THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

HILLSBOROUGH, SS. SEPTEMBER TERM, 2010
Northern District
Docket nos. 10-S-0240-245

The State of New Hampshire

v.

Steven Spader

STATE'S OBJECTION TO THE DEFENDANT'S MOTION IN LIMINE #3: TO EXCLUDE EVIDENCE OF OTHER BAD ACTS

NOW COMES the State of New Hampshire, by and through its attorneys, the Office of the Attorney General, and hereby objects to the defendant's motion to exclude what he incorrectly characterizes as "evidence of other bad acts." In support of this objection, the State submits the following:

1. The defendant is charged with conspiracy to commit murder, conspiracy to commit burglary, and other offenses, in connection with the armed home invasion of the Cates family residence, the murder of mother Kimberly Cates, and the attempted murder of daughter Jaimie Cates. All of these crimes occurred in the early morning of October 4, 2009, in Mont Vernon, New Hampshire [hereinafter, "Mont Vernon crimes"].

2. The defendant has moved to exclude evidence regarding two matters. Specifically, the defendant seeks preclusion of "evidence of [his] alleged research and/or attempts to make chloroform" and "evidence that relates in any way to the gang 'Disciples of Destruction' or 'DOD.'" Defendant's Motion In Limine #3: To Exclude Evidence of Other Bad Acts, dated September 7, 2010 [hereinafter, "Defendant's

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Motion"], at p.1. The defendant's motion is specious. First, the defendant has provided the Court with an incomplete and misleading account of the evidence at issue and its relationship to the charged conspiracies. Moreover, the defendant's attempt, a little over a month before his trial is scheduled to commence, substantively to amend the two conspiracy indictments against him by striking charged overt acts of which he known about for over six months is untimely. Lastly, the defendant fundamentally misconstrues the nature of the evidence at issue, which does not constitute "other bad acts," but rather intrinsic proof of the charged conspiracies. For these reasons, the Court should reject the defendant's factual and legal characterizations, and deny his motion in its entirety.

Relevant Facts

Disciples of Destruction

3. About a month before the commission of the Mont Vernon crimes, the defendant spoke with codefendants and coconspirators William Marks and Quinn Glover about forming what he termed a "brotherhood." 7190, 8931, 11348, 11358.[1] The defendant called this brotherhood the "Disciples of Destruction," or "DoD" for short. 7189-90, 8929, 9650, 10038. That association was centered on making money. 7189-90, 9650, 11359. The defendant created detailed goals and bylaws for the Disciples of Destruction, which he set forth in a written document. 9650-51, 11348-49. Loyalty and brotherhood are key themes that run throughout that document. 9650.

4. The defendant named himself as president of the Disciples of Destruction, and named coconspirators Marks and Glover as officers. 9651. Although Glover was

[1] Page references are to the State's discovery, which the defense has received. The State has submitted with this Motion, under seal, two copies of the cited discovery pages.

unaware that codefendant and coconspirator Christopher Gribble was a member of the Disciples of Destruction, 7190, both Gribble and Marks understood Gribble to be a member. 6958, 8930, 11349. The defendant attempted to recruit friend and coconspirator Autumn Savoy to join his association as well. 8930, 10038. Savoy declined, but worked with the defendant to design and create a logo for the Disciples of Destruction. 10038-39.[2]

5. On the day before the defendant went with coconspirators Gribble, Marks, and Glover to Mont Vernon, where he murdered Kimberly Cates and attempted to murder Jaimie Cates, the defendant told coconspirator Savoy that he was going to do a "job" that night. 10038. Savoy believed that the defendant meant that he was going to break into a home. 10038. The defendant further told Savoy that the "job" was going to be an initiation mission for the members of the Disciples of Destruction. 10038.[3]

6. Just hours before the commission of the Mont Vernon crimes, the defendant and coconspirator Glover exchanged a series of cellular telephone text messages. In those text messages, the defendant cajoled Glover into joining him in the home invasion that they had previously discussed, and noted what items that Glover should bring with him. 4638-4646. At the very beginning of that exchange, the defendant himself discussed the direct link between the planned crimes and the brotherhood he had formed with his conspirators:

> its stevie. You gotta get out soon cuzz we ready we need the conpletion [sic] of d.o.d. to go on.

[2] That logo is plain and nondescript. Specifically, the logo consists of a backwards "D," followed by an "O," followed by a "D." 10038-39.

[3] According to admissions that Gribble made to investigators after his arrest, after the Mont Vernon crimes the defendant said that what they all had done was "a test to make sure that we had the balls to do whatever." 6958.

4638. On the way over to Mont Vernon with his coconspirators, the defendant stated in substance that what they would do would be an initiation for their group. 11360.

7. During the investigation of the charged crimes, investigators executed numerous duly issued search warrants. As a result of the searches conducted, investigators found items linking the coconspirators with the Disciples of Destruction. Specifically, investigators recovered from the defendant's computer the gang's bylaws and officer list. 9650-51. Investigators also recovered from Christopher Gribble's car a drawing of the "DoD" logo, and recovered from Marks's cellular telephone a photograph of the same logo that had been marked on the defendant's bare back. 11359-60.

8. While incarcerated awaiting his trial in this case, the defendant wrote the following to a fellow inmate regarding the brotherhood that he had attempted to form, and its relationship to the charged crimes:

> So Billy, Chris, and Quinn knew that I've been about bodies, and all three wanted to kill someone. Personally, I was considering starting a cr[e]w, not a "gang" but a group of like-minded individuals, with the balls to do crazy shit. I didn't want pussies, or people who just talk the talk, digg? So I set this up to see if my homies could be about it. I guess I thought wrong.

9970.

Chloroform

9. In the weeks leading up to the attacks on Kimberly and Jaimie Cates, the defendant spoke to coconspirators about how he wanted to break into homes and murder the occupants thereof. E.g., 8919-20, 9078-80, 11345. While discussing those plans, the defendant further disclosed that he wanted to use chloroform in order to incapacitate his

victims and then tie them up, so that they could be easily moved to other locations in order to be tortured for financial information and then murdered. 7047-48, 7092, 8920, 9057-59, 9079, 11210-12, 11345-47. The defendant had these discussions regarding the use of chloroform in the context of stealing and killing with coconspirators Gribble, Marks, and Glover. 7047-48, 8920, 9057-61, 9080-81, 11209, 11212-13, 11347-48.

10. On the morning of Saturday, October 3, 2009 – less than twelve hours before the burglary on Trow Road, the murder of Kimberly Cates, and the attempted murder of Jaimie Cates – the defendant with Autumn Savoy's help - used Savoy's computer to access the Internet and research how to make chloroform. 10036, 10067. Gribble participated in that Internet search. 10036, 10066-67. The defendant told Savoy that he and Gribble needed chloroform for a robbery. 10066, 10069. This was the same time when the defendant told Savoy that he was going to do a "job" later that night as an act of initiation for him and other members of the Disciples of Destruction. ¶5.

11. The defendant conducted a similar Internet search on how to make chloroform later that same day, on his own computer at home. A subsequent forensic examination of Savoy's computer and the defendant's computer revealed the conducted Internet searches for chloroform manufacturing instructions. The searches on Savoy's computer occurred at about 8:40 a.m., 2:40 p.m., and 5:50 p.m. on October 3, 2010. 7976-77, 9677-83.[4] The searches on the defendant's computer occurred at about 4:20 p.m. on October 3, 2010.[5] From the research that the defendant conducted, he

[4] According to Savoy, out of "curiosity" he alone had conducted additional internet searches for chloroform on his computer after the defendant and Gribble had left his house that Saturday. 10036-37, 10068.

[5] The unnumbered exhibits accompanying this objection document the internet searches conducted on the defendant's home computer. The defense already was provided with this information through discovery, in disc format.

determined that in order to make chloroform he needed ice, bleach, and acetone. 10195-99.

12. When the defendant met coconspirator Glover later in the afternoon on Saturday, he gave Glover the list of ingredients for the manufacture of chloroform that he had obtained earlier. 11210-11. The defendant told Glover that he thought that they – himself, Gribble, Glover, and Marks – could gather all of the necessary ingredients. 11212. Prior to heading to Mont Vernon, the defendant told coconspirator Marks that Gribble was attempting to make chloroform, and that he needed ice. 7092-93, 9058-60, 11345, 11361-63.

13. That Saturday night, Gribble attempted to obtain acetone from his girlfriend and from his mother. 4618-20, 9204-05. In a series of text messages exchanged between the defendant and Gribble that same night, just hours before the Trow Road burglary, the murder of Kimberly Cates, and the attempted murder of Jaimie Cates, the two conspirators discussed their efforts to assemble the other members of their group and to gather supplies for the planned crime, including acetone:

> [10:16 p.m., Gribble to defendant]: hey man. i'm trying to get some acetone to clean something off and i don't have any. any way we can get some at walmart or something on the way to jill's [friend of defendant's]?[6]
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> . . .
>
> [10:25 p.m., defendant to Gribble]: Alright well try idk where bill is but he is coming as is quinn

[6] Gribble admitted to investigators that his explanation to his mother that he needed acetone to clean a knife was just a ruse concealing the true purpose behind his need for the chemical, namely, manufacture of chloroform. 10182.

[10:27 p.m., Gribble to defendant]: cool. oughta be a good party. remind me to show you the new pocket knife I picked up from a friend

[10:27 p.m., defendant to Gribble]: word up dude

[10:42 p.m., Gribble to defendant]: ok. i'm goin to ashley's right now [Gribble's girlfriend]. anything iu should bring to the party? extra set of warm clothes maybe?

[10:43 p.m., defendant to Gribble]: Yeah, did you ever get those gloves from your dad? Jw cuzz I can help wit your trucc?

. . .

[10:48 p.m., defendant to Gribble]: Ight man, well can i borrow an extra set of gloves, and if you get rope, cuzz we need it to tie the bottom of the trucc down. Feel me?

[10:54 p.m., Gribble to defendant]: i got rope. and i got that blanket for if we get cold at the party

[10:55 p.m., defendant to Gribble]: "Word, any plastic garbage bags, she said we needed them to clean up after"

[11:01 p.m., Gribble to defendant]: yup. force flex.

[11:02 p.m., defendant to Gribble]: Word, well have fun and when billy shows up ill txt.

4622-32. Despite the efforts made, Gribble was unable to secure any acetone that evening.[7]

[7] According to admissions ultimately made by Gribble to investigators after his arrest, he confirmed that he and the defendant had planned to use chloroform to incapacitate anyone found in the house that they had targeted, and to take the occupants elsewhere to torture them. 10168. Gribble further confirmed that he and the defendant had learned how to manufacture chloroform through the internet at Savoy's house, that they needed acetone and bleach, and that he was tasked with obtaining acetone but was unable to secure any. 10168, 10182.

Relevant Procedural History

14. The defendant received copies of his indictments by February 22, 2010. Signed Entry of Not Guilty Plea and Waiver of Arraignment, dated Feb. 22, 2010. Among the charged crimes were two counts of conspiracy, namely, conspiracy to commit murder and conspiracy to commit burglary. Those charges include several specifically enumerated overt acts. Among the listed overt acts are the following five:

-- Spader discussed with others how he wanted to break into a home and render the occupants thereof unconscious with chloroform; or

-- On or about October 3, 2009, Spader conducted research on the internet on how to manufacture home-made chloroform; or

-- On or about October 3, 2009, Spader and Gribble exchanged text messages attempting to secure acetone, an ingredient in the manufacturing of home-made chloroform; or

-- On or about October 3, 2009, Gribble exchanged text messages with another person attempting to secure acetone; or

-- On or about October 3, 2009, Spader gave Glover a paper detailing how to manufacture chloroform

Docket Nos. 10-S-243 & 10-S-245. These two indictments also contain literally dozens of other charged overt acts in furtherance of the conspiracy, including the procurement of the murder weapons and other equipment to perpetrate the burglary and murder that were the target offenses.

15. By agreement of both sides, the Court conducted a structuring conference setting forth relevant deadline dates for the exchange of discovery, the disclosure of defenses of experts, witness depositions, and the filing of various motions. As a result of

that conference, the Court sent to both sides a Structuring Conference Order, dated April 12, 2010. Among the deadlines set by the Court was the following:

> All major and dispositive motions, including any motion to suppress, motion to dismiss or motion to change venue, shall be filed no later than June 30, 2010.

Court's Criminal Structuring Conference Order, dated April 12, 2010, at ¶9. The defendant never objected to the motion deadline set. The defendant's attorneys filed several motions by the established deadline, but did not challenge any of the indictments.

Legal Argument

16. The defendant argues that evidence pertaining to the Disciples of Destruction and to chloroform constitutes "other bad acts" evidence, the admission of which must be analyzed under New Hampshire Rule of Evidence 404(b). Defendant's Motion, at ¶¶5-7. The defendant further asks the Court to strike as "surplusage" the charged overt acts regarding chloroform contained in the two conspiracy indictments. See ¶14. The defendant's attempt to dismiss substantive portions of the indictments is not timely. In any event, the defendant's attempt to portray substantive and intrinsic proof of the conspiracies charged in those indictments as "other bad acts" evidence widely misses the mark under the law and as a matter of basic common sense.

The Defendant's Challenge to the State's Conspiracy Indictments Is Untimely

17. As an initial matter, the defendant' challenge to enumerated overt acts charged in the two conspiracy indictments is untimely. The Court set deadlines for both parties to follow in this case. Pursuant to those deadlines, the defendant was to submit all

"major and dispositive motions," including motions to dismiss, by June 30. That was over two months before the defendant filed his present motion. But the defendant at that proper time did not challenge any of his indictments. Both parties had an opportunity to seek extensions of the agreed-to deadlines, including the deadline for dispositive motions. The defendant sought no additional time, and should not now be allowed to litigate a claim that he had the ability to bring forth when the Court gave him the opportunity to do so.

18. The defendant attempts to spin his present attack on the State's conspiracy indictments as an evidentiary challenge. Defendant's Motion, at ¶18. It is not. As a matter of rudimentary evidence, proof regarding chloroform is "relevant" to the charged conspiracies, as that proof directly establishes proffered overt acts in those crimes. See ¶14. So too is the evidence not "other bad acts." Again, the evidence constitutes direct proof of allegations contained in the indictments at issue. Plainly, then, the defendant's claim regarding chloroform is not evidentiary in nature. Rather, he seeks to dismiss parts of the indictment against him. That is an attack on the accusatory instrument that the defendant should have brought months ago.[8]

19. To the extent that the Court chooses to entertain the defendant's motion to strike the challenged overt acts from the conspiracy indictments as "surplusage," the Court should deny the motion. "Motions to strike surplusage from an indictment will be granted only where the challenged allegations are not relevant to the crime charged and

[8] The defendant's reliance on State v. Pond, 132 N.H. 472 (1989), Defendant's Motion, at ¶18, is fundamentally misplaced. The Supreme Court in Pond merely approved a lower court's striking of the inclusion of the enumeration of a lower mental state in indictments, because such inclusion was surplusage on otherwise legally sufficient charging instruments. 132 N.H. at 477. Nothing in the Pond decision supports the defendant's attempt to excise proper and permissible language from a valid indictment that, in the final analysis, he just does not like.

are inflammatory and prejudicial." United States v. Scarpa, 913 F.2d 993, 1013 (2d Cir. 1990); see United States v. Moss, 9 F.3d 543, 550 (6th Cir. 1993); United States v. Figueroa, 900 F.2d 1211, 1218 (8th Cir. 1990). "[I]f the language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be (provided, of course, it is legally relevant)." Moss, 9 F.3d at 550; see United States v. Montour, 944 F.2d 1019, 1026 (2nd Cir. 1991) ("If an act is relevant to the alleged conspiracy when viewed in light of all the evidence, it should not be stricken."); United States v. Edwards, 72 F. Supp. 2d 664, 667 (M.D. La. 1999) ("In cases where the government charges a defendant with conspiracy, the court should not strike overt acts that are relevant to the charges.")

20. As discussed fully supra, evidence pertaining to chloroform is highly relevant to the charged conspiracies. Indeed, not only is the evidence relevant, it is part and parcel of those crimes, as much as assembling the murder weapons and other equipment. Notably, the defendant has neither moved to strike as "surplusage" these other charged overt acts, nor attempted to distinguish them from those five overt acts that he seeks to remove from the indictments. Excising the overt acts at issue is unwarranted, and in fact would prejudice the State's case by removing from the jury's consideration overt acts that properly and permissibly can be used to establish the conspiracies that the State must prove beyond a reasonable doubt.

The Contested Evidence Is Not "Other Bad Acts" Evidence, But Rather Constitutes Intrinsic Proof of the Charged Conspiracies

21. The Defendant is charged with, inter alia, conspiracy to commit murder and conspiracy to commit burglary. In order to prove the existence of any conspiracy,

the State must prove the existence of an agreement to commit or cause the commission of a defined crime, as well as at least one overt act committed by a conspirator in furtherance of the conspiracy. See RSA 629:3, I; State v. Sanchez, 152 N.H. 625, 631 (2005). "The act which the crime of conspiracy punishes is an agreement to commit or cause the commission of a crime." Sanchez, 152 N.H. at 630 (emphasis in original); State v. Donohue, 150 N.H. 180, 182 (2003); State v. Kilgus, 128 N.H. 577, 586-87 (1986). "The overt act may be any transaction or event, even one which may be entirely innocent when considered alone, but which is knowingly committed by a conspirator in an effort to accomplish some object of the conspiracy." Kilgus, 128 N.H. at 586 (internal quotation marks omitted; emphasis added).

22. For each the two charged conspiracies, the State must establish the existence of an agreement and the commission of overt acts. Obviously, any evidence on these issues is not "other bad acts," but rather direct evidence of the charged crimes. Considered in this proper light, the challenged evidence is intrinsic proof of essential elements of the crime of conspiracy that the State must prove at trial. Specifically, evidence regarding the Disciples of Destruction is direct proof of the charged illicit agreements. And, evidence regarding attempts to procure chloroform are overt acts in furtherance of the conspiracies to burgle and to murder.

23. The circumstances regarding the Disciples of Destruction demonstrate how central the group was to the agreements at issue. Those agreements, in general terms, were to break into residential homes, and to murder people. The defendant began discussing the formation of his created group at about the same time as when he began revealing these conspirational goals. ¶¶3, 9. The members of the group – who the

defendant himself selected – were the very same people with whom he conspired to burgle and to kill. ¶¶4, 9. On the very night those conspirational goals were achieved, and while the defendant was reaching out one of his coconspirators and imploring him to join in the planned home invasion, the defendant told his cohort to accompany him and the other members of their group specifically in order to "complete D.o.D." ¶6. And, as the defendant told others both before and after he committed his planned burglary and murder, he considered the crimes to be an initiation for the members of the group. ¶¶5-6, 8.

24. For all these reasons, evidence regarding the Disciples of Destruction is fundamentally tied to the agreements at issue in the charged conspiracies. See, e.g., United States v. Suggs, 374 F.3d 508, 516 (7th Cir. 2004) ("[e]vidence of gang affiliation is admissible in cases in which it is relevant to demonstrate the existence of a joint venture or conspiracy and a relationship among its members. . . . . Gang affiliation is particularly relevant, and has been held admissible, in cases where the interrelationship between people is a central issue[,] such as in a conspiracy case") (internal quotation marks omitted); United States v. Sloan, 65 F.3d 149, 150-51 (10th Cir. 1995) (gang membership admissible to prove existence of conspiracy and relationship between witnesses); United States v. Johnson, 28 F.3d 1487, 1497 (8th Cir. 1994) (gang association admissible to prove conspiracy existed); United States v. Robinson, 978 F.2d 1554, 1562-63 (10th Cir. 1992) (gang affiliation admissible to establish conspiracy agreement and purpose and to show knowledge of conspiracy).[9] The connection between

[9] Although the decisions cited in support of the State's arguments are cases that involve evidence of gang membership, the Disciples of Destruction must be considered in its more accurate light: a group of a few friends who shared criminal interests, the actual conduct of whom does not extend beyond the charged crimes at issue. Indeed, the State does not seek to elicit any other acts, let alone "bad acts," committed by

the defendant's creation and the agreements that he entered into with his coconspirators is obvious. Indeed, the fact that the defendant chose to label and build on his association with his coconspirators by forming a rudimentary "gang" should not shield him from presenting to the jury a full and fair picture of the nature of the agreement at issue.

25. Similarly, although challenged by the defendant, it is hard to fathom how any reasonable person could seriously dispute that the evidence of chloroform at issue constitutes proof of overt acts that were committed in furtherance of the charged conspiracies. The defendant repeatedly talked to his all of his coconspirators about using chloroform as a means of subduing burglary victims and later killing them. ¶9. In the hours before the defendant and coconspirator Gribble committed their conspired crimes, they actively searched out how to make chloroform and attempted to manufacture the substance. ¶¶10-13. The defendant also kept his other coconspirators aware of his intention to use chloroform, in accordance with his previously discussed plans. ¶¶12-13.

26. These actions are textbook examples of conspirational overt acts. That ultimately the efforts of the defendant and his coconspirator were not successful, see Defendant's Motion, at ¶13, does not negate their relevance and value as overt acts. See Kilgus, 128 N.H. at 586-87. In fact, the charged overt acts involving chloroform are no different from other charged overt acts that obtusely could be considered "other bad acts," such as gathering the murder weapons and supplies, exchanging text messages discussing plans and efforts, and assembling the group. The defendant's attempt to pick and choose those overt acts that the State can present at his trial is unsupported by law or

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the Disciples of Destruction. Although nominally a "gang," the Disciples of Destruction had none of the notoriety, structure, reach, extensive criminality, following, or even recognition of what are commonly considered to be "gangs." In these significant regards, the Disciples of Destruction is very different from the types of criminal organizations discussed in the cases cited by the State infra.

logic. Notably absent in the defendant's motion is any citation to relevant law from this state or any other jurisdiction that supports his efforts to direct the charging of his offenses. The conduct enumerated in the conspiracy indictments are all overt acts, and they are all equally admissible as proof of his guilt.

27. Consequently, the challenged evidence constitutes direct proof of the charged conspiracies. As a result, that evidence's admission simply is not governed by Rule 404(b). The defendant's myopic reliance on that standard, Defendant's Motion, at ¶¶4-7 et seq., is puzzling given the large and consistent body of law that flatly rejects his assumption in that regard.

28. The law in New Hampshire is clear. Rule 404(b) does not apply to evidence that is "a material part of the entire course of conduct surrounding the commission of the alleged [offense]." State v. Martin, 138 N.H. 508, 517 (1994); see State v. Kulikowski, 132 N.H. 281, 287 (1989). The Supreme Court recently reaffirmed this principle, albeit not in the context of a conspiracy charge, in State v. Nightingale, ___ N.H. ___, 2010 WL 2869542 (July 23, 2010). The defendant in Nightingale was charged with sale of a controlled drug. 2010 WL 2869542 at *1. The defendant argued on appeal that evidence regarding an earlier conversation between her and an undercover police officer regarding the purchase of narcotics was inadmissible under Rule 404(b). Id. at *2. The Supreme Court disagreed with the defendant that Rule 404(b) applied. As the Court explained:

> Although this test [Rule 404(b)'s three-pronged analysis, see Defendant's Motion, at ¶6] must be applied before evidence of "other crimes, wrongs or acts" may be admitted, Rule 404(b) does not apply here. The challenged conversations are not "other crimes, wrongs or acts," but rather are "inextricably intertwined with evidence of the crime charged in the indictment." The

> conversations at issue and the crime charged in the indictment "are part of a single criminal episode." Therefore, Rule 404(b) does not apply, and the applicable test for admissibility is found in New Hampshire Rule of Evidence 403.

Id. at *3 (citations omitted; emphasis in original).

29. Similarly here, the challenged evidence is part of a single criminal episode, namely, the charged conspiracies to commit burglary and to commit murder. The evidence regarding the Disciples of Destruction is part and parcel of the agreement alleged, and evidence regarding chloroform constitutes methods used in an effort to achieve conspirational goals. Such evidence does not fall within the purview of Rule 404(b). Any question in this regard is resolved by State v. Martineau, 116 N.H. 797 (1976), which also informs the evidentiary issue raised by the defendant.

30. The defendant in Martineau was charged with conspiracy to commit murder and criminal solicitation. 116 N.H. at 798. Those charges arose from the murder of a woman who had accused the defendant, a member of a motorcycle club, of rape; the actual murder was committed by one of the defendant's fellow club members. See State v. Colby, 116 N.H. 790, 791-93 (1976) (setting forth facts of case). In his appeal to the Supreme Court, the defendant claimed error with the trial court's admission of evidence of the patch worn by club members. The Supreme Court rejected that claim, assuming the propriety of evidence of gang membership in itself:

> The defendant also excepts to the admission into evidence as being unduly prejudicial of a witness' sketch of the emblem or 'patch' worn by members of the Die Hard Motorcycle Club, the organization to which defendants Martineau and Colby, as well as Larry Simmons, the actual perpetrator of the murder, and all other parties to the conspiracy belonged. This evidence was offered by the State as part of the circumstantial evidence that the murder of Wanda Graham was the product of a conspiracy undertaken by members of the organization in an attempt to insulate their

> 'brothers' from the consequences of the rape prosecution. No authority is cited nor any reason advanced as to why this evidence would be any more prejudicial than the other evidence relating to the Die Hards, and accordingly the exception to its admission is overruled.

Id. at 799. See State v. Legere, 157 N.H. 746, 759-63 (2008) (concluding that expert testimony on motorcycle gang properly admissible and analyzing evidentiary issue under Rules 401 and 403 rather than Rule 404(b)).

30. This Court also can look to the decisions of federal courts, in which conspiracy charges are a more regular occurrence. Those decisions reflect no more than what common sense would dictate. Namely, that evidence of a charged conspiracy, no matter how criminal that evidence, does not constitute "other bad acts" evidence. Consequently, the propriety of such evidence's admission is not analyzed under Rule 404(b). As the Eighth Circuit Court of Appeals explained in United States v. Aranda, 963 F.2d 211 (8th Cir. 1992), in rejecting a claim premised on Rule 404(b) similar to that raised by the defendant here:

> Aranda's sole argument on appeal is that the District Court erred in allowing evidence of the November 1989 stop, arrest, and vehicle search in Texas. He argues that the evidence was "other crimes" evidence, that it was relevant only to his character, and that it allowed the jury impermissibly to infer that he acted in conformity with that character. This character evidence, Aranda argues, should have been ruled inadmissible under Rule 404(b).
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> . . . .
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> It is clear, however, that Aranda's argument relies on a mischaracterization of the government's evidence. This Court has consistently held that "[e]vidence that is probative of the crime charged and not relevant solely to uncharged crimes is not 'other crimes' evidence." Evidence that is probative of the crime charged does not fall within the ambit of Rule 404(b), and thus is not subject to its heightened scrutiny. This is particularly important in cases such as the present one involving a charge of conspiracy.

> Where the government has introduced evidence of acts committed by the defendant or a co-conspirator, during the time frame of the conspiracy and in furtherance of it, this Court has held that such evidence is not of "other crimes," but rather is evidence of the very crime charged. Because this is evidence of the conspiracy itself, the policy of Rule 404(b), that a criminal defendant should not have to defend himself against uncharged crimes, is not implicated. Further, the inference sought to be foreclosed by Rule 404(b), that a person of demonstrated criminal character can be presumed to have acted in conformity with that character, is not raised where the challenged evidence directly supports the existence of the charged criminal conspiracy without regard to the defendant's character.

963 F.2d at 213-14 (citations omitted).

31. Federal case law is replete with decisions in accord with the Aranda court's ruling. See, e.g., United States v. Parker, 553 F.3d 1309, 1314-15 (10th Cir. 2009) ("It is well settled that Rule 404(b) does not apply to other act evidence that is intrinsic to the crime charged. Generally speaking, [i]ntrinsic evidence is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury. Extrinsic evidence, on the other hand, is extraneous and is not intimately connected or blended with the factual circumstances of the charged offense. Because Rule 404(b) only limits evidence of 'other' crimes – those extrinsic to the charged crime – evidence of acts or events that are part of the crime itself, or evidence essential to the context of the crime, does not fall under the other crimes limitations of Rule 404(b). The three transactions within the charged conspiracy time-frame are intrinsic to the crime and substantiate the criminal conspiracy. They directly support the conspiracy charged [and] provided direct proof of Parker's involvement with the crimes charged. Rule 404(b) only applies to evidence of 'other' crimes – the transactions were part of the crimes charged, not some other crime.") (citations and internal quotation marks omitted); United States v.

Gobbi, 471 F.3d 302, 311(1st Cir. 2006) ("The prohibition against 'other acts' evidence typically refers to evidence that is extrinsic to the crime charged and introduced for the purpose of showing propensity. Here, however, we never reach the question of propensity; the drug-purchasing evidence in this case is intrinsic to the conspiracy described in count 1 of the indictment. That is to say, the evidence comprises part and parcel of the charged offense. Thus, the evidence is not 'other acts' evidence at all and, accordingly, Rule 404(b) is not implicated."); United States v. Chavis, 429 F.3d 662, 670 (7th Cir. 2005) ("As we have stated before, evidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of 'other acts' within the meaning of Fed. R. Evid. 404(b).") (internal quotation marks omitted); United States v. Gibbs, 190 F.3d 188, 217-218 (3rd Cir. 1999) (" Rule 404(b) . . . does not apply to evidence of uncharged offenses committed by a defendant when those acts are intrinsic to the proof of the charged offense. . . . Since the government introduced evidence of Gibbs's use of violence to further the illegal objectives of the cocaine conspiracy by removing threats to himself (since threats to Gibbs meant threats to the trafficking enterprise), the District Court did not abuse its discretion in permitting this evidence to come in."); United States v. Candelaria-Silva, 162 F.3d 698, 704 (1st Cir. 1998) ("Here, the evidence of the arrest [of passenger in defendant's car on gun possession and other charges during car chase] was intrinsic to the conspiracy charge, and consequently, does not fall within the purview of Rule 404(b)."); United States v. Miller, 65 F.3d 149, 682 (2nd Cir. 1997) ("Where the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself. An act that is alleged to have been done in furtherance

of the alleged conspiracy . . . is not an 'other' act within the meaning of Rule 404(b); rather, it is part of the very act charged.") (internal quotation marks and citation omitted); United States v. Arboleda, 929 F.2d 858, 866 (1st Cir. 1991) ("We think it plain that the disputed testimony was generally admissible as direct evidence of the conspiracy. Because it tied Arboleda to possession of a large amount of cash in connection with drug sales, it was relevant to the charge. And it corroborated the testimony of accomplices. It was therefore not extrinsic act evidence subject to the Fed. R. Evid. 404(b) standard of admissibility. "Rule 404(b) applies just to evidence of other bad acts or crimes – those other than the crime charged. Where evidence of 'bad acts' is direct proof of the crime charged, Rule 404(b) is, of course, inapplicable.") (citation omitted; emphasis in original); United States v. Murillo, 11 Fed. Appx. 901, 903 (9th Cir. 2001) ("Rule 404(b) does not apply to evidence that establishes an element of the conspiracy charged.").

32. The defendant has not provided the Court with any basis, let alone any compelling rationale or case law support, to depart from these sound decisions. Rather, the defendant simply presumes application of Rule 404(b). But his presumption flies directly in the face of relevant law. And again, those cases only state the obvious, namely, that evidence of the charged crime is just that. The evidence challenged by the defendant is intrinsic to the conspiracy charges, by definition cannot constitute 404(b) evidence, and falls outside the purview of that rule.[10]

[10] The admission of evidence pertaining to the Disciples of Destruction and chloroform is not governed by Rule 404(b) for another reason. Namely, the defendant has not truly alleged any "other bad acts." Rather, he has challenged discussions and acts that are not themselves crimes or wrongs. The defendant takes issue with the inferences of wrongdoing that jurors could draw from that evidence. That does not raise the challenged evidence to propensity-based, namely, that he acted in conformity with actual specific misconduct:

> [F]or Rule 404(b) to apply, there must be evidence of a crime, wrong, or act at issue. Here, the defendant does not allege a crime, wrong, or act – only an inference. "Rule

The Contested Evidence Is Relevant and Admissible

33. To be sure, the evidence at issue still must be relevant in order to be admissible. It clearly is. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.H. R. Ev. 401; see State v. Guyette, 139 N.H. 526, 529 (1995); State v. Walsh, 139 N.H. 435, 436 (1995). Pursuant to New Hampshire Rules of Evidence 402 and 403, all relevant evidence generally is admissible. Otherwise relevant evidence may be excluded only if its probative value is substantially outweighed by, inter alia, the danger of unfair prejudice, confusion of the issues, or misleading jurors. N.H. R. Ev. 403; see State v. Jenot, 158 N.H. 181, 185 (2008). Evidence is unfairly prejudicial under Rule 403

> if its primary purpose or effect is to appeal to a jury's sympathies, arouse its sense of horror, provoke its instinct to punish, or trigger other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case. Unfair prejudice is not, of course, mere detriment to a defendant from the tendency of the evidence to prove his guilt, in which sense all evidence offered by the prosecution is meant to be prejudicial. Rather, the prejudice required to predicate reversible error is an undue tendency to induce a decision against the defendant on some improper basis, commonly one that is emotionally charged.

> 404(b) generally bars evidence of specific acts to show character in order to prove conduct on a particular occasion." 2 J. McLaughlin, Weinstein's Federal Evidence § 404.02[2], at 404-9 (2d ed. 2006) (emphasis added). Since the evidence at issue is simply an inference, we agree with the trial court and conclude that Rule 404(b) does not apply to the challenged evidence in this case.

State v. Giddens, 155 N.H. 175, 179 (2007).

State v. Giddens, 155 N.H. 175, 179-80 (2007); State v. Yates, 152 N.H. 245, 249-50 (2005); State v. DiNapoli, 149 N.H. 514, 518 (2003).

34. Guided by these well-established principles, evidence regarding the Disciples of Destruction and chloroform is admissible. With respect to relevancy and probativeness, the proffered evidence easily satisfies the threshold standard. As previously noted, the evidence constitutes direct evidence of the charged conspiracies. ¶¶23-26. That alone more than suffices to establish relevancy.

35. Nevertheless, the probative value of the proffered evidence extends beyond its intrinsic value to the conspiracy charges. The proffered evidence on the Disciples of Destruction demonstrates the camaraderie and shared trust between the defendant and his coconspirators. This kinship, in turn, explains why the defendant would include them in his criminal plans and the offenses that he ultimately committed with them. The State by separate motion has established how prior shared criminality is probative and relevant for this purpose. See State's Motion Pursuant to N.H. R. Evid. 404(b) Seeking To Introduce Evidence of Other Bad Acts (Motion 2), dated September 1, 2010. Evidence of the defendant's self-created association also establishes his motive to commit burglary and to commit murder. After all, according to the defendant himself, those crimes were a form of initiation for his coconspirators into the Disciples of Destruction. ¶¶5-6, 8. See, e.g., Legere, 157 N.H. at 759 (gang membership admissible to show motive for murder). See generally John E. Theuman, Admissibility of Evidence of Accused's Membership in Gang, 39 A.L.R. 4th 775, 776 (1985 & Supp. 2008) (collecting cases on relevancy of gang affiliations to issue of motive).

36. With respect to evidence pertaining to chloroform, that evidence is proof of the defendant's intent to steal and to kill. The defendant discussed using chloroform in the context both of robbing from people, and of murdering them; indeed, according to the defendant's own admissions the use of chloroform was a means by which he had wanted to incapacitate, steal, torture, and then ultimately kill. ¶9. The evidence also demonstrates the efforts that the defendant took to think out and execute his stated intentions of burglary and murder, and thus is relevant to the first degree murder – particularly the essential elements of premeditation and deliberation – and attempted murder charges against him. The evidence also logically completes the narrative leading up to the charged substantive crimes, and provides necessary context to the pertinent test message conversation that he had with coconspirator Glover while assembling Glover to join him and the other group members. ¶6.

37. Lastly, as the defendant has not conceded identity – or any other material trial issue, for that matter – all of the challenged evidence establishes his identity as one of the armed intruders who broke into the Cates homes. All of these other grounds of admission underscore the high degree of relevance of the challenged evidence.[11] Nor is

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[11] The defendant complains that the evidence regarding chloroform lacks relevant because "there is no evidence that [he] intended to use it during the alleged burglary of the Cates' home" and he was unsuccessful in making the chemical. Defendant's Motion, at ¶¶13-15. The former assertion is flatly belied by the facts. ¶¶9-13. The latter assertion is simply irrelevant; that the defendant failed in his attempts may be a defense if he were charged with criminal manufacture of chloroform, but does not detract from the relevance of those efforts, however unsuccessful, to the charged conspiracies. In any event, the defendant's complaints go to the weight that jurors may give the challenged evidence, not the evidence's admissibility. The defendant's attempt to shift the burden of proof on the State by suggesting that the State has to prove an intent to use chloroform and an agreement to use chloroform simply turns a blind eye to the actual crimes with which he's been charged.

Similarly, the defendant's attack on the relevancy of evidence regarding the Disciples of Destruction, Defendant's Motion, at ¶¶19-21 amounts to no more than a challenge to the reliability and weight of that evidence that is best left for the jurors to resolve. The defendant's assertion that there is no proof "that DOD existed or [] was in any way related to the instant matter," Defendant's Motion, at ¶ 22, just ignores the State's evidence to the contrary. ¶¶3-8.

such value substantially outweighed by prejudice or other factor that might warrant preclusion. See N.H. R. Ev. 403. In arguing to the contrary, the defendant contends that the challenged evidence will "arouse a sense of horror from the jury." Defendant's Motion, at ¶¶16, 23. He apparently fails to remember that he is charged with hacking a mother to death and horrifically wounding an 11-year-old girl, while invading their home in the middle of the night with three other armed cohorts. The evidence is direct proof of what he conspired and intended to do to his victims; and no greater prejudice will flow from that which is inherent in the charged crimes. See Legere, 157 N.H. at 761.

38. Although mention of the Disciples of Destruction as a "gang" undoubtedly carries with it a general negative connotation, that in itself does not warrant preclusion even absent a high degree of relevancy. See id.; Martineau, 116 N.H. at 799. That is particularly so here, given the limited criminality and nonexistent notoriety of the "gang" at issue, see fn.9, as well as the limited information on the Disciples of Destruction that the State ultimately seeks to elicit. Under these circumstances, the probative value of the challenged evidence is not substantially outweighed by the danger of unfair prejudice. See id. In any event, the defendant can request a limiting instruction in order to eliminate any possible prejudice. See Giddens, 155 N.H. at 181; Martin, 138 N.H. at 519.

39. The defendant's motion badly misses the mark, both in its recitation of all of the relevant facts and in its application of controlling legal principles. The challenged evidence does not constitute "other bad acts," but instead is evidence of the charged conspiracies. Viewed in this correct context, the challenged evidence is relevant and admissible in its entirety under Rule 403.

WHEREFORE, the State of New Hampshire respectfully requests that this Honorable Court:

A. Deny the defendant's Motion to Preclude; and

B. Grant such other and further relief as this Court may deem just and proper.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

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CERTIFICATION OF SERVICE

I hereby certify that the foregoing was mailed this day, postage prepaid, to Andrew S. Winter and Jonathan Cohen, counsel of record for defendant Steven Spader.

Peter Hinckley