WRITING FOR TRIAL: THE MOTION IN LIMINE

Trials can be won and lost before your trial even begins. A motion in limine is a powerful weapon for advocates that can alter the entire makeup of the case. This type of motion is a pretrial request of the court to rule on the admissibility of a certain piece of evidence.[2] Although these motions can be used to affirmatively admit evidence, the more typical use for a motion in limine is to exclude admission of and any reference to a certain piece of evidence.[3]

Since you are reading this handout, you have likely already decided that it is strategically appropriate for you to file a motion in limine. Thus, this handout will focus on the best way to write a motion in limine. Procedural requirements for writing motions in limine vary by jurisdiction. Be sure to consult your jurisdiction's local rules to fully understand the procedural considerations required when writing and filing motions.[4] PART I will outline the standard organizational structure that can be used to write motions in limine. PART II will discuss common advocacy techniques to include in your written motion. PART III will provide tips for strengthening the persuasiveness of your written motion.

PART I: ORGANIZING YOUR MOTION IN LIMINE

How you choose to organize your motion in limine will be determined, in part, by the jurisdiction in which you file.[5] Regardless of the organizational format you choose, all motions in limine must include a case caption and a document title.[6]

A case caption typically shows the court in which the case is being heard, the parties involved in the case, the case number, the judge before whom the motion will be argued, and any other procedural information required by your jurisdiction. For example[7]:

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[1] This handout was created in 2018 by Jordan Dickson.
[2] *See* Mansur v. Ford Motor Co., 129 Cal. Rptr. 3d 200, 217 (Cal. Ct. App. 2011).
[3] ROGER S. HAYDOCK, DAVID F. HERR, & JEFFREY W. STEMPEL, FUNDAMENTALS OF PRETRIAL LITIGATION 654 (West Acad. Publ'g, 9th ed. 2013).
[4] *See, e.g.*, Rule 12-I: Motions Practice, D.C. Rules of Civil Procedure <https://www.dccourts.gov/sites/default/files/2017-05/Civil%20Rule%2012-I.%20Motions%20Practice.pdf>.
[5] TRYING YOUR FIRST CASE: A PRACTITIONER'S GUIDE 82 (Nash Long ed., 2014).
[6] *Id.*
[7] Government's Motion in Limine to Preclude Reference to Duress or Coercion at 1, United States v. Bagcho, 151 F. Supp. 3d 60 (D.D.C. 2015) No. 06-334 (ESH).

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA		
UNITED STATES OF AMERICA	:	
	:	
v.	:	Criminal Case No. 06-334 (ESH)
	:	
HAJI BAGCHO	:	

The document title should simply state what the motion is. For example:

MOTION TO SUPPRESS TANGIBLE EVIDENCE, STATEMENTS, AND IDENTIFICATION EVIDENCE

After the caption and title, your organizational structure will vary depending on your own stylistic preferences and the requirements of your jurisdiction. Below is a description of a standard organizational method typically used.[8]

A. Sample Structure[9]

This organizational structure breaks the body of the motion in limine down into two distinct parts: (1) the motion and (2) a memorandum of points and authorities.[10] In this structure, the motion itself is only a short, bulleted set of statements that state (1) the piece of evidence the party wishes to exclude/admit and (2) the evidentiary bases upon which that evidence should be excluded or admitted.[11] If there is more than one issue you wish to address in your motion, include that as a separate bullet point. For example[12]:

[8] *See* LONG, *supra* note 5; MARILYN J. BERGER, JOHN B. MITCHELL, & RONALD H. CLARK, PRETRIAL ADVOCACY: PLANNING, ANALYSIS, AND STRATEGY 410 (Wolters Kluwer Law & Business, 4th ed. 2013).

[9] For an example of an alternative organizational structure for your motion in limine see BERGER, *supra* note 8, at 412–417. This alternative structure more closely mirrors the standard organization of an appellate brief and includes a "Relief Requested," "Statement of the Case," "Statement of Facts," "Issue Presented," "Argument," and "Conclusion" section.

[10] *See* LONG, *supra* note 5, at 82–83.

[11] *Id.*

[12] United States' Motion in Limine at 1, United States v. Maloof, No. H-97-93 (S.D. Tex. 1997) <https://www.justice.gov/atr/case-document/united-states-motion-limine>.

Pursuant to Fed. R. Crim. P. 12(b), and for the reasons set forth in the accompanying Memorandum, the United States hereby moves that the Court enter an Order:

1. Prohibiting the defendant from offering or commenting on the following evidence on the grounds that it is irrelevant to the charges against him and the fact-finding duties of the jury:
    a. Evidence related to the punishment that may be provided by law for a violation of the Sherman Act (15 U.S.C. § 1); and conspiracy to commit wire fraud (18 U.S.C. § 371);

The motion itself should be a stand-alone document that includes a signature from counsel. Beginning on a new page, you will then address the merits of your argument in a section titled "Memorandum of Points and Authorities."[13] The Memorandum section of your motion in limine should be broken into two sections: (1) Factual Background and (2) Argument.

The "Factual Background" section of your Memorandum should include all of the facts necessary for the judge to resolve every issue raised in your motion.[14] It can, if appropriate, include procedural posture, as well. The facts and procedural underpinnings can be presented in standard essay form or as bullet points.[15] Keep in mind that motion filings may be the judge's first opportunity to hear and react to the facts of the case.[16] Because of this, you will want to include an overview of the case as a whole while highlighting the facts specifically relevant to your motion issues.

The "Argument" section of your Memorandum will look similar to other types of persuasive legal writing you have likely done. In this section you will be applying the facts of your case to legal rules and precedent. This section should tell the judge why it is legally appropriate to rule in your favor.[17] It should be written in essay format. It would be wise to use separate point headings to distinguish between each piece of evidence you want the judge to rule on. Likewise you should use separate point headings to separate different legal arguments for each piece of evidence at issue.[18]

The Memorandum should include a conclusion restating what action you want the judge to take.[19] Counsel should sign the Memorandum.

B. Additional Parts of Your Motion

Regardless of your organizational choice, your motion should be delivered with the evidence or facts you rely upon as an attachment or appendix.[20] This appendix

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[13] *See* LONG, *supra* note 5, at 82–83.
[14] *Id.* at 83.
[15] *Id.*
[16] *See* HAYDOCK ET AL., *supra* note 2, at 669.
[17] LONG, *supra* note 5, at 83.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 417.

material can include affidavits, exhibits, police reports, pictures of tangible evidence, etc. You should cite to this appendix when you write your statement of facts.[21]

Separately, your motion should include a proposed order.[22] The proposed order should be written so if the judge decides to grant your motion, all she has to do is sign at the bottom for it to become a court order. How a proposed order should look will vary by jurisdiction. But as an example, a proposed order could look, in part, like this[23]:

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Family Division – Juvenile Branch

In the Matter OF J.W.	**:**	**Docket No. 2017-DEL-000000**
Respondent	**:**	**Status: November 27, 2017**

ORDER APPOINTING EDUCATION ATTORNEY

Upon consideration the record in this case and after due consideration of the interests of all parties in the above captioned matter, it is this _____ day of November, 2017, hereby

ORDERED that Kimberly Glassman, is appointed as educational attorney for C.M., mother of J.W. , concerning J.W.'s educational needs, and it is

FURTHER ORDERED that Kimberly Glassman is authorized to attend, participate in, and provide reports in connection with any D.C. Superior Court proceeding;

PART II: ADVOCACY TECHNIQUES TO INCORPORATE IN YOUR MOTION

The facts and/or the law may not always be perfectly on your side when trying a case or when filing a motion in limine. But sometimes you can overcome unfavorable facts and unfavorable law by using effective advocacy techniques.[24] Below you will find a few standard trial advocacy concepts that, if incorporated properly, can help give you the best chance to have your motion granted.

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[21] *Id.*
[22] *Id.*
[23] Proposed Order Appointing Education Attorney at 1, In re J.W., No. 2017-DEL-1190 (D.C. Super. Ct. 2017).
[24] *See* LONG, *supra* note 5, at 25.

A. Motion Theory

A theory is an "ends-means" analysis targeted at achieving the overall objective.[25] The "ends" of your overall case is to win the case for your client. The "means" by which to achieve these ends is the legal argument and factual application required to secure a victory from the judge or jury. In layman's language, a motion theory fills in the blank in the statement, "My client will win this case because [insert theory]." The "ends" of your motion in limine is for the court to grant your motion. The "means" is the legal mechanism and factual application required to get the court to grant your motion.

Typically your motion theory will parallel your case theory, but will be more nuanced and focused on only the issue covered in your motion. Motions, and cases in their entirety, can falter if the theory is not clear.[26] You should ensure you understand your motion theory and that your motion theory comes across clearly in your written product. For example, your theory on a motion to suppress could be, "The court should grant my motion to suppress because officers did not have reasonable suspicion to stop my client and the evidence seized is therefore fruit of an illegal stop."

The statement of the motion theory does not need to appear verbatim in your motion. It is only important that the concept of the theory comes across clearly to the judge so that she understands precisely what you are arguing and the basis for that argument.

B. Motion Theme

Every motion needs a central, unifying theme in order to be effective.[27] A theme is a short statement, phrase, or simply a word that encapsulates the analytic framework of your motion.[28] But most importantly, a theme is a persuasive hook—something memorable the judge can latch onto that catches her attention. The most classic example of a trial theme is "if the glove don't fit, you must acquit," from the O.J. Simpson trial. Motion themes will likely not be as trite or casual. Motions, after all, are grounded in law and argued to a judge, not a jury. But even judges can benefit from attention-grabbing themes that give them a reason to remember what you wrote or said.

As an example, assume you are filing a motion to disqualify an expert witness under *Daubert* and FRE 702 because you do not believe she has any specialized expertise. Your theme could be something like, "One needs real expertise to be an expert." As a standalone statement, this does not add much to your argument nor does it

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[25] *See* BERGER, *supra* note 8, at 395.
[26] *Id.*
[27] *See* HAYDOCK ET AL., *supra* note 2, at 671. Some practitioners refer to this unifying theme concept as a "theory of the case." *See, e.g.*, Osamudia Guobadia and Jennifer Pogue, FROM MEMO TO BRIEF, 3–4 <http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/memotobrief.pdf>.
[28] *See* BERGER, *supra* note 8, at 405.

explain any facts. But its purpose is to grab the reader's attention and to be pithy enough to use throughout your writing.

Your theme should appear early and often in your motion.[29] For example, in the beginning of your statement of the relevant facts you could include your theme. It should also be interwoven throughout your motion, in both the facts and the argument section.[30] This does not mean that you have to continuously state the "theme statement" over and over again. Interweaving words or phrases that evoke the same meaning and use consistent phraseology is an effective way of reminding the judge of your theme without being blatantly repetitive.[31] The theme should also be repeated at the end of your argument.[32]

C. Knowing Your Audience

Understanding the audience to which you are writing probably seems like an obvious piece of advice. But when writing a motion in limine, knowing the judge's tendencies can be particularly important.[33] Understanding how the judge thinks and reacts to motions on similar subject matter can guide choices you make about the order of your various arguments or about whether to even include a particular argument at all. For example, the judge before whom you appear may have, via her decisions or statements, indicated that she will never grant pretrial motions on relevance grounds.[34] If that happens, you can choose to either forego that part of your motion entirely or shift your argument away from relevance grounds and onto a different evidentiary basis.

Talking with other lawyers who have appeared before this judge, observing the judge during motion arguments, and reading previous decisions on related topics can help you frame your argument most effectively.[35]

PART III: PERSUASIVE WRITING TIPS FOR MOTIONS

The final part of this handout addresses tips to make your written motion in limine compelling, believable, and approachable. Many of these tips are applicable across different pieces of legal writing. Regardless, your motion will be improved by attention to these legal writing tips.

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[29] RONALD WAICUKAUSKI, PAUL MARK SANDLER, & JOANNE EPPS, THE WINNING ARGUMENT 74 (American Bar Association 2001).
[30] *See* BERGER, *supra* note 8, at 425.
[31] *See* HAYDOCK ET AL., *supra* note 2, at 671.
[32] WAICUKAUSKI, *supra* note 37, at 75.
[33] BERGER, *supra* note 8, at 427.
[34] *See* LONG, *supra* note 5, at 84.
[35] *Id.*

A. Storytelling

A judge, like any other person, can be engaged by a well-crafted story.[36] Your motion in limine will, therefore, be made more compelling by creating a vivid, story-like picture for the judge to experience.[37] Creating a compelling story can be achieved by including specific, sensory details that present your characters as developing individuals or entities that the judge has a reason to care about.[38] This, of course, does not mean that your motion should be a dramatic, hyperbolic work of fiction. But telling a value-based, human story can increase the likelihood that a busy trial judge will take the time to thoroughly read your work.[39]

One classic legal storytelling technique is to use a figurative analogy.[40] In this type of narration, you relate the facts of your case to the elements of the analogy.[41] For example, if you believe your opponent has brought a meritless case, you could analogize to the boy who cried wolf. You could say by bringing meritless cases the government jeopardizes people believing the government when it brings genuine cases—similar to how the boy who cried wolf jeopardized people believing him when he actually saw a wolf.[42]

Regardless of how you tell the story, having elements of storytelling can keep your reader interested and engaged.

B. Candor

It is critical in your motions in limine to be candid with the court.[43] If you overstate the evidence, overstate the favorability of the law, or otherwise exercise license with the truth you run the risk of the judge beginning to view you, and more importantly your arguments, with skepticism.[44] It is beneficial often to admit where a fact or a piece of precedential authority may not be favorable to your side.[45]

Overstating often occurs in the "ask" of the court.[46] For example, ending your motion by stating, "There is only one possible outcome the Court can reasonably come to," is probably an overstatement. It is better to be candid, but still assertive and expressive in your tone.[47] For example, your "ask" would be more reasonable, but still

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[36] *See* BERGER, *supra* note 8, at 419.
[37] WAICUKAUSKI, *supra* note 37, at 87.
[38] *Id.*
[39] *See* BERGER, *supra* note 8, at 419.
[40] WAICUKAUSKI, *supra* note 37, at 87–88.
[41] *Id.*
[42] *Id.* at 88.
[43] HAYDOCK ET AL., *supra* note 2, at 671.
[44] WAICUKAUSKI, *supra* note 37, at 36.
[45] *Id.* at 36–37.
[46] HAYDOCK ET AL., *supra* note 2, at 679.
[47] *Id.*

assertive, if you said something like, "For the aforementioned reasons, the United States urges this Court to exclude Exhibit 11."

C. Brevity

As has been mentioned several times already, trial judges are busy people with a lot on their dockets. As such, brevity in a motion can be your best friend. The length of your motion should correspond to jurisdictional requirements, but also correspond to the complexity of the issue(s) being addressed.[48] That said, your motion must give the court enough factual background and legal authority to understand the evidence in question and the legal basis for your requested relief.[49] Judges will appreciate a complete picture, but will appreciate if that picture can be conveyed in as succinct a way as possible.[50]

PART IV: EXAMPLE

Below is an excerpt of example motion in limine.[51]

[48] *Id*. at 669.
[49] LONG, *supra* note 5, at 81.
[50] *Id.* at 80.
[51] Jordan Dickson, GOVERNMENT'S MOTION *IN LIMINE* TO ADMIT CERTAIN EVIDENCE AND EXCLUDE CERTAIN EVIDENCE, Georgetown University Law Center: Advanced Evidence, Professors Blanco and Mossier, Fall 2017.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	;	
	;	
v.	;	**Criminal Case No. 14-017**
	;	
ZACH LODGE	;	

GOVERNMENT'S MOTION *IN LIMINE*
TO ADMIT CERTAIN EVIDENCE AND EXCLUDE CERTAIN EVIDENCE

The United States of America, by and through counsel, respectfully submits this Motion *In Limine*, pursuant to Fed. R. Crim. P. 12(b) and for the reasons set forth in the accompanying Memorandum, and hereby moves that the Court enter an Order:

1. Admitting into evidence Joint Exhibit 10—the February 12, 2014, email from David O'Neil to John Kelly.
    a. Alternatively, excluding David O'Neil's testimony in its entirety under Fed. R. Evid. 403.
2. Denying the defendant's request for judicial notice that visibility was diminished on February 11, 2014, under Fed. R. Evid. 201.
3. Excluding testimony or evidence that the victims possessed guns when they were murdered under Fed. R. Evid. 104(b) and Fed. R. Evid. 401.
4. Excluding testimony or evidence of prior convictions of victims John Beckwith and Chazz Reinhold under Fed. R. Evid. 404(b).
5. Excluding statement of Kathleen Cleary of, "Whether the man I saw running had shot them in self-defense," under Fed. R. Evid. 401 and Fed. R. Evid. 802.

6. Excluding testimony of Kathleen Cleary relating to improper character evidence of the victims under Fed. R. Evid. 404(a) and Fed. R. Evid. 404(b).
7. Excluding testimony of Kathleen Cleary relating to a specific instance of prior bad acts by one of the victims under Fed. R. Evid. 404(b) and Fed. R. Evid. 802.

Respectfully submitted,

_____

Jordan Dickson
United States Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	**;**	
	;	
v.	**;**	**Criminal Case No. 14-017**
	;	
ZACH LODGE	**;**	

MEMORANDUM IN SUPPORT OF GOVERNMENT'S MOTION *IN LIMINE*

This Memorandum sets forth the reasons for the relief sought in the Motion *In Limine*.

FACTUAL BACKGROUND

The defendant, Zach Lodge, is charged with two counts of murder in the first degree in violation of 18 U.S.C. § 1111 and one count of attempted murder in violation of 18 U.S.C. § 1113. On February 11, 2014, the defendant, a convicted felon, shot and killed Jeremy Grey and John Beckwith and shot, with the intent to kill, Chazz Reinhold. The defendant shot the victims during a drug transaction on the corner of 2nd and E Street NW. The victims owed the defendant in excess of $5,000. An argument ensued. The defendant, in a premeditated fashion, murdered Mr. Grey and Mr. Beckwith and attempted to murder Mr. Reinhold.

Kathleen Cleary, a citizen of D.C., heard the gunshots and saw the defendant flee from the scene. Police, using a K-9 unit, recovered the defendant's M&P9 handgun. Expert analysis concluded lip prints found on this gun match the defendant's lip prints.

An anonymous 911 call came from an apartment located at 595 3rd Street NW. Police surveilled this apartment owned by David O'Neil. Ten days after the murders, police saw the defendant inside. Police executed legally operative arrest and search

warrants at O'Neil's residence. They arrested both the defendant and O'Neil. Police recovered a box of forty-five 9mm bullets. These bullets, upon testing by an FBI materials expert, had the same metallic composition of the bullets used to murder the victims. Police also recovered an email sent by O'Neil implicating the defendant in the murders and implicating O'Neil in the cover up.

ARGUMENT

1. The Court should admit into evidence Joint Exhibit 10—an email from David O'Neil to John Kelly—or alternatively exclude David O'Neil's testimony in its entirety.

The Court should admit Joint Exhibit 10. It is an email from David O'Neil to John Kelly. This email implicates O'Neil's involvement in covering up the defendant's crimes and implicates the defendant in the commission of those crimes. The email is relevant and easily authenticated. It is not barred by hearsay or privilege. If the Court excludes Joint Exhibit 10, it should exclude David O'Neil's testimony in its entirety pursuant to Fed. R. Evid. 403.

a) Joint Exhibit 10 is relevant to the defendant's commission of this crime.

Evidence is only admissible if it tends to make a fact more or less probable and is of consequence to the action. Fed. R. Evid. 401; Fed. R. Evid. 402. This email states specifically, "This boy shot and killed men only for selfish reasons." Because of O'Neil's relationship with the defendant—that of a parishioner and a priest—and the fact that the 911 call about these murders came from O'Neil's residence where the defendant was later found, it is reasonable to infer this email pertains to the defendant. It is relevant evidence.

b) Joint Exhibit 10 can easily be authenticated.

A person with knowledge can authenticate evidence. Fed. R. Evid. 901(b)(1). If O'Neil testifies, he can authenticate the email. If he does not, Detective Dubliner can authenticate it. He discovered the email. O'Neil's email address in the "From" line is sufficient to establish the authenticity of the document. *See* Fed. R. Evid. 104(a) (requiring only a finding by a preponderance of the evidence that a piece of evidence is what someone purports it to be).

c) Joint Exhibit 10 is admissible as an exception to the hearsay rule.

Out of court statements offered to show the truth of the matter asserted are generally inadmissible unless an exception to the rule applies. *See* Fed. R. Evid. 802. One exception is when a declarant is unavailable and his statement is against his penal interest. *See* Fed. R. Evid. 804(a); Fed. R. Evid. 804(b)(3). This exception to the hearsay rule applies to Joint Exhibit 10.

O'Neil is unavailable for purposes of Rule 804(a). A person is unavailable if he refuses to testify about the subject matter despite a court order to do so. Fed. R. Evid. 804(a)(2). O'Neil refuses to testify about anything other than positive character traits of the defendant, including Joint Exhibit 10. Unless the defendant proffers that O'Neil will be available for cross-examination on all relevant topics, he is unavailable under the hearsay rule.

O'Neil's statements embedded in Joint Exhibit 10 are statements against interest under Rule 804(b). Statements against a party's interest are admissible as an exception to hearsay if (1) a reasonable person in the declarant's position would have made the statement only if it were true because the statement tends to expose the declarant to

criminal liability and (2) if it has supporting indicia of trustworthiness. *See* Fed. R. Evid. 804(b)(3). O'Neil's statements meet both prongs of Rule 804(b)(3).

First, O'Neil's statements would only be made if they were true because it exposes O'Neil to criminal liability. The statements, made the day after the murder, show O'Neil had knowledge of the murder. O'Neil did not inform the police. He consulted with the perpetrator. This statement exposes O'Neil to criminal liability.

Second, O'Neil's statements have supporting indicia of trustworthiness. O'Neil is a priest seeking spiritual advice from a bishop. Further, the statement itself implicates the declarant in the commission or furtherance of a crime. Rule 804(b)(3)(B) contemplates a heightened tendency of trustworthiness if the statement implicates the declarant in criminal liability.

If the Court is not persuaded by the above arguments, this email is also admissible as it is not hearsay under Rule 801(d)(2)(E). This rule admits statements of co-conspirators when those statements are made in furtherance of the conspiracy. O'Neil, based on this statement, knew of the murders the day after they occurred. He did nothing. But instead allowed the defendant to hide in his residence until police discovered him ten days later. This statement was thus still in furtherance of the conspiracy to hide the murders and obstruct the police investigation.

d) Joint Exhibit 10 is not a privileged communication.

Statements made between a priest and parishioners are generally privileged. *See* Fed. R. Evid. 501; *Jaffee v. Redmond*, 518 U.S. 1, 16 (1996) (holding courts should examine the proposed Federal Rules of Evidence on Privileges). Privilege is generally waived when it is communicated to a third party. *See* Fed. R. Evid. 501; Proposed Fed. R. Evid.

511 (articulating that privilege is waived when the holder of the privilege discloses that communication). O'Neil holds the privilege because he is asserting it on the defendant's behalf. He waived that privilege by disclosing the contents of his otherwise privileged communication to John Kelly. Because of this disclosure, the privilege is waived.

e) If the Court excludes Joint Exhibit 10, it should exclude David O'Neil's entire testimony.

David O'Neil's testimony should be excluded in its entirety if the Court excludes Joint Exhibit 10. Testimony may be excluded if its probative value is substantially outweighed by unfair prejudice to the opposing party. Fed. R. Evid. 403. David O'Neil's testimony is substantially and unfairly prejudicial to the government. O'Neil will only testify to instances of positive character of the defendant. He has indicated that he will not respond to <u>any other inquiries</u>. O'Neil is essentially telling this Court he will not answer cross-examination questions. To permit O'Neil to choose what he wants to testify to will substantially prejudice the government. If the Court excludes Joint Exhibit 10, it should also exclude O'Neil's testimony.

2. The Court should deny the defendant's request for judicial notice that visibility was diminished on February 11, 2014.

This Court may take judicial notice of a fact only if it is (1) generally known within the court's territorial jurisdiction or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). A person's ability to see events or actions taking place is a matter of perspective with myriad contributing factors—distance, quality of personal vision, obstructions, distractions, etc. Judicial notice of diminished visibility would require the court to instruct the jury that it may or may not accept that visibility conditions for all relevant

parties was the same. *See* Fed. R. Evid. 201(f). But a person's opinion of visibility conditions can certainly vary. Given the deference juries tend to give to judges' articulation of certain facts, judicially noticing diminished visibility would be improper.

3. The Court should exclude any testimony or evidence of guns possessed by the victims.

Any evidence of guns possessed by the victims when they were murdered is irrelevant and should be excluded without further proffer by the defendant. Evidence is only admissible if it tends to make a fact more or less probable and is of consequence to the action. Fed. R. Evid. 401; Fed. R. Evid. 402. When the relevance of evidence depends on whether a different fact exists, proof of that fact must be introduced prior to the admission of the original evidence. Fed. R. Evid. 104(b).

The two murder victims had guns in their pockets at the time they were murdered. However, there is no evidence the defendant knew this. There is no evidence the victims reached for their guns, made motions toward them, said anything about the guns, or otherwise indicated they had guns. If the defendant did not know the victims had guns prior to shooting them, evidence of possession of guns by the victims is irrelevant. The defendant cannot reasonably claim the victims' guns caused him to shoot them in self-defense if he cannot proffer that he knew of the guns. Possession of the guns by the victims is only conditionally relevant under Rule 104(b). Unless and until the defendant can proffer he had knowledge of the existence of these guns prior to shooting the victims, the Court should exclude this evidence as irrelevant.

4. The Court should exclude testimony and evidence related to prior convictions of the victims.

Evidence related to prior convictions of both Mr. Beckwith and Mr. Reinhold is improper character evidence. Evidence of a prior crime is inadmissible to prove a

person's character in order to show action in conformity therewith. Fed. R. Evid. 404(b). Both Mr. Beckwith and Mr. Reinhold were previously convicted of crimes. However, this evidence serves no purpose other than to suggest that because the victims had the requisite character to commit crimes in the past, they were more likely to be involved in crimes on February 11, 2014, when they were murdered.

Prior convictions are, at times admissible. *See* Fed. R. Evid. 609(a). However, the victims' convictions do not fall under Rule 609 for two reasons. First, Rule 609 only pertains to a witness's character. Mr. Beckwith cannot be a witness because he was murdered. Second, the conviction is admissible only after surviving a Rule 403 balancing test. *See* Fed. R. Evid. 609(a)(1)(A). Evidence of Mr. Reinhold's conviction does not survive this embedded balancing test. The probative value is minimal at best. Mr. Reinhold's conviction was two years ago and only resulted in probation. It had no bearing on his truthfulness. Conversely, the prejudice is unfair and substantial. The jury will likely unfairly confer Mr. Reinhold's prior behavior onto the other victims in this case. This is improper. Evidence of these convictions should be excluded.

5. The Court should exclude the statement by eyewitness Kathleen Cleary of, "Whether the man I saw running shot them in self-defense."

Kathleen Cleary's statement to Detective Dubliner of, "Whether the man I saw running shot them in self-defense," should be excluded on two grounds. First, the statement is irrelevant. *See* Fed R. Evid. 401; Fed R. Evid. 402. Even if the Court instructs the jury on self-defense despite the lack of evidence supporting it, Ms. Cleary's statement is of no consequence to this action and invades the province of the jury. Whether a lay witness believes the man was acting in self-defense makes no fact more or less likely. Whether what she saw was self-defense is the precise question the jury will be

asked to decide if the Court instructs it to do so. Ms. Cleary's characterization of the interaction between the defendant and the victims is irrelevant to the outcome of this case.

Second, the statement should be excluded on hearsay grounds. Hearsay is an out of court statement offered for the truth of the matter asserted and is generally inadmissible. *See* Fed. R. Evid. 801; Fed. R. Evid. 802. Ms. Cleary made this statement out of court and the defendant could only possibly be offering it for the truth of the matter it asserts—that the man may have been acting in self-defense. The statement was framed as a question. But there is an implanted assertion within the question—that the man may have been acting in self-defense. The Court should exclude Ms. Cleary's statement.

6. The Court should exclude Kathleen Cleary's characterization of the murder victims' reputation and any related improper character evidence.

Ms. Cleary's statement, "everyone knows they are bad people, in a gang, doing and selling drugs and always being arrested," and similar testimony is inadmissible. Evidence of a person's character to show action in conformity therewith is generally inadmissible. Fed. R. Evid. 404(a). Evidence of prior bad acts to prove a person's character to show action in conformity therewith is also inadmissible. Fed. R. Evid. 404(b). The defendant would only be admitting this evidence to show that because the victims had a reputation for bad behavior in the past, they were likely exhibiting bad behavior on the night they were murdered. That is quintessential propensity evidence and is inadmissible under both Rule 404(a) and Rule 404(b).

7. The Court should exclude Kathleen Cleary's testimony of a prior specific instance of conduct by murder victim Jeremy Grey.

Ms. Cleary's testimony that Jeremy Grey broke into Rose Hurtsmith's apartment, stole her earrings, and pointed a gun at her is inadmissible on two grounds. First, it is improper character evidence. Evidence of prior bad acts to prove a person's character to show action in conformity therewith is inadmissible. Fed. R. Evid. 404(b). The defendant seeks to show the victims had a propensity for committing crimes. This is inadmissible. It would only be used to show action in conformity therewith.

Second, Ms. Cleary's testimony is based on inadmissible hearsay. Hearsay is an out of court statement offered for the truth of the matter asserted and is generally inadmissible. *See* Fed. R. Evid. 801; Fed. R. Evid. 802. Ms. Cleary testified that she learned of this prior instance of conduct by Mr. Grey because "Rose told me." A recitation of this event would be based not on personal knowledge, but on inadmissible hearsay. It asserts that on a prior occasion Mr. Grey used a gun and committed a crime.

Because this testimony is both improper character evidence and inadmissible hearsay, the Court should exclude it.

CONCLUSION

The United States respectfully submits this motion and its Memorandum in support and asks this Court to enter an order consistent with the Federal Rules of Evidence as outlined above.

Respectfully submitted,

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United States Department of Justice