UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES—GENERAL

Case No. CR-12-0041-MWF **Date: March 4, 2014**
Title: United States of America -*v*- Gary Edward Kovall, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: MOTIONS IN LIMINE [175, 176, 178, 179, 180, 181, 182, 186, 187, 188, 194, 195, 196, 197, 198, 199]

This matter is before the Court on the motions in limine filed by Defendant David Alan Heslop (Docket Nos. 179, 180, 181, 182); the motions in limine filed by Defendant Gary Edward Kovall (Docket Nos. 175, 176); and the motion in limine filed by the government (Docket No. 178). Additionally, Dr. Heslop, Mr. Kovall, and Defendant Peggy Ann Shambaugh have filed various joinders to some of these motions, which are noted below. The Court read and considered the papers filed on these motions, and held a hearing on **February 18, 2014**. The Court addresses each motion, in turn, below.

When used below, the term "Indictment" refers to the First Superseding Indictment filed on September 5, 2012 (Docket No. 63), and the term "Tribe" refers to the Twenty-Nine Palms Band of Mission Indians (*see* Indictment, ¶ 1).

As a general matter, the motions below are **DENIED** as moot as to Mr. Kovall, since he pled guilty on February 21, 2014 (Docket No. 223). While it is likely that Ms. Shambaugh will also plead guilty, she has not done so yet. Accordingly, the rulings on Defendants' motions in limine below apply to Ms. Shambaugh where she has filed a joinder. It is possible that the testimony of Messrs. Bardos or Kovall or Mr. Shambaugh might necessitate a revision of the Court's evidentiary rulings.

Dr. Heslop's Motions

***Motion in Limine No. 1 to Preclude Evidence Constructively Amending the Indictment (Docket No. 179)*: DENIED**

Dr. Heslop seeks to preclude the government from presenting evidence that alters the roles that each Defendant allegedly played in the Indictment, or that differs from the transactions described in the Indictment. (Mot. at 6). This motion in limine was joined by Mr. Kovall and Ms. Shambaugh. (Docket Nos. 186, 196). The government filed an Opposition to Defendant Heslop's Motion in Limine No. 1 to Preclude Evidence Constructively Amending the Indictment. (Docket No. 191). Dr. Heslop also filed a Reply to Motion in Limine No. 1 to Preclude Evidence Constructively Amending the Indictment. (Docket No. 208).

The Ninth Circuit has stated:

> The Fifth Amendment guarantees a criminal defendant "[the] right to stand trial only on charges made by a grand jury in its indictment." . . . After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself.

United States v. Adamson, 291 F.3d 606, 614 (9th Cir. 2002), *holding modified on other grounds by United States v. Larson*, 495 F.3d 1094 (9th Cir. 2007) (citations omitted).

The Ninth Circuit has found constructive amendment where (1) "'there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument,'" or (2) "'the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" *Adamson*, 291 F.3d at 615.

However, it does not appear that courts exclude evidence to prevent a constructive amendment of the Indictment. Rather, the prohibition against constructive amendments is generally invoked after the government has presented its evidence at trial. "Motions based on constructive amendment and variance must be made after a trial has been completed because both theories involve a review of the evidence presented at trial." *United States v. Vondette*, 248 F. Supp. 2d 149, 163 (E.D.N.Y. 2001). Accordingly, this motion is **DENIED** as premature.

***Motion in Limine No. 2 to Exclude Evidence Related to Bardos's Alleged Over-Pricing of Construction Contracts (Docket No. 180)*: DENIED**

Dr. Heslop seeks to exclude evidence (i) that Mr. Bardos's construction contracts were over-priced and (i) that Mr. Bardos attempted to sabotage a competitor so that he could get the construction contracts at issue. (Mot. at 2). Dr. Heslop argues that such evidence is irrelevant, immaterial, misleading, and prejudicial under Federal Rule of Evidence 403. (Mot. at 2-8). This motion in limine was joined by Mr. Kovall and Ms. Shambaugh. (Docket Nos. 188, 197). The government filed an Opposition to Defendant Heslop's Motion in Limine No. 2 to Exclude Evidence Related to Bardos' Alleged Over-Pricing of Construction Contracts. (Docket No. 202). Dr. Heslop also filed a Reply in Support of Motion in Limine No. 2 to Exclude Evidence Related to Bardos's Alleged Over-Pricing of Construction Contracts. (Docket No. 209).

As indicated at the hearing held on February 18, 2014, the Court separately addresses the two categories of evidence: (i) overpricing of the construction contracts, and (ii) attempts to sabotage a competitor. At the hearing, the Court requested that the government submit in writing exactly what exhibits and testimony it intends to use to establish Mr. Bardos's attempts to sabotage a competitor, and based on those pieces of evidence, what it would argue to the jury. On February 20, 2014, the government filed its Position Paper on the Worth Group Witnesses (Docket No. 222), in which it represented that the government would not elicit testimony "whether there were indeed problems with the Worth Group's performance" (*id.* at 2). The Court expects that this issue will not be prejudicial to Dr. Heslop beyond what relevance it has to the

testimony of Messrs. Kovall or Bardos. Therefore, based on the government's representation and upon the guilty pleas, this portion of motion no. 2 is denied *without prejudice* to a renewal by Dr. Heslop.

The analysis below applies only to evidence regarding Mr. Bardos's overpricing of the construction contracts.

Evidence that Mr. Bardos's contracts were over-priced is relevant to the crime charged (*i.e.*, the conspiracy to influence Tribal agents through kickbacks). Here, the Indictment alleges that after Mr. Bardos was awarded construction contracts, he subcontracted the work out and used his profits to pay kickbacks to the other Defendants. (Indictment, Overt Acts 5, 7-9, 11-12, 14). It thus appears that this evidence is inextricably intertwined with the crime charged because such evidence is part of the transaction that serves as the basis for the criminal charge. *See United States v. Dorsey*, 677 F.3d 944, 951 (9th Cir. 2012) *cert. denied*, 133 S. Ct. 2850, 186 L. Ed. 2d 913 (2013) (stating that evidence that (1) "constitute[s] a part of the transaction that serves as the basis for the criminal charge," or (2) is "necessary to offer a coherent and comprehensible story regarding the commission of the crime," is inextricably intertwined with the crime charged, and thus, not considered to be other wrongs under Federal Rule of Evidence 404(b)). Accordingly, evidence that Mr. Bardos's contracts were over-priced is relevant to the crimes charged.

The Court must also determine whether "the probative value" of such evidence is "substantially outweighed by a danger of . . . unfair prejudice" or "misleading the jury." Fed. R. Evid. 403. Contrary to Dr. Heslop's assertion, evidence that Mr. Bardos's construction contracts were over-priced is probative of the co-conspirators' motive, plan, and opportunity to share the profits from the construction contracts. Such evidence is particularly probative of Mr. Kovall's motive and intent, since he is alleged to have advised the Tribe at times that Mr. Bardos's contracts were the lowest bid or would save the Tribe money. (Indictment, Overt Acts 4, 12). Accordingly, the probative value of such evidence is high.

Moreover, the high probative value of evidence of over-pricing is not outweighed by the risk of a lengthy mini-trial on what a reasonable price is for the relevant construction contracts. The government indicates that it only intends to show what the subcontractors charged Mr. Bardos, without presenting other evidence of what a reasonable price for Mr. Bardos's contracts would be. (Opp. at 8-9). With such a limited scope of evidence, the risk of a mini-trial is low.

Nor is the probative value of the evidence in question substantially outweighed by the risk of unfair prejudice. Dr. Heslop argues that evidence of Mr. Bardos's bad acts creates a risk that Dr. Heslop would be convicted simply because the jury "believes that [Mr.] Bardos is a bad person." (Mot. at 7). However, as indicated above, evidence of over-pricing does not constitute other bad acts, but is intrinsic to the very transactions that are the subject of this Indictment. Evidence of the crimes charged is inherently prejudicial to Defendants, but such prejudice goes to the very essence of this action. Accordingly, this motion is denied, with regard to evidence that Mr. Bardos's construction contracts were over-priced.

***Motion in Limine No. 3 to Preclude Evidence of Defendant Kovall's Ethical Duties or Alleged Nondisclosures (Docket No. 181)*: GRANTED IN PART**

This motion in limine presents primarily the same arguments as Mr. Kovall's Motion to Strike Surplusage from Indictment & Motion in Limine to Preclude Introduction of Evidence (Docket No. 176). Accordingly, this motion in limine is granted in part for the same reasons that Mr. Kovall's motion is granted in part below.

***Motion in Limine No. 4 to Preclude Use of Certain Terms as Prejudicial Under FRE 403 and Improper Argument (Docket No. 182)*: GRANTED**

Dr. Heslop seeks to preclude the government (1) from referring to the corporate entities—Twenty-Nine Palms Enterprise Corporation ("EC") and Echo Trail Holdings, LLC ("ETH")—as the Tribe, and (2) from referring to the charged payments as "bribes" or "kickbacks" prior to closing arguments. (Mot. at 2). This motion in limine was joined by Mr. Kovall and Ms. Shambaugh. (Docket Nos. 187, 199). The

government filed an Omnibus Opposition to Defendant Heslop and Kovall's Motions in Limine to Preclude Evidence. (Docket No. 203). Dr. Heslop also filed a Reply in Support of Motion in Limine No. 4 to Preclude Use of Certain Terms as Prejudicial Under FRE 403 and Improper Argument. (Docket No. 211).

First, the Court agrees with Dr. Heslop that the Tribe, EC, and ETH are distinct legal entities. The Indictment alleges that the Tribe created ETH, a California limited liability company, and that the Tribe is the sole member of ETH. (Indictment, ¶ 3). Given that the Tribe is located in California and that it created EC to operate a casino located in California, the Court assumes, for the purpose of this motion in limine, that EC is also a California corporation. California law treats both LLCs and corporations as legal entities distinct from its members. *See Abrahim & Sons Enters. v. Equilon Enters., LLC*, 292 F.3d 958, 962 (9th Cir. 2002) ("The acts of a corporation or LLC are deemed independent of the acts of its members. . . . Members own and control most LLCs, yet the LLCs remain separate and distinct from their members.").

Moreover, this distinction between the Tribe, EC, and ETH is potentially significant because 18 U.S.C. § 666 only applies to payments to "an agent of an organization, or of a State, local or Indian tribal government, or any agency thereof," where such payments were intended to influence a transaction of an organization, government, or agency that receives "benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(a)(1), (a)(2) & (b). Therefore, whether the relevant Defendants were agents of the Tribe and whether the charged payments were related to a transaction of the Tribe are material elements of the offense. It is thus legally significant to avoid conflating the Tribe and other legal entities.

The government argues that requiring it to distinguish between EC, ETH, and the Tribe would create confusion among witnesses who view these entities as one and the same. (Opp. at 10). The government further argues that Defendants themselves viewed these entities as one and the same. (*Id.*). But the government has not cited legal authority showing that the perception of the witnesses and Defendants is sufficient to establish that EC, ETH, and the Tribe are in fact one and the same for the purposes of 18 U.S.C. § 666.

With regard to the terms EC, ETH, or the Tribe, the Motion is granted on the following terms, which were discussed at the hearing. The government shall not refer to EC or ETH as the Tribe. The Court will not instruct witnesses as to how they should testify, but counsel for Dr. Heslop may cross-examine on this point.

Second, it does not appear that the words "bribe" or "kickback" is specifically used in 18 U.S.C. § 666. Rather, the language used in § 666 prohibits "corruptly" soliciting or giving "anything of value" with the intent of influencing a transaction of an entity that receives federal funds. 18 U.S.C. § 666. However, the statute was clearly designed to address bribes and kickbacks. The Supreme Court has stated that "§ 666 'was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds.'" *Sabri v. United States*, 541 U.S. 600, 607, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004). The government itself states that defendants are charged with "paying" and "receiving a bribe," demonstrating that the essence of the criminal charge is bribery. (Opp. at 12). Therefore, describing the allegedly unlawful payments as "bribes" or "kickbacks" is tantamount to saying that those payments violated 18 U.S.C. § 666, and thus, would constitute inappropriate legal argument.

Moreover, it would not appear to prejudice the government to require it to refer to the charged payments as "payments." Federal Rule of Evidence 403 permits the Court to consider the availability of a neutral alternative. *See* Fed. R. Evid. 403 advisory comm.'s notes ("The availability of other means of proof may also be an appropriate factor."). Here, it is feasible for the government to use the term "payments."

Accordingly, with regard to the terms "bribes" and "kickbacks," the Motion is granted on the following terms. The government shall not refer to or describe the charged payments as kickbacks, except (1) when describing the charges in the Indictment, (2) when describing what it believes the evidence will prove in its opening statement, (3) in cross-examination, if the door is opened on direct examination, and (4) when delivering the closing argument. Moreover, the government shall not

describe the charged payments as bribes, except in the closing argument if supported by the evidence elicited during trial.

Mr. Kovall's Motions

As indicated above, Mr. Kovall has pled guilty. The Court nonetheless rules on his motions in limine because they were joined by Ms. Shambaugh who is still actively litigating this action, and because Mr. Kovall's second motion in limine overlaps significantly with Dr. Heslop's third motion in limine.

***Motion in Limine to Exclude Witness Testimony (Docket No. 175)*: DENIED**

Mr. Kovall seeks to exclude the testimony of government witness James T. Schaefer, who is a Certified Public Accountant that represented Dr. Heslop since 1995. (Mot. at 1). Mr. Kovall argues that this testimony is hearsay and violative of his Fifth and Sixth Amendment rights. (Mot. at 6-10). This motion in limine was joined by Ms. Shambaugh. (Docket No. 194). The government also filed an Opposition to Defendant Kovall's Motion in Limine to Exclude Witness Testimony Pursuant to F.R.E. 802 & Fifth & Sixth Amendments. (Docket No. 193).

Under Federal Rule of Evidence 801(d)(2)(E), the statement of a co-conspirator is admissible against all co-conspirators, if the government shows by a preponderance of the evidence: (1) "that a conspiracy existed at the time the statement was made;" (2) the defendant had knowledge of, and participated in, the conspiracy;" and (3) "the statement was made in furtherance of the conspiracy." *United States v. Bowman*, 215 F.3d 951, 960-61 (9th Cir. 2000) (citing *Bourjaily v. United States,* 483 U.S. 171, 175, 107 S. Ct. 2775, 97 L. Ed. 2d 144 (1987)).

The first two requirements will likely be met by the evidence at trial. With regard to the first requirement, the Indictment alleges that the conspiracy began in September 2006 (Indictment, ¶ 9), and the parties indicate that Dr. Heslop's statements to Mr. Schaefer occurred in 2007 (Mot. at 4-5; Opp. at 4-5). With regard to the second

requirement, the Indictment alleges that, as of September 2006, all Defendants were knowingly participating in the conspiracy. (Indictment, ¶ 9).

Mr. Kovall challenges only the third requirement, arguing that there is no evidence that Dr. Heslop's statements to Mr. Schaefer were made for any purpose other than for seeking personal tax advice. (Mot. at 5). Accordingly, Mr. Kovall argues that such statements were not in furtherance of the alleged conspiracy. (Mot. at 6). In contrast, the government argues that Dr. Heslop's statements are admissible because some of his statements are expressions of his future intent, while others were in furtherance of the conspiracy. (Opp. at 5-8).

"Narrations of past events are inadmissible, but expressions of future intent or statements that 'further the common objectives of the conspiracy or set in motion transactions that are an integral part of the conspiracy' are admissible under Rule 801(d)(2)(E)." *Bowman*, 215 F.3d at 961 (citing *United States v. Yarbrough,* 852 F.2d 1522, 1535 (9th Cir.1988)).

It is a close call whether some of Dr. Heslop's statements to Mr. Schaeffer are simply descriptions of past events, or made in furtherance of the conspiracy. It appears that statements simply describing Dr. Heslop's creation of Diversification Resources, LLC, independent of any expressions of its future activities, are narrations of past events. *See, e.g.*, *United States v. Mitchell*, 31 F.3d 628, 632 (8th Cir. 1994) (finding that out-of-court statements could not have been made to advance the objectives of the conspiracy because they described a transaction that was already final). As narrations of past events, Dr. Heslop's statements would only be admissible against Dr. Heslop as party-opponent admissions under Federal Rule of Evidence 801(d)(2)(A). If this situation arises at trial, Mr. Kovall and Ms. Shambaugh should ask for a limiting instruction.

However, if any narrations of past events were provided by Dr. Heslop to elicit Mr. Schaefer's tax advice and services with regard to Diversification Resources, LLC, then those statements were arguably made in furtherance of the conspiracy because the government alleges that Diversification Resources, LLC was a shell company created

to receive the kickbacks at issue. (Mot. at 6). If Dr. Heslop's statements were uttered in this context, then they are likely admissible against all co-conspirators under Rule 801(d)(2)(E).

Additionally, Dr. Heslop's statements that Diversification Resources, LLC *would* "gross $1 million," that the LLC's business *would* consist of outsourcing to construction companies, and that the LLC *would* receive 15% in commission payments appear to express Dr. Heslop's future intent with regard to the conspiracy, since those activities had not yet occurred at the time Dr. Heslop made his statements. (Opp. at 3). Accordingly, these statements also would be admissible against all co-conspirators under Rule 801(d)(2)(E).

Finally, Dr. Heslop's statements, referring Mr. Bardos to Mr. Schaeffer for tax advice "to keep the company free of troubles" (Opp. at 4), appear to arguably be in furtherance of the conspiracy, since they can be construed as seeking advice to keep Diversification Resources, LLC free from scrutiny. Accordingly, these statements are likely admissible against all co-conspirators under Rule 801(d)(2)(E).

The fact that the statements described above could be evidence of either lawful acts, or the unlawful objectives of the conspiracy, does not render them inadmissible. "A particular statement may be found to be 'in furtherance' of the conspiracy even though it is 'susceptible of alternative interpretations' and was not 'exclusively, or even primarily, made to further the conspiracy,' so long as there is 'some reasonable basis' for concluding that it was designed to further the conspiracy." *United States v. Shores*, 33 F.3d 438, 444 (4th Cir. 1994) (quoting *United States v. Shoffner*, 826 F.2d 619, 628 (7th Cir. 1987)).

Mr. Kovall further argues that Dr. Heslop's statements, if admitted, would violate his right to confrontation under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). (Mot. at 8-10). However, the Ninth Circuit has held that the *Bruton* rule is inapplicable, where "there [is] independent evidence that a conspiracy existed," "the statements were made in furtherance of that conspiracy, and

that [the defendant] had knowledge of the conspiracy and participated in it." *United States v. McCown*, 711 F.2d 1441, 1449 (9th Cir. 1983).

At this stage, the motion is denied. Based on the allegations in the Indictment and the anticipated testimony by Mr. Schaeffer, there is a reasonable basis to find that Dr. Heslop's statements to Mr. Schaeffer will meet the requirements of Rule 801(d)(2)(E).

***Motion to Strike Surplusage from Indictment & Motion in Limine to Preclude Introduction of Evidence (Docket No. 176)*: GRANTED IN PART and DENIED IN PART**

Mr. Kovall seeks to strike Paragraphs 4 and 24(g) of the Indictment, describing Mr. Kovall's ethical duties as an attorney under California Rule of Professional Conduct 3-310, and to preclude evidence of those duties from being introduced at trial. (Mot. at 5-9). Paragraph 24(g) is no longer at issue because it was part of Counts 32 and 33, which was dismissed on February 12, 2014. (Docket No. 207). Mr. Kovall further seeks to strike the word "kickback" from the Indictment as inflammatory and prejudicial. (*Id.* at 9-10). This motion in limine was joined by Ms. Shambaugh. (Docket Nos. 195). The government filed an Omnibus Opposition to Defendant Heslop and Kovall's Motions in Limine to Preclude Evidence. (Docket No. 203).

First, with regard to his ethical obligations as an attorney, Mr. Kovall argues that those obligations are irrelevant to the 18 U.S.C. § 666 counts, and even if relevant, their probative value is substantially outweighed by prejudice. (Mot. at 6-9).

The oral arguments at the hearing distilled the parties' positions as follows. Mr. Kovall seeks to strike Paragraph 4 from the Indictment, to preclude the government from introducing evidence of California Rule of Professional Conduct 3-310 by way of testimony or judicial notice, and to preclude evidence or argument that Mr. Kovall violated Rule 3-310. The government does not seek to introduce Rule 3-310 itself, and is willing to strike Paragraph 4 from the Indictment. Instead, the government seeks to

present statements made by and emails from Mr. Kovall to show that he was cognizant of his ethical duties under Rule 3-310, and that such cognizance motivated Mr. Kovall, in part, to structure the charged transactions so that Ms. Shambaugh received payments, instead of him.

It appears that Mr. Kovall's statements and emails showing that he was aware of Rule 3-310 are relevant to and probative of his motivation in allegedly structuring the charged transactions in a certain way. However, it appears that introducing Rule 3-310 itself is unnecessary for the government to establish evidence of Mr. Kovall's motivation.

Similarly, it is possible that whether Mr. Kovall actually violated Rule 3-310 could be relevant to proving his corrupt intent, if such violation was shown to be part and parcel of the charged transactions. *See, e.g.*, *United States v. Rosen*, 716 F.3d 691, 702 (2d Cir. 2013) (finding that evidence of "a deliberate attempt to conceal a corrupt relationship with [a co-defendant]," or "consciousness of guilt," was relevant to whether the defendant had specific intent to commit bribery). However, any tangential relevance and probative value of such evidence is substantially outweighed by the danger that such evidence (1) will result in unnecessary time spent litigating whether Mr. Kovall violated Rule 3-310, and (2) will distract the jury from the actual elements of the crimes charged (*i.e.*, 18 U.S.C. § 666 and conspiracy to violate 18 U.S.C. § 666). As discussed at the hearing, the contours of an attorneys' ethical obligation under Rule 3-310 are complicated, and it would waste court time to have substantial testimony about what constitutes a violation of Rule 3-310. Moreover, it appears that the government can introduce other evidence that Mr. Kovall concealed his relationship with other co-conspirators without having to reference Rule 3-310.

Accordingly, with regard to Mr. Kovall's ethical obligations, the Court grants the Motion in part as follows. Paragraph 4 is stricken from the Indictment. The government is precluded from introducing the text of Rule 3-310 into evidence, and from introducing evidence or arguing that Mr. Kovall violated Rule 3-310. However, the government is permitted to introduce evidence that Mr. Kovall was aware of his

ethical duties under Rule 3-310 as evidence of Mr. Kovall's motivation in allegedly structuring the charged transactions as he did. This ruling is not meant to prevent Mr. Kovall from testifying that he knowingly violated Rule 3-310, if that testimony is otherwise relevant.

Second, Mr. Kovall requests that the Court strike the term "kickback" from the Indictment as irrelevant. (Mot. at 9-10). Mr. Kovall argues that the term "kickback" has a distinct legal meaning that is not part of the charges against Mr. Kovall. (Mot. at 9). But, as indicated above, 18 U.S.C. § 666 was clearly enacted to target bribes and kickbacks, and courts have treated § 666 as covering both bribes and kickbacks. *See Sabri*, 541 U.S. at 604-05 (describing § 666 as applying to bribes and kickbacks). Therefore, this motion is denied with regard to striking the term "kickback" from the Indictment.

The Government's Motion

***Motion in Limine to Preclude Evidence of Defendants' Prior Lawful Conduct (Docket No. 178)*: DENIED**

The government seeks to exclude all evidence of Defendants' lawfulness or non-corrupt conduct, except (i) reputation or opinion evidence offered by character witnesses, in accordance with Federal Rule of Evidence 405(a), and (ii) evidence introduced for the limited purpose of why each Defendant engaged in the charged conduct to show that they did not have the requisite intent. (Mot. at 1-3). Dr. Heslop filed an Opposition to Government's Motion in Limine. (Docket No. 192). Mr. Kovall also filed a Reply to Government's Motion in Limine to Preclude Evidence of Defendants' Prior Lawful Conduct, which relies entirely on the arguments made by Dr. Heslop. (Docket No. 206).

After reviewing the briefs, it does not appear that the parties are in dispute as to what evidence of Defendants' prior lawful conduct is admissible pursuant to Federal Rule of Evidence 405(a). On February 14, 2014, the Court also received notice that

the parties stipulated to having this Motion be denied without prejudice because the parties are in general agreement.

Accordingly, the Court denies the Motion at this time. But the Court notes that if Defendants seek to introduce character evidence regarding specific instances not charged in the Indictment, they should first raise this issue with the Court outside the presence of the jury. This procedure will give the government an opportunity to object to such evidence before it is introduced.

IT IS SO ORDERED.