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UNITED STATES OF AMERICA

11 UNITED STATES DISTRICT COURT

12 FOR THE CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 v.

16 GARY KOVALL, et al.,

17 Defendants.  
18

No. CR 12-441(A)-MFW

MOTION IN LIMINE TO PRECLUDE  
EVIDENCE OF DEFENDANTS' PRIOR  
LAWFUL CONDUCT

19  
20 Plaintiff United States of America, by and through its counsel  
21 of record, the United States Attorney for the Central District of  
22 California, hereby files its motion in limine to preclude evidence of  
23 defendants' prior lawful conduct.  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. ARGUMENT

3 A. Evidence Of Defendants' Prior Lawfulness And/Or Non-Corrupt  
4 Conduct Is Not Relevant To This Case

5 The government moves the Court to exclude all evidence offered  
6 by defendants of their lawfulness and/or non-corrupt conduct, except  
7 reputation or opinion evidence offered by character witnesses  
8 strictly in accord with the limitations of Federal Rule of Evidence  
9 405(a).<sup>1</sup> Other than testimony from character witnesses fitting  
10 within the narrow confines of Rule 405(a), no such evidence is  
11 admissible.

12 In an effort to distract the jury from the charges defendants  
13 face, they may seek to introduce evidence that on some prior  
14 occasions, they performed work that benefitted the tribe, or  
15 conducted business with the tribe that did not involve the payment of  
16 bribes. Any evidence or argument of this sort is inadmissible, and  
17 the Court should exclude it. See United States v. Spencer, 1 F.3d  
18 742, 744 (9th Cir. 1992) (noting that a character trait must be an  
19 essential element of the defense to allow specific instances of prior  
20 conduct).

21  
22  
23 <sup>1</sup> Even evidence offered under Rule 405(a), of course, cannot  
24 include specific instances of good conduct: it is limited to a  
25 description of the subject's reputation or to a brief statement of  
26 opinion, without support from specific instances of conduct. See  
27 Advisory Committee Notes to Rule 405 (The rule "contemplates that  
28 testimony of specific instances is not generally permissible on  
direct examination of an ordinary opinion witness to  
character . . . . [O]pinion testimony on direct in these situations  
ought in general to correspond to reputation testimony as now given,  
i.e. be confined to the nature and extent of observation and  
acquaintance upon which the opinion is based").

1           The government acknowledges that the defense may wish to  
2 introduce evidence regarding the reasons each defendant engaged in  
3 the charged conduct to prove that they did not have the requisite  
4 intent to be guilty of the crimes charged in the First Superseding  
5 Indictment. The government does not dispute that such evidence can  
6 be used for that limited purpose. However, defendants should not be  
7 permitted to argue -- or even suggest -- that that their other  
8 dealings with the tribe were lawful and/or non-corrupt. Doing so  
9 would improperly allow defendants to rely on evidence that they did  
10 not engage in criminal conduct in other transactions with the tribe  
11 to establish their innocence in this case.

12           It is well-established as a matter of law that a defendant may  
13 not elicit of prior lawful conduct to prove his innocence. See  
14 Michelson v. United States, 335 U.S. 469 (1948); see also United  
15 States v. Messano, 114 Fed. Appx. 785, 789 (9th Cir. 2004) (finding  
16 that the Court properly excluded defendant's involvement in adult  
17 dating relationships in trial for inducement of minors); United  
18 States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) (excluding taped  
19 proof that defendants met regularly and did not discuss criminal  
20 activity). Evidence of other lawful behavior is irrelevant because  
21 acts of honesty do not prove an absence of dishonest acts. See,  
22 e.g., id.; United States v. Marrero, 904 F.2d 251, 260 (5th Cir.  
23 1990) (holding that specific instances of conduct are not admissible  
24 as circumstantial evidence proving lack of intent); United States v.  
25 Beno, 324 F.2d 582, 589 (2d Cir. 1963) ("Evidence of noncriminal  
26 conduct to negate the inference of criminal conduct is generally  
27 irrelevant."); United States v. Grimm, 568 F.2d 1136, 1138 (5th Cir.

1 1978) (upholding exclusion of evidence that used car dealer paid for  
2 some cars instead of stealing them).

3 To hold otherwise would be to eviscerate the carefully drafted  
4 limitations of Rule 405. "The language of the rule states in  
5 straightforward manner that evidence of specific instances of conduct  
6 may only be made when a person's character is 'an essential element  
7 of an element of the charge or defense.'" United States v. Keiser,  
8 57 F.3d 847, 856 (9th Cir. 1995); see also Spencer, 1 F.3d at 744.  
9 Like Rule 403, Rule 405 is intended to prevent the series of wasteful  
10 "mini-trials" which would inevitably ensue if the defendant were  
11 allowed to pursue this irrelevant line of inquiry. The Advisory  
12 Committee Notes for Rule 405 conclude that proof of character by  
13 means of specific acts "possesses the greatest capacity to arouse  
14 prejudice, to confuse, to surprise, and to consume time." See, e.g.,  
15 Grimm, 568 F.2d at 1136 (evidence of lawful transactions "could have  
16 complicated the case and confused the jury").

17 **B. The Court Should Exclude Evidence And Argument Relating To**  
18 **A Jury Nullification Defense**

19 Defendants have no right to a jury nullification instruction.  
20 United States v. Powell, 955 F.2d 1206, 1213 (9th Cir. 1991).  
21 Defendants, therefore, have no right to present evidence relevant  
22 only to such a defense. Zal v. Steppe, 968 F.2d 924, 930 (9th Cir.  
23 1992); United States v. Griggs; 1995 WL 7669 \*3 (9th Cir. 1995);  
24 United States v. Funches, 135 F.3d 1405, 1409 (11th Cir. 1998)  
25 (collecting cases).

26 Any argument or evidence about beneficial work that defendants  
27 did for the tribe or their prior lawful conduct with the tribe is  
28 irrelevant to the statutory elements of the crimes that the

1 government has to prove beyond a reasonable doubt. Further, such  
2 arguments or evidence are not relevant to any valid defense that is  
3 available to any defendant.

4 The only purpose for such arguments is to attempt to "back door"  
5 a jury nullification defense. See Powell, 955 F.2d at 1213.  
6 Accordingly, such arguments and evidence are improper and should be  
7 excluded because they are irrelevant and will unnecessarily confuse  
8 the issues and mislead the jury.

9 **II. CONCLUSION**

10 For the foregoing reasons, the government respectfully requests  
11 that this Court exclude all evidence offered by defendants of their  
12 lawfulness and/or non-corrupt conduct, except reputation or opinion  
13 evidence offered by character witnesses strictly in accord with the  
14 limitations of Federal Rule of Evidence 405(a).