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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-00362-01-CR-W-NKL
	)	
JAMES J. STROBBE,	)	
	)	
Defendant.	)	

GOVERNMENT'S TRIAL MEMORANDUM

Comes now the United States of America, by and through its undersigned attorneys, and respectfully submits this Memorandum of Law regarding issues which the government anticipates may arise in the trial of the above-styled case.

I. PRIOR CONSISTENT STATEMENTS

Rule 801(d)(1)(B), Federal Rules of Evidence, provides in pertinent part:

> **(d) Statements which are not hearsay.** A statement is not hearsay if -
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> > **(1) Prior statement by witness.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant or recent fabrication or improper influence or motive.[1]

The Eighth Circuit has held that a statement is admissible under the rule if: (1) the declarant testifies at trial and is subject to cross-examination; and (2) the statement offered is consistent with the declarant's trial testimony, and was made prior to the alleged fabrication, or

1. The Supreme Court has held that, to qualify for admission under this rule, the statement must have been made prior to the alleged recent fabrication or improper motive or influence. *Tome v. United States*, 513 U.S. 150 (1995).

prior to the motive or influence which is alleged to have improperly resulted in the "fabricated" testimony. *United States v. Red Feather*, 865 F.2d 169, 171 (8th Cir. 1989); *United States v. Bowman*, 798 F.2d 333, 337-339 (8th Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

Where it is contended at trial that a witness' testimony is the result of the witness' discussions or negotiations with the authorities, evidence that the witness made similar statements to others prior to such contacts with the authorities logically rebuts the allegations of false testimony, and specifically addresses the precise type of express or implied charge against the declarant of recent fabrication or improper motive referred to by the rule. *United States v. Barrett*, 937 F.2d 1346 (8th Cir.), *cert. denied*, 502 U.S. 916 (1991).

The admission of such statements is within the discretion of the trial court. *United States v. Andrade*, 788 F.2d 521, 532 (8th Cir.), *cert. denied*, 479 U.S. 963 (1986). The rule itself is not one providing for "exceptions" to the general rule against hearsay; Rule 801(d) instead provides that such statements are not hearsay. Accordingly, such a statement can be utilized as substantive evidence, and the jury may be so instructed. *Tome v. United States,* 513 U.S. 150 (1995); *United States v. White*, 11 F.3d 1446, 1450 (8th Cir. 1993); *United States v. Bowman*, *supra*, 798 F.2d at 338.[2] In a decision squarely on point, the Eighth Circuit upheld an instruction to the effect that prior consistent statements could be considered "as evidence of the truth of the matters contained in them," against defense arguments that such an instruction unfairly emphasized a particular piece of evidence. *United States v. (Luisa) Ward,* 21 F.3d 264, 265 (8th

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2. *Accord*, *United States v. Lanier*, 578 F.2d 1246, 1255-56 (8th Cir.), *cert. denied*, 439 U.S. 856 (1978); *United States v. Casoni*, 950 F.2d 893, 903-906 (3rd Cir. 1991); *United States v. Cherry*, 938 F.2d 748, 755 (7th Cir. 1991); *United States v. Miller*, 874 F.2d 1255, 1271-1274 (9th Cir. 1989); *United States v. James*, 609 F.2d 36, 49-50 (2nd Cir. 1979); *cert. denied*, 445 U.S. 905 (1980).

Cir. 1994).[3]

II. POTENTIAL IMPROPER IMPEACHMENT

Rule 608(b), Federal Rules of Evidence provides in pertinent part:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness . . . (Emphasis added).

The purpose of the rule is to "avoid holding mini-trials on peripherally related or irrelevant matters." *United States v. Martz*, 964 F.2d 787, 789 (8th Cir.), *cert. denied*, 506 U.S. 1038 (1992). *Cf.*, *United States v. Southwest Bus Sales, Inc.*, 20 F. 3d 1449, 1456-1457 (8th Cir. 1994) (FED. R. EVID. 404(b) overrules 608(b) with regard to relevant evidence regarding a defendant); *Foster v. General Motors Corp.*, 20 F.3d 838, 839 (8th Cir. 1994) (Rule 608(b) does not apply to impeachment on a material issue).

The rule has been repeatedly given the interpretation of its own plain language by the Eighth Circuit, to the effect that while a party may inquire of a witness concerning matters which go to the witness' character for truthfulness, the examiner may not thereafter seek to impeach the witness' answer with extrinsic evidence, but must take the answer of the witness. *United States*

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3. The exact instruction given in *Ward* read:

You have heard evidence that [witnesses] made statements prior to their testimony in court which were consistent with their testimony in court. This testimony was offered to rebut allegations that these witnesses' testimony was the product of improper influences or a motive to falsify. If you find that prior statements of the witness were consistent with the in-court testimony of that witness, you may consider the prior consistent statements as substantive evidence - that is, as evidence of the truth of the matters contained in the statements. *United States v. Luisa Ward*, No. 92-00084-02-CR-W-8, W.D.MO. (1993), Court's instruction no. 16.

v. Swanson, 9 F.3d 1354, 1358 (8th Cir. 1993); *United States v. Johnson*, 968 F.2d 765, 766-767 (8th Cir.), *cert. denied*, 506 U.S. 980 (1992); *United States v. Capozzi*, 883 F.2d 608 (8th Cir. 1989), *cert. denied*, 495 U.S. 918 (1990).[4]

We respectfully request that, prior to engaging in any impeachment which might be of questionable relevance (in that the matter of inquiry might not go directly to veracity), and prior to offering any extrinsic evidence whatsoever for impeachment purposes, counsel for defendant be instructed to alert the Court in a bench conference so that such a matter may be resolved outside the hearing of the jury.

III. MULTIPLE CONSPIRACY ALLEGATIONS

Since defendant may invoke an issue of law, alleging that the indictment charges multiple conspiracies, a discussion of the authorities governing claims of multiple-versus-single conspiracies, and variance, is required.

A. Variance

A variance occurs when the evidence admitted at trial establishes facts which are materially different from those alleged in the indictment. The trial judge is normally in the best position to resolve claims of variance based upon allegations of multiple conspiracies. *United States v. Towers,* 775 F.2d 184, 189 (7th Cir. 1985).

Whether the evidence shows the single conspiracy charged, or multiple conspiracies, is essentially a factual issue for the jury to resolve. *United States v. Willis*, 940 F.2d 1136 (8th Cir.

4. *Accord, United States v. Petty*, 798 F.2d 1157, 1161-1162 (8th Cir. 1986), *cert. denied*, 486 U.S. 1057 (1988); *United States v. Randle*, 815 F.2d 505 (8th Cir. 1987); *United States v. Bussey*, 942 F.2d 1241 (8th Cir. 1991), *cert. denied*, 504 U.S. 908 (1992); *United States v. May*, 727 F.2d 764 (8th Cir. 1984); *United States v. Marvin*, 720 F. 2d 12 (8th Cir. 1983).

1991); *United States v. Regan*, 940 F.2d 1134 (8th Cir. 1991); *United States v. Nevils*, 897 F.2d 300, 306 (8th Cir.), *cert. denied*, 111 S. Ct. 125 (1990); *United States v. Zimmerman*, 832 F.2d 454, 457 (8th Cir. 1987).

An indictment which alleges a conspiracy to commit several offenses may be sustained by proof of a conspiracy to commit any one of the charged offenses. *United States v. Burchinal*, 657 F.2d 985, 992 n.4 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States v. Wendelstedt,* 589 F.2d 339, 342 (8th Cir. 1978), *cert. denied*, 442 U.S. 916 (1979).

B. Methods of Analysis - Single v. Multiple Conspiracies

Defendant may claim (based ultimately upon *Kotteakos v. United States,* 328 U.S. 750 (1946)) that the conspiracy charged in Count One alleges (at least) two conspiracies without what the *Kotteakos* court would metaphorically have labeled a common purpose "rim," and connected only by their "common denominator" or "hub" conspirators.[5] Since *Kotteakos*, few conspiracy defendants have failed to claim that they suffer from being joined in a "rimless" "wheel" conspiracy, and several federal courts have utilized "wheel" metaphors in analyzing the cases before them.[6] Where the subject of the conspiracy is an agreement to distribute narcotics,

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5. *Kotteakos* involved a collection of otherwise unrelated "spoke" conspiracies revolving around a single common member, Brown, at the "hub" of the wheel. Nineteen defendants were brought to trial, and the evidence established eight or more different conspiracies to defraud the Federal Housing Administration. Brown was the only common denominator between the various schemes, with no other connections between the various "spokes". The government conceded that multiple conspiracies had been shown by its evidence, but contended that the variance was harmless. 328 U.S. at 753-756. The Supreme Court ruled otherwise and reversed. By contrast, the evidence at trial in this case will show that the defendants were aware of the ongoing conspiracy to distribute marijuana, and to threaten and act violently against the persons and property of potential informants, in order to avoid prosecution.

6. See generally, Note, "Single vs. Multiple" Criminal Conspiracies: A Uniform Method of Inquiry for Due Process and Double Jeopardy Purposes, 65 Minn. L. Rev. 295 (1980); and Note,

however, the circuit courts have usually analogized the conspiracy to a "chain" type of agreement.[7] Such agreements are commonly held to be single conspiracies "despite the fact that there has been no direct contact whatsoever amongst some of its links." *United States v. Inadi*, 748 F.2d 812, 817 (3rd Cir. 1984), reversed on other grounds, 106 S. Ct. 1121 (1985). *Accord*, *United States v. Baker*, *supra*, 855 F.2d at 1357; *United States v. Tarantino*, 846 F.2d 1384, 1392 (D.C. Cir.), *cert. denied*, 109 S. Ct. 174 (1988); *United States v. Rich*, 262 F.2d 415, 417-418 (2d Cir. 1959).

Even though the courts utilizing wheel and chain metaphors have had little difficulty finding a single conspiracy where a narcotics scheme is charged, the application of these metaphors has been the subject of increasing criticism. In *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973), the court said:

> The problem is difficult enough without trying to compress it into figurative analogies. Conspiracies are as complex as the versatility of human nature and federal protection against them is not to be measured by spokes, hubs, wheels, rims, chains, or anyone or all of today's galaxy of mechanical, molecular, or atomic forms. *Id.* at 59 n. 11.[8]

As replacements for such metaphors, the circuits have employed more functional means

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Resolution of the Multiple Conspiracies Issue Via A "Nature of the Enterprise" Analysis: The Resurrection of Agreement, 42 Brooklyn L. Rev. 243 (1975).

7. *See*, *e.g.*, *United States v. Gantt*, 617 F.2d 831, 846 (D.C. Cir. 1980); *accord*, *United States v. Andrus*, 775 F.2d 825, 840-841 (7th Cir. 1985); *United States v. Michelena-Orovio*, 719 F.2d 738, 746 (5th Cir. 1983) (*en banc*), *cert. denied*, 465 U.S. 1104 (1984); *United States v. Moten*, 564 F.2d 620, 624 (2d Cir.), *cert. denied*, 434 U.S. 942 (1977).

8. *Accord*, *United States v. Lee*, 782 F.2d 133, 134-135 (8th Cir. 1986) (holding that a single overall agreement is the test, and refusing "to describe the conspiracy in structural terms"); *United States v. Elam,* 678 F.2d 1234, 1246 (1st Cir. 1982) ("The government is not required to attempt to squeeze a conspiracy into any particular mold"); *United States v. Borelli*, 336 F.2d 376, 383-384 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *see also*, Note, 42 Brooklyn L. Rev. 243, *supra*, at 275-308.

in distinguishing single from multiple conspiracies. Recognizing the high degree of interdependence between the players in a narcotics conspiracy, the courts have used a "dependence" analysis when examining the flow of narcotics and money within a charged conspiracy. *United States v. Regan*, *supra* ("The existence of a single agreement can be inferred when the evidence reveals the participants shared a common aim or purpose and mutual dependence and assistance existed"); *United States v. Lee*, 782 F.2d 133, 134 (8th Cir. 1986).[9] Thus, where the members of a conspiracy are dependent upon each other for financing or for product supply, and thereby share a common goal or agreement, a single conspiracy may be properly charged and found. *United States v. Dickey*, 736 F.2d 571, 582 n.15 (10th Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).[10] Other courts, also eschewing labels, have called for an examination of the "nature of the enterprise" underlying the conspiracy charged. *See*, *e.g.*, *United States v. Taylor*, 562 F.2d 1345, 1351-1352 (2d Cir.), *cert. denied*, 435 U.S. 853 (1977) (also holding that such conspiracy factors as knowledge of scope and interdependence can be inferred from the nature of the enterprise in a narcotics case).

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9. *Accord*, *United States v. Jackson*, 696 F.2d 578, 583 (8th Cir. 1982), *cert. denied*, 460 U.S. 1073 (1983). *See also*, *United States v. Daily*, 921 F.2d 994, 1007 (10th Cir. 1990); *Tarantino*, *supra*, 846 F.2d 1392-1393; *United States v. Adamo*, 742 F.2d 927, 932-933 (7th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985); Note, 42 Brooklyn L. Rev., *supra*, at 284; Note, 65 Minn. L. Rev., *supra*, at 316-317.

10. *See also*: *United States v. Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 903 (1973) ("each level of the operation depends upon the existence of the other, and the mutual interdependence of each is fully understood and appreciated by the other"); *United States v. Cerro*, 775 F.2d 908, 914 (7th Cir. 1985); *United States v. Percival*, 756 F.2d 600, 607-609 (7th Cir. 1985); *United States v. Moten, supra*, 564 F.2d at 624; *United States v. Agueci*, 310 F.2d 817, 826-827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963); Note, 65 Minn. L. Rev. 295, *supra*, at 316-317; Note, 42 Brooklyn L. Rev. 243, *supra*, at 284.

The courts' recognition that the narcotics trade is a "different animal" for purposes of conspiracy analysis stems largely from *Direct Sales Co. v. United States*, 319 U.S. 703 (1943), in which the Supreme Court distinguished a narcotics conspiracy - involving illegal contraband - from one involving an illegal use of a legal commodity. The Court noted that activities which would be wholly innocuous or not more than grounds for suspicion in relation to unrestricted goods, may furnish conclusive evidence of guilt with respect to restricted goods, because the seller "knows the buyer has an illegal object and enterprise." *Id.* at 711-712. Since *Direct Sales*, the circuits applying a "nature of the enterprise" test have held that where a narcotics distribution scheme is alleged, the nature and quantity of the goods involved may justify an inference that the conspirator knew the scope of the overall enterprise involved, and hence that a single conspiracy existed. *United States v. Watson*, 594 F.2d 1330, 1340 (10th Cir.), *cert. denied*, 444 U.S. 840 (1979).[11] In light of these authorities, those decisions analyzing conspiracies which did not involve narcotics are of limited value in evaluating schemes which do concern illegal drug transactions. *Tarantino*, *supra*, 846 F.2d at 1393.

One final series of cases applies the most expansive, and perhaps most appropriate, set of guidelines in distinguishing single from multiple conspiracies. These decisions examine the "totality of evidence"[12] or all "relevant factors"[13] in weighing claims of variance.

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11. *Accord*, *United States v. Behrens*, 689 F.2d 154, 160 (10th Cir.), *cert. denied*, 459 U.S. 1088 (1982); *United States v. Elam*, 678 F.2d 1234, 1246 (1st Cir. 1982); *United States v. Murray,* 618 F.2d 892, 902 (2d Cir. 1980); *United States v. Baxter*, 492 F.2d 150, 158-160 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); Note, 42 Brooklyn L. Rev., *supra*, at 250-254.

12. *United States v. Drougas*, 748 F.2d 8, 17 (1st Cir. 1984).

13. *United States v. Zemek*, 634 F.2d 1159, 1168 (9th Cir. 1980).

Any assertion that the charged conspiracy is actually more than one conspiracy fails to give these authorities their due. The fact that multiple defendants or groups may be involved, or that separate crimes or acts are performed, does not rule out the possibility that one overall conspiracy exists, since a conspiracy may have more than one criminal goal. *United States v. Roark*, 924 F.2d 1426, 1429 (8th Cir. 1991); *United States v. Semek,* 634 F.2d 1159, 1167 (9th Cir. 1980), *cert. denied,* 452 U.S. 905 (1981).

That any defendant may not have been aware of each and every facet of the conspiracy, or of the identity or role of every other conspirator is of little consequence, as long as these defendants knew they were participating in a narcotics conspiracy. *United States v. Baker*, *supra*, 855 F.2d at 1357. Similarly, the fact that various conspirators entered the conspiracy at various times or performed different functions is not controlling. *Id.* at 1357. *Accord*, *United States v. Massa*, 740 F.2d 629, 636 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

In the event that the Court feels that the evidence actually raises a multiple conspiracy issue, the United States offers the following instruction, which was held by the Eighth Circuit to adequately address such issues in *United States V. Adipietro*, 983 F.2d 1468, 1475 (8th Cir. 1993):

> If the United States has failed to prove beyond a reasonable doubt the existence of the conspiracy charged, then you must find the defendant not guilty even though some other conspiracy did exist. Likewise, if the United States has failed to prove beyond a reasonable doubt that the defendant was a member of the conspiracy which is charged, then you must find the defendant not guilty even though he may have been a member of some other conspiracy. Keep in mind that you must give separate consideration to the evidence about each individual defendant. Each defendant is entitled to be treated separately and you must return a separate verdict for each defendant. In determining whether the defendant became a member of the charged conspiracy, you may consider only evidence pertaining to his own acts and statements.

IV. UNCHARGED, SIMILAR CRIMES EVIDENCE

In separate pleadings, the United States will provide the required notice to the Court and counsel for the defendant that instances of uncharged conduct may be offered in evidence at trial.

The United States respectfully submits that, based upon the authorities discussed below, these incidents fall into two distinct categories for purposes of analysis and admission: (1) evidence admissible in the government's case-in-chief which tends to prove defendants' motive, intent, knowledge, and plan, scheme, or design, under Rule 404(b), Federal Rules of Evidence; and (2) other uncharged offenses, which the government does not intend to offer in its case-in-chief, unless the "door is opened" by the defense in some other fashion.

Rule 404(b), of Federal Rules of Evidence provides:

> 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, plan, knowledge, identity, or absence of mistake or accident . . . Rule 404(b) is a rule of inclusion, not a rule which carries a presumption of exclusion.

United States v. Arcoren, 929 F.2d 1235, 1243 (8th Cir.), *cert. denied,* 502 U.S. 913 (1991). If, therefore, the prosecution can offer a proper purpose for the admission of the evidence, the evidence is to be admitted unless considerations of unfair prejudice (Rule 403) dictate otherwise. *United States v. Butler*, 56 F.3d 941 (8th Cir.), *cert. denied*, 516 U.S. 924, (1995); *United States v. Yellow*, 18 F.3d 1438, 1441 (8th Cir. 1994); *United States v. Dobynes*, 905 F. 2d 1192 (8th Cir. 1990), *cert. denied*, 498 U.S. 877 (1990); *United States v. Johnson*, 892 F. 2d 707 (8th Cir. 1989). Such unfair prejudice is to be found only where the evidence shows only the criminal propensities of the defendant. *United States v. Escobar*, 50 F.3d 1414, 1421

(8th Cir. 1995); *United States v. Sykes*, 977 F.2d 1242, 1246 (8th Cir. 1992).[14] The admission of evidence under Rule 404(b) is left to the broad discretion of the trial judge. *United States v. Crouch*, 46 F.3d 871 (8th Cir.), *cert. denied*, 516 U.S. 871, (1995); *United States v. Sykes*, *supra*; *United States v. House*, 939 F.2d 659 (8th Cir. 1991); *United States v. Yerks*, 918 F.2d 1371, 1373 (8th Cir. 1990). The trial court does not abuse this discretion by admitting such evidence, unless the evidence clearly had no bearing on any material issue in the case. *United States v. DeAngelo,* 13 F.3d 1228, 1232 (8th Cir.), *cert. denied,* 512 U.S. 1224 (1994).

Such evidence is admissible in the government's case-in-chief, because the offense charged is a specific intent crime, and the "government need not await the defendant's denial of intent before offering evidence of similar acts relevant to that issue." *United States v. Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977). *Accord*, *United States v.*

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14. The most damning types of "uncharged crimes" do not necessarily result in "unfair" prejudice when admitted under the Rule. In *United States v. Chagra*, 754 F.2d 1186 (5th Cir. 1985), *cert*. *denied*, 474 U.S. 922 (1985), the defendant was charged with murder and conspiracy to commit murder, obstruction of justice and conspiracy to possess marijuana with intent to distribute. Defendant sought, inter alia, severance of the murder counts from the other charges. The appellate court upheld the district court's denial of the severance motion, noting that, in a separate trial, the evidence of the murder would have been admitted under rule 404(b) as evidence of the defendant's motive in the other offenses. In doing so, the Court noted:

> Evidence of Chagra's involvement in the plan to murder Judge Wood -- whether offered to convict of murder and conspiracy to murder or to show motive and intent to commit the offenses charged in counts III and IV -- undoubtedly placed Chagra in a bad light before the jury. Evidence is not unfairly prejudicial, however, simply because it convincingly incriminates the accused. We have no doubt that if counts III and IV had been severed and each tried separately from the murder and conspiracy to murder counts, it would have been well within the discretion of the trial judge under Fed. R. Evid. 404(b) to admit in each of these trial the evidence of Chagra's participation in the scheme to murder Judge Wood.

Id. at 1189.

Schweihs, 971 F.2d 1302 (7th Cir. 1992) (prior extortionate acts as old as six years prior to charged offenses properly admitted where intent was automatically in issue as material element of charged offense); *United States v. Zeuli*, 725 F.2d 813 (1st Cir. 1984); *United States v. Wilkes*, 685 F.2d 135, 138 (5th Cir. 1982) (intent was in issue and difficult to prove without uncharged evidence "important factor in admission" was "government's need for the evidence" and absence of other evidence to show motive, intent, or knowledge); *United States v. Hamilton*, 684 F.2d 380, 384 (6th Cir.), *cert. denied,* 459 U.S. 976 (1982); *United States v. Price*, 617 F.2d 455, 459 (7th Cir. 1980).

Such prior "intent" incidents "need not be duplicates of the of the one for which the defendant is now being tried . . . The degree of similarity is relevant only insofar as the acts are sufficiently alike to support an inference of criminal intent." *United States v. Tuchow*, 768 F.2d 855, 863 (7th Cir. 1985), *citing, United States v. Radseck*, 718 F.2d 233, 236-7 (7th Cir. 1983), and *United States v. O'Brien*, 618 F.2d 1234, 1238 (7th Cir.), *cert. denied,* 449 U.S. 858 (1980). *Accord*, *United States v. Brown*, 250 F.3d 580, 585-6 (7th Cir. 2001) (issue of required similarity is case specific).

The period of time which may have elapsed between a prior conviction and the charged conspiracy may not be so remote as to preclude admission or reduce the probative value of this evidence. *See, e.g., United States v. Green*, 151 F.3d 1111, 1114 (8th Cir. 1998) (noting Eighth Circuit approvals of admission of uncharged acts 17 years, 12 years, and 13 years before charged offenses (citations omitted)); *United States v. Prevatte*, 16 F.3d 767, 771-777 (7th Cir. 1994) (prior offense eighteen-months old not too remote to show scheme, background, and motive), *citing, United States v. Obiuwevbi*, 962 F.2d 1236, 1241 (7th Cir. 1992) (five years). *Accord*,

United States v. Lopez-Martinez, 725 F.2d 471, 475 (9th Cir.) (eight years), *cert. denied,* 469 U.S. 837 (1984).

A. Potential Rebuttal Evidence

Other matters would become admissible, subject to the discretion of the Court, if the defense places in issue any matter which would make such evidence proper rebuttal. Such issues could, for example, include evidence of the defendant's good character, or entrapment. *United States v. Bruguier*, 161 F.3d 1145, 1148-9 (8th Cir. 1999); *United States v. Roper*, 135 F.3d 430 (6th Cir.), *cert. denied,* 524 U.S. 920 (1998); FED. R. EVID. 404(a).

B. Burden of Proof

The former rule in this circuit (See, e.g., *United States v. Weber*, 818 F.2d 14 (8th Cir. 1987)) was that the proponent of 404(b) evidence had the burden of establishing by clear and convincing evidence that the defendant was the "actor" in the uncharged misconduct. This test was overruled by the Supreme Court's decision in *Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496 (1988) which held that the governing foundation requirement for Rule 404(b) evidence is simple relevance. The Court in *Huddleston* announced a four-step inquiry as the appropriate test for admission of evidence under this rule:

> *First*, the evidence must be offered for a proper purpose;
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> *Second*, the evidence must be relevant;
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> *Third*, the probative value of the evidence must outweigh any potential for unfair prejudice to the defendant; and
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> *Fourth*, the jury must be instructed as to the limited purposes for which the evidence may be considered.

Citing its decision in *Bourjaily v. United States*, 483 U.S. 171 (1987), (discarding the

common-law rule against "bootstrapping" with respect to Rule 801(d)(2)(E)), the Court in *Huddleston* rejected the appellant's assertion that any preliminary showing of even a preponderance of the evidence was required before the proffered evidence could be received. The Court instead held that the trial judge could properly consider all the evidence in the case in determining whether the jury could find that the defendant had committed the challenged acts. 108 S.Ct. at 1501-1502; *accord*, *United States v. Drew*, 894 F.2d 965, 971 (8th Cir.), *cert. denied*, 494 U.S. 1089 (1990); *United States v. Felix*, 867 F.2d 1068 (8th Cir. 1989), reversed on other grounds, 503 U.S. 378 (1992).

C. Procedure

The Eighth Circuit has continued to hold that where intent is an element of the charged offense, uncharged misconduct evidence is admissible to prove this element in the government's case-in-chief, even if the defendant plans to present only a general denial defense. *United States v. Crouch*, *supra*; *United States v. Miller*, 974 F.2d 953, 960 (8th Cir. 1992); *United States v. Ballew*, *supra*, 40 F.3d at 941-942.

To guarantee that jurors correctly limit their consideration of evidence admitted under the rule, the Eighth Circuit has held that a standard limiting instruction is appropriate. *United States v. Felix*, *supra*, 867 F.2d at 1075; Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (2003), Instruction No. 2.08.

1) Intent and Motive

Anticipating a defense argument that intent cannot be addressed with 404(b) evidence in a general denial case, the United States respectfully directs the Court's attention to the decision in *United States v. Hill*, 249 F.3d 707 (8th Cir. 2001). In this decision, Judge Lay, writing for the

Court, noted that the Supreme Court's decision in *Old Chief v. United States*, 519 U.S. 172 (1997), and the Supreme Court's remand in *United States v. Crowder*, 519 U.S. 1087 (1997), had implicitly overruled the Eighth Circuit's earlier decision in *United States v. Jenkins*, 7 F.3d 803 (8th Cir. 1993). The *Jenkins* court had held that "a defendant who unequivocally claims not to have committed the acts charged against him has not placed intent into issue such that his past crimes can be admitted to show intent." *Hill*, *supra*, 249 F.3d at 210, citing *Jenkins*, 7 F.3d at 807.

Noting that even subsequent Eighth Circuit cases had limited the holding in *Jenkins*, the *Hill* court held that *Old Chief* and *Crowder* had "overruled, or at least substantially limited, the *Jenkins* line of cases," further confirming that "Rule 404(b) acts *as a theory of admissibility* . . . since intent is one of those valid purposes, and the parties do not dispute that the past crime is relevant to shoe Hill's intent, the admission of the past crime meets Rule 404(b)'s relevancy test." *Hill*, 249 F.3d at 712-13 (emphasis added). Judge Lay further noted that in enacting Rule 404(b) Congress had "determined that past crime evidence can be part of the story of defendant's criminal behavior, so long as it proves an issue, such as intent, other than the defendant's criminal predisposition to commit criminal acts." He then cited *United States v. Bilderbeck*, 163 F.3d 971, 977 n.10 (6th Cir. 1999), quoting, "The intent with which a person commits an act on a given occasion can many times are best proven by evidence of his prior acts." *Hill*, 249 F.3d at 713.[15]

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15. *Accord*, *United States v. Crouch*, 46 F.3d 871, 874 (8th Cir.) ("We have consistently held Rule 404(b) evidence is admissible to show intent *during the government's case-in-chief* . . . even if the defendant plans to present a general denial defense")(emphasis added), *cert. denied*, 516 U.S. 871 (1995). *Accord*, *United States v. Thomas*, 58 F.3d 1318, 1321 (8th Cir. 1995); *United States v. Miller*, 974 F.2d 953, 960 (8th Cir. 1992) (fact that defendant asserted general

2) Plan, Scheme and Design

The government notes that in *United States v. LeCompte*, 99 F.3d 274 (8th Cir. 1996), the court recognizes distinctions between the various permissible uses under the rule for "plan" evidence. The term has a broad, natural meaning, and is not a limited term of art. *LeCompte* noted that "plan" evidence may be admitted to show "preparation," and a "common scheme or plan," as well as a "signature *modus* operandi," and that different standards of similarity between the prior acts and charged crimes applied to these categories.[16] 99 F.3d at 277-280. *LeCompte* also cites with approval the case of *United States v. Baker*, 82 F.3d 273, 276 (8th Cir. 1996), for the proposition that "evidence of . . . similar prior offenses has been admitted because it tended to prove that defendant employed a 'common scheme' to commit a series of similar crimes." *LeCompte* also instructs that, "When prior crime's evidence is relevant to prove intent, it need only be similar to the charged offense; it need not evidence a 'signature' *modus operandi*." *Ibid*, at 279, citing, *United States v. Burkett*, 821 F.2d 1306, 1309 (8th Cir. 1987).

Citing the case of *United States v. Mothershed*, 859 F.2d 585, 590 (8th Cir. 1988), however, the *LeCompte* court then declared that such evidence should not be admitted "to prove a nominally contested issue." 99 F.3d at 279. This is a fatal flaw in *LeCompte*, in that it - like the now discredited *Jenkins* line of decisions - sought to present the keys of admissibility on an

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denial defense did not render evidence or prior crime inadmissible on issues of intent and motive); *United States v. Marin-Cifuentes*, 866 F.2d 988, 996 (8th Cir. 1989); *United States v. Brown*, 250 F.3d 580, 584 (7th Cir. 2001) ("Intent is automatically at issue in specific intent crimes").

16. The Eighth Circuit's Model Jury Instructions fail to make this distinction, offering only one instruction for *mens rea* evidence (No. 2.08 - intent, knowledge, and motive), and one for identity (No. 2.09 - *modus operandi* evidence).

element of the charged offense to the defendant, who could attempt to define the litigation (and eliminate intent evidence) through either stipulation or general denial. The government respectfully submits that such portions of *Mothershed*, and this portion of the *LeCompte* decision, paralleling *Jenkins*, have similarly been overruled by *Old Chief*. LeCompte is also discussed at length in a later 8th Circuit decision.[17] In *United States v. Carroll*, 207 F.3d 465, 467 (8th Cir. 2000), the Court listed three distinct categories of "plan" evidence:

> In some circumstances, a defendant's prior bad acts are part of a broader plan or scheme relevant to the charged offense . . . Evidence of past acts may also be admitted . . . *as direct proof of a charged crime that includes a plan or scheme element* . . . In other circumstances . . . the pattern and characteristics of the crimes are so unusual and distinctive as to be like a signature . . . In these cases, the evidence goes to identity . . . These 'plan' and 'identity' uses of Rule 404(b) evidence are distinct from each other . . .
>
> (Emphasis added).

Other decisions of the 8th Circuit have made it clear that "plan" evidence can take many more varied shapes than that of a *modus operandi* "signature." *See, e.g.*, *United States v. Alaniz*, 148 F.3d 929, 924 (8th Cir.)(prior drug offenses admitted to show "plan and intent"), *cert. denied*, 522 U.S. 1047 (1998); *United States v. Carr*, 764 F.2d 496, 499 (8th Cir. 1985) (evidence of uncharged fraudulent loans properly admitted to show "common scheme and design and intent" [not *modus operandi* or identity]), *cert. denied*, 475 U.S. 1010 (1986).

The United States respectfully submits that, in light of the more recent authorities discussed above, the *LeCompte*/*Mothershed*/*Jenkins* line of cases has been overruled, especially as such cases purport to limit 404(b) evidence to issues defined by defense strategies, and as they

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17. To the extent that *Carroll* relied upon the *Jenkins*-like analysis of *LeCompte*, it, too has been overruled.

purport to limit "plan" evidence to cases in which identity is in issue.

The continued reliance upon *Mothershed* accordingly also represents a flaw in the current jury instruction (No. 2.08) found in this Circuit's Model Jury Instructions. (Committee Comments to Instruction 2.08, stating that *Mothershed* requires that issues such as intent be reserved until placed in issue by the defense. Eighth Circuit Model Jury Instructions, Criminal, 2003, at 34-35.) The current instruction's requirement that the jury consider 404(b) evidence only after it has found that the charged criminal act has been committed beyond a reasonable doubt is a reference to the procedure suggested by *Jenkins* and *Mothershed* - that the government not present 404(b) evidence in its case-in-chief, and that such evidence only be admitted and considered when an issue is first and specifically contested by the defense.

This approach is inherently illogical, in that some intent, motive, and plan evidence, admissible under 404(b), is relevant only in its logical tendency to prove the commission of the criminal acts charged. To - in essence - require a jury verdict first on the charged acts prior to even considering the 404(b) evidence deprives the 404(b) evidence of any relevance whatsoever.

Accordingly, the government respectfully suggests that the following language should be deleted from the Model Instruction on Rule 404(b) evidence (Instruction No. 2.08):

> You may not use this evidence to decide whether the defendant carried out the acts involved in the crime charged in the indictment. However, if you are convinced beyond a reasonable doubt, based on other evidence introduced, that the defendant did carry out the acts involved in the crime charged in the indictment, then you may use this evidence to decide whether defendant had the intent, knowledge, motive and /or opportunity to participate in the charged conspiracy.

A revised, proposed Instruction will be included in the government's package of jury

instructions. The United States is otherwise aware of the limitations to which it can put such evidence in argument, and of the requirement for limiting instructions in this matter.

V. STATEMENTS OF CO-CONSPIRATORS

During the course of the government's case-in-chief, during cross-examination of defense witnesses, and possibly in rebuttal, the United States may be offering into evidence out-of-court statements made by a co-conspirator of the defendant, in furtherance of the charged conspiracy.

Rule 801(d)(2)(E), of the Federal Rules of Evidence provides:

> **(d) Statements which *are not* hearsay.** A statement is not hearsay if -
>
> **(2) Admission by party-opponent.** The statement is offered against a party and is . . .
>
> **(E)** a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.[18]

To fulfill the requirements of Rule 801(d)(2)(E), of the Federal Rules of Evidence, the proponent must demonstrate, by a preponderance of the evidence, (1) that a conspiracy existed, (2) that the declarant and a defendant were members of the conspiracy, and (3) that the statement was made during and in furtherance of the conspiracy. *United States v. Escobar*, 50 F.3d 1414, 1422-23 (8th Cir. 1995); *United States v. Garcia*, 893 F.2d 188, 190 (8th Cir. 1990); *United States v. Lewis*, 759 F.2d 1316 (8th Cir.), *cert. denied*, 474 U.S. 994 (1985), *United States v. Leroux*, 738 F.2d 943, 949 (8th Cir. 1984); *accord, United States v. Sinclair*, 109 F.3d 1527,

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18. In 1997, the rule was amended, specifying that while the statement itself could be considered on the issues of the existence of the conspiracy and the declarant's authority as a member of the conspiracy, independent evidence was required for the establishments of these prerequisites to admission. Since such statements are not "testimonial" in nature, they are not affected by the Supreme Court's decision in *Crawford v. Washington* 124 S.Ct. 135 (2004).

1533 (10th Cir. 1997). In proving the existence of the conspiracy, the government need only demonstrate a likelihood of illicit association between the declarant and the party to whom the statement is directed. *Lewis*, 759 F.2d at 1339; *United States v. Scholle*, 553 F.2d 1109, 1117 (8th Cir.), *cert*. *denied*, 434 U.S. 940 (1977). The Rule applies to statements of both indicted and unindicted conspirators, and to named and unnamed parties to the conspiracy. *Lewis*, 759 F.2d at 1316; *United States v. Ziperstein*, 601 F.2d 281, 294 (7th Cir. 1979), *cert*. *denied*, 444 U.S. 1031 (1980). It is not required that a conspiracy be charged in order for the Rule to be applied. *United States v. Jones*, 880 F.2d 55, 65 (8th Cir. 1989); *accord*, *United States v. Wiles*, 102 F.3d 1043, 1065 (10th Cir. 1996), *cert. denied*, 522 U.S. 947 (1997). It is not necessary that the statement in question be made to a co-conspirator, as long as the making of the statement is intended to further the conspiracy. *United States v. Mayberry*, 896 F.2d 1117, 1121 (8th Cir. 1990).

Under FED. R. EVID. 801(d)(2)(E), a statement is not hearsay if offered against a party-opponent and is a statement made by a co-conspirator of that party made during the course of and in furtherance of a conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 173 (1987). Where the preliminary facts relevant to the admission of such a statement are disputed, the offering party need only establish them by a preponderance of the evidence. *Id*. at 175-176. The question of admissibility is one for the court, and the statements themselves may be considered on the preliminary question of admissibility. *Id.* at 179-181.[19] Furthermore, the admission of such

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24. *Accord*, *United States v. Roach*, 28 F.3d 729, 737 (8th Cir. 1994); *United States v. Clay*, 16 F.3d 892 (8th Cir. 1994); *United States v. Hoey*, 983 F.2d 890, 893 (8th Cir. 1993); *United States v. Askew*, 958 F.2d 806, 809 (8th Cir. 1992). The previous prohibition against "bootstrapping", as set forth in *Glasser v. United States*, 315 U.S. 60 (1942), was superseded by FED. R. EVID. 104(a). *Bourjaily*, *supra*, at 181. Accordingly, cases holding that a preliminary, or "James"

statements does not offend the Confrontation Clause, nor is an independent finding of reliability required before a co-conspirator's statement may be admitted. *Id.* at 181-184.[20] The trial court may admit such statements

subject to later proof of the conspiracy (and of the connection of the statement to the conspiracy) in lieu of a preliminary hearing as to admissibility. *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *accord*, *United States v. Owens*, 70 F.3d 1118, 1123 (10th Cir. 1995); *United States v. Jackson*, 627 F.2d 1198, 1217-1218 (D.C. Cir. 1980).

The Rule's requirement that a statement be made "in furtherance" of the conspiracy has been construed liberally, not restrictively.[21] *United States v. Escobar*, *supra*, 50 F. 3d at 1422-23; *United States v. McMurray*, 34 F.3d 1405, 1412 (8th Cir. 1994), *cert. denied*, 513 U.S. 1179 (1995). This requirement means that the act of making the statement served a purpose of the

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hearing, is required prior to the admission of such statements, are of questionable value. *See*, *e.g.*, *United States v. Lopez-Gutierrez*, 83 F.3d 1235, 1242 (10th Cir. 1996), *citing*, *United States v. James*, 590 F.2d 575 (5th Cir. 1979), a pre-*Bourjaily* decision. *United States v. Bell*, *infra*, the 8th Circuit case which relied upon *Glasser* in requiring such a hearing, was also overruled in this regard by *Bourjaily*.

25. The Court in *Bourjaily* held that the trial court need not conduct any independent inquiry into the reliability of such statements, and noted that the opposing party "still has the opportunity to attack the probative value of the evidence as it relates to the substantive issues in the case". 483 U.S. at 180, 183. The Court had previously held that there is no requirement for a showing of the declarant's unavailability before a statement can be admitted under Rule 801(d)(2)(E). *United States v. Inadi*, 106 S.Ct. 1121, 1125-1129 (1985).

27. *United States v. Lewis*, *supra*, 759 F.2d at 1340; *accord*, *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979) ("Although the phrase 'in furtherance of the conspiracy' has a talismanic ring to it, the phrase must not be applied too strictly or the purpose of the exception would be defeated").

conspiracy;[22] it is not essential that the statement be necessary to the conspiracy,[23] or that the statement "in furtherance" actually has the effect of furthering the conspiracy.[24] Statements made "to give confidence to those involved in the transaction" have been properly admitted,[25] as have statements made to co-conspirators in order to keep them informed of the progress of the conspiracy's schemes,[26] or to assure that a new co-conspirator's participation will be informed and efficient.[27] In addition, statements establishing the identity, intent or motives of co-conspirators (and thus, of the conspiracy) meet the "in furtherance" requirement,[28] as do statements whose overall effect is to "solidify" the conspiracy.[29]

Similarly, an effort by one conspirator to pass along the statements of a

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28. *United States v. Haldeman*, 559 F.2d 31, 110-111 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977) (while "mere narrations" of past events may not qualify, a review of past events by one conspirator for the benefit of another is an act "in furtherance" of the conspiracy).

29. *United States v. Patton*, 594 F.2d 444, 447 (5th Cir. 1979).

30. *United States v. Hamilton*, 689 F.2d 1262, 1270 (6th Cir. 1982), *cert. denied*, 459 U.S. 1117 (1983).

31. *United States v. Piccolo,* 696 F.2d 1162, 1169, *affirmed*, 723 F.2d 1234 (6th Cir. 1983), *cert. denied*, 466 U.S. 970 (1984); *United States v. McGuire*, 608 F.2d 1028, 1032-1033 (5th Cir. 1979), *cert. denied*, 444 U.S. 1092 (1980).

32. *United States v. Escobar*, *supra*, 50 F.3d at 1422-23; *United States v. Lewis*, *supra*, 759 F.2d at 1340; *accord*, *United States v. DePeri*, 778 F.2d 963, 981-982 (3rd Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986); *United States v. Gibbs*, 739 F.2d 838, 845 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1106 (1985).

33. *United States v. Snider*, 720 F.2d 985, 993 (8th Cir.), *cert. denied*, 465 U.S. 1107 (1983).

34. *United States v. Escobar*, *supra*, 50 F.3d at 1422-23; *accord*, *United States v. Layton*, 720 F.2d 548, 555-557 (9th Cir.), *cert. denied*, 465 U.S. 1069 (1984) (also holding that statements made to enlist another's participation in the conspiracy are admissible).

35. *United States v. Leisure*, 844 F.2d 1347, 1361-1362 (8th Cir.), *cert. denied*, 488 U.S. 932 (1988).

co-conspirator does not result in hearsay within hearsay. *United States v. Lenfesty*, 923 F.2d 1293, 1296-1297 (8th Cir.) (Statement of one conspirator to co-conspirator relating statement of a third co-conspirator is admissible where both statements are defined as not being hearsay by reason of Rule 801(d)(2)(E)), *cert. denied*, 499 U.S. 968 (1991). In *United States v. Meeks*, 857 F.2d 1201, 1202-1203 (8th Cir. 1988), the Eighth Circuit specifically held that the Rule permitted the introduction into evidence of a statement by one co-conspirator to another that a third member of the conspiracy had said that he intended to kill a potential witness against the conspiracy.[30]

At the close of the case, it is the recommended procedure for the trial court to make findings (1) that, based both upon the statements of the co-conspirators and independent evidence, a conspiracy existed, (2) that the declarants were members of the conspiracy, and (3) that the statements were made during and in furtherance of the conspiracy. The Eighth Circuit's opinion in *United States v. Bell*, *supra*, "requires district courts to admit conditionally the hearsay statements of alleged co-conspirators, subject to a final on-the-record ruling that the statement is admissible under the co-conspirator exception." *United States v. Coco*, 926 F.2d 759, 761 (8th Cir. 1991); *accord*, *United States v. Hoelscher*, 914 F.2d 1527, 1539 (8th Cir. 1990), *cert. denied*, 498 U.S. 1090 (1991); *United States v. Meggers*, 912 F.2d 246, 248 (8th Cir. 1990); *United States v. Owens*, *supra*.

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36. *Meeks* also held that a co-conspirator's statement identifying a third co-conspirator as his source of cocaine was properly admitted. *Accord*, *United States v. Williams*, 604 F.2d 1102, 1113 (8th Cir. 1979). It should be noted that the admission of such statements does not necessarily permit the impeachment by a defendant of non-testifying co-defendants. *United States v. Robinson*, 783 F.2d 64 (7th Cir. 1986); *cf*, *United States v. Bovain*, 708 F.2d 606 (11th Cir.), *cert. denied*, 464 U.S. 898 (1983).

Recorded conversations to which the defendant was a party are admissible as admissions of a party opponent under FED. R. EVID. 801(d)(2)(A), and no conspiracy findings are required. *United States v. Quintana*, 70 F.3d 1167, 1170 (10th Cir. 1995).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on April 2, 2010, 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.

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