

Defendant believes that a goodly portion of such an agreement is highly prejudicial, irrelevant and self serving information that should not be placed before the jury. More recent practice in this district has been to include a lengthy recitation of facts taken from investigative reports ostensibly to aid the court in a Rule 11 factual-basis determination and to tie down that defendant to a factual version of potential testimony. This is precisely what appears to have occurred at the Rostie plea proceedings conducted in open court on September 4, 2008, as the Court saw fit to accept the plea based on such a paragraph in the agreement without conducting further factual inquiry. The latter type of information in such an agreement is particularly prejudicial since it amounts to nothing more than a written version of that person's anticipated testimony which the government wants to emphasize with the jury.

A prior panel opinion of the 8th Circuit, *United States v. Brown*, 941, F.2d 656 (8th Cir. 1991) has ruled that co-conspirator plea agreements are admissible, presuming the Court gives a proper limiting instruction. Also see *United States v. Kroh*, 915 F.2d 326 (8th Cir. 1990 (en banc)); *United States v. Alama*, 486 F.3d 1062 (8th Cir. 2007).

In *Alama*, the defendant argued for the first time on appeal that the admission of the plea agreement was reversible error because it negated the presumption of innocence. The panel in *Alama*, rejected the argument citing *Brown* and *Kroh* but then

noted that “[d]istrict courts have discretion to exclude all or part of a plea agreement whose specific terms would have an ‘undue tendency to suggest decision on an improper basis’ [citations omitted].”

Defendant Elder submits that substantial portions of the plea agreement entered into by Rostie in this case and potential cooperating witnesses in other state or federal cases will require close scrutiny by the court and that the court should make a Rule 403, FRCP, balancing test prior to allowing the government to even make reference to any such agreements and their content, much less offer them into evidence. See *United States v. Morris*, 327 F.3d 760 (8th Cir. 2003), cited with approval in *Alama*.

WHEREFORE, defendant Elder moves the Court to enter an order in limine that requires the United States to refrain from discussing, mentioning, or alluding to in any fashion the existence of plea agreements (or the contents contained therein) entered into between the United States or the State of Missouri or any other jurisdiction between a witness in this case or any other case, whether the witness is or is not characterized as a direct co-conspirator in this case, without first obtaining a specific ruling from the Court out of the presence of the jury as to whether the agreement is admissible in whole or in part or not at all.

Respectfully submitted,

/s/

John R. Osgood
Attorney at Law, #23896
Bank of the West Bank Building - Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086

Osgood Law Office

<http://www.juris99.com/index.htm>

Office Phone: (816) 525-8200

Fax: 525-7580

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri through use of the Electronic Court Document Filing System on Thursday, September 04, 2008.

/s/

JOHN R. OSGOOD

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