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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

| | | |
|---|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>v.<br><br>THOMAS T. ANDERSON,<br><br>Defendant. | ) | No. 3:06-cr-00099-JWS<br><br>**GOVERNMENT'S TRIAL MEMORANDUM** |

The defendant is charged by Indictment with seven felony counts related to an investigation involving public corruption. Trial is set to commence on Monday, June 25, 2007.

The government anticipates that its case-in-chief will take approximately one week of trial time to present.

**Case Summary**

This case involves a criminal enterprise in existence from approximately July, 2004, until March, 2005, in which the defendant, THOMAS ANDERSON, who was at the time an elected member of the Alaska State House of Representatives, received monetary payments from an individual who was cooperating in a federal criminal investigation in exchange for ANDERSON's performance of official acts. In exchange, ANDERSON and a co-conspirator received a total of $24,000. In addition, ANDERSON solicited an additional payment of $2,000 directly from the cooperating individual.

**Statement of Facts**

**Individuals and Entities at Issue**

The defendant, THOMAS ANDERSON was at all relevant times an elected member of the Alaska House of Representatives representing District 19, located in Anchorage.[1]

The individual who cooperated with law enforcement during the investigation (identified as "CS-1" in the Indictment) worked as a contract consultant for Cornell Companies, Inc. ("Cornell"), a company that specializes in developing and running private prisons ("Prison Company" in the Indictment). CS-1's job was to create support for the construction and operation of a private prison in a number of communities around the State of Alaska.[2] During

[1] ANDERSON was first elected to the House of Representatives in November 2002, and was re-elected in November 2004. ANDERSON did not run for reelection in 2006.

[2] "CS-1" had a contract to perform personal services and lobbying activities for Cornell. Cornell has had multiple interests within the state of Alaska, including, without limitation: (1) a

the investigation, CS-1 consensually recorded conversations, telephonically and in person, with ANDERSON and "Lobbyist A".

"Lobbyist A" was a lobbyist who had a contract with Cornell (in addition to numerous other clients). "Lobbyist A", whose lobbying efforts for Cornell related primarily to a planned juvenile psychiatric treatment facility in Anchorage, frequently worked with "CS-1" on matters related to Cornell.

PACIFIC PUBLISHING was an entity created by "Lobbyist A" for the purpose of funneling monetary payments to ANDERSON in such a way that the true identity of the payors would be kept secret.[3]

**The Corruption Scheme**

The government will prove that ANDERSON, an elected member of the Alaska State House of Representatives, entered into a corrupt relationship with CS-1 in which ANDERSON agreed to perform official acts in exchange for monetary payments totaling $24,000. The scheme, which began in or about July, 2004, was facilitated by "Lobbyist A".

**"Lobbyist A"'s Pitch to "CS-1" in July 2004**

Although "CS-1" was working for the government during the summer of 2004, "CS-1"'s efforts at that time were directed to other, unrelated investigative matters. On July 16, 2004,

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series of halfway houses in the Anchorage area that provide services to the State; (2) a planned juvenile psychiatric treatment facility to be built in Anchorage; and (3) a planned privately-operated state prison, which was to be operated by Cornell.

[3] At various times, ANDERSON and/or "Lobbyist A" also referred to this entity as "Pacific Publications" or "Alaska Publishing."

"Lobbyist A" left "CS-1" a message on "CS-1"'s answering machine asking "CS-1" to consider whether they could "try with Cornell to help out Tom ANDERSON." "Lobbyist A" further stated that "[i]t's not additional funds for myself, it's for Tom."

On July 21, "CS-1" and "Lobbyist A" had an in-person discussion in which "Lobbyist A" stated, "what would be great is if I could get [Cornell] to hire Tom ANDERSON through me." In response, "CS-1" asked "Lobbyist A", "what could Tom do?" "Lobbyist A" then said, "[b]e our boy in Juneau." "Lobbyist A" then told "CS-1" his plan for how Cornell could provide money to ANDERSON. "Lobbyist A" told "CS-1" that "Lobbyist A" planned to create a political newsletter "that will come out quarterly," and that ANDERSON would write articles for the newsletter. ANDERSON would be paid by the company to set up and run the newsletter. In later conversations, "Lobbyist A" indicated that the alleged newsletter would be published as an internet website. The benefit of this, according to "Lobbyist A", was that "[ANDERSON] doesn't have to report any of my clients, just the money that he gets paid by a company that he writes the column for." "Lobbyist A" added, "[i]t's not really a pass-through, but the majority of that [money] would go to Tom."

"CS-1" stated that the real question was "what can ANDERSON do for Cornell? . . . How do we know that he'll deliver, and what can he deliver?" "Lobbyist A" discussed ANDERSON's connections within the Alaska State House, and, in particular, noted ANDERSON's romantic relationship another elected public official, stating that Cornell would "get two [legislators] – you know, Chair of Labor and Commerce [ANDERSON] and Chair of Judiciary [other elected public official] ... that's the minimum we're going to have next year." When "CS-1" asked about whether ANDERSON would be willing to get on subcommittees that Cornell requested,

"Lobbyist A" responded that "[h]e would go wherever we wanted him to go, no two ways about it."

"Lobbyist A" then brought up with "CS-1" the issue of money. Under the scheme proposed by "Lobbyist A," Cornell would pay approximately $24,000 to "Lobbyist A"'s shell corporation, Pacific Publishing. ("Lobbyist A" subsequently applied for a business license for Pacific Publishing on August 2, 2004.) "CS-1" indicated that it might make more sense to do the deal through a company affiliated with Cornell, as opposed to Cornell itself. "Lobbyist A" responded: "Oh my god, that's even better. That's even better. . . . That's even cleaner. . . . If the company that Cornell owned would pay that company, then it's even more arm's length because if somebody said to me you need to disclose your list of clients of this other company, there you go. And we'll have more than one, because I intend on signing up a whole bunch of people."

In a July 29, 2004 meeting between "Lobbyist A" and "CS-1", "Lobbyist A" explained why "CS-1" should provide ANDERSON with financial payments:

> "Here's the deal with ANDERSON. Let me, let me put it this way. If I was a Soviet spy and I was looking for a legislator to recruit.....he'd be the one I'd get. But when I say that ...what I mean is he needs the money." "Lobbyist A" later added: "He, he's (UI) and he's smart enough not to get in trouble....and he's motivated...and needs help financially."[4]

**"CS-1"'s August 17, 2004, Meeting with ANDERSON**

On August 17, 2004, ANDERSON and "CS-1" had an in-person meeting in which they discussed the terms of their financial relationship. "CS-1" indicated that he could pay

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[4] Later in the same conversation, "Lobbyist A" again emphasized to "CS-1" that ANDERSON would be useful to "CS-1" and Cornell in providing legislative assistance.

approximately $24,000 total to ANDERSON and "Lobbyist A", but that ANDERSON would need to help further Cornell's interests in the legislature. "CS-1" specifically mentioned a particular issue with which Cornell needed assistance: pushing the State Department of Corrections to conduct a feasibility study concerning the potential for a private prison within the State. ANDERSON expressed his agreement to help further Cornell's interests on this issue, noting that "I'll call [the Commissioner of the Department of Corrections] in October and say, 'In November you better have [this feasibility study] done.'"

During the August 17 meeting, ANDERSON and "CS-1" had the following discussion about the "website" referenced previously by "Lobbyist A":

"CS-1": ...[I]n all candor, we don't need any advertising [on a website], you know, a company like Cornell.

TA: Oh, I know, I know, I know.

"CS-1": Ahm, ahm, I'll give, let me give you an example what happened this morning.

TA: I figured that.

"CS-1": I come back from four days, ah yeah, like "Lobbyist A" says, well we're gonna buy, buy advertising, this is a legitimate deal. I said [to] []—

TA: At some point you were probably like, 'stop, ["Lobbyist A"] . . . It's like, oh, Cornell, a banner on the website.

"CS-1": I mean come on, you know. Actually it's a little embarrassing that he keeps hammering it that way.

TA: You mean the point was you're trying to help and we are appreciative, but quit the bullshit on the banner thing.

Later in the conversation, ANDERSON further added, "let's be real – [the website]'s not going to do anything for" Cornell.

In the same August 17, 2004, conversation, ANDERSON and "CS-1" also had the following exchange concerning the need for payments to go to "Lobbyist A" instead of ANDERSON:

> "CS-1": ...Who do I give, ahm, I should have my check for Alaska Publishing. Do I give it to you or ["Lobbyist A"]?
>
> TA: Him. I'll tell, no, give it to ["Lobbyist A"], all through ["Lobbyist A"].
>
> "CS-1": Okay.
>
> TA: Because it always has to be that way.
>
> "CS-1": Okay.
>
> TA: And no one can ever, if anyone ever says [unintelligible], I say, hey, I work for ["Lobbyist A"], I don't know what the hell you're talking about.
>
> "CS-1": Yeah, you're working for Alaska Publishing.
>
> TA: Yeah, so I mean I, I know I've worked with ["CS-1"] on issues, but ["Lobbyist A"] is my boss, he pays me. APOC only needs to know ["Lobbyist A"] pays me and then we're always safe.

**ANDERSON, "Lobbyist A" and "CS-1" Implement the Scheme**

Over the remainder of 2004 and continuing into early 2005, "CS-1" had numerous additional interactions with both ANDERSON and "Lobbyist A", which were either consensually-recorded telephone conversations or consensually-recorded in-person meetings. During these interactions, "CS-1" transmitted a total of $24,000 in three $8,000 installments to

ANDERSON and "Lobbyist A" through "Lobbyist A"'s shell corporation, Pacific Publishing, as well as an additional $2,000 directly to ANDERSON.

On or about November 16, 2004, ANDERSON and "CS-1" had a meeting in ANDERSON's legislative office in Anchorage. In that meeting, ANDERSON stated to "CS-1" that, with respect to the website, "Will you benefit from this web, from this email thing? No, probably not." Also, during that conversation, ANDERSON further described ANDERSON's understanding of his relationship with "CS-1":

> TA: That's why when you say, when you kinda giggle and say, 'hey, Tom, we're doing this to help you, it's really not for your web thing'...
>
> "CS-1": Right.
>
> TA: ... but we have to have something.... I mean, unless you want me to [quit the legislature] and, you know, work for you. But no, you don't want that. You want votes in the legislature, I would assume.
>
> "CS-1": Of course.

ANDERSON then told "CS-1" that ANDERSON was unhappy with the cut of the money that "Lobbyist A" was providing him

> And, and every time he's ever taken these checks, he's cut 'em in half and I'm like, you can't repeat that, but so he's like here's yours, here's mine. You know I'm like I don't understand that.

"CS-1" responded:

> "CS-1": Well, this is, you know, TOM, I guess my concern is I don't need ["Lobbyist A"]'s vote.
>
> TA: I know.
>
> "CS-1": You know, I don't need his support on issues.

TA: I know.

"CS-1": You know, I don't need him to speak Wednesday night at [a public hearing relating to a project in which Cornell has an interest].

TA: Exactly.

Later in the conversation, ANDERSON told "CS-1" that, with respect to the third $8,000 payment, "I don't want to split that with ["Lobbyist A"]." "CS-1" responded that "we, you don't want to estrange ["Lobbyist A"]," and then stated that "I should try to do a separate deal." After discussing it, ANDERSON told "CS-1" that "if there's a way you can think of that, that would be nice." As a result of ANDERSON's request, on December 21, 2004, "CS-1" provided ANDERSON an additional $2,000 check as a payment directly to him.

As a result of the relationship described above, "CS-1" paid a total amount of $26,000: $24,000 to ANDERSON and "Lobbyist A" together, and $2,000 to ANDERSON directly. The FBI provided the money paid by "CS-1", and each of the four payments was made by check. The dates of these payments are:

| Date | Amount | Payee on Check | Given to |
|---|---|---|---|
| August 19, 2004 | $8,000 | Pacific Publishing | "Lobbyist A" |
| October 22, 2004 | $8,000 | Pacific Publishing | "Lobbyist A" |
| December 21, 2004 | $8,000 | Pacific Publishing | ANDERSON |
| December 21, 2004 | $2,000 | Tom Anderson | ANDERSON |

According to bank records, the checks provided by "CS-1" were deposited in Pacific Publishing's account. Following the deposit, checks were written from the Pacific Publishing

account to Alaska Strategic Consultants and THOMAS ANDERSON and deposited into ANDERSON's accounts:

| Amount | Date of Check | Check From | Check To |
|---|---|---|---|
| $3,328.00 | August 21, 2004 | Pacific Publishing | Alaska Strategic Consultants |
| $3,500.00 | October 21, 2004 | Pacific Publishing | Alaska Strategic Consultants |
| $4,000.00 | December 21, 2004 | Pacific Publishing | Alaska Strategic Consultants |

**ANDERSON's Official Acts**

In exchange for the payments from "CS-1", ANDERSON explicitly agreed to take official acts for the benefit of "CS-1"'s business interests. Furthermore, ANDERSON in fact took a series of official acts at "CS-1"'s request. These official acts, without limitation, include the following:

**Memberships on House Committees**

During the meetings between "CS-1" and ANDERSON in July and August 2004, "CS-1" told ANDERSON that both Cornell and the private investors needed ANDERSON to become a member of two particular House of Representatives subcommittees: Corrections and HESS (Health, Environment and Social Services). In an October 20, 2004, telephone call between "CS-1" and ANDERSON – after the first $8,000 payment, and one day before the second $8,000 payment – "CS-1" and ANDERSON explicitly addressed ANDERSON's memberships on these committees:

"CS-1": "So, uh, you were [previously] on the Corrections subcommittee, right?"

TA: "Yeah."

"CS-1": "Can you get back on it?"

TA: "Yeah."

"CS-1": "Great. Because we're going to need you there."

TA: "Yeah."

"CS-1": [Then asks about the HESS subcommittee.] "Can you get on that?"

TA: "That one...I wasn't on, but I certainly can, I can, I can choose that. I can choose – and we talked about this a while back – I can do those two, and I can also do, there is a few that I'd love to be on . . public safety is one, corrections is one, and HESS is another one of interest . . . and maybe natural resources. I wouldn't mind being on four."

"CS-1": "For our purposes, Corrections and HESS are the most important."

TA: "For sure. You bet. I was trying – I understand what you meant. Definitely. And those are the areas of interest to me anyway . . . . but I get what you're saying."

Additionally, on both November 16, 2004, and December 21, 2004, ANDERSON again confirmed to "CS-1" that he would seek and obtain membership on the legislative committees requested by "CS-1".

On January 21, 2005, ANDERSON, using his email account, sent an email to "CS-1" concerning a meeting that ANDERSON had with a Cornell executive and an Anchorage developer working with Cornell. In reporting to "CS-1" on the meeting, ANDERSON wrote: "I noted your recommendation of the importance of HESS and Correction subcommittees to the

Budget, and am now on them...." ANDERSON further wrote: "Let me know your concerns and I'll assist where necessary."

**ANDERSON's Letter to the Commissioner of Corrections**

During an October 20, 2004, telephone call, "CS-1" asked ANDERSON to help Cornell with an issue concerning Cornell's halfway houses in Anchorage. At the time, state regulations by the Department of Corrections required minimal staffing levels at halfway houses, regardless of inmate occupancy. Cornell wanted to change the regulations to permit the company to shift inmates and staffing in ways to minimize costs. After presenting this issue, "CS-1" asked ANDERSON to help Cornell's interests by contacting Marc Antrim, the Commissioner of the Department of Corrections.

The government will prove that on October 21, 2004, ANDERSON sent a letter to Department of Corrections Commissioner Marc Antrim concerning halfway houses operated by Cornell in the Anchorage area. The letter was on Alaska State Legislature letterhead, and was faxed from ANDERSON's legislative office in Anchorage. The text of the letter states that it was written by ANDERSON "[a]s a member of the House Finance Committee's Corrections Sub-Committee." The letter largely incorporated an email draft from "CS-1," and requested a meeting between ANDERSON and Antrim to discuss issues concerning "the budget challenges for the private contractors" that operate halfway houses. One day after ANDERSON's letter, on October 22, 2004, "CS-1" made the second $8,000 payment to "Lobbyist A".

**ANDERSON's Meeting with Commissioner Antrim**

On October 29, 2004, Commissioner Antrim met with ANDERSON at ANDERSON's legislative office in Anchorage. ANDERSON told Antrim that he wanted to talk about the halfway house utilization in Anchorage. In a November 16, 2004, meeting with "CS-1," ANDERSON confirmed that he met with Antrim at "CS-1"'s request.

**ANDERSON's Assistance with the "CON" Process**

In late 2004, Cornell ran into a problem concerning its plan to use the McKay Building to house a juvenile treatment facility/prison. The Commissioner of Health and Human Services, Joel Gilbertson, delayed Cornell's application for a certificate of need ("CON") until formal guidelines for CON issuance could be developed by the department. This marked a significant delay in Cornell's project.

On November 27, 2004, ANDERSON, sent an email to "CS-1" concerning the certificate of need ("CON") sought by Cornell. ANDERSON reported that "[i]n light of the recent decision by HESS to delay the CON issuance, please advise how I can assist." After "CS-1" replied that certain assistance could be useful the following week, ANDERSON replied, "I'm available Mon. or Tue."

In a December 21, 2004, in-person meeting between "CS-1" and ANDERSON, "CS-1" raised the CON/juvenile facility with ANDERSON and explained the issue's importance. ANDERSON replied, "So we have to get the CON." ANDERSON then proposed the following:

> How about I do a letter to Dan Kertaukis? I'll talk to ["Lobbyist A"] and have him draft a letter that the whole legislature can sign. And rather than have an Anchorage Caucus meeting, we'll pass it around at the beginning of [the state legislative] session, the first day of session . . . I'll go around with that letter and say, sign this. We could do something like that.

Although ANDERSON never followed through with the proposed letter, he did take other steps to assist with the CON issue and the McKay Building. First, ANDERSON asked another Anchorage state representative to call Commissioner Gilbertson on Cornell's behalf to get the CON process changed. During a February 2005 dinner in Juneau with "CS-1", ANDERSON, and that other state representative, the other state representative mentioned that s/he and ANDERSON met with Gilbertson in November 2004 to discuss the CON. The other state representative also made clear that the contact with Gilbertson was done because of ANDERSON:

> TOM called me on the phone and he said [], I don't care what you are doing, I need you to get on the phone right now, talk to ["Lobbyist A"], talk to ["CS-1"].....I need you to make these phone calls. ... I mean I was on the phone because of TOM.

**ANDERSON's Statements at the CON Public Hearing**

During the November 16, 2004, meeting in ANDERSON's legislative office between ANDERSON and "CS-1", "CS-1" brought up the issue of an upcoming Anchorage "Public Hearing" concerning the CON for the Anchorage juvenile facility. "CS-1" asked ANDERSON to attend the meeting and to speak on Cornell's behalf. ANDERSON agreed to do so. ANDERSON further suggested that he had some degree of "cover" because he was on the HESS subcommittee.

On November 17, 2004, ANDERSON appeared at a CON Public Hearing concerning Cornell's proposed juvenile facility. After a speech by a Cornell employee, ANDERSON addressed the public in attendance. According to a witness who attended the meeting, ANDERSON said that as Chairman of the Legislature's Regulatory Review committee, he hoped

to have regulations and guidelines passed for such a service provider. ANDERSON told the crowd that "I don't have a connection with either group here," and that "I'm not here on behalf of any group."

**Summary of the Charges**

As noted, ANDERSON is charged in the Indictment with the following offenses:

| COUNT | OFFENSE CHARGED |
|---|---|
| 1 | CONSPIRACY - Vio. of 18 U.S.C. § 371 |
| 2 | INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED UNDER COLOR OF OFFICIAL RIGHT - Vio. 18 U.S.C. § 1951(a) and § 2 |
| 3 | BRIBERY CONCERNING PROGRAMS RECEIVING FEDERAL FUNDS - Vio. 18 U.S.C. § 666(a)(1)(B) and § 2 |
| 4 - 6 | MONEY LAUNDERING - Vio. 18 U.S.C. § 1956(a)(1) and § 2 |
| 7 | INTERFERENCE WITH COMMERCE BY EXTORTION INDUCED UNDER COLOR OF OFFICIAL RIGHT - Vio. 18 U.S.C. § 1951(a) and § 2 |

**Witnesses**

At trial, the government will call some or all of the following:

1. Some of the law enforcement officers who were involved in the investigation of this case;

2. "CS-1" and "Lobbyist A", who were involved in the corruption scheme with ANDERSON; and

3. Certain other non-law-enforcement personnel who were witnesses to the transactions described above.

At this time, the government anticipates calling approximately 10 witnesses in its case-in-chief.

**Exhibits**

The government will offer some or all of the following exhibits at trial:

1. Audio and/or video recordings and corresponding transcripts of conversations or meetings involving the defendant and/or his co-conspirators;

2. Documents reflecting monetary payments made in connection with the scheme;

3. Documents concerning the defendant's financial status, including, without limitation, bank records;

4. Letters, emails, and other correspondence between the defendant and others in connection with the scheme; and

5. Required state filings made by the defendant during his time as a member of the Alaska State Legislature.

**LEGAL / EVIDENTIARY ISSUES**

**Stipulation Concerning Admissibility of Certain Records**

The government has requested that the defendant stipulate to the authenticity of certain records which have been marked as government exhibits. A written stipulation has been prepared, but as of the date of this filing, it has not been signed.

**Summary Witness Testimony and Admissibility of Composite Recordings**

Rule 1006 of the Federal Rules of Evidence provides that:

> 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. The originals, or duplicates, shall be made available for examination, copying or both, by other parties at reasonable time and place. The court may order that they be produced in court.

At trial, the government will offer, through the testimony of a summary witness and summary exhibits, evidence concerning the financial condition of the defendant in 2004 and 2005 as well as evidence concerning the financial transactions made in connection with the conspiracy.

In addition, the government will introduce shortened, or redacted, audio and video recordings of conversations and meetings. These "composite" recordings have been edited down from much lengthier recordings.[5] Some of these recordings will be paired with transcripts.

The provisions of this rule have been complied with. The purpose of playing the redacted recordings will be to prevent the introduction of irrelevant material and to conserve the court's time. Naturally, the defendant will be free to introduce and play the entirety of any recording, if he chooses - as long as the content is relevant.

**Admissibility of Prior Consistent Statements**

The government anticipates that some of its witnesses will be impeached at trial concerning plea agreements or cooperation agreements entered into with the United States. These witnesses made statements early on in the investigation which are consistent with their expected trial testimony. Rule 801(d)(1)(B), Fed. R. Evid., permits the introduction of prior consistent statements offered to rebut a charge of improper influence or motive to fabricate testimony. Assuming that these witnesses are impeached by their cooperation agreements with the government -with their motive to testify attacked and their credibility thus sharply challenged - the introduction of their prior consistent statements is proper. See United States v. Collicott, 92 F.3d 973, 979 (9th Cir.1996); United States v. Allen, 579 F.2d 531, 532-33 (9th Cir.1978) (prior consistent statements of a

[5] The defendant has been provided with complete copies of all of the redacted versions which the government will introduce. In addition, copies of transcripts corresponding to the redacted versions have been provided to the defendant.

declarant made to an agent may be elicited from the agent under Rule 801(b)(1)(B) where defendant sharply attacked the credibility of the declarant and implied that the declarant was testifying out of motive to avoid criminal prosecution).

**Proof of the Conspiracy**

The essential elements necessary to establish a conspiracy are: "(1) an agreement to accomplish an illegal objective; (2) coupled with one or more acts in furtherance of the illegal purpose; and (3) the requisite intent necessary to commit the underlying substantive offense." United States v. Bailon-Santana, 492 F.3d 1258, 1262 (9th Cir. 2005) (citations omitted); United States v. Bailey, 607 F.2d 237, 243 (9th Cir.), cert. denied, sub nom. Whitney v. United States, 445 U.S. 934 (1980). Coordinated activity can raise a reasonable inference of a joint plan, U.S. v. Smith, 962 F.2d 923, 930(9th Cir. 1992) (citations omitted), and a conspiracy may involve sub-groups or sub-agreements. United States v. Fernandez, 388 F.3d 1199, 1248 (9th Cir. 2004); United States v. Patterson, 819 F.2d 1495, 1502 (9th Cir. 1987).

One may join a conspiracy already formed and in existence and be bound by all that has gone on before in the conspiracy even if unknown to him. United States v. Umagat, 998 F.2d 770, 772 (9th Cir. 1993)(citations omitted); United States v. Bibbero, 749 F.2d 581, 588 (9th Cir. 1984). A person is culpable if he joins a conspiracy knowing of its illegal purpose, and that his benefits depend on the success of the entire venture. United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir. 2004)(citations omitted); United States v. Arbelaez, 719 F.2d 1453, 1458-1459 (9th Cir.) cert. denied sub nom, Ponce de Leon v. United States, 467 U.S. 1255 (1984).

Participation is deemed to be "knowingly" if the defendant knew or should have known of the conspiracy. Montgomery, 384 F.3d.at 1062; see also Arbelaez, 719 F.2d at 1459. Participation

is also criminal if the defendant maintained deliberate ignorance. United States v. Aguilar, 80 F.3d 329, 331 (9th Cir. 1996)(citations omitted); United States v. Nicholson, 677 F.2d 706, 719 (7th Cir. 1982); United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976). The requirement of knowledge does not mean that the government must show the defendant knew all the details of the conspiracy or the identity or the role of all the other conspirators to be culpable. United States v. Herrera-Gonzalez, 263 F.3d 1092, 1095 (9th Cir. 2001); United States v. Thomas, 586 F.2d 123, 132 (9th Cir. 1978).

Once existence of a conspiracy has been established, only a slight connection to the conspiracy is necessary in order to convict any one defendant of knowing participation. Montgomery, 384 F.3d at 1062; United States v. Zakharov, 468 F.3d 1171, 1180 (9th Cir.2004); United States v. Stauffer, 922 F.2d 508 (9th Cir. 1990); United States v. Arevis, 847 F.2d 1417, 1422-23 (9th Cir. 1988). The law of conspiracy does not distinguish between the relative degree of culpability of the defendants. United States v. Marcello,731 F.2d 1354, 1360 (9th Cir. 1984). All members of a conspiracy are equally guilty.

**Admission of Co-conspirator Statements**

Fed. R. Evid. 801(d)(2)(E) provides that a statement is not hearsay if the statement is offered against a party and in furtherance of the conspiracy. Before a court will admit a statement of a co-conspirator into evidence and against a defendant, the government must establish by a preponderance of the evidence the three following requirements: (1) the existence of a conspiracy; (2) that the defendant and declarant were members of the conspiracy; and (3) that the statements were made during the course of and in furtherance of the conspiracy. United States v. Bridgeforth,

441 F.3d 864, 869 (9th Cir. 2006); Bourjaily v. United States, 483 U.S. 171, 173 (1987) (emphasis added).

The trial court, in making the above preliminary factual determinations under Fed. R. Evid. 801(d)(2)(E), may consider the actual hearsay statements sought to be admitted, as well as other independent evidence. United States v. Castaneda, 16 F.3d 1504 , 1507 (9th Cir. 1994); Bourjaily, 483 U.S. at 181; United States v. Schmit, 881 F.2d 608 (9th Cir. 1989).

Fed. R. Evid. 104(a) states that a judge is not bound by the rules of evidence when determining preliminary fact questions except with respect to privileges. The judge may receive the hearsay evidence and "give such weight as his judgement and experience counsel." United States v. Schmit, 881 F.2d 608, 610 (9th Cir. 1989)(citations omitted).

The Court in Bridgeforth, citing Bourjaily, held that the requirements for admission of a co-conspirator statement under the Confrontation Clause of the Sixth Amendment are identical to the requirements under Fed. R. Evid. 801(d)(2)(E). Bridgeforth, 441 F.3d at 869 (citations omitted). The trial court need not inquire into the circumstances of co-conspirator's statements to determine independent indicia of the reliability of the statements. United States v. Moran, 482 F.3d 1101, 1108 (9th Cir. 2007) (citations omitted); Bourjaily, 483 U.S. at 182. The hearsay rules and the Confrontation Clause are designed to protect similar values. Thus, if evidence falls within a hearsay exception, a court need not independently inquire into the reliability of such statements and the defendant's right of confrontation is not violated. Bridgeforth, 441 F.3d at 869 .

Finally, the decision as to whether the government has laid the proper foundation for the admission of co-conspirator statements lies with the judge rather than the jury. Bourjaily, 483 U.S. at 174; United States v. Fleishman, 684 F.2d 1329, 1337 (9th Cir. 1982) (citations omitted); United

States v. Eubanks, 591 F.2d 513 (9th Cir. 1979). If the statement is admitted, the jury is to treat it as it does any other piece of evidence. The trial court need not instruct the jury that it is only to consider the statement if it makes certain preliminary findings relative to the alleged conspiracy and the statements. United States v. Hagmann, 950 F.2d 175, 181 (5th Cir. 1991) (citations omitted); United States v. Ascarrunz, 838 F.2d 759 (5th Cir. 1988).

The procedure for determining the admissibility of co-conspirators statements is left to the discretion of the trial court. United States v. Brewer, 947 F.2d 404, 410 (9th Cir. 1991); United States Court v. Zemek, 634 F.2d 1159, 1169 (9th Cir. 1980), cert. denied, sub nom., Janovich v. United States, 452 U.S. 905 (1981); Bourjaily, 483 U.S. at 181.

The court can allow the evidence of co-conspirators' statements subject to a motion to strike if the government's evidence does not ultimately satisfy the foundational requirements. See United States v. Reed, 726 F.2d 570, 580 (9th Cir. 1984); United States v. Watkins, 600 F.2d 201, 204 (9th Cir.), cert. denied, 444 U.S. 871 (1979); Zemek, 634 F.2d at 1169. The Ninth Circuit has stated that it does not have a "preference" for the order of proof for admissibility of co-conspirator statements and leaves the order of proof to the discretion of the trial judge. United States v. Loya, 807 F.2d 1483, 1490 (9th Cir. 1987); United States v. Long, 706 F.2d 1044, 1053 (9th Cir. 1983) (defendant's request for a pretrial hearing properly denied); United States v. Kenny, 645 F.2d 1323, 1333-1334 (9th Cir. 1981), cert. denied, 454 U.S. 828 (1981); Zemek, 634 F.2d at 1169; United States v. Perez, 658 F.2d at 658, n. 2.

Requiring a "mini-trial" on the admissibility of the evidence or even requiring the government to lay a complete foundation prior to admitting the co-conspirator's statements would

frustrate justice and be an inefficient use of this Court's time. As the commentary to Rule 104(c), Fed. R. Evid., notes regarding a preliminary hearing:

> The procedure is time consuming. Not infrequently the same evidence which is relevant to the issue of establishment of fulfillment of a condition precedent to admissibility is also relevant to weight or credibility, and time is saved by taking foundation proof in the presence of the jury.

Notes of the Advisory Committee on Proposed Rules, Pub L. 93-595, Section 1, 88 Stat. 1926 (1981).

The government must establish by a preponderance of the evidence that the co-conspirator's statement sought to be admitted was made "in furtherance" of the conspiracy. Moran, 482 F.3d at 1108; Bourjaily, 483 U.S. at 173. To meet the "in furtherance" requirement, the statements must further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy. The question is whether the declarant was speaking so as to pursue the conspiracy. United States v. Bowman, 215 F.3d 951, 961 (9th Cir. 2000) (citations omitted); United States v. Yarbrough, 852 F.2d 1522 (9th Cir. 1988). The statements must somehow assist the conspirators in achieving their objectives. Id.; see also United States v. Layton, 720 F.2d 548 (9th Cir. 1983).

To establish that a co-conspirator's statement was made "in furtherance" of the conspiracy, as required for admission, the government is not required to prove that the statements actually furthered the conspiracy. It is sufficient if the declarant made the statement for the purpose of furthering the conspiracy. United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991). The statements are admissible even if they hinder the plot. Moran, 482 F.3d at 1108; United States v. Reyes, 798 F.2d 380, 383-84 (10th Cir. 1986).

The Ninth Circuit held in United States v. Schmit, the tape that the government sought to admit consisted of lengthy and somewhat rambling statements about "what (the declarant) was gonna do" and "who's involved." 881 F.2d at 611. The defendant argued that the statements were not "in furtherance" of the conspiracy because the statements were only "casual admissions" of culpability and "idle chatter." Id. at 612. The court rejected this argument finding that the trial court could infer from the context and content of the statement that the declarant intended to use it to advance the common enterprise. Id.

**Limits Regarding Impeachment Through Specific Instances of Conduct of Witness**

Rule 608(b) of the Fed. R. Evid. clearly provides that extrinsic evidence of a witness's past misconduct (other than a prior conviction properly admissible under Rule 609) is not admissible for the purpose of attacking the witness's credibility. See United States v. Hinton, 31 F.3d 817, 824 (9th Cir. 1994); United States v. Brooke, 4 F.3d 1480, 1484 (9th Cir. 1993); United States v. Lew, 875 F.2d 219, 223 (9th Cir. 1989); United States v. Noti, 731 F.2d 610, 612 (9th Cir. 1984). To the extent that the defendant will attempt to introduce such information about government witnesses, such evidence, even if it exists, is simply inadmissible to impeach the credibility of the witness.

**Limits Regarding Relevant Defenses**

Rule 403, Fed. R. Evid., provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See also United States v. Olano, 62 F.3d 1180, 1204 (9th Cir. 1995), cert. denied, 519 U.S. 931 (1996); United States v. Brannon, 616 F.2d 413, (9th Cir. 1980), cert. denied, sub nom. Cox v. U.S., 447 U.S. 908 (1980). The trial court has broad discretion in determining

admissibility under Rule 403. Olano, 62 F.3d at 1204; United States v. Moore, 552 F.2d 1068, 1079 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976).

An area of common exclusion involves attempts to confuse the issues or mislead the jury by introducing evidence of matters that do not establish a defense to the charged crimes. See Olano, 62 F.3d at 1204-05 (excluding evidence of a civil judgment on the validity of a letter of credit issued by a Texas court on the grounds the jury would give it undue influence and be confused by the additional testimony of the Texas judgment); United States v. Perkins, 937 F.2d 1397, 1401 (9th Cir. 1991) (excluding evidence of several unrelated robberies because of possibility that such evidence may confuse or mislead the jury as to the offense at issue); United States v. Tidwell, 559 F.2d 262, 266-7 (5th Cir. 1977), cert. denied, 435 U.S. 942 (1978) (excluding evidence that defendant's manipulation of bank funds was beneficial to bank on grounds of danger of confusion of issues and misleading jury where belief in benefit to bank was not a defense to misapplication of funds); United States v. Johnson, 558 F.2d 744, 746-47 (5th Cir. 1977), cert. denied, 434 U.S. 1065 (excluding evidence of purported overpayment of taxes in fraudulent tax return prosecution on grounds of confusion of issues and improper appeal to emotions of jury).

**Specific Instances of the Defendant's "Good Conduct" are Inadmissable**

It is a fundamental rule of evidence that:

> Evidence of specific acts may not be used to prove character where the evidence is to be used circumstantially to support the inference that a person acted in conformity with his character.

2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence, § 405.05[3] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2007).

The rule with respect to specific instances of conduct applies to attempts to introduce "good conduct" as well as bad acts. See United States v. Camejo, 929 F.2d 610, 613 (9th Cir. 1991) (excluding evidence of prior good conduct offered to negate criminal intent); United States v. Barry, 814 F.2d 1400, 1402-04 (9th Cir. 1987) (excluding evidence of prior "good conduct" offered in support of entrapment defense). The rule has been applied to attempts to defeat bribery charges by showing non-receipt of bribes. See United States v. O'Connor, 580 F.2d 38, 43 (2nd Cir. 1978) (defendant could not properly have introduced evidence of non-receipt of bribes by meat packers in their plants to rebut bribery charges regarding other meat packers "because such testimony would in effect be an attempt to demonstrate appellant's good character by proof of specific good acts"); Accord United States v. Benedetto, 571 F.2d 1246, 1249-50 (2nd Cir. 1978). See also Camejo, 929 F.2d at 613; United States v. Haese, 162 F.3d 359, 364-65 (5th Cir. 1998); United States v. Russell, 703 F.2d 1243, 1249 (11th Cir. 1983) (excluding evidence of specific, unrelated "good acts" as irrelevant to guilt); United States v. Gravely, 840 F.2d 1156, 1165 (4th Cir. 1988) (excluding evidence of specific good acts in antitrust prosecution).

In addition:

> Evidence of prior acts, whether offered under Rule 404(b) or 405(b) by the prosecution or by the defense, must be sufficiently related and proximate in time to the crime charged to be relevant under Rule 403.

Barry, supra at 1404 (citations omitted).

In this case, should the defendant attempt to introduce evidence of "good acts" unrelated in time and circumstance to prove that he acted in conformity with such character, such evidence of specific acts of "good character" is inadmissible.

Finally, although the Ninth Circuit has long recognized that juries have the power to acquit a defendant regardless of the evidence of his guilt, (See United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991); United States v. Simpson, 460 F.2d 515, 518-19 (9th Cir. 1972)), it has never recognized a right held by a defendant to seek such a verdict. United States v. Navarro-Vargas, 408 F.3d 1184, 1198 (9th Cir. 2005); Powell, 955 F.2d at 1213. Thus, because a defendant has no right to seek nullification, he has no right to present evidence relevant only to such a defense. See, Zal v. Steppe, 968 F.2d 924, 930 (9th Cir. 1992), Trott, J., concurring, cert. denied, 506 U.S. 1021 (1992).

While the defendant obviously has a right to present relevant defenses to the charges, he has no right to seek jury nullification and thus no right to introduce evidence which would be relevant only to nullification. This includes any reference to the potential penalties which the defendant faces as a result of conviction. As the court is well aware, this is an area where trial juries are routinely instructed they are not to concern themselves with. Should the defendant attempt to introduce evidence or make argument concerning the potential penalties he faces in this case, including the nature of the charges (felony offenses), this should be excluded as irrelevant to the jury's mission here - to be the finders of fact.

**Unavailability of Entrapment Defenses**

**Lack of Entrapment by CS-1**

Should the defendant attempt to raise an entrapment defense at trial concerning the activities of CS-1, such a defense will fail as a matter of law. As the Ninth Circuit has held, the entrapment defense has two elements: (1) government inducement to commit the crime; and (2) absence of predisposition by the defendant. United States v. Davis, 36 F.3d 1424, 1430 (9th Cir.1994). With

respect to the first element, "[m]ere suggestions or the offering of an opportunity to commit a crime is not conduct amounting to inducement." United States v. Manarite, 44 F.3d 1407, 1418 (9th Cir.), cert. denied, 515 U.S. 1158 and 516 U.S. 851 (1995).

The element of predisposition requires the examination of five factors: (1) the defendant's character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government's inducement. United States v. McClelland, 72 F.3d 717, 722 (9th Cir.1995), cert. denied, 517 U.S. 1148 (1996). "[E]vidence of predisposition may arise both before the government's initial contact and during the course of dealings." United States v. Garza-Juarez, 992 F.2d 896, 908 (9th Cir.1993).

The evidence will plainly demonstrate that the defendant was not entrapped by CS-1. CS-1's activities regarding the defendant did not induce the defendant to commit the crimes charged in the Indictment. See Manarite, 44 F.3d at 1418. Similarly, the five predisposition factors demonstrate no absence of predisposition on behalf of the defendant. See, e.g., United States v. Thickstun, 110 F.3d 1394 (9th Cir. 1997) (no predisposition in bribery scheme where defendant was in poor financial condition, benefitted financially from the transaction, and "repeatedly thanked" the government agent for the assistance brought about by the bribe).

**Lack of Entrapment by "Lobbyist A"**

In United States v. Thickstun, the Ninth Circuit held that a defendant may not attempt to claim entrapment by a co-conspirator that was not working at the direction of the government:

> Only a government official or agent can entrap a defendant. . . . We now hold explicitly that a principal wrongdoer, not knowingly working for the government, cannot entrap his co-conspirator. We rely for our holding on the

> policy behind the entrapment defense, the problems of proof inherent in a private entrapment defense, and existing law.
>
> The entrapment defense is narrow. It proceeds from the concept that "Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government." United States v. Russell, 411 U.S. 423, 435 (1973). Because the defense is rooted in congressional intent, and is "not intended to give the federal judiciary a 'chancellor's foot' veto" over federal prosecutions, id., it does not apply when one criminal simply convinces another to join him in criminal enterprise. We assume that Congress did intend to punish such conduct.

Id. at 1398-99.[6]

Although CS-1 was working at the direction of the government during the events alleged in the Indictment, "Lobbyist A" was not. As a result, the defendant is foreclosed, as a matter of law, from attempting to argue that he was entrapped by co-conspirator "Lobbyist A," either directly or derivatively. Should the defendant attempt at trial to assert such a defense, the government will be forced to move in limine to exclude such a defense and to seek a limiting instruction if appropriate.

RESPECTFULLY submitted this 18th day of June, 2007, at Anchorage, Alaska.

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s /Joseph W. Bottini for
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[6] The Ninth Circuit has also rejected the related defense of "derivative entrapment." Davis, 36 F.3d at 1431; United States v. Bonanno, 852 F.2d 434, 439 (9th Cir.1988). "Derivative entrapment occurs when an entrapped individual induces the defendant to commit a crime." Thickstun, 110 F.3d at 1399.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 18, 2007,
a copy of the foregoing Government's Trial Memorandum
Certificate was served electronically on Paul Stockler.

s/ Joseph W. Bottini