

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

UNITED STATES OF AMERICA,            )  
  )  
  )            Plaintiff,  
  )            v.  
  )            No. 09-00296-06-CR-W-FJG  
NICHOLAS DONKERSLOOT,            )  
  )  
  )            Defendant.

**GOVERNMENT’S SUGGESTIONS IN OPPOSITION  
TO DEFENDANT’S MOTION IN LIMINE TO  
PRECLUDE USE OF THE WORD “GANG”**

The United States of America, by and through United States Attorney Matt J. Whitworth and Assistant United States Attorney Daniel M. Nelson, both for the Western District of Missouri, and respectfully moves this Court to deny the defendant’s request to bar the government from referencing the word “gang” during the trial of this matter. In support thereof, the government avers as follows:

**I. BACKGROUND**

On September 23, 2009, a grand jury sitting in the Western District of Missouri returned a two-count indictment, in which the listed defendants were charged with conspiracy to distribute methamphetamine, cocaine, and marijuana, all Scheduled Controlled Substances, between January 1, 2002 and July 31, 2007, contrary to the provisions Title 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of Title 21 U.S.C. § 846. This matter is currently set for jury trial, on Count One only, commencing on Monday, December 14, 2009, before the Honorable Fernando J. Gaitan.

## **II. STANDARD OF REVIEW**

The district court is given “substantial deference” on evidentiary rulings, and the Eighth Circuit will only find error with the trial court’s evidentiary ruling if there has been a clear abuse of discretion. *United States v. Blue Bird*, 372 F.3d 989 (8th Cir. 2004) (noting that the Eighth Circuit gives deference to the trial judge regarding the application of evidentiary rules that “require a balancing of how particular evidence might affect the jury”); *see also United States v. King*, 351 F.3d 859, 866 (8th Cir. 2003); *United States v. Bolden*, 92 F.3d 686, 687 (8th Cir. 1996).

## **III. USE OF THE WORD “GANG”**

The defendant does not seek to exclude evidence of his membership in the El Forastero motorcycle club. He merely seeks to prohibit the government from using the word “gang” as opposed to “club.” The case the defendant cites places limitations on the proper scope of motorcycle gang evidence. But he cites no case where use of the word gang itself was categorically prohibited. In the case at bar, the government believes that both “gang” and “club” are accurate descriptions. The government’s witnesses use the words interchangeably.<sup>1</sup> As discussed more fully in its response to Defendant Larson’s Motion in Limine to preclude certain expert testimony, the government does not intend to make motorcycle gangs the theme of the trial. Instead, the government seeks to introduce

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<sup>1</sup>Indeed, in the cases cited in the next section, the Eighth Circuit itself refers to the El Forasteros and Galloping Goose interchangeably as both “gangs” and “clubs.”

limited evidence of the drug activities of these two specific motorcycle gangs and actions the defendants undertook while they were members.

*Webster's* defines the word gang as meaning "a group of people who socialize regularly." *Webster's II New College Dictionary* 460, Houghton Mifflin, 2001. Its secondary definition is "a group of criminals or hoodlums who band together for mutual protection and profit." *Id.* By contrast, *Webster's* defines a club as "a group of people organized for a common purpose, esp. one that holds regular meetings." *Id.* at 212. The evidence in the government's case will show that the El Forastero and Galloping Goose meet all three definitions. The purpose of using the words gang or club is not to improperly inflame and prejudice the jury, these are simply the words used most often and most accurately to describe these organizations. Instructing the government and its witnesses to avoid the use of the word "gang" would cause unnecessary semantic difficulties. Any prejudice to the defendants from the word gang is *de minimis*.

A federal grand jury has charged the defendants with conspiring with each other and others to distribute methamphetamine. During the conspiracy, all defendants were members of the El Forastero or Galloping Goose outlaw motorcycle gangs ("OMGs"). Both organizations have multiple charters across the United States with the largest concentration of charters in the Midwest. In Kansas City, they shared a clubhouse in the West Bottoms. They held joint meetings and essentially functioned as one club. All of the indicted conspirators in this indictment were members of these two charters, except

for Steve Larson, who was a member of an El Forastero charter in Minneapolis, and Nick Donkersloot, who was an El Forstero in Okoboji, Iowa. The organizations adhered to common rules and practices across all charters, including for the use and distribution of illegal drugs, which they frequently consumed together at multiple-charter gatherings.

Sometimes these organizations functioned as clubs, such as when members attended motorcycle shows and assisted each other with cycle maintenance. On other occasions, they functioned as gangs, since members pooled money that went towards the purchase of illegal drugs that were then distributed to club members, their guests, and others, enabling members to travel to the location of the parties without having to personally transport the drugs they planned to consume. Often, the organizations functioned as both gangs and clubs, such as when they discussed drug buys at weekly “church” meetings. The secretive cultures of the organizations, and the rules they propounded and adhered to including for “runs,” were purposefully designed to protect members when they engaged in the purchase, distribution and consumption of illegal drugs. The government’s evidence will show that they engaged in illegal activity systematically, repeatedly, pervasively and as a group enterprise, as opposed to a group of individual enthusiasts some of whom occasionally participated in illicit activities. Thus use of the words club and gang are descriptive, appropriate and not unduly prejudicial.

#### **IV. SCOPE OF GOVERNMENT'S GANG EVIDENCE**

Former club brothers will testify that they joined the El Forasteros and Galloping Goose for a lifestyle choice. Some of the benefits of that choice included socializing and recreation similar to that afforded by any lawful motorcycle club, but another benefit was a purposefully-constructed shelter to insulate members from criminal narcotics prosecutions. Members used the gangs to obtain narcotics, and the gangs served to shield members from law enforcement.

The Eighth Circuit has repeatedly upheld evidence of gangs and gang-related activity in drug trafficking cases.<sup>2</sup> *United States v. Johnson*, 28 F.3d 1487, 1497-98 (8th Cir. 1994). In *Johnson*, the Eighth Circuit found that the evidence of gang activity was more probative than prejudicial because the evidence helped explain the connections between some of the defendants. *Id.* However, clearly, there are limits on the propriety of evidence of motorcycle gang evidence under Rule 403. The Eighth Circuit has found that extensive evidence of the history, propensities and violent tendencies of OMGs in general introduced against a person who was not an OMG member can be unduly

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<sup>2</sup>The following Eighth Circuit cases have upheld admissibility of gang evidence in the context of narcotics prosecutions: *U.S. v. Johnson*, 28 F.3d 1487 (8th Cir. 1994)(testimony on drug trafficking trade and on gangs was admissible); *U.S. v. McCoy*, 131 F.3d 760 (8th Cir. 1997)(evidence that the defendant and a defense witness whose credibility was crucial to the resolution of the case were affiliated with the same street gang was admissible and not unfairly prejudicial); *U.S. v. McKay*, 431 F.3d 1085 (8th Cir. 2005)(court did not abuse its discretion in admitting evidence that defendant was involved in a gang). *See also, United States v. Sloan*, 65 F.3d 149 (10th Cir. 1995)(gang membership admissible to prove existence, purpose, and knowledge of conspiracy).

prejudicial. *United States v. John Phillip Street*, 548 F.3d 621 (8th Cir. 2008). In that case, evidence of OMGs' general propensities for territoriality and violence was introduced to explain the role and motive of the defendant, who government witnesses testified was a gang associate and enforcer. Detective Steve Cook testified for over 20 trial transcript pages about the history of OMGs and their propensity for violence. The Eighth Circuit overturned the case in part because of what it deemed an overly copious amount of testimony about OMGs in general, which it found was "excessive, unduly prejudicial, and in great part completely irrelevant to the charged offenses." *Id.* at 633. Likewise, the Eighth Circuit has held that a "relentless attempt" by the government to convict a defendant club member through his association with the motorcycle club can constitute reversible error. *U.S. v. Roark*, 924 F.2d 1426, 1432 (8th Cir. 1991).

By contrast, in the instant case, the government seeks to introduce limited evidence concerning the drug practices of the two specific motorcycle gangs that all of the defendants belonged to. Testimony will focus on club members' drug use and distribution, which is inextricably intertwined with the government's case-in-chief. The government does not intend to adduce evidence of the general propensities of the gangs for violence, which is not relevant to the government's case. And the government seeks to introduce the gang evidence to prove knowledge and intent, not to show a general aptitude for lawlessness.

Other Circuits have specifically upheld the introduction of relevant and intertwined gang evidence regarding OMGs in drug and firearms trafficking trials. *See United States v. Bonds*, 12 F.3d 540, 573-74 (6th Cir. 1994) and *United States v. Harrell*, 737 F.2d 971, 977-78 (11th 1984). In *Harrell*, the defendants were convicted of drug trafficking, and they appealed the trial court's decision to admit evidence regarding their membership in an OMG and the culture surrounding the OMG. *Id.* at 974 and 977. The defendants in *Harrell* argued that the admission of the OMG evidence was probative only of their propensity to commit crime, in violation of FED. R. EVID. 404(b). *Id.* at 977. The Eleventh Circuit held that the challenged testimony was used to "enhance the trier's understanding of the event, and not to prove propensity." *Id. citing Weinstein & M. Berger, Weinstein's Evidence* ¶ 404[10] at 404-61 (1982). The appellate court noted that the OMGs' way of life "was important in understanding the existence, motives and object of the drug-trafficking conspiracy and the means through which it was conducted." Similarly, in this case, evidence regarding how the organizations functioned as gangs, and members' attitudes and actions regarding drugs, is important in understanding the defendants' motive and opportunity.

In *United States v. Bond*, the defendants were charged with federal firearm offenses after shooting and killing a man in an apparent retaliation of a shooting of a Hell's Angel member. *Bond*, 12 F.3d at 546-47. The defendants were convicted, and they appealed the convictions arguing that the trial court erred in admitting evidence of

OMGs. *Id.* at 573. The Sixth Circuit affirmed the convictions, ruling that the OMG evidence was “inextricably entwined” with the charged offense, and the evidence was necessary “in order to complete the story of the crime on trial.” *Id.* at 574 n.30.

Finally, in *United States v. Frank*, 2009 WL 2016342 (8th Cir. July 14, 2009)(unpublished), the convicted defendant in the companion case to *Street* attempted to argue that the motorcycle gang evidence introduced at his trial was also unfairly prejudicial. Noting that Frank was a former gang member, and the testimony was limited and more closely related to a relevant issue (snitches), the court distinguished the *Street* case and upheld admission of the evidence under Rule 403. *Id.* at \*3.

First, the main purpose of the El Forasteros evidence introduced at Street’s trial was “to illustrate the violent, lawless propensities of outlaw motorcycle gangs.” After discussing the testimony in depth, the Court found its “net effect” was “to locate El Forasteros within a tradition of misogynistic, hardened outlaws.” In contrast, the El Forasteros evidence introduced at Frank’s trial was sharply limited, focusing mainly on their view of “snitches.” Second, the *Street* court found significant that Street did not have any serious ties to El Forasteros. Frank, on the other hand, was a former member of the motorcycle gang, and there was testimony indicating Frank had adopted its view of snitches.

*(Internal citations and footnotes omitted).*

In the current case, the evidence of the defendants’ association with the El Forasteros and Galloping Goose motorcycle gang is inextricably entwined with the criminal agreement at the heart of the charged conspiracy. In order for the jury to get the complete story, it must understand the defendants’ drug activities within the



organizational structure of the Galloping Goose and El Forastero. The use of the word gang is not unduly prejudicial, and introduction of narrowly tailored gang evidence is highly probative of the drug conspiracy.

**V. CONCLUSION**

WHEREFORE, for the foregoing reasons and authorities, the government respectfully requests the Court deny defendant's motion in limine to preclude any use of the word "gang."

Respectfully submitted,  
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United States Attorney

By */s/Daniel M. Nelson*

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was delivered on December 7, 2009, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

*/s/Daniel M. Nelson* \_\_\_\_\_

Daniel M. Nelson

Assistant United States Attorney