabbi Stimler. He was the only defendant who, the prosecution argued, should be convicted of aiding and abetting. JA 4071, 4132-34. Moreover, several of the jury's later questions appeared to be directly addressed to Rabbi Stimler's guilt or innocence. For example, on the last day of deliberations, about two hours before the jury announced it had reached a verdict, it sent a question to the Judge asking about the aiding and abetting charge. DDE 348; JA 5101. See also DDE 342; JA 5100 (asking for the Ralbag testimony). Indeed, the Court explicitly noted that the answer to the jury's question with respect to Counts 1 and 5 was "more nuance[d]" with respect to the aiding and abetting charge against Rabbi Stimler. JA 4608. On this ground Rabbi Stimler should be granted a new trial.

CONCLUSION

The judgment of conviction against Appellant Binyamin Stimler on Counts One and Five should be reversed with instructions to enter a judgment of acquittal or, alternatively, for a new trial.

August 5, 2016

Respectfully submitted,

s/Nathan Lewin

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COMBINED CERTIFICATION

I, Nathan Lewin, whose name appears on the forgoing Brief for the Appellant Binyamin Stimler, certifies as follows:

Certification of Admission-Bar Membership

I am admitted to practice before the United States Court of Appeals for the Third Circuit and am a member in good standing.

Certification of Compliance with Federal Rule of Appellate Procedure 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 12,734 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 point Times New Roman font.

Certification of Service upon the Court and Counsel

I have filed and served the Brief for the Appellant Binyamin Stimler upon all counsel by CM/ECF.

I will send seven hard copies of the Brief for the Appellant Binyamin Stimler by Federal Express to the Office of the Clerk within five days of electronically filing .

Certification of Identical Compliance and Virus Check Pursuant to Rule 31.1

The text of the brief filed electronically on August 5, 2016, and the text of the hard copies sent to the Office of the Court Clerk are identical.

A virus check using Webroot was performed on the electronically filed brief and no viruses were detected.

August 5, 2016 s/Nathan Lewin