

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

UNITED STATES OF
AMERICA,

Plaintiff,

v.

JAMES COX,

Defendant.

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) Case No. 09-00296-03-CR-W-FJG
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MOTION TO JOIN AND ADOPT IN LIMINE TO DISALLOW THE
TESTIMONY OF DETECTIVE STEVE COOK INSOFAR AS IT INVOLVES HIS
OPINION AS TO THE HISTORY AND ALLEGED GENERAL CRIMINAL
PROPENSITIES, ACTIVITIES, PRACTICES, AND RITUALS OF PERSONS
WHO BELONG TO SO-CALLED "OUTLAW" MOTORCYCLE CLUBS WITH
SUGGESTIONS IN SUPPORT

The government contends that all the charged defendants are members of one of two 'outlaw' motorcycle gangs. These individuals are identified as so-called one-percenters based on various accoutrements they wear on their club jackets. Members of such clubs, according to the government, routinely engage in criminal behavior, brutalize females, engage in rampant use of drugs and alcohol, and are prone to violent acts including murder.

This precise picture of the very clubs involved in this indictment was described in detail by Detective Cook, the case agent in this case, in *United States v. John P. Street*, 548 F.3d 618 (8th Cir. 2008) (reversed and remanded). The Panel in *Street* characterized Cook's testimony as "excessive", and "unduly

prejudicial" sufficient standing alone to warrant reversal. Indeed, the Court was apparently so concerned about the evidence that it took time to summarize it in considerable detail. Inasmuch as defendant suspects that the government will attempt to distinguish *Street* (Street was not a motorcycle gang member whereas these defendants are) and again try to offer this evidence in this case, relevant portions of that summary follows:

The government also put on a witness with special knowledge of motorcycle gangs, Detective Steve Cook. He testified about the history and organization of American motorcycle gangs in general and specifically about the criminal tendencies of the motorcycle gang "El Forasteros." He also provided specific examples of El Forasteros' violent and lawless behavior. In particular he discussed gang members' degrading attitudes toward women and their brutal hazing rituals. The testimony also indicated that El Forasteros gang members enforced an uncompromising policy against police informants or "snitches."

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[T]he government acknowledged in its closing argument that the "main purpose of [his] testimony" was . . . to illustrate the violent, lawless propensities of outlaw motorcycle gangs. Half of Cook's testimony, spanning twenty pages in the record, is devoted to an alarming portrayal of gang culture in general and of the local El Forasteros gang in particular.

* * *

Cook testified that he had received approximately one thousand hours of training on "outlaw motorcycle gangs." He began his

gang testimony by recounting a 1947 riot in California which evidently spawned the outlaw biker movement. Gang members self consciously adopt an "outlaw lifestyle," he testified, and refer to themselves as "One Percenters" to distinguish themselves from the bulk of law abiding motorcycle enthusiasts.

"They want to be different. They want to dress different. They don't want to associate with normal people and don't want to follow the rules that normal citizens follow on a day-to-day basis, they want to do their own thing regardless of the effect it has towards them or what the law says."

Cook then identified El Forasteros as an outlaw gang operating in the Kansas City metropolitan area. Cook told jurors that El Forasteros was affiliated with another local gang known as Galloping Goose, as well as with the national Hells Angels club. The allied gangs, he said, would support each other when disputes turned violent. "If there is any kind of an incident, a shoot-out, a large scale fight, brothers back brothers." Cook further emphasized the violent nature of the gangs by distinguishing them from other fraternal societies. "[I]f the Kiwanis, the Lions Club have a disagreement they will sit and talk about it. The Banditos and the Hells Angels will blow each other's vehicles up, shoot, assault. That's how they resolve issues within the biker community." Cook explained that bikers were territorial and would resort to violence to protect their turf, offering as an example a shooting in a Las Vegas casino. The gangs, he said, also modified or "chopped" stolen motorcycles to conceal their illegal origins.

Cook described the elaborate three part vest patches used to identify gang loyalties and demarcate territory. These include "One Percenter" designations and tattoos: "sometimes on the throat is a pretty popular location and painful." New El Forasteros members, Cook testified, underwent a "very degrading" hazing process in which prospects might be forced to clean up self induced vomit of full members and in which the mettle of initiates is tested by random beatings. Women, according to Cook, were never permitted to join the gang. "Women are property. They are property to the gang. They have no status in the gang, [t]hey are looked down upon. They are considered they're disposable. If one of them goes to jail, takes a fall, they replace them and they are expected to keep quiet."

All gang associates are expected to keep quiet according to Cook, who described a violent and uncompromising gang policy against "snitches" who cooperate with law enforcement authorities. "They have a term for snitches, Snitches are a Dieing [sic] Breed." To underscore this gangland ethos, the government introduced into evidence-over specific objection by the defense-a photograph of a t shirt which Cook identified as similar to those sold by El Forasteros at motorcycle shows. The shirt depicts "a coffin with a skull and cross bones in it with blood dripping from it. Says KC. for Kansas City and says Snitches Get Stitches for Being Punk Bitches." Although there was no evidence linking this t shirt to Street or to any of his associates, Cook was allowed to testify that the shirt was "an advertisement for violence." The jury was further told that "with the blood dripping from it you can tell that there is damage to the

head of the skull. It's showing what can happen, showing what could happen to a snitch or what they believe should happen to a snitch."

The net effect of Cook's testimony was to locate El Forasteros within a tradition of misogynistic, hardened outlaws, but the relevance of this testimony was not established. Cook testified to incidents of violence from as long ago as 1947 and from as far afield as Las Vegas, Nevada, and Hollister, California. He described arcane insignia and painful tattoos intended to set gang members apart from the rest of civilized society. He recounted nauseous and brutal initiation procedures. He made repeated references to shootings, assaults, and theft. He explained the general contempt gang members displayed towards women. None of this was tied to the actual crimes with which Street was charged or the particular facts of his case.

The holding in *Street*, is not unique or new law. This type of evidence was condemned some 17 years ago in *United States v. Roark*, 924 F.2d 1426 (8th Cir. 1991), a case cited and relied on by the Panel in *Street*. Admittedly, evidence of mere membership in a gang, absent other evidence of bad acts by that gang is not a violation of Rule 404(b). *United States v. Hodges*, 315 F.3d 794 (7th Cir. 2003). Also see *U.S. v. Jobson* 102 F.3d 214 (6th Cir. 1996) (gang membership evidence that in and of itself is a criminal act or statement is subject to a 404(b) notice in advance of trial). In *United States v. Ball*, 868 F.2d 984 (8th Cir. 1989) the defendant bragged after arrest that he was a biker and that to join his club, "Sons

of Silence" you have to kill someone. This statement was offered specifically as proof of *mens rea* in an assault-on-a-federal-officer case tried before Judge Whipple in this district. In *Ball* there was a direct connection between the evidence of gang membership, motive and the charged offense so there was no Rule 404(b) violation.

No such connection between Cook's wide-ranging testimony in *Street* and the conspiracy charged in this case is evident from the discovery or the admissions made by former members who have already pled to similar charges as pointed out below. Also, Cook's testimony about the nature of motorcycle gangs also appears to be much akin to the type of evidence roundly condemned by this Circuit in *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001)(reversed and remanded). In *Peoples* the court expressed grave concern about allowing a government "expert" agent to testify about what alleged criminals were thinking and the agent's interpreted meaning of their words absent direct personal knowledge by the agent:

Her testimony was not limited to coded, oblique language, but included plain English words and phrases. She did not personally observe the events and activities discussed in the recordings, nor did she hear or observe the conversations as they occurred. Agent Neal's testimony included her opinions about what the defendants were thinking during the conversations, phrased as contentions supporting her conclusion, repeated throughout her testimony, that the defendants were responsible for Ross's murder.

If allowed to testify, Cook will no doubt attempt to paint all these defendants as violent, aggressive, anti-social criminals engaged in wide-ranging criminal behavior without any specific knowledge of specific criminal acts by individual defendants that might otherwise arguably be admissible under Rule 404(b), FREv. See *United States v. Ball*, 868 F.2d 984 (8th Cir. 1989).

It is anticipated that no less than seven or eight former club members may be witness in this case. Those individuals include: Michael Hensley, Steven Street, Gary Mickiewicz, Robert Peters, Donald Culey, Robert L. May, Michael Fitzwater, and William Eneff. Each of the before named defendants entered a guilty plea. The plea agreements almost uniformly included a Rule II, FRCP, factual basis paragraph typical of that contained in the *U.S. v. Mickiewicz* agreement describing the alleged conspiracy:

Defendant was a member of the EI Forastero Motorcycle Gang chartered in Kansas City, Missouri. The EI Forastero have an affiliate organization known as the Galloping Goose Motorcycle Gang and in fact, the gangs share a common clubhouse in Kansas City, Missouri. As a member of the EI Forastero, he was required to annually pay dues and attend a certain number of motorcycle trips, known as "runs" per year. On each run, the members were required to pay run money that was pooled, or collected by each gang charter, forwarded to the specific EI Forastero or Galloping Goose charter that hosted the particular motorcycle run, and was used to purchase

methamphetamine, cocaine, and marijuana. Those drugs were maintained in run bags and were distributed, or made available, to all the club members that attended the run. The defendant knew what the money was going to be used for and knowingly contributed run money and in so doing, the defendant admits that he distributed methamphetamine, cocaine, and marijuana and assisted others in the distribution of those drugs.

As an active member of the EI Forastero Motorcycle Gang, defendant participated in the distribution of between 500 - 1500 grams of methamphetamine, figuring at least 20 runs over 5 years, each involving the distribution of 1 ounce (28 grams) of methamphetamine or more per run.

It would appear from all the plea agreements that the general theory is the host club would collect advance money to buy drugs to use at a planned get-together at various affiliate locations much the way one might send in a token payment to cover coffee, cookies and soda at a short CLE session at the Kansas City Bar Association or \$10 or \$12 for lunch at the annual Public Defender's CLE seminar. Absolutely nothing contained in the allegations in the indictment insofar as the conspiracy is concerned would therefore justify the prejudicial testimony Cook offered in the *Street* case and which he will likely try to offer in this case.

It is worthwhile to note that Count two of the indictment charges defendant Angell separately with allegedly threatening fellow club member Michael Hensley

for providing information to Detective Cook. It is not alleged in the indictment that any other defendant was aware of this, aided and abetted in the act, or conspired to bring it about. Indeed, it appears, if it did happen, to be an isolated act and expression of frustration and anger by one club member directed to a former friend. The charging of this isolated act in this single count simply does not justify allowing Cook to rant about motorcycle gangs in general and how "snitches get stitches" insofar as Defendant Larson and others not charged in Count two are concerned.

Finally, while Cook may have previously believed that based on his 1000 hours of training that motorcycle gang members routinely engage in acts of retribution against witnesses and that one-percenters "never" testify or cooperate, that belief has surely been dispelled and proven false in this case by the multiple number of former club members of these two clubs who have elected to accept plea agreements, cooperate with the government, and testify. This general attitude and approach about how to deal with and engage in damage control in the criminal justice system when accused of a criminal act seems to wholly discredit the opinion testimony of Cook in the *Street* case insofar as how these club members view their so-called fictional one-percent oath. Such testimony should not be allowed.

WHEREFORE. defendant Cox moves the Court to enter an order granting the relief requested.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2009, I electronically filed the foregoing through use of the CMIECF system causing a copy of same to be served electronically on all counsel presently of record in the case.