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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 09-00112-01-CR-W-ODS
	)	
CLIFTON D. TAYLOR,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE WITH SUGGESTIONS IN SUPPORT

Comes now the United States of America, by and through the undersigned Assistant United States Attorney for the Western District of Missouri, and respectfully submits the following suggestions in support of its opposition to defendant's motion in limine to exclude evidence of defendant's destruction of agent notes during a post-robbery interview. The government further stipulates that it will not seek to introduce evidence of the defendant's prior criminal history in its case-in-chief.

I. Background

Defendant Clifton Taylor is charged with robbing the Central Bank of Kansas City, 2301 Independence Avenue, Kansas City, Missouri, on March 12, 2009 in violation of Title 18 United States Code, Section 2113(a). The money was taken by coercion from a bank teller and the total loss was $2,700. The bank was insured by the Federal Deposit Insurance Corporation. Around 12:30 p.m. that day, a robber passed a note to a bank teller at the Central Bank of Kansas City that read "Smile! $3000 now or somebody out here get shot 20 seconds." When the teller handed over the money, the robber departed from the bank's southwest exit. Two bank

employees who were returning from lunch observed as the departing robber exited the bank, running at first, and then walking along Independence Boulevard. The robber crossed Prospect, and entered a commercial building.

Law enforcement responded to the scene. Police observed as defendant Taylor exited a tobacco and cellular phone store down the street from the victim bank. Store employees described Taylor's behavior in the store as unusual. Taylor was identified by multiple witnesses, including the two bank employees returning from lunch, as the person they saw exit the Central Bank of Kansas City. In the back of a pickup truck parked near the bank, police recovered two stocking hats and a black leather jacket matching the teller's description of that worn by the robber. In a jacket pocket, they recovered $2700 consisting of twenty-seven $100 dollar bills. The owner of the pickup stated he had never seen the items before. Subsequent DNA testing found Taylor's DNA on the jacket.

Defendant Taylor was transported to the Kansas City, Missouri Police Department ("KCPD"), where he was interviewed by Detective Christopher Toigo and Special Agent Michael Mrachek of the Federal Bureau of Investigation ("FBI") beginning at 2:32 p.m. The defendant gave multiple, inconsistent stories when he attempted to explain how he arrived to the area that day and what he was doing there. At two separate points, he admitted that he had not been fully truthful during other parts of the interview, and he attempted to re-explain himself. For example, at first he said he took the bus to the Independence Boulevard area, and later he admitted that he was not truthful about that, but instead claimed that a female friend had dropped him off.

As he interviewed the defendant, Agent Mrachek took notes. Taylor consistently denied

that he was involved in the robbery. However, at one point, when confronted with the fact that witnesses saw him coming out of the bank after the robbery, he stated "we all know what happened," apparently referencing his involvement in the robbery. Around 5:00 p.m., Agent Mrachek offered to get a glass of water for the defendant, who accepted. As soon as Agent Mrachek left the room, the defendant grabbed the top page of Agent Mrachek's notes from across the table. He tore off a portion of the notes and ate it, and he knocked other notes onto the floor. This was witnessed by Detective Toigo, who will testify that he was too surprised to intervene. Agent Mrachek returned to find his notes in disarray and partially destroyed. He gave the cup of water to the defendant. The defendant then ate part of the Styrofoam cup, and the interview was terminated.

II. Discussion

At trial, the government will seek to introduce evidence of the inconsistent statements and the apparently inculpatory statement the defendant made during the interview. The government will also seek to introduce evidence that the defendant destroyed part of Agent Mrachek's notes when he left the interview room. Stuffing the agent's notes into his mouth after making inconsistent and inculpatory statements is relevant evidence of the defendant's consciousness of guilt under Rule 401 and 402 of the Federal Rules of Evidence. It is not *unfairly* prejudicial under Rule 403. There is nothing about this evidence that is likely to mislead or confuse a jury.

Evidence of flight or other consciousness of guilt evidence is frequently admitted and upheld as relevant, admissible evidence at trial, just as contemporaneous evidence of consciousness of innocence can also be relevant, admissible evidence. *United States v. Scheffer*,

523 U.S. 303, 331 (1998). Evidence of flight has probative value as an "admission by conduct" of guilt or consciousness of guilt. *United States v. Hankins*, 931 F.2d 1256, 1261 (8th Cir. 1991). Even if a defendant has possibly innocent reasons for evidence being offered to show consciousness of guilt, that does not automatically render the evidence inadmissible. *See United States v. El-Alamin*, 574 F.3d 915, 927 (8th Cir. 2009)(upholding "consciousness of guilt" evidence regarding flight from police though defendant argued he fled for another reason). In addition to flight, the Eighth Circuit has upheld introduction of consciousness of guilt evidence in additional situations. *See United States v. Carr*, 560 F.3d 849, 851-52 (8th Cir. 2009)(use of false I.D.); *United States v. Chauncey*, 420 F.3d 864, 875 (8th Cir. 2005)(evidence of defendant's threat against a witness); *United States v. Herrin*, 242 F.3d 377 (8th Cir. 2000)(evidence of defendant's hostile and threatening behavior after a bank robbery).

Other circuits have consistently upheld consciousness of guilt evidence in a variety of situations. *See United States v. White*, 563 F.3d 184, 191 (6th Cir. 2009)(drug defendant forced witness to take polygraph to determine if she had spoken with the DEA); *United States v. Briscoe*, 896 F.2d 1476, 1497-98 (7th Cir. 1990)(defendant attempted to remove an incriminating airline ticket from evidence during his own trial); *Marcoux v. United States*, 405 F.2d 719, 721 (9th Cir. 1968)(evidence of car driver's concealment of vehicle registration from police was proper consciousness of guilt evidence). Forty years ago, in *Marcoux*, the Ninth Circuit held that "'[i]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself.'" *Id.*, citing *Wigmore on Evidence*, 3d Ed., § 276.

While the term is more frequently used in a civil litigation context, courts have also allowed evidence of "spoliation" by a criminal defendant as evidence of consciousness of guilt. *United States v. Santiago-Mendez*, 599 F. Supp. 2d 95, 126 (D. Puerto Rico 2009). "Spoliation of evidence constitutes the intentional destruction of evidence by an affected party" and "is probative of consciousness of guilt." *Id.*, *internal citations omitted.* In *Santiago-Mendez*, the spoliation consisted of a fabricated sworn statement to attempt to offset evidence of a box of illegal drugs. "[S]ince the jury does not leave common sense at home, a plan to offset the most critical piece of evidence known then to defendants in the case, planned barely three days after the evidence is discovered, constitutes a matter of common sense and does not require a specific cautionary instruction." *Id. See also, United States v. Copeland*, 321 F.3d 582, 597 (6th Cir. 2003)(holding that threats to a co-witness to eliminate or affect evidence constituted spoliation); *United States v. Anderson*, 333 Fed.Appx. 17, 24 (6th Cir. 2009)(unpublished)(under rule 404(b), spoliation evidence, including evidence that defendant attempted to bribe and threaten a witness, is admissible to show consciousness of guilt, but it is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice).

In the present case, the defendant's destruction of notes is not an illegal act or a prejudicial bad act *per se*, so the government will not seek to introduce it as 404(b) evidence. The central issue at trial will be whether the defendant robbed the Central Bank of Kansas City on March 12, 2009. The fact that he tried to destroy agent notes of an interview he gave later that same day, in which he made incriminating statements, is relevant evidence of his consciousness of guilt. Regardless of any possible innocent explanation, the government believes that the defendant's highly unusual act of eating the interview notes is probative of the defendant's guilty state of mind at the time. The government believes that destruction of the

drinking cup is inextricably intertwined with the destruction of the agent's notes. Further, destruction of the cup is not prejudicial, or likely to be misleading or confusing to the jury.

For these reasons, the government requests that the Court grant the defendant's motion as to the prior convictions, but deny it as to the issue of the defendant's destruction of evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on December 28, 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
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Assistant United States Attorney