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

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

GOVERNMENT'S TRIAL BRIEF

Comes now the United States of America, by and through its undersigned attorneys, and files with the Court the government's trial brief regarding issues which the government anticipates may arise in the trial of the above-styled case.

I. SUMMARY OF CHARGE AND ELEMENTS

A. Charge

On March 13, 2009, a one-count complaint was filed charging that on or about March 12, 2009, defendant Clifton D. Taylor ("**Taylor**"), did knowingly by force, intimidation and violence, commit the robbery of Central Bank, 2301 Independence Avenue, Kansas City, Missouri, in violation of 18 U.S.C. § 2113(a).

On April 8, 2009, the complaint was replaced by a one-count indictment. Count One charges that **Taylor**, did knowingly by force, intimidation and violence, take from the person and presence of another, to wit: Veronica Lopez, money in the amount of $2,700 which belonged to, and was in the care, custody, control, management, and possession of Central Bank, 2301 Independence Avenue, Kansas City, Missouri, a financial institution the accounts of which

were then insured by the Federal Deposit Insurance Corporation (FDIC), all in violation of 18 U.S.C. § 2113(a).

B. Elements

For the crime of bank robbery charged in Count One, the government must prove:

> *One*, the defendant took money in the amount stated in the indictment from the person or presence of another, while that money was in the care, custody, control, management, or possession of the bank stated in the indictment;
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> *Two*, such taking was by force, violence, or intimidation; and
>
> *Three*, the deposits of the bank were then insured by the Federal Deposit Insurance Corporation.

Eighth Circuit Jury Instructions, No. 6.18.2113A

II. FACTS

On March 12, 2009, at approximately 12:30 p.m., law enforcement officers responded to a reported robbery at Central Bank, 2301 Independence Avenue, Kansas City, Missouri. Veronica Lopez, the victim teller, was interviewed. She said that she was working at her teller station when she noticed a lone black male standing in the bank lobby. Thinking he was a customer, Lopez waived him over to her teller window in order to assist him. The robber then placed a demand note through the glass. The robber did not speak to Lopez. She noted that he was wearing a dark jacket, jeans, and a green hat. The note stated: "Smile! $3000 now or somebody out here get shot 20 seconds." Lopez began counting out $100 bills. The robber gestured to her, she pushed the bills through the glass partition. The robber took the money and fled from the bank, leaving the note on the counter. Analysis of bank surveillance footage showed a black male matching Lopez's description. In addition, the robber was wearing tan construction-type boots with ivory soles.

Lopez reported to Lori Dorr, Senior Vice President of Central Bank, that the bank had just been robbed. Dorr ran to lock the doors. As she did so, she saw two bank employees, Michelle Visos and Virginia Spino, exiting Visos' car after returning from lunch. Dorr indicated that they should follow the man who had just exited the bank. Visos and Spino got back in the car and followed the robber. Spino dialed 911. The robber walked east on foot down an alley, and Visos paralleled him by driving down 6th Street. As the robber was walking through paths and yards, Visos and Spino observed him from the car. They were able to see him at all times, except for when he briefly passed behind homes, only to become visible again after a short period. The witnesses observed that he was wearing a hunter green stocking cap, a jacket, blue jeans, and tan construction-type boots with ivory soles. At one point, the robber walked behind a home, near a pickup truck, and when Visos saw him again, she noticed that he was no longer wearing the green stocking cap. Visos followed him as he walked down an alley, through a CVS Pharmacy parking lot, crossed Prospect Avenue, and headed towards a strip mall. Visos and Spino did not see which business he entered, but they only lost sight of him for a very short period, so they concluded he had entered one of the stores.

When they heard the report of a robbery, Officers Karl Reineke and Jason Cramblit of the Kansas City, Missouri Police Department responded to the area of 2301 Independence Avenue. There, they received information that the robber was in the area of Sixth Street and Prospect. The officers located Visos and Spino, who were standing in Independence Avenue near Visos' car near a strip mall. Visos and Spino stated that the robber had entered one of the businesses in the strip mall and they had been watching ever since, so they believed he was still inside. Visos and Spino then saw **Taylor** walking out of the tobacco and cell phone store in the strip mall. He was wearing a brown jacket, jeans, and tan construction-type boots with ivory soles. Both

witnesses identified him to the officers as the man they had followed from the bank, and **Taylor** was taken into custody.

During a canvass of the area where the witnesses said **Taylor** had walked, police found a black leather jacket along with hunter green and brown stocking caps in the open back of a pickup truck. Police found twenty-seven one-hundred dollar bills in a jacket pocket. The truck's owner, Juan Gomez, was located working on a nearby vacant lot. Through an interpreter, Gomez told police he did not own and had never previously seen, the jacket and stocking caps. All three items were submitted to the Kansas City, Missouri Police Department Crime Lab. Forensic Specialist Jessica Hannah compared DNA from three swabs taken from the leather jacket and each stocking cap with DNA from a buccal swab of Clifton **Taylor**. Hannah determined that **Taylor**'s DNA matched the DNA found on all three items. The expected frequency of **Taylor**'s DNA in the human population is one in two quadrillion (one quadrillion is one million times one billion).

III. POST-ARREST

Defendant **Taylor** was transported to the Kansas City Police Department ("KCPD"), where he was interviewed by Detective Christopher Toigo and FBI Special Agent Michael Mrachek beginning at 2:32 p.m. He admitted that he was a former customer of Central Bank. According to the interviewers, the defendant gave multiple, inconsistent explanations regarding his activities that day, and how he arrived to the area of Prospect and Independence Avenue. At two separate points, he admitted that he had not been fully truthful during other parts of the interview, and he offered new explanations. For example, at first he said he took the bus to the area in order to give plasma, and later he admitted that he had not been truthful, but instead claimed that a female friend had dropped him off. He stated that he had attempted to buy

cigarettes at a convenience store at 39th and Troost, but then he admitted that he had not told the truth about this visit, and instead he had purchased cigarettes at a convenience store at 55th and Troost.

As he interviewed the defendant, Agent Mrachek took notes. **Taylor** consistently denied that he was involved in the robbery. However, after he was confronted with the fact that witnesses saw him coming out of the bank after the robbery and followed him to the cell phone store, **Taylor** stated "we all know what happened," apparently referencing his involvement in the robbery. Around 5:00 p.m., Agent Mrachek offered to get another 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, spilling other notes onto the floor. This was witnessed by Detective Toigo, who 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 chewed up part of the Styrofoam cup, and the interview was terminated.

Defendant **Taylor** requested appointed counsel, and Assistant Public Defender Travis Poindexter entered his appearance. At his detention hearing on March 18, 2009, the court ordered **Taylor** detained. Over the next months, the defendant proceeded to file numerous handwritten, *pro se*, motions requesting dismissal of charges, suppression of evidence, and new counsel. Judge Larsen denied the motions. On August 6, 2009, Mr. Poindexter filed a motion, pursuant to 18 U.S.C. §§ 4241(a) and (b), for a judicial determination of defendant's mental competency. Judge Larsen granted the motion the following day and the defendant was subsequently examined. After a written report was issued, Judge Larsen issued a report and

recommendations to the district court. On November 9, 2009, this Court entered an order adopting Judge Larsen's report and finding **Taylor** competent to stand trial.

Through *pro se* motions, Defendant **Taylor** continued to request new counsel. On November 9, 2009, Judge Larsen held an attorney appointment hearing. Orally, **Taylor** again moved the court to replace Mr. Poindexter, emphatically exclaiming that he did not "want that dude to serve as my lawyer!" Judge Larsen inquired into the reasons for **Taylor**'s request, and **Taylor** offered several reasons, including what he characterized as Mr. Poindexter's failure to file motions concerning an unlawful wire tap for video from the cell phone store. Government counsel proffered that there was no wire tap, that the video in question had been willingly turned over by the store's consenting owner, and that it had already been produced. Mr. Poindexter stated that he had explained that to **Taylor**, who apparently nonetheless wanted to suppress it on improper seizure grounds. The government notes here that it does not plan to use the video since the quality is extremely poor and the fact that **Taylor** was in the store soon after the time of the robbery is not in dispute. **Taylor** freely admitted being in the store when he was interviewed, and he was witnessed in the store by two store employees. At least two additional witnesses saw him coming out of the store. Judge Larsen found that none of the reasons **Taylor** gave constituted a legal basis to replace his counsel and he denied the motion. In apparent protest, **Taylor** flipped over the counsel table, injuring defense investigator Ron Neimeyer in the process. Judge Larsen ordered **Taylor** removed from the courtroom. After a short break, he was allowed to return and the hearing was concluded without further incident.

IV. LEGAL PRINCIPLES

A. Consciousness of Guilt

The government anticipates that it will discuss four examples of **Taylor**'s consciousness of guilt in closing argument. First, witnesses describe **Taylor** running and walking quickly away from the bank immediately after the time the bank was robbed. Second, the government will argue that he discarded clothing that he wore during the robbery during his flight by placing it in the back of a pickup truck in order to conceal the evidence. Third, the government will argue that **Taylor** made certain inconsistent and incriminating statements to Detective Toigo and Agent Mrachek after he was arrested. Fourth, the government will argue that **Taylor** attempted to destroy evidence of those statements by eating part of Agent Mrachek's notes. The government has requested jury instructions regarding the defendant's discarded clothing and the contradictory and incriminating statements he gave to police after he was arrested. The government is not requesting specific instructions on his flight and destruction of the notes, but the government does plan to argue during closing that these acts also demonstrate consciousness of guilt. Courts have upheld jury instructions regarding consciousness of guilt. In *Merced v. McGrath*, the court upheld a trial court's jury instruction which stated:

> If you find that the defendant attempted to suppress evidence against himself in any manner, such as by the intimidation of a witness, by removing his clothing, or by concealing a gun, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt and its weight and significance, if any, are for you to decide.

2004 WL 302347 at *9 (N.D. Cal. 2004)(unreported).

The court went on to state that "the consciousness of guilt instruction given by the trial court was not contrary to, or an unreasonable application of, "federal constitutional law" and that the instruction "was permissive, not mandatory." *Id.* at *10.

1. **FLIGHT**

Witnesses will testify at trial, and an outdoor surveillance photo will confirm, that following the robbery, the robber ran out of the bank and down the steps, and walked quickly away from the scene. Witnesses followed the robber to a strip mall. When he emerged from a store, they identified **Taylor** to police as the person that they followed from the bank to the store. It is well settled that "flight of the accused subsequent to the commission of a crime is, in certain instances, a circumstance proper to be laid before the jury as having a tendency to prove guilt." *United States v. Schepp*, 746 F.2d 406, 409 (8th Cir. 1984); *United States v. Hankins*, 931 F.2d 1256, 1261 (8th Cir. 1991)(evidence of flight is an "admission by conduct" of guilt). In assessing the value of flight evidence the facts of each case must be scrutinized to determine the strength and validity of drawing the following four inferences: 1) from the defendant's behavior to flight; 2) from flight to consciousness of guilt; 3) from consciousness of guilt to consciousness of guilt concerning the crime charged; 4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged. *Id.* The validity of drawing an inference of guilt depends on the number of evidentiary manifestations suggesting that the defendant's decision to flee was prompted by consideration related to the crime in question. *Id.*

2. **DISCARDED CLOTHING**

Surveillance footage of the bank robber indicates that he was wearing a black leather coat and a green stocking cap during the robbery. Two bank employees will testify that they were returning from lunch when they witnessed a black male walking quickly away from the bank.

They will testify that something seemed amiss, and then their manager indicated that the bank had been robbed. They got into a car and followed the robber, who they noted was wearing a green stocking cap. The two employees will testify that they followed in a car as he proceeded down an alley and momentarily passed behind a building. When he emerged from behind the building, he was no longer wearing the green stocking cap and they will testify that his jacket was brown. They recall him passing near a pickup truck that was parked near the building. Later, police discovered a black leather jacket and two stocking caps, including one green stocking cap, in the open bed of the truck. The money from the bank robbery was found in a jacket pocket. A Forensic Examiner from the Kansas City Police Department Crime Laboratory will testify that DNA recovered from the jacket and both of the caps matched **Taylor**.

Based upon this evidence, the government respectfully requests the Court to instruct the jury:

> Attempts by a defendant to suppress evidence against himself by removing his clothing following the Central Bank robbery charged in this case may be considered by you in light of all the other evidence in the case. You may consider whether this evidence shows a consciousness of guilt and determine the significance to be attached to any such conduct.

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. *United States v. Clark*, 45 F.3d 1247, 1250 (8th Cir. 1995)(internal citations omitted). In *Williams v. Roper*, the court held that it was not improper for the prosecutor to use evidence the defendant discarded his shirt in closing argument. *Williams v. Roper*, 2005 WL 2931933 at *13 (E.D.MO 2005)(unreported). The court noted that the trial court has broad discretion in controlling the direction of opening statements and closing arguments. *Id.* (*citing United States v. Johnson*, 968 F.2d 768, 769 (8th Cir. 1992). Similarly, in a habeas corpus

petition case the Southern District of New York upheld the trial court's logic and the use of evidence of a change of clothing prior to arrest as evidence of a consciousness of guilt. *Harris v. Allard*, 2002 WL 31780176 at *4 (S.D.N.Y. 2002)(unreported)(*citations omitted*).

3. **FALSE EXPLANATIONS**

When questioned, the defendant attempted to offer innocent explanations for why he was in the vicinity near the bank and for his activities that day. First he explained that he had taken the bus to the area near the Central Bank the morning of the robbery to give plasma. Later, he admitted that he had not been truthful about taking the bus. Instead, he claimed that a friend had dropped him off. Second, when questioned about where he claimed to have purchased cigarettes that morning, he admitted he had been lying, and instead claimed he bought them at a different store. Based upon this evidence, the government respectfully requests the Court to instruct the jury:

> When a defendant voluntarily and intentionally offers an explanation, or makes some statement before trial tending to show his innocence, and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

This instruction is taken verbatim from the Manual of Model Criminal Jury Instructions for the district courts of the Eighth Circuit (2003), Instruction No. 4.15. Although the Committee notes that it does not normally recommend an instruction on this issue, it notes that it may be given in appropriate circumstances. It has been repeatedly approved by the Eighth Circuit. *See, e.g., United States v. Ward*, 21 F.3d 264, 265 (8th Cir. 1994)(essentially same instruction given and approved in a case in this district).

As the Committee Comments for this instruction in the Manual note, the Eighth Circuit has frequently held that false exculpatory statements are admissible as substantive evidence tending to show the defendant's consciousness of guilt. *United States v. Hudson*, 717 F.2d 1211, 1215 (8th Cir. 1983); *United States v. Matousek*, 483 F.2d 286, 287 (8th Cir. 1973)(false denial of knowledge of the offense was evidence of consciousness of guilt); *United States v. Merrill*, 484 F.2d 168, 170 (8th Cir.), *cert. denied*, 414 U.S. 1077 (1973).

Such an instruction does not unfairly penalize a defendant who makes false denials (rather than remaining silent). *Wells, supra*, 702 F.2d at 144. The instruction is not an unfair comment on the evidence, since the instruction permits the jury to attach as much or as little weight to the statement as it chooses. *Hudson, supra*, 717 F.2d at 1215; *United States v. Turner*, 551 F.2d 780, 783 (8th Cir.), *cert. denied*, 431 U.S. 942 (1977).

Although general denials of guilt are not considered to be exculpatory statements which would justify the instruction, any other exculpatory statement which is refuted by the evidence at trial justifies the instruction. *United States v. Penn*, 974 F.2d 1026, 1028-1029 (8th Cir. 1992) (circumstantial evidence contradicting defendant's exculpatory statement justified instruction); *United States v. Bear Killer*, 534 F.2d 1253, 1260 (8th Cir.), *cert. denied*, 429 U.S. 846(1976) (defendant's affirmative statement of an alibi, rebutted at trial, justified instruction); *United States v. McDougald*, 650 F.2d 532, 533 (4th Cir. 1981).[1]

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[1] *Accord, United States v. Zang*, 703 F.2d 1186, 1191 (10th Cir. 1982), *cert. denied*, 464 U.S. 828 (1983) (evidence contradicted defendant's denial of intent); *United States v. Boekelman*, 594 F.2d 1238, 1240-1241 (9th Cir. 1979); *United States v. Pringle*, 576 F.2d 1114, 1120 (5th Cir. 1978).

4. **DESTRUCTION OF INTERVIEW NOTES**

Taylor was interviewed within two hours of the robbery. He attempted to give innocent explanations for his activities that day, stating that he bought cigarettes and that he came to the area near the bank to give blood. Later in the interview, he admitted that he had been untruthful regarding those statements. At another point, in response to follow-up questioning, **Taylor** stated "we all know what happened," apparently referencing his involvement in the robbery. Thereafter, when Agent Mrachek left the interview room momentarily, **Taylor** grabbed Agent Mrachek's notes and began eating them. The government plans to argue on closing that **Taylor**'s destruction of his statement demonstrates his consciousness of guilt.

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. Courts have upheld consciousness of guilt when defendants have attempted to conceal evidence. *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).

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, which constituted a record of his 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.

B. Chain of Custody

For physical evidence that is not readily identifiable or may be susceptible to tampering, contamination or exchange, it is the obligation of the prosecution to establish the chain of custody. 23 C.J. S., Criminal Law § 1142 (2009).[2] As the Supreme Court held in *Melendez-Diaz v. Massachusetts*, meeting this obligation requires representations - that one officer retrieved the evidence from the crime scene, that a second officer checked it into an evidence locker, that a third officer verified the locker's seal was intact, and so forth. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2546 (2009). But in-court testimony "from every human link in the chain" is not required. *See id.* The Eighth Circuit has observed that the presumption of integrity of physical evidence is such that "any defect in the chain of custody goes more to its weight than its admissibility." *United States v. Briley,* 319 F.3d 360, 363 (8th Cir. 2003). "It is generally not necessary that every witness who handled the evidence testify." C.J.S., *supra*, § 1142, at 67.

"A district court may admit physical evidence if the court believes a reasonable probability exists that the evidence has not been changed or altered." *United States v. Cannon*, 88 F.3d 1495, 1503 (8th Cir.1996), citing *United States v. Miller*, 994 F.2d 441, 443

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[2] According to Corpus Juris Secundum, "[t]o establish a chain of custody, the state must provide evidence that strongly suggests the exact whereabouts of the item proffered while it has been in the possession of the police. As long as the chain of possession is complete, the state need not provide evidence that excludes all possibilities of tampering, but need only provide evidence that establishes a reasonable probability that the evidence has not been tampered with. Under some authority physical evidence is admissible unless there is a probability that it has been tampered with. In any case, the mere possibility of tampering will not render evidence inadmissible."

(8th Cir.1993). "In making this determination, absent a showing of bad faith, ill will, or proof of tampering, the court operates under a presumption of integrity for the physical evidence." *Cannon*, 88 F.3d at 1503. In *United States v. Allen*, 106 F.3d 695, 700 (6th Cir.), cert denied, 520 U.S. 128 (1997), the court found that merely raising the possibility that someone tampered with evidence was insufficient to render it inadmissible where government showed there was no reasonable probability marijuana was altered. In *United States v. Brown*, 136 F.3d 1176, 1182 (7th Cir. 1998), the court held that where there is no evidence of tampering, the presumption that evidence in official custody remained unaltered is not rebutted by a break in chain of custody. In *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), cert denied, 519 U.S. 1118 (1997), the court held that defects in the chain of custody did not dismantle the government's showing that tapes were unaltered.

C. Authentication of Tape Recordings

The government will seek to play a recorded 911 call and video surveillance footage. Authentication of exhibits is governed by Rule 901, Federal Rules of Evidence, which provides:

(a) General Provision. The requirement of authentication or identification is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

> **(1) Testimony of a witness with knowledge**. Testimony that a matter is what it is claimed to be . . .

> **(5) Voice identification.** Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.[3]
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> **(6) Telephone conversations.** Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

Shortly after the adoption of the Federal Rules of Evidence,[4] the Eighth Circuit decided *United States v. McMillan*, 508 F.2d 101 (8th Cir. 1974), *cert. denied*, 421 U.S. 916 (1975). In *McMillan*, the Court set out a seven-part test for the authentication of tape recordings of

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[3] The Notes of the Advisory Committee on the proposed rules provide: "Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting." *Accord United States v. Kirk*, 534 F.2d 1262, 1277 (8th Cir. 1976), *cert. denied*, 433 U.S. 907 (1977).

[4] Since the adoption of the Federal Rules of Evidence, the Supreme Court has repeatedly held that the rules superseded any common law evidentiary holdings to the contrary. *See, e.g.*, *Bourjaily v. United States*, 483 U.S. 171, 181 (1987). Although *McMillan* was decided shortly after the rules became effective, it was decided prior to many of the Supreme Court's decisions to the effect that the rules speak for themselves, and that no additional requirements for admissibility must be met.

conversations. According to these requirements, the proper foundation must include evidence that (1) the recording was made by a device capable of recording the conversation; (2) the operator of the device must have been competent; (3) the recording must be authentic and correct; (4) no alterations have been made to the recording; (5) the recording has been preserved; (6) the speakers in the conversation have been identified; and (7) the conversation was made voluntarily and in good faith by the speakers without improper inducement. *Id* at 104.[5]

Since *McMillan*, however, the Eighth Circuit has frequently limited the application of these requirements to situations in which traditional forms of authentication meeting the test of Rule 901 have been absent. *See, e.g.*, *United States v. O'Connell*, 841 F.2d 1408, 1419-22 (8th Cir. 1988) (the *McMillan* criteria are not subject to "mechanical or wooden application" and "become meaningful only when viewed in light of the facts of a specific case" (*citing United States v. Durns*, 562 F.2d 542, 547 (8th Cir. 1977)), *cert. denied*, 488 U.S. 1011 (1989). The court has, in fact, repeatedly upheld the admission of tapes into evidence in trials where the requirements of Rule 901 were met, but the *McMillan* standards were not. *United States v. Roach*, 28 F.3d 729, 733 (8th Cir. 1994) (recording authenticated as a fair and accurate reproduction of the conversation by a witness to that conversation); *accord United States v. Risken*, 788 F.2d 1361, 1370 (8th Cir.), *cert. denied*, 479 U.S. 923 (1986); *Williams v. Butler*, 746 F.2d 431, 441 (8th Cir. 1984) (satisfaction of *McMillan* standards is not required when accuracy of recordings was verified by witness who monitored original conversations), *vacated on other grounds*, 475 U.S. 1105 (1986); *United States v. Panas*, 738 F.2d 278, 286 (8th Cir.

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[5] These requirements far exceed those of Fed. R. Evid. 901.

1984); *United States v. McGowan,* 706 F.2d 863, 865 (8th Cir. 1983).[6] Accordingly, the United States does not view *McMillan* to be an accurate statement of the currently applicable laws or rules of evidence.

D. Admissibility of Photocopies

The government may seek to introduce photocopies. Photocopies are admissible under Rule 1002 and 1003, Fed. R. Evid. These rules provide:

> Rule 1002: To provide the context of a writing, recording, or photograph, the original writing, recording or photograph is required except as otherwise provided in these rules or by Act of Congress.
>
> Rule 1003: A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

E. Requirements for Demonstrative Aids

The government will seek to use demonstrative aids during direct exams and during closing argument. "The use of summary charts, diagrams, and other visual aids is generally permissible in the sound discretion of the trial court." *United States v. McGhee,* 532 F.3d 733, 741 (8th Cir. 2008)*, reh'g and reh'g en banc denied* (September 2, 2008) (permitting use of collage featuring a photo of the robbery suspect, taken at the time of the robbery, with an image of McGhee, in a similar pose, inserted next to the suspect); *United States v. Green*, 428 F.3d 1131, 1134 (8th Cir. 2005). "Charts or summaries may include assumptions and conclusions,

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[6] These decisions generally apply Rule 901(b)(1) to aural recordings in much the same fashion as that rule has been traditionally applied to photographs. There appears to be no sound reason why the more restrictive tests of *McMillan* would be applied to recordings of sound, but not to those of visual images. Accordingly, the reluctance of the Eighth Circuit to apply *McMillan* to most cases has resulted in the explicit rejection of *McMillan* by other circuits. *See, e.g.*, *United States v. Shukitis*, 877 F.2d 1322, 1327-28 (7th Cir. 1989); *United States v. Biggins*, 551 F.2d 64, 66-68 (5th Cir. 1977).

but said assumptions and conclusions must be based upon evidence in the record." *Id*. at 741. "Visual aids that summarize other evidence are generally permissible pedagogic devices, especially when used to organize complex testimony or transactions for the jury." *United States v. Crockett*, 49 F.3d 1357, 1360-1361 (8th Cir. 1995). "Such summaries need not be admitted into evidence, and therefore can be created by counsel for or during closing argument." *Id.*

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." Fed. R. Evid. 1006. "Summary evidence is properly admitted when (1) the charts fairly summarize voluminous trial evidence; (2) they assist the jury in understanding the testimony already introduced; and (3) the witness who prepared the charts is subject to cross-examination with all documents used to prepare the summary. *Green*, 428 F.3d at 1134; *United States v. Bosen*, 541 F.3d 838, 848 (8th Cir. 2008). For a summary chart to be admissible under Rule 1006, it must also contain relevant information. Fed. R. Evid. 402. Relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401; *United States v. Bosen*, 541 F.3d at 848.

F. Proof of FDIC Insurance Does Not Require FDIC Witness

The government intends to introduce evidence that, at the time of the robbery, the Central Bank of Kansas City was insured by the Federal Deposits Insurance Corporation ("FDIC"). However, the government will introduce this evidence through a bank employee, and does not plan to call a witness from the FDIC to testify. In *United States v. Mitchell*, 136 F.3d 1192, 1193 (8th Cir. 1998), the defendant appealed his bank robbery conviction on the grounds that the government had not sufficiently proved the bank was FDIC-insured. At trial, the bank's vice

president testified that the bank "is" insured by the FDIC, as evidenced by a form displaying the bank's FDIC certificate number. *Id.* The vice president also referred to a printout of the bank's expense account showing recent payment of the semi-annual FDIC premium. The Eighth Circuit held this was sufficient proof of insurance. *Id.*

G. Defendant's Right to Represent Himself is Not Absolute

The Constitution guarantees a defendant who knowingly and voluntarily waives the right to counsel the right to proceed *pro se* at his trial. *Faretta v. California*, 422 U.S. 806 (1975). The defendant has expressed a desire to waive his Sixth Amendment right in order to represent himself. In *United States v. Abdul-Aziz*, 486 F.3d 471, 475 (8th Cir. 2007), the Eighth Circuit upheld such a waiver as knowing and intelligent where the district court sought assurances from the defendant that he understood the nature of the charges being brought against him, the defendant was repeatedly warned about the disadvantages and complexities involved in representing himself, and he was strongly encouraged to seek the assistance of counsel. Despite these warnings, the defendant still insisted on proceeding *pro se*, assuring the court that he understood the charges being brought against him and the ramifications of his decision. *Id.* However, in that case, the district court noted that the defendant appeared to be an intelligent, well-spoken individual with at least several years of education beyond high school, he had previously represented himself in criminal proceedings, and, "as evidenced by his cross-examination of witnesses, objections, and motions at trial, had a sense of how to put on a defense-all evidence that he was 'able to grasp the nature of the charges against him and that he had the intellectual capacity required to understand the consequences of his decision.'" *Id.* at 475 (citing *United States v. Patterson*, 140 F.3d 767, 775 (8th Cir. 1998)).

A mentally ill defendant who knowingly and voluntarily elects to proceed *pro se* instead of through counsel receives a fair trial that comports with the Fourteenth Amendment. *Godinez v. Moran*, 509 U.S. 389 (1993). However, a court may nonetheless strip a mentally ill defendant of the right to represent himself when that would be fairer. "The Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so." *Indiana v. Edwards*, 128 S.Ct. 2379, 2387-88 (2008). "A pro se defendant may not 'abuse the dignity of the courtroom,' nor may he fail to 'comply with relevant rules of procedural and substantive law,' and a court may 'terminate' the self-representation of a defendant who 'deliberately engages in serious and obstructionist misconduct.'" *See Id.* at 2392 (citing *Faretta*, supra, at 834-835, n. 46, 95 S.Ct. 2525.

H. Defendant's Right to be Present at Trial is Not Absolute

One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial. *Lewis v. United States*, 146 U.S. 370 (1892). However, as the Supreme Court has acknowledged for almost 40 years, that right is not absolute.

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom. Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings.

Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 1060-61 (1970)(discussing the trial court's expulsion of a *pro se* defendant for unruly behavior)(*internal citations omitted*).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on January 11, 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.

/s/Daniel M. Nelson
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