UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Hon. William H. Walls, United States District Judge
v.	:	
KELVIN L. JONES a/k/a "Mike Smith"	:	Crim. No. 10-366 (WHW)

TRIAL MEMORANDUM OF THE UNITED STATES

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TABLE OF CONTENTS

PRELIMINARY STATEMENT

The United States respectfully submits this memorandum pertaining to evidentiary issues that may arise during trial. An overview of the pending charges and details regarding the governing substantive law can be obtained from reading the United States' Requests to Charge as well as the underlying Superseding Indictment. The United States requests leave to supplement this memorandum if other issues arise during the trial.

I. SELF-AUTHENTICATING BUSINESS RECORD/PUBLIC RECORD CERTIFICATIONS

The United States may seek to admit certain documents and records under the business record exception to the hearsay rule. The business record exception authorizes the admission of:

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by . . . a certification that complies with [Federal] Rule [of Evidence] 902(11) . . . .

FED. R. EVID. 803(6). The rule permits the introduction of business records "without foundation testimony from the record custodian so long as the records are authenticated according to FED. R. EVID. 902(11)." United States v. Klinzing, 315 F.3d 803, 805 (7th Cir. 2003). Under Rule 902(11), those foundational requirements are that:

> (1) the record was prepared in the normal course of business;
>
> (2) the record was made at or near the time of the event it records;
>
> (3) the declarant had knowledge to make accurate statements; and
>
> (4) the records were regularly kept in the normal course of business.

FED. R. EVID. 902(11); United States v. Console, 13 F.3d 641, 657 (3rd Cir. 1993). A written declaration by a qualified custodian is sufficient. Klinzing, 315 F.3d at 805. As a prerequisite to

admission, the offering party must provide written notice of this intention, and must make the record and certification/declaration available for inspection sufficiently in advance of trial. FED. R. EVID. 902(11).

Similarly, the Federal Rules of Evidence carve out an exception for public records and reports, which include:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report . . . .

FED. R. EVID. 803(8). Not only are such public records excepted from the hearsay rule, but these records are self-authenticating when certified as a copy of an official public record. See FED. R. EVID. 902(4).[1] The proponent must only ensure that the offered record is a "copy of an official record or report or entry . . . or of a document authorized by law to be recorded or filed in a public office . . ." Id.

In the case at bar, the United States may seek to offer certain documentation under one or both of these hearsay exceptions without the testimony of a custodial witness.

[1] No parallel notice requirement exists when offering certified public records without a witness.

II. **INTRINSIC EVIDENCE AND/OR 404(b) EVIDENCE**

The United States intends to introduce the following evidence during its case-in-chief as evidence intrinsic to the crimes charged, and/or appropriate evidence of other crimes, wrongs and bad acts under Federal Rule of Evidence 404(b):

A. The Brooklyn Robbery

In or about August 2009, the defendant, a police officer with the New York City Police Department ("NYPD") at the time, together with Richard LeBlanca ("LeBlanca") and Brian Checo ("Checo"), who also were NYPD officers, and Orlando Garcia ("Garcia"), a former NYPD officer, and Luis Reyes ("Reyes"), Danny Bannout ("D. Bannout") and Alan Bannout ("A. Bannout"), conspired to commit and committed the armed robbery of an industrial warehouse in Brooklyn, New York. The warehouse contained sneakers, purses and other items (hereinafter, "the Brooklyn Robbery"). Prior to the date of the Brooklyn Robbery, the defendant recruited Checo and LeBlanca who, in turn, recruited Garcia and Reyes, to rob this warehouse. The defendant instructed LeBlanca and Checo to bring their NYPD police badges and handcuffs to the robbery, and the defendant, LeBlanca and Checo all brought guns with them. The defendant and others had earlier surveilled the location to gather information to assist in effectuating the planned robbery.

On the day of the Brooklyn Robbery, the defendant, LeBlanca, Checo and Garcia met in New York City and traveled in their personal vehicles to an industrial area in Brooklyn to commit the robbery. When they arrived at the warehouse, other members this conspiracy were present there, including D. Bannout and A. Bannout. The defendant, LeBlanca and Checo, who wore his NYPD raid jacket at the time, all entered the warehouse while carrying their weapons, displaying NYPD badges and identifying themselves as law enforcement. Garcia and Reyes entered shortly thereafter.

Upon entering the warehouse, the conspirators encountered approximately six employees, all of whom were corralled into the warehouse office at the defendant's direction. Each employee was restrained with handcuffs by Jones, LeBlanca and Checo, while Garcia, Reyes and others removed the employees' wallets and identification cards. During the robbery, one conspirator read aloud from computer printouts, provided to him by the defendant, that contained certain personal information about some of the employees. After the employees were restrained, other members of the robbery crew loaded rental trucks, with the assistance of day laborers hired to assist in moving the boxes, driven to the warehouse with boxes of merchandise stored at the warehouse. Thereafter, the defendant paid Checo and Garcia approximately $4,000 in cash for their participation in this robbery. The United States further intends to present evidence that the

individual who purchased the bulk of the merchandise stolen from the Brooklyn Robbery informed the defendant and others, in substance and in part, that he would be interested in purchasing stolen perfume in bulk quantities, if available. Approximately six months after the Brooklyn Robbery, the defendant approached members of the robbery crew from the Brooklyn Robbery, and recruited them to participate in the charged robbery by telling them, in substance and in part, that it would happen the same way as the Brooklyn Robbery. The proffered evidence of the Brooklyn Robbery is intrinsic to the charges that the defendant now faces. Alternatively, testimony to this effect is admissible as 404(b) evidence.

Federal Rule of Evidence 404(b) does not extend to evidence of acts which are "intrinsic" to the charged offense. Fed. R. Evid. 404(b), Advisory Committee Notes to 1991 Amendments, ("The amendment does not extend to evidence of acts which are 'intrinsic' to the charged offense."); United States v. Cross, 308 F.3d 308, 319 (3d Cir. 2002), cert. denied 523 U.S. 1076, 118 S. Ct. 1519 (1998)(citing Fed. R. E. 404(b) Advisory Committee note, supra); United States v. Gibbs, 190 F.3d 188, 217-18 (3d Cir. 1999).

Courts have explained that intrinsic evidence is admissible notwithstanding Fed. R. Evid. 404(b) because the jury must be permitted to "view and consider the entire circumstances

surrounding an alleged offense," United States v. Smith, 930 F.2d 1081, 1087 (5th Cir. 1991), so that it "may evaluate all of the circumstances under which the defendant acted." United States v. Navarro, 169 F.3d 228, 233 (5th Cir. 1999). See also United States v. Sriyuth, 98 F.3d 739, 747 (3d Cir. 1996), cert. denied, 519 U.S. 1141 (1997)(stating "without [the intrinsic evidence], her actions in this case make no sense"); United States v. Royal, 972 F.2d 643, 647 (5th Cir. 1992), cert. denied 507 U.S. 911 (1993)(holding that intrinsic evidence is admissible so that the jury may evaluate all the circumstances under which the defendant acted).

The definition of intrinsic evidence is fairly broad. In United States v. Williams, 900 F.2d 823, 825 (5th Cir. 1990), the court stated evidence is intrinsic "when the evidence of the other act and the evidence of the crime charged are part of a 'single criminal episode' or the other acts were 'necessary preliminaries' to the crime charged." In United States v. Williford, 764 F.2d 1493, 1499 (11th Cir. 1985), the court defined intrinsic evidence as "[e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and material part of an account of the crime, or is necessary to complete the story of the crime to the jury." See

also United States v. Towne, 870 F.2d 880, 886 (2d Cir. 1989), cert. denied, 490 U.S. 1101, 109 S. Ct. 2456 (stating that evidence of uncharged activity does not fall within the scope of Rule 404(b) if it arose out of the same series of transactions as the charged offense, is inextricably intertwined with the evidence of the charged offense, or if it is necessary to complete the story of the crime on trial); Federal Rule of Evidence 401, Advisory Committee Notes, "Evidence which is essentially background in nature . . . is universally offered and admitted as an aid to understanding . . . A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence[.]"

In United States v. Blyden, 964 F.2d 1375, 1378 (3d Cir. 1992), the court held that "when the evidence of another crime is necessary to establish an element of the offense being tried, there is no 'other crime [to be limited by Rule 404(b)].'" See also United States v. Wilson, 46 Fed. Appx. 93, 96 (3d Cir. 2002)(not precedential) (stating evidence which goes "directly to issues material to the indictment" constitutes intrinsic evidence); 2 Weinstein's Federal Evidence § 404.20[2][b] (citing Blyden as evidence that the Third Circuit has endorsed the broad definition of intrinsic evidence).

When defining intrinsic evidence, courts in this district have indicated acceptance of the broad Williams definition.

United States v. Bertoli, 854 F.Supp. 975, 1056-57 (D.N.J. 1994), rev'd in part on other grounds and aff'd in part, 40 F.3d 1384 (3d Cir. 1994) (quoting the broad definitions of Williams, Blyden, and Towne, supra, to admit uncharged evidence of a defendant's "continuing pattern of criminal activity" as intrinsic evidence); United States v. Butch, 48 F.Supp.2d 453, 458 (D.N.J. 1999), aff'd 256 F.3d 171(3d Cir. 2001)(noting, without deciding the issue, that reliance on Blyden "for the proposition that the Third Circuit has embraced the Williams definition of 'intrinsic' is not entirely misplaced").

As a general matter, the Brooklyn Robbery is linked to Count 1, which charges the defendant with conspiring with the *exact same* conspirators to commit the robbery of the In-Style USA warehouse. The *exact same individuals* used the *exact same criminal plan and scheme* to carry out the charged robbery. In other words, these same individuals used the same means and methods (e.g., acting under the guise of law enforcement; use of firearms and badges; targeting an industrial warehouse; restraint of victim employees; the taking of victims' personal belongings while restrained; use of rental trucks to transport stolen merchandise; use of day laborers to load merchandise; performance of preliminary surveillance on robbery site; use of NYPD computer printouts containing personal information on employees). As such, the Brooklyn Robbery, and the circumstances thereto,

facilitated the commission of the charged crime. See United States v. Green, 617 F.3d 233, 238 (3d Cir. 2010). Indeed, this evidence "completes the story" of the crime on trial by providing the immediate context of events in time and place. Sriyuth, 98 F.3d at 747 (evidence which completes the story of the crime on trial constitutes intrinsic evidence). Without it, the jury will not have useful and revealing evidence regarding the how the relationships among the co-conspirators came to exist, and how the charged conspiracy to rob the In-Style warehouse developed.

Alternatively, the United States seeks to admit the above-referenced testimony concerning the defendant's involvement in the Brooklyn Robbery under Fed.R.Evid. 404(b). Rule 404(b)[2] provides that evidence of other crimes, wrongs, or acts may be admissible as proof of "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) is a rule of "inclusion." Government of the Virgin Islands v. Harris, 938 F.2d 401, 419 (3d Cir. 1991); see also United States v. McClory, No. 90-3604, slip op. at 65 (3d Cir. June 19, 1992) (stating that the possible uses of "other crimes evidence listed in Rule 404(b) are not the only proper ones.").

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[2] Rule 404(b) provides:

> **(b) Other crimes, wrongs, or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident ....

The drafters intended the rule to be one of inclusion to "emphasize the admissibility of other-acts evidence." Id.

The Rule by its own terms only precludes evidence of "other crimes, wrongs, or acts" when offered "to prove the character of a person in order to show action in conformity therewith." Indeed, "the burden on the government is not onerous. All that is needed is some showing of a proper relevance [other than to show the defendant's criminal propensity.]" United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992); see United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir.), cert. denied, 488 U.S. 910 (1988); United States v. Mehrmanesh, 689 F.2d 822, 828 (9th Cir. 1982).

Courts should admit evidence of such other wrongs or bad acts, if (1) the evidence has a proper purpose, such as to show intent or knowledge or absence of mistake or identity, see e.g., Fed. R. Evid. 404(b); United States v. Pungitore, 910 F.2d 1084, 1149-50 (3d Cir. 1990); Scarfo, 850 F.2d at 1019; United States v. O'Leary, 739 F.2d 135, 136 (3d Cir. 1984); (2) it is relevant; and (3) the probative value of the evidence is not substantially outweighed by the dangers of unfair prejudice. Harris, 938 F.2d at 419; United States v. Zolicoffer, 869 F.2d 771, 773 (3d Cir. 1989); Scarfo, 850 F.2d at 1019; see also United States v. Echeverri, 854 F.2d 638, 644 (3d Cir. 1988); O'Leary, 739 F.2d at 136.

Applying these standards, the United States should be permitted to admit the proffered evidence of the Brooklyn Robbery. As stated, the robberies involved many of the same conspirators, and both were prepared and planned by the defendant, D. Bannout and A. Bannout in nearly the exact same manner - both demonstrate the defendant's *modus operandi*, or "plan and preparation," as it pertained to the commission of these robberies. See FED.R.EVID. 404(b). Moreover, the distinctive pattern of the robberies was virtually identical in that the defendant and other NYPD officers, including Checo and LeBlanca, stormed the warehouse while possessing guns, NYPD badges and other police paraphernalia to give employees the false appearance that the raid was for some lawful police conduct. The defendant, with LeBlanca, Checo, Garcia and Reyes (the same conspirators who raided the In-Style warehouse), then restrained employees by binding their hands and stole their personal belongings. Once the employees were restrained, other conspirators, including A. Bannout and D. Bannout, drove rental trucks to the warehouse loading docks and day laborers loaded up hundreds of boxes of merchandise.

The Brooklyn Robbery, therefore, is being offered for purposes other than to show the defendant's criminal propensity. Rather, it is highly probative under Rule 404(b) in demonstrating proof of: (a) the defendant's plan and preparation for the

charged robbery; (b) the defendant's identity - an element that will be heavily contested by the defendant; (c) the defendant's intent to commit the crime of robbery; and (d) the lack of any mistake or accident in identifying the defendant as a co-conspirator in the charged offense. Id. Thus, the proffered evidence can alternatively be admitted under the Third Circuit's liberal Rule 404(b) standard.

B. $100,000 Conveyance

In or about April 2007, the defendant borrowed $100,00 from his uncle, Raymond Jones. His uncle obtained the proceeds for the loan by taking out a $100,000, 25-year loan from American Airlines Federal Credit Union. The defendant deposited the $100,000 into his bank account and obtained a money order payable to "James Ambrosio" for $100,000. Mr. Ambrosio subsequently cashed the money order and delivered $100,000 in cash back to the defendant. The defendant defaulted on his repayment of the loan shortly after his uncle gave the defendant the money. After the defendant borrowed and failed to repay the $100,000, his uncle filed a civil lawsuit against the defendant to recover the $100,000. Around approximately the same time, the defendant submitted documentation to the United States Treasury seeking reimbursement for approximately $100,000 in cash that he claimed was mutilated or destroyed. Since that time, the defendant's uncle has made monthly payments in the amount of approximately

$950 to repay the loan from his credit union (hereinafter, “the $100,000 Conveyance”).

The United States will also seek to present evidence that the defendant was having serious financial difficulties at the time he committed the charged robbery. As a result, the defendant borrowed $100,000 in April 2007, as more fully set forth in the $100,000 Conveyance above. This proffered evidence is admissible under Rule 404(b) because it demonstrates the defendant’s motive for the committing the robbery of the In-Style warehouse, as charged in Counts 1 and 2. The fact that the defendant was in such extreme debt, while receiving a modest salary as an NYPD officer, demonstrates that he had a financial motivation to commit the robbery. FED.R.EVID. 404(b). This evidence will allow the United States to explain why a gainfully employed police officer is committing the armed robbery of a perfume warehouse (e.g., his motive). Accordingly, this evidence should also be admitted as appropriate 404(b) evidence.

III. **SUMMARY & DEMONSTRATIVE CHARTS/PROGRAMS**

The United States also may seek the admission of certain summary and demonstrative charts to aid the jury in reviewing the evidence offered during the United States' case-in-chief. The admission of such evidence is proper, pursuant to FED. R. EVID. 611(a) and 1006, in light of the documentary evidence that the United States will introduce during the trial and the convenience and clarity of presenting the contents in chart form.

Rule 1006 of the Federal Rules of Evidence governs the admission of summaries. Rule 1006 provides, in pertinent part:

> The contents of voluminous writings . . . which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

FED. R. EVID. 1006. The clear language of the rule suggests that summaries of evidence, whether or not the underlying evidence is produced in court, are admissible, particularly when the summaries are a practical way to place information in an intelligent form. See, e.g., Hackett v. Housing Authority of San Antonio, 750 F.2d 1308, 1312 (5th Cir.), cert. denied, 474 U.S. 850 (1985); Soden v. Freightliner Corp. 714 F.2d 498, 506 (5th Cir. 1983); United States v. Clements, 588 F.2d 1030, 1039 (5th Cir.), cert. denied, 440 U.S. 982 (1979); see also United States v. Campbell, 845 F.2d 1374, 1381 (6th Cir.), cert. denied, 488

U.S. 908 (1988).

Summary charts are admissible if: (1) they are based upon witness testimony or documents that are actually admitted into evidence or otherwise admissible, but not produced in court; (2) the underlying evidence is available to the other side for inspection and (3) the person who prepared the charts is available for cross-examination. See, e.g., United States v. Johnson, 594 F.2d 1253, 1254-57 (9th Cir.), cert. denied, 444 U.S. 964 (1979); United States v. Denton, 556 F.2d 811, 816 (6th Cir.), cert. denied, 434 U.S. 892 (1977); United States v. Strauss, 473 F.2d 1262, 1263 (3d Cir. 1973); United States v. Moody, 339 F.2d 161, 162 (6th Cir. 1964). There is no requirement that the court find it to be "literally impossible to examine the underlying records before a summary chart may be utilized." United States v. Scales, 594 F.2d 558, 562 (6th Cir.), cert. denied, 441 U.S. 946 (1979). The court need only find that in-court examination would not be convenient. In sum then, as the United States Court of Appeals for the First Circuit stated:

> So long as the government, exercising due diligence, collects whatever records are reasonably available and succeeds in introducing them, it may be permitted (subject, of course, to relevancy and perscrutation under Fed. R. Evid. 403) to summarize the data it has managed to obtain. If defendants possessed exculpatory records not in the government's files, they could have offered them at trial or prepared their own summary.

United States v. Nivica, 887 F.2d 1110, 1126 (1st Cir. 1989).

The court also may admit demonstrative charts pursuant to Rule 611(a). E.g., United States v. Johnson, 54 F.3d 1150, 1158 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995); United States v. Bertoli, 854 F. Supp. 975, 1053 (D.N.J.), aff'd in part, vacated in part on other grounds, 40 F.3d 1384 (3d Cir. 1994). The use of demonstrative charts to "aid the jury's comprehension is well within the court's discretion." United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988). When a party uses Rule 611 charts, the court must instruct the jury that the charts are for a summary purpose and are not, themselves, evidence. United States v. Paulino, 935 F.2d 739, 753 (6th Cir.), cert. denied, 502 U.S. 917 (1992). Courts regularly admit these types of charts to trace ill-gotten gains, e.g., Paulino, 935 F.2d at 752-54.

Another court has explained the slight difference between Rule 1006 charts and Rule 611(a) charts:

> [T]here is a distinction between a Rule 1006 summary and a so-called "pedagogical" summary. The former is admitted as substantive evidence, without requiring that the underlying documents themselves be in evidence; the latter is simply a demonstrative aid which undertakes to summarize or organize other evidence already admitted. . . . [A] pedagogical summary can itself be admitted into evidence where the trier of fact will find it helpful and will not be unduly influenced thereby.

White Indus. v. Cessna Aircraft Co., 611 F. Supp. 1049, 1069-70 (W.D. Mo. 1985). In either case, however, similar standards govern the charts' admission. Compare Strauss, 473 F.2d at 1236

with Johnson, 54 F.3d at 1159 (helpfulness to jury and safeguards in the form of (1) availability of underlying evidence for review, (2) cross-examination and (3) limiting instructions are guiding principles for admission of charts under Rule 611(a)). The United States can introduce the charts into evidence either through a person who prepared the chart or a person who has reviewed the underlying documents and confirmed the accuracy of the particular chart. Bertoli, 854 F. Supp. at 1055 (citations omitted).

The United States may seek to enter certain charts and summaries that will aid the jury in understanding GPS tracking records and other evidence to be presented in this case. Copies of the underlying evidence itself has been provided to counsel via discovery. The Court also can instruct the jury regarding the limited use these summary charts. See United States v. Pinto, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867, 932 (1988).

IV. **GOOD FAITH BASIS FOR QUESTIONS**

The scope and extent of cross examination lies within the discretion of the trial judge. The trial court may, in its discretion, preclude questions for which the questioner cannot show a good faith basis. United States v. Adames, 56 F.3d 737, 745 (7th Cir. 1995), cert. denied, 517 U.S. 1250 (1996); United States v. Concepcion, 983 F.2d 369, 391 (2nd Cir. 1992), cert. denied, 510 U.S. 856 (1993); see also United States v. Millan-Colon, 836 F. Supp. 1022, 1024 (S.D.N.Y. 1993) ("pure speculation" and "hypothesis" are not a substitute for good faith basis). Although counsel "may explore certain areas of inquiry in a criminal trial without full knowledge of the answer to anticipated questions, he must, when confronted with a demand for an offer of proof, provide some good faith basis for questioning that alleges adverse facts." Id. at 779. Similar good faith bases are necessary in this case.

V. **SELF-SERVING HEARSAY IS INADMISSIBLE**

It is anticipated that the defendant may attempt to introduce his own statements or assertions through the testimony of third-party witnesses, members of his family, community, or other individuals. The testimony elicited from such witnesses constitutes nothing more than inadmissible self-serving hearsay and should be excluded.

Federal Rule of Evidence 801(d)(2) states, in relevant part, that statements or assertions are not deemed hearsay if they are "offered against a party and is (A) the party's own statement, either in an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth . . ." (emphasis added). Put simply, statements or assertions offered on behalf of a party (in this case, the defendant) cannot be admitted through the testimony of a third-party witness. A defendant's own assertions of innocence through third-party witnesses are "self-serving, hearsay, and not admissible." United States v. Kemp, 362 F.Supp.2d 591, 594 (E.D.Pa. 2005). Such hearsay statements are generally inadmissible because the declarant is not under oath; his credibility cannot be evaluated; and he is not subject to cross-examination. Williamson v. United States, 512 U.S. 594, 598 (1994); 5 Weinstein & Berger, Weinstein's Federal Evidence, §802.2[2] and [3], pp. 802-7 through 802-9 (1998)

Because of the highly self-serving nature of these statements, they are thus more likely to be untrue. See United States v. Day, 789 F.2d 1217 (6th Cir. 1987). For example, the defendant provided certain handwritten notes purported to have been written by co-conspirator Richard LeBlanca and provided to the defendant. The admission of these notes would precisely violate the constraints of Rule 801, as stated above. Accordingly, the Court should preclude the defendant from presenting such inadmissible evidence at trial.

VI. THE COURT SHOULD PROPERLY LIMIT THE DEFENDANT'S INTRODUCTION OF CHARACTER OR REPUTATION EVIDENCE

The defendant may seek to introduce evidence of his reputation or character during the trial. The United States respectfully requests that the Court remind the defendant as to the proper bounds for admitting such evidence.

Rule 405(a) of the Federal Rules of Evidence provides three different methods of proving character: (1) by testimony as to reputation; (2) by testimony in the form of opinion; and (3) by inquiry into specific instances of conduct. The evidence must also be pertinent to a trait at issue in the case. Set forth below are the standards governing the admissibility of character evidence on direct and cross-examination.

A. *Direct Examination*

Any defendant may "open[] the door to a discussion of his character by calling character witnesses under Rule 404(a)(1)." 2 Weinstein & Berger, Weinstein's Evidence, ¶ 405[02] at 405-22 (1986). Such witnesses may testify as to a defendant's reputation in the community or may provide opinion testimony. Character witnesses on direct examination, however, are precluded from testifying "about defendant's specific acts or courses of conduct." Michelson v. United States, 335 U.S. 469, 477 (1948); Notes of Advisory Committee on Proposed Rules to Fed. R. Evid. 405; 2 Weinstein's Evidence at 405-22. In other words, an opinion witness testifying to character on direct examination may

give a general description of his acquaintance with the defendant (e.g., “we do business together”), but the witness must be barred from testifying further about specific conduct (e.g., “he has borrowed money and repaid it”).

With regard to reputation testimony, the witness must demonstrate that he is familiar with defendant's reputation in the community, that he is a member of the relevant community, and that he speaks for it. See United States v. Perry, 643 F.2d 38, 52 (2d Cir.), cert. denied, 454 U.S. 835 (1981) (private investigator could not testify to the defendant's reputation as gathered by interviews with his neighbors); 2 Weinstein's Evidence at 405-18. Such testimony also must be limited to a time “contemporaneous with the acts charged.” United States v. Curtis, 644 F.2d 263, 268 (3d Cir. 1981), cert. denied, 103 S. Ct. 379 (1982).

Any character evidence that the defendant intends to introduce must be “pertinent”, i.e. relevant to issues germane to the case. Otherwise it is inadmissible. See, e.g. United States v. Sanchez-Gonzalez, 294 F.3d 563, 567 (3d Cir.2002)(upholding the district court’s exclusion of evidence of impoverishment as irrelevant under Federal Rules of Evidence 401, 402, and 403).

B. *Cross-Examination*

When a defendant introduces character testimony he opens the door to cross-examination of his witnesses.

(i) Reputation

Where there is direct testimony addressed to community reputation, the United States is permitted to and intends to inquire "about conduct, and even about charges, which may have come to the attention of the relevant community." Curtis, 644 F.2d at 268. These inquiries will be limited to "matters reasonably proximate to the time of the alleged offense." Id. at 269. As discussed in the Notes of the Advisory Committee, the United States may properly inquire "as to whether the reputation witness has heard of particular instances of conduct" which meet the above relevance standards.

(ii) Opinion

Where a defendant offers opinion testimony, the United States is permitted to and intends to inquire about matters "which bear on the fact or factual basis for formation of opinion." Curtis, 644 F.2d at 268. Accordingly, the scope of cross-examination is broader than with reputation testimony. Not only can a witness' testimonial qualifications be challenged (e.g., knowledge and observations of the defendant), but his or her opinion itself may also be probed (e.g., would the witness' opinion change if he or she were aware of relevant specific instances of conduct). Id. at 268-69. The United States is thus not limited to specific instances likely to be known to the relevant community. Indeed, an opinion witness can be asked

"whether he knew as well as whether he heard." Notes of Advisory Committee on Proposed Rules to Fed. R. Evid. 405. Indeed, the Third Circuit recently discussed the distinction between reputation character witnesses and opinion character witnesses and, in the context of cross-examination of such witnesses, determined that "a person testifying regarding a present opinion should be open to cross-examination on how additional facts would affect that opinion." See United States v. Kellogg, 510 F.3d 188, 196 (3d Cir. 2007).

VII. **ADMISSIONS OF A PARTY AND CO-CONSPIRATOR STATEMENTS**

The defendant's own words, whether spoken or authored, are admissions of a party-opponent, and, therefore, admissible if offered by the United States. See FED.R.EVID. 801(d)(2)(A) (an admission is a statement offered against a party that is the party's own statement in either an individual or a representative capacity). See also United States v. Williams, 837 F.2d 1009, 1014 (11th Cir.) (receipts initialed by defendant considered admissions, even though testimony providing foundation was not received until after the court admitted the evidence), cert. denied, 488 U.S. 965 (1988); United States v. Moran, 759 F.2d 777, 786 (9th Cir. 1985) (letters and deposit slips that the defendant signed are admissions), cert. denied, 474 U.S. 1102 (1986); United States v. Norris, 205 F.2d 828, 829 (2d Cir. 1953) (defendant's statements on a bank loan application, including statements regarding net worth, are admissible in evidence as admissions); South Central Bank & Trust Co. v. Citicorp Credit Services, Inc., 863 F. Supp. 635, 646 (N.D. Ill. 1994) (crossed out statements considered admissions--

> A crossed out sentence is not like an unexpressed thought; to the contrary, it is more like an expressed thought that someone thought to rescind or retract.[] It is the written equivalent of a spoken statement followed by the words, "forget I said that." A statement once made, is no less a statement simply because its maker has changed his or her mind.).

In addition, the United States may offer certain statements and materials under Rule 801(d)(2)(E) of the Federal Rules of Evidence which provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not inadmissible hearsay as to that party. Before the Court admits such statements, the United States must demonstrate that:

(a) a conspiracy existed;
(b) the declarant and the party against whom the statement was offered were members of the conspiracy;
(c) the statement was made in the course of the conspiracy; and
(d) the statement was made in furtherance of the conspiracy.

United States v. McGlory, 968 F.2d 309, 333 (3d Cir. 1992), cert. denied, 507 U.S. 962 (1993); see United States v. Gricco, 277 F.3d 339, 354 (3d Cir. 2002). The Court must find that these factors exist not beyond a reasonable doubt, but by a mere preponderance of the evidence. Id. (citing, e.g., Bourjaily v. United States, 483 U.S. 171, 175 (1987)). The Court may utilize the hearsay statements themselves in reaching this determination. Bourjaily, 483 U.S. at 178-79 (individual pieces of evidence, insufficient in themselves to prove a point, may be added together to reach the determination that the statements in question are admissible under the coconspirator exception). A declarant need not be identified to make the statement admissible under the exception. McGlory, 968 F.2d at 335. Nor need the United States actually charge a conspiracy in the Indictment for

a coconspirator's statements to be admissible. United States v. Ellis, 156 F.3d 493, 497 (3d Cir. 1998); United States v. Trowery, 542 F.2d 623, 626 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977). See United States v. Leroux, 738 F.2d 943, 949 (8th Cir. 1984) (in mail fraud prosecution, Rule 801(d)(2)(E) was applicable even though conspiracy was not formally charged); United States v. Peacock, 654 F.2d 339, 349 (5th Cir. 1981) (in mail fraud prosecution, "[c]oconspirator statements are admissible even when no conspiracy is charged if there is . . . evidence of a concert of action in which the defendant was a participant."), cert. denied, 464 U.S. 965 (1983). Handwritten notes and jottings can be declarations of a coconspirator. McGlory, 968 F.2d at 333-38; United States v. Cerone, 830 F.2d 938, 949 (8th Cir. 1987), cert. denied, 486 U.S. 1006 (1988). Moreover, if a defendant or his coconspirator "makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are "reasonably required to place the defendant or coconspirator's nontestimonial statements into context." See United States v. Hendricks, 395 F.3d 173, 184 (3d Cir. 2005).

VIII. **EVIDENCE OF PLEA AGREEMENTS, IMMUNITY AND DISHONESTY**

The United States may attempt to offer evidence of its witnesses' dishonest conduct, guilty pleas, plea agreements, compulsion orders and other forms of immunity during the direct examination of some of its witnesses. An en banc panel of the United States Court of Appeals for the Third Circuit has recognized that such impeachment evidence properly can be offered during the United States' direct examination of its witnesses. In United States v. Universal Rehabilitation Services (PA), Inc., 205 F.3d 657 (3d Cir. 2000), Judge Garth, writing for the panel, observed that there were at least three reasons to permit the United States to adduce evidence of a testifying witness's guilty plea or plea agreement, to include allowing the jury accurately to assess the credibility of the witness and to explain how the witness has first-hand knowledge concerning the events about which the witness was testifying. 205 F.3d at 665 to 667. The Third Circuit also held that the United States could adduce such evidence even in the absence of an affirmative challenge to witness credibility because in every case jurors are instructed that they must determine the credibility of the witnesses who testify. Id. at 666. See United States v. Montani, 204 F.3d 761, 765 (7th Cir. 2000) ("The well-settled rule in this Circuit allows the government to take the sting out of a defendant's cross-examination by introducing evidence of a co-defendant's

plea agreement as part of its case in chief."). This reasoning applies to grants of immunity, as well. See Montani, 204 F.3d at 765-66 ("introducing evidence of a witness's guilty plea or immunity deal serves the 'truth-seeking' function of the trial by presenting all relevant aspects of the witness's testimony at one time").

The United States recognizes, however, that the introduction of such evidence only may be for a proper purpose. In this regard, for instance, the United States may not argue that a witness's guilty plea, or that the grant of immunity to a witness, is substantive proof of the defendant's guilt. 205 F.3d at 668. The Third Circuit has suggested a cautionary instruction to the jury which, it has held, insulates the defendant from any prejudicial effect. Id. at 668. The Third Circuit has observed that the jury in such cases should be instructed that it may not consider the guilty plea and/or plea agreement as evidence that the defendant is guilty of the offenses with which he is charged, but rather that such evidence is offered only to allow the jury, for instance, to assess the witness's credibility. Id. See also Montani, 204 F.3d at 767 (suggesting similar cautionary instruction). The Court can employ a similar instruction here.

IX. **HOSTILE OR ADVERSE WITNESSES AND LEADING QUESTIONS**

The United States may call certain witnesses who may be hostile or identified with an adverse party. Rule 611(c) of the Federal Rules of Evidence provides that when a party "calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions." A witness need not be contemptuous or surly to be hostile; all that the witness need be is evasive or adverse to the United States, see United States v. Brown, 603 F.2d 1022, 1026 (1st Cir. 1979), or identified with an adverse party, see United States v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984). Another district court in this Circuit summarized the rationale:

> A witness should not have words put in his mouth. But neither should an attorney, confronted with an obviously recalcitrant witness, be confined to neutral questions. . . . Leading questions are prohibited in order to prevent a partisan witness from accepting suggestions from a friendly attorney. . . . When the witness is hostile leading questions are as permissible as if the witness had been called by the other side.

United States v. Barrow, 229 F. Supp. 722, 728 (E.D. Pa. 1964) (Lord, J.), aff'd in part, rev'd in part on other grounds, 363 F.2d 62 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967). Where this situation occurs, it is appropriate for the United States to interrogate by leading questions.

The Court also has the discretion under the rule to limit the use of leading questions by the defense when the United States calls a witness closely identified with the defendant.

Under federal law, no one has an absolute right to ask leading questions on cross examination. Oberlin v. Marlin American Corp., 596 F.2d 1322, 1328 (7th Cir. 1979). In this regard, the rule reads in relevant part that "[o]rdinarily leading questions should be permitted on cross-examination." Fed. R. Evid. 611(c) (emphasis added). The Advisory Committee Notes explained the reason for the use of the qualifier, "ordinarily," stating: "[t]he purpose of the qualification 'ordinarily' is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the 'cross-examination' of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff." Hence, the Court also may limit leading questions by the defense on cross-examination where the witness is closely identified with the defendant.

X. **PROPER SCOPE OF CROSS-EXAMINATION BY COUNSEL**

Federal Rule of Evidence 608 states, in relevant part, that "specific instances of the conduct of a witness . . . may . . ., in the discretion of the court . . . be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified." FED.R.EVID. 608(b). The Rule allows for questions on cross-examination that are "probative of a witness's truthfulness or untruthfulness." United States v. Davis, 183 F.3d 231, 257 (3d Cir. N.J. 1999). "[T]he scope of cross-examination is left to the sound discretion of the trial court." United States v. Werme, 939 F.2d 108, 117 (3d Cir. 1991).

The Third Circuit "has construed Rule 608(b) as requiring the exclusion of extrinsic impeachment evidence concerning a witness' prior instances of conduct." United States v. McNeill, 887 F.2d 448, 453 (3d Cir. 1989) (defining extrinsic evidence as "evidence offered through other witnesses, rather than through cross-examination of the witness himself or herself"); see also United States v. Agnes, 753 F.2d 293, 304-05 (3d Cir. 1985); United States v. Oxman, 740 F.2d 1298, 1303 (3d Cir. 1984); United States v. Herman, 589 F.2d 1191, 1196-97 (3d Cir. 1978), cert. denied, 441 U.S. 913, 60 L. Ed. 2d 386, 99 S. Ct. 2014

(1979). Furthermore, the Third Circuit has held that "there may be cross-examination into the prior conduct of a witness only if the trial court determines that the conduct is probative of the witness's truthfulness or untruthfulness." McNeill, 887 F.2d at 453.

Not all criminal, illegal, or immoral behavior is relevant to truthfulness of a witness. See United States v. Bynum, 566 F.2d 914 (5th Cir. 1978) (holding his foster children against their will to work at his racetrack not probative of witness's truthfulness). "Rule 608(b) makes clear that not all prior bad acts are admissible [on cross-examination] . . . [s]uch acts are only admissible insofar as they bear on a witness's propensity for truthfulness or untruthfulness." United States v. Devery, 935 F. Supp. 393, 407 (S.D.N.Y. 1996). For example "[v]iolent crimes . . . are irrelevant to a witness's character for truthfulness." United States v. Parker, 133 F.3d 322, 337 (5th Cir. 1998). "[C]ourts have denied cross-examination of specific instances of conduct, such as conduct that involved the issuance of a temporary order of protection, that are not probative of either truthfulness or untruthfulness." United States v. Baskerville, 2010 U.S. Dist. LEXIS 9085, n.6 (D.N.J. Feb. 3, 2010). However, "[c]onduct involving lying, theft, perjury, fraud or deception are generally considered probative of truthfulness, and therefore permissible subjects of cross-

examination." Id. Moreover, cross-examine is permitted into witness's prior plea agreements. United States v. Martz, 964 F.2d 787, 789 (8th Cir. 1992) (defendant was properly permitted to cross-examine witness about his prior pleas and his knowledge of benefits of plea agreements).

Here, any cross-examination by counsel must only reach those prior acts of the witness that would demonstrate untruthfulness. The Third Circuit has long held that it is in the discretion of the trial court, but questions relating to prior conduct must only be permitted if they are probative of untruthfulness.

XI. **CHAIN OF CUSTODY AND AUTHENTICITY OF AN EXHIBIT**

"Physical evidence must be authenticated before it is admitted. Authenticity is elemental to relevance, for 'evidence cannot have a tendency to make the existence of a disputed fact more or less likely if the evidence is not that which its proponent claims'." United States v. Rawlins, 606 F.3d 73, 82 (3d Cir. 2010) (quoting United States v. Branch, 970 F.2d 1368, 1370 (4th Cir. 1992)). "The requirement of authentication . . . is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." FED. R. EVID. 901(a).

"The standard for the admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." Bibby v. Sherrer, 2006 U.S. Dist. LEXIS 72081, at *14 (D.N.J. Sept. 20, 2006). Pursuant to Third Circuit precedent, "[t]o establish a chain of custody, the government need only show that it took reasonable precautions to preserve the evidence in its original condition, even if all possibilities of tampering are not excluded." United States v. Dent, 149 F.3d 180, 188 (3d Cir. 1998).

"[E]vidence is admissible if the trial judge determines that there is a reasonable probability that the evidence has not been altered in any material respect since the time of the crime."

United States v. Jackson, 649 F.2d 967, 973 (3d Cir. 1981) (internal quotations omitted). Additionally, "the government need only show that it took reasonable precautions to preserve the original condition of the evidence, it does not have to exclude all possibilities of tampering with the evidence . . . . A presumption of regularity exists with respect to official acts of public officers and, absent any evidence to the contrary, the court presumes that their official duties have been discharged properly." Bibby, 2006 U.S. Dist. LEXIS 72081, at *14

The Third Circuit has long rejected the proposition that evidence may only be admitted if a "complete and exclusive" chain of custody is established. United States v. De Larosa, 450 F.2d 1057, 1068 (3d Cir. 1971). Gaps in the chain of custody "go to the weight of the evidence rather than to its admissibility and . . . the question [should be] left to the jury." United States v. Clark, 425 F.2d 827, 833 (3d Cir. 1970); see also Dent, 149 F.3d at 189. "The jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence." United States v. Brandon, 847 F.2d 625, 630 (10th Cir. 1988); see Threadgill v. Armstrong World Industry, Inc., 928 F.2d 1366 (3rd Cir. 1991 (showing of authenticity is accomplished by proponent's making prima facie case exhibit is what proponent claims it to be; once prima facie case is made, exhibit goes to jury, which makes ultimate determination of authenticity).

If the Court determines that a colorable question is raised at trial concerning the authentication of a critical item of evidence, instead of suppressing the evidence, instructions may be given to the jury to make their own determination of authenticity by the amount of weight they place on that piece of evidence. The Third Circuit Model Jury Instructions 4:12 provide:

> The defense has raised the issue of defects in the chain of custody of (describe evidence in question; e.g., the firearm, the drugs). You may consider any defects in determining the authenticity of this evidence and what weight to give it. The government must prove beyond a reasonable doubt that the (describe evidence in question) (is)(are) the same as the (describe evidence) (alleged in the indictment)(introduced during the trial).

Here, any motion by the defense counsel to suppress the printouts is unwarranted. The Third Circuit has long held that any gaps in the chain of custody will not render an item inadmissible, but instead that it will only go to the weight of the evidence for the jury to consider.[3]

[3] The Court's Order for Discovery dated July 7, 2010 states that the authenticity of exhibits and the chain of possession of a particular exhibit "will be deemed to have been accepted by either the defendant or the United States unless counsel files with the Court fourteen (14) days prior to the date of trial . . ." See Order for Discovery at ¶ 9. To date, the defendant has not challenged any of the United States's exhibits on either of these bases.

CONCLUSION

For these reasons, the Court should admit the evidence referenced in this trial memorandum and permit the United States to prove its case consistent with the law articulated in this memorandum.

Respectfully submitted,

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Newark, New Jersey