

Missing V-3
215 - 275

FEBRUARY 8, 2001

THE COURT: All right, we had a chance to briefly run through in chambers the pre-trial rulings that I was still hanging on the fence about, so the attorneys can be thinking about what they want to argue. I'm going to start with you, Mr. Wetle, and I'll ask you if you have any further argument on any of your offers of proof, and anything else in regard to the admissibility of the various items of proof that you wish to introduce.

MR. WETLE: No, your Honor. As we come to the contested areas, I guess, if I could address them at the time.

THE COURT: Okay. Well, that's what I was going to have you do if you want to go ahead with that. If there's anything that I didn't mention that I was having trouble with that you think I should have been having trouble with, feel free.

MR. WETLE: Let's see. The ones I know-- Let's see. Like on page 2, bullet 6, Rob Schultz says the nark is going to show up at the barter fair and John Douglas-- that John told Douglas some of the information. I guess that just goes to a foundational issue and we'll see if that doesn't get developed a little more with some more backgrounds, so I'd ask the court to reserve on that.

THE COURT: Okay, and we're talking about what Douglas Grange says-- is going to testify to, in this section?

MR. WETLE: Right.

THE COURT: Okay.

MR. WETLE: And I think that-- Was it the first part was okay? Douglas said that Rob said the nark was going to show up at the barter fair?

THE COURT: That was my inclination, yes. The second one--

MR. WETLE: It's the second part, and--

THE COURT: What I was wondering is if-- That didn't come out, I don't think, on the-- You know, come to think of it, it might have been in Exhibit 2, the statement of Mr. Grange. So to the extent that it was in that, would be admissible, assuming he says it on the witness stand.

MR. WETLE: I think he was reluctant to say what his son had said, and so then just said that John told him some of the information, I think is how it finally came out, but--

THE COURT: Okay. All right, then, the next one that I was having concerns about had to do with page 3, bullet 10: Douglas thought John met Dane at Rob's house. And my question about that was what was the source of his understanding or his thought.

If it came from John Grange, then that would be admissible as an admission of his connection with Rob Schultz. If it came from some other source, I suppose it would depend on the source.

So depending on the foundation, but did you have anything else to say about that?

MR. WETLE: No.

THE COURT: Okay, now, page 4-- I guess I will just kind of walk through this. Page 4, item 2, in the top of the page, about the fellow down at the Waterside Park in Portland. My inclination is to exclude that because the State cannot establish it by a preponderance of the evidence through this witness, because of his testimony yesterday on the stand. Anything to say about that?

MR. WETLE: I think-- Right. I think you're correct, your Honor. Based on what he said, I don't know how to get it in.

THE COURT: Okay. All right, so that one is dealt with. Then, Mr. Simeone, we won't need to hear from you on that any further.

The next one I had marked was on page 5, paragraph 1. I'll hear your argument on why that should come in, and in what form. Should there be-- Should it be allowed that a confidential source, or should the source be named in order to get it in?

MR. WETLE: We can name the source, your Honor.

THE COURT: Okay.

MR. WETLE: The CS will be named. And it goes to the verbal acts in terms of showing a conspiracy existed and how-- Well, let's see. This is background information on how Mr. Kaiser was arrested.

THE COURT: Okay, now, is the confidential source allegedly a member of the conspiracy?

MR. WETLE: Yes, he would have been part of that organization.

THE COURT: Okay.

MR. WETLE: Because he knew that the source was in the Berkeley area and then got distributed in the Puget Sound area, so that would go to-- that is someone who was involved in the overall conspiracy.

THE COURT: Okay, but I suppose you would concede, wouldn't you, that when he's talking to Dogeagle he's not speaking in furtherance of the conspiracy, or in the course and conduct of the conspiracy?

MR. WETLE: No. He's been arrested and he is now trying to get a better deal. I guess what Dogeagle does is it shows how Mr. Kaiser got arrested. How he was able to arrest him to get to the situation where the Family needed to get rid of Mr. Kaiser. So in that respect I still think it's a verbal act showing how they-- how the officer got involved in the case to be able to put it together.

THE COURT: But in order to be able to be one of those verbal acts, doesn't it have to be a statement under 801 (b) (2) (v)? Doesn't it have to be a statement in furtherance of the-- and in the course of the conspiracy? Eight-o-one (d), excuse me. Eight-o-one (d) (2) (v)? A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy?

MR. WETLE: Well, this person-- it would show that there was the overall drug trafficking conspiracy, that, you know, he was involved.

THE COURT: Okay. And I take it you are offering to-- offering it to show that Kaiser was in fact involved in an LSD trafficking organization which got the LSD from the source who resides in the Berkeley area, and then distributed it to the greater Puget Sound area?

MR. WETLE: Yes.

THE COURT: Okay. I think you're out of luck, Mr. Wetle, on that one. In terms of the details of it, I think you-- the fact of the arrest can be testified to by the officer, but that would not be subject to 801 (d) (2) (v) exception, because it's not a statement by a co-conspirator during the course and in furtherance of the conspiracy; it's well outside the conspiracy and contrary to the conspiracy, so to speak, if he's turning state's evidence, this confidential source. And so my thought is that that would not-- It's not-- I think my-- You know, it's just plain hearsay basically, if you're offering it to prove that Kaiser was involved in all of that detail there. But if you want to talk about what Detective Dogeagle talked about yesterday, or Agent Dogeagle talked about yesterday, which was that he arrested him and he discovered him with gloves on and

that he had LSD on blotters and that he had X, Y and Z, then certainly that is something that Dogeagle can testify about, but I think this is just plain hearsay.

MR. WETLE: Okay.

THE COURT: So I would have to exclude that. And the next one I had of any consequence was page 6, paragraph 2. My note said-- It says in April, 2000, at a party in Williams' cabin on Crown Creek, Williams learned--and my question was from whom--that Schultz was in charge of a group of LSD dealers in Portland, and Kaiser was in charge of LSD dealers in Seattle. This is assuming that Williams testifies to this on the stand. And if Williams-- Do you know who it was that Williams allegedly learned that from?

MR. WETLE: Those were-- Not specifically, your Honor, but those were-- It was a party where Family members had all gathered at his place and--

THE COURT: Okay.

MR. WETLE: So it's certainly Schultz and Shadow were there, and we may be able to develop that. But once again, that is a verbal acts to prove the conspiracy.

THE COURT: Okay. All right, from-- All right, we'll hear from you, Mr. Simeone, here on all this in a minute.

The next one of any consequence was page 8, paragraph bullet 2. I think you clarify now that Cunningham-- That the

after-Christmas part was-- That Cunningham said that sometime after Christmas Rob Schultz told him about the arrest.

MR. WETLE: That's correct.

THE COURT: And the fact-- And the Christmas was Christmas, '99.

MR. WETLE: That's correct.

THE COURT: Okay. All right, and now that we have that clarified, I don't have any more questions about that. We'll hear from Mr. Simeone here on all these.

Page 9, paragraph 7:
Cunningham believes that when he called Rob Schultz and told him that Kaiser was at the barter fair, that Schultz turned to Shadow, and when Cunningham put Chewy on the phone, Shadow told Chewy to kill Kaiser.

My note to myself is speculation, unless foundation. In other words, unless there's some circumstantial reasonable evidence to cause Cunningham to believe that, if he just speculated that, then we have a problem.

MR. WETLE: I agree.

THE COURT: Okay, so you agree that it's speculation, unless there's some foundation--

MR. WETLE: It needs-- It needs foundation, yes.

THE COURT: Okay. And then page 10, paragraph 4, second sentence. This is talking about-- This paragraph is talking about Mr. Williams saying that Mr.-- that he was riding back

to Crown Creek from the barter fair with Mr. Grange here, and Grange told him that Kaiser and them are coming out that way and he was going to threaten them. And then the second sentence: Chewy also mentioned that he used to do this before for the Family. That he was going to make sure that he didn't come around his area any more, make sure he didn't go visit Family, let Kaiser know he wasn't wanted.

Any-- Anything about that? I know that's a major issue for Mr. Simeone.

MR. WETLE: Well, first of all, it needs to be noted to the court that it's limited to he's going to threaten him, and then he says he used to do this before, and the intent is to threaten them before. So that's what the focus of that is. That would be one, an admission that, you know, he would do that before and, second, it's maybe a common scheme. And I think it's relevant, given his position in this particular case as what the overall picture is of what is about to happen.

THE COURT: Okay. All right, we'll hear from Mr. Simeone on these in a minute.

Paragraph 7, on page 10, the part that I'm really having trouble with-- Let me just say that I think that there's a preponderance of the evidence to indicate that the "prior bad act" of threatening people, being an enforcer, being a collector for drug debts and other debts, is established by a preponderance of the evidence.

The question of whether there were-- there's a preponderance of the evidence as to Mr. Grange actually getting rid of people. That's another matter, and so what is your thought on paragraph 7, then, in regard to that offer of proof that Mr.-- Again, this is Mr. Williams saying that Mr. John Grange said he collected for the Family, people that ripped the Family off, he got rid of some people, that he was good at finding people, finding out where they were. The parts that I have trouble with in terms of a preponderance are just the part: He got rid of some people.

MR. WETLE: I suppose that needs to be further clarified too, your Honor. Part of what they do is, and there was evidence that the Families, one of their modus operandi is to tell them that they can no longer associate or be at certain places.

THE COURT: Ostracized.

MR. WETLE: Ostracized. And I know-- I think they were going to-- Even when the nark showed up they were supposed to have alerted the security at the gate to not let them in, or what they call the lot, and so to get rid of some people is either to ostracize them or scare them away--

THE COURT: I see.

MR. WETLE: --or possibly murder. I think it just needs to be clarified as to how, you know, in what context that should be taken.

THE COURT: Okay. All right, thank you. So you're wanting to reserve that pending clarifying that with Mr. Cunningham?

MR. WETLE: Yes.

THE COURT: Okay. And then paragraph 10, the last couple of clauses there, right before the semi-colon-- second semi-colon from the back:
Chewy had done this before, that he had taken care of people, that he's been a collector for the Family for years.

Same thing, then? You want to clarify that?

MR. WETLE: Yes.

THE COURT: Okay. And then the same thing at the top of page 11, first paragraph. You want to reserve that as well?

MR. WETLE: Yes.

THE COURT: Okay. Then on all of the material concerning Brian Nehring, I know Mr. Simeone has a problem with the relevancy there, so do you want to touch on that, please?

MR. WETLE: Thank you. Your Honor, we-- We know we have established the link between Kaiser and San Francisco and Oakland for his source of LSD. What we expect at trial is that Kim Kerpin will show the close relationship, friendship, between Josh Schaefer and Nick Kaiser, and it just happened that those were the two people that were killed here together at the Crown Creek cabin. Their ties go back a long ways. They were both in the LSD business. They had both been busted and turned State's evidence, and within

a month of the information getting out on Josh Schaefer in Oakland as to what he had done, he happens to be with Nick Kaiser and he is also killed. They're both in the LSD business, they're both on the West Coast, they're both friends. It seems unlikely that this is just a happenstance circumstance and that there's an over-arching conspiracy here. So on that basis, I wanted to call Detective-- or Agent Nehring to show what had happened to Josh Schaefer to show the connection between the two people.

THE COURT: Okay, now, is Ms. Kerpin going to testify--

MR. WETLE: Yes.

THE COURT: --that Mr. Schaefer was in the LSD business?

MR. WETLE: I believe so. They both got arrested.

THE COURT: Okay, and is she going to testify that he was a member of the Family?

MR. WETLE: Yes.

THE COURT: Okay. All right, thank you. Mr. Wetle, let's move to the next-- your two-page document called Additional Offer of Proof. I didn't have anything other than I marked that on page 2, paragraph 4, the last paragraph, the Irish Mafia tattoo. I already ruled on that yesterday that that would be excluded.

MR. WETLE: That's correct.

THE COURT: All right, anything else to say on any of these offers of proof unless-- excuse me, before I hear from Mr. Simeone?

MR. WETLE: No, your Honor.

THE COURT: Okay, now, Mr. Simeone?

MR. SIMEONE: Your Honor, I'll renew the standing objection that I've made by way of my pleadings as to the-- the offer of proof items. In addition to that, though, I wanted to go and touch on all of those specific ones that you discussed, without going through all of these that I have done in my--

THE COURT: In your brief.

MR. SIMEONE: --my brief and my memo. I'll go through those that are of concern to the court seriatim. Where do we-- Where did you want to begin then? Would that be Item Number 6 on page 2?

THE COURT: Right.

MR. SIMEONE: And, your Honor, there I don't know that we have enough in the way of a foundation to show that that's a conspiratorial remark. I think that was my chief objection to the admissibility of that. And I don't know whether or not-- It's still not clear, even after Mr. Grange's testimony yesterday, in my mind, when it is that that took place in time. And if it's after the fact, I don't know that it's conspiratorial, and that's largely what I was trying to clarify with him yesterday.

THE COURT: Okay. **Here's my ruling on that one.** And, by the way, my ruling on everything up until then is that-- all of the offers of proof up until then are that they are admissible.

Some of them are not objected to. One, 2 and 3 on page 1 are not objected to by the defendant. Three through 9 are admitted. Three is-- Well, I'm sorry, 3 I already did admit.

MR. SIMEONE: You mean 4?

THE COURT: Four through 9-- By the way, I think that means it was a nark, not a mark, that you meant on that typo there, Mr. Wetle.

MR. WETLE: I'm sure.

THE COURT: That will be admissible as a statement of a co-conspirator in furtherance of and in the course of a conspiracy. The same with Number 5, Number 6, Number 7, Number 8, which was also okay with the defendant. Number 9, same theory of admissibility. The Number-- On page 2, Number 1, same 801 (d)(2)(v) reason. Same with Number-- paragraph 2 on page 2; paragraph 3, paragraph 4, and I believe the same thing applies to paragraphs 5 and 6. There's an independent reason to admit whatever information John Grange told Douglas Grange on the admission of a party opponent, the other subsection to Rule 801. So that will be admitted.

MR. SIMEONE: Your Honor, with regard to Number 7, we never really did have any-- we never really did get any foundation from Mr. Grange that he knew that-- He says he got the information from more than one person now, and we're talking about these conspirators and all of a sudden I think we're getting a little

relaxed on who the conspirators are and it worries me. He-- I don't know who he's getting this information from. He's saying he has-- he gets it from more than one person, but, you know, I think it's unfair to all of a sudden now start grouping everybody as a conspirator, which I think is what we're-- what we're-- we're falling into that trap.

THE COURT: Okay. Well, as I found yesterday, the conspiracy that I found there was a preponderance of the evidence to establish, making these other statements admissible, is a sub-group of the Rainbow Family, according to the testimony of not only Mr. Grange through his lengthy statement, Exhibit 2, but also from-- from the offer of proof that came in through Detective Erdman. So Number 7 is admissible.

Number 8, the same on a statement of a co-conspirator. He's learned this at his-- his times that he has been at the-- at the Schultz home, is what his testimony-- or his statement indicated that he would be testifying to.

Same with Number 9, Number 10, Number 11, 12, 13, 14, 15, and I guess this doesn't have a number here, but that would be 16.

MR. SIMEONE: The bottom one?

THE COURT: The bottom paragraph. Now, page 3, Number-- Paragraph 1 is admitted for the same reason, 801 (d) (2) (v). Paragraph 2, the same. Paragraph 3, the same. Paragraph 4--

Well, no, wait. Paragraph 3 was an admission of a party opponent. Paragraph 4, the same. Personal observations. Paragraph 5, the same, and also persona observations. Six, the same. Seven is an admission of Mr. John Grange, party opponent. Number 8, the same, admission of a party opponent. Number 9 was 801 (d) (2) (v), just further background information he came upon by his contacts at the Rob Schultz--

MR. SIMEONE: Are you-- Is that Number 9, your Honor?

THE COURT: Nine, yes. Did I say five?

MR. SIMEONE: I don't know where that's conspiratorial of anything, your Honor.

THE COURT: Well, I agree that it-- that it may not in and of itself, standing alone, and I'm not sure how--

MR. SIMEONE: And then there's the relevance.

THE COURT: --important it is.

MR. SIMEONE: Relevance issue too.

THE COURT: True. I'm not sure how important it is, but to the extent that-- And, Mr. Wetle, I guess we don't need to go off on a tangent about who all went to Montana, if that has absolutely nothing to do with these murders.

MR. WETLE: Just Cunningham. I think that was maybe the last time that he was seen by the Family, or was some-- He was falling out at that point, and--

THE COURT: Oh, Mr. Cunningham was being ostracized?

MR. WETLE: He said they all went to this Family gathering in Montana, even Jeff, and at that point I think he was being-- he considered himself to being spun, and was disappearing.

THE COURT: Oh, in July. I see. Okay, well, that can come in to the extent you make that connection on the relevancy.

Number 10 is what I had marked next about what the source of this information is.

MR. SIMEONE: Is that July, 2000?

THE COURT: I believe that's what you meant, July 2000 in the previous paragraph 9?

MR. WETLE: Yes.

THE COURT: Yes. Okay, Number 10, do you have anything to say about that, Mr. Simeone?

MR. SIMEONE: Yeah, because I think there's conflicting information all over the place about when it is that he's supposed to have met him. I'm also questioning the source of Mr. Grange's information that he supposedly met-- John supposedly met Dane at Rob's house. I think it's speculation.

THE COURT: Yeah, I think we would need some more foundation on that.

MR. SIMEONE: Well, on that point, your Honor, I know that you've made that observation in a couple of things. What-- How do you envision that we're going to go about clarifying the things that we're supposed to clarify by either getting more foundation

or to prove. Now, is this something that's going to take place outside the presence of the jury, or is it just going to come up in their testimony? I mean I--

THE COURT: No. That's a good question. No. It will come up in their testimony, with the exception of this really important area that will have to take place outside the jury about these prior statements about getting rid of people. That'll take place outside the presence of the jury.

These kind of minor things about-- I guess suffice it to say, Mr. Wetle, you will need to phrase your questions in such a way that it doesn't call for speculation, that it calls for whatever the source is of whatever information is being asked for.

MR. SIMEONE: Another thing--

THE COURT: It's clear from the context that he was talking to John Grange and that's how he knew that John Grange met Dane Williams at Rob Schultz's house, well, then, fine. That's obviously non-hearsay. That's an admission of a party opponent.

MR. SIMEONE: So those-- You envision that those are objections that I'll make along the way, then--

THE COURT: Right.

MR. SIMEONE: --if they fall short of what I feel is--

THE COURT: Sure.

MR. SIMEONE: Okay, and another thing along those lines, I wanted to clarify whether or not my objections to these given items that we've reviewed now in depth, are these objections that I've then made for the record and you're--

THE COURT: Yes.

MR. SIMEONE: I mean you don't want me at each and every juncture here when this information comes up in testimony to start saying that I object because I feel it's either-- there's foundational or speculation or there's-- It's-- There's no corpus delicti or that it's-- It's not a-- a common _____ furtherance of conspiracy, and I feel like we're sufficiently--

THE COURT: Right.

MR. SIMEONE: --doing that here.

THE COURT: That's true.

MR. SIMEONE: ___ preserve my record.

THE COURT: Yeah. No, you have made your record and you don't need to make it again.

MR. SIMEONE: Okay, I wanted to make--

THE COURT: Right.

MR. SIMEONE: I don't want to interrupt, whereas at the same time I don't want to lose whatever--

THE COURT: That's true.

MR. SIMEONE: _____ arguments I have.

THE COURT: That's true. Okay, ready to go with Number 11?

MR. SIMEONE: Yes.

THE COURT: Okay. That would be, again, admissible under 801 (d) (v) -- (d) (2) (v) because of his observations and the statements made to him in the Rob Schultz home by Family members.

Same with Number 12.

MR. SIMEONE: My objection to 11, your Honor, is speculation there as part of how-- whether there's any foundation or how it is he's supposed to know that. Knows that, whether or not that's a guess on his part based upon what he's believing to be true.

THE COURT: Okay. Well, the part that provides him with the foundation is that they always knew what the others were doing and what was going on. So-- And what he's talking about is the activities of Family members in other states. So to the extent that he can testify that there were frequent discussions about what the others were doing and what was going on in other states, then he can-- he can say that, but that would be the circumstantial evidence that-- that Rob Schultz had contact with Family members in other states, or that others had contact with Family members in the other states. So he doesn't get to say it-- You know, Rob Schultz-- I think Rob Schultz had contact with Family members in other states. He gets to say they always knew what the others were doing and what was going on in other states.

MR. SIMEONE: Well, _____ for his testimony.

THE COURT: They were always discussing that, so-- But he doesn't get to speculate that Rob had contact or somebody else, unless he saw him actually make phone calls or have contact with him, Mr. Wetle.

MR. WETLE: Okay.

THE COURT: And then Number 12. Thought the Family was spread out across the United States. I guess we need some foundation on that. I didn't think of that. Mr. Simeone?

MR. SIMEONE: Same argument there as the prior one, your Honor. I think he's wildly speculating _____.

THE COURT: Okay. You'll need to lay your foundation on that before you can get it in then, Mr. Wetle.

Number 13 was okay with you, Mr. Simeone, my notes say. Number 14--

MR. SIMEONE: Well, your Honor, I kind of reconsidered my position on that. It's the same as in the above _____. I think these are major points, not that I really care, but so long as we're going to be consistent here--

THE COURT: Sure.

MR. SIMEONE: --I don't know how he knows that.

THE COURT: Right. Mr. Wetle, my understanding was from something that Mr.-- that Detective Erdman said, I believe that John had actually observed selling of drugs and that he had been

aware through John that he had been selling drugs from the Family for-- for about nine months. Is that your understanding?

MR. WETLE: I don't know if he observed it or not, your Honor. I think he asked him.

THE COURT: Okay, well, you need to get the foundation there then.

MR. SIMEONE: Again, you know, so we're in the right ballpark here, I mean, keep an eye on what it is that we're doing. We still have basic-- basic hearsay rules that apply, and one we're talking about something here that's conspiratorial, I don't think you can just shovel this in under the (d) (v) exception to hearsay.

THE COURT: Well, but certainly if he knows it through John Grange or through his own personal observations it's--

MR. SIMEONE: Right, your Honor.

THE COURT: --admissible--

MR. SIMEONE: I understand.

THE COURT: --as the background information, so to speak, of the existence of this drug trafficking conspiracy alleged by the State. And then to the extent that he knows about it from other Family members, then that would also be 801 (d) (2) (v) exception.

MR. SIMEONE: Right, if it's like a conspiratorial thing, if we're going to-- But what I'm afraid of is we're getting

off too far with this-- We start to think that everything's an exception here based upon that conspiracy exception, but a lot of these things are just basic bedrock evidentiary rules here--

THE COURT: Right.

MR. SIMEONE: --to decide whether or not they're hearsay. He thought he met Dick, John and to him he admits-- This is just a straight hearsay objection. He thought he had-- Rob had contact with Family members. Again, that's strictly hearsay. Where does he know that? How-- Or is it speculation?

THE COURT: True.

MR. SIMEONE: For the same-- the same for the rest of them, unless you can _____.

THE COURT: That's why we're going through them, Mr. Simeone.

MR. WETLE: Well, your Honor, they're all hearsay. It's the hearsay-- There's an exception to the hearsay rule under this 801.

THE COURT: No, it's not-- it's non-hearsay.

MR. WETLE: Well, okay. I'm saying it's an exception--

THE COURT: If it's 801 (d) (2) (v) it's non-hearsay.

MR. WETLE: Okay.

THE COURT: Go figure, but-- So-- But I hear what you're saying, Mr. Simeone, that we can't-- We can't just lump it all

together--

MR. SIMEONE: Right.

THE COURT: --and shovel it in. So in regard to Number 14, and I know you made an additional objection besides hearsay on that, that was without admitting the truth-- No, wait.

MR. SIMEONE: I said no objection, but I clarified in my-- reconsidered my position on that one.

THE COURT: Okay. All right, so you do object. And so we're going to wait for the foundation for how he knows that, but assuming he has direct knowledge of it, either through a member of the Family or through his own observations, then obviously that can come in, Mr. Wetle. Or if he knows that from Mr. John Grange himself.

MR. SIMEONE: I have no objection to Number 15, without admitting the truth _____.

THE COURT: Okay. All right, now, page 4, top one, Number 1, and I'll hear your objection on that, Mr. Simeone. I know you object to that. My thought is that it's admissible as an 801 (d) (2) (v).

MR. SIMEONE: You're talking about Number 1 at the top of page 4?

THE COURT: Right, top of the page.

MR. SIMEONE: Well, we have it "them," Douglas heard "them," [quotations supplied] talk about people, and I don't know what

his source is, and I think it's a foundational issue there again.

THE COURT: Okay. Well, as long as it's those people at Rob Schultz's house or those people that he knows to be members of the Family then, he would be-- that would be an 801 (d) (2) (v) exception.

MR. SIMEONE: Again, I don't know if your Honor-- you're talking about people-- I think what you said there we're going to make this conditional on other people at Rob's house. Again, I think we're getting into a situation where everybody at Rob's house is now a member of his Family, or a member of his sub-group or family. That's a conspiracy, or a conspiratorial group, and therein lies the danger. He talked to people. It's getting to me to be very unreliable, which is the basis of the hearsay rule, and I don't know that it really meets the exception without some clarification of who it is we're talking about there. So far as I can tell from that statement, he heard them talk about people. I don't know the antecedent reference is to them.

THE COURT: Okay. And your objection's noted, but I think that the context of the statement from Mr. Grange is very clear that he learned this from people that he identified as members of the Family involved in this illicit gambling business. Gambling, excuse me. Drug trafficking business, similar to the gambling business, so to speak. Illicit gambling conspiracy in the Maruso (sp?) case. So that would be admissible.

And then paragraph 2 has already been excluded as conceded by the State, so we can go on to--

MR. SIMEONE: Okay.

THE COURT: Paragraph 2 is already excluded. So then down to the Warren Dogeagle part, paragraphs 1, 2 and 3, you had no objection to. Paragraph 4--

MR. SIMEONE: That's right. One, 2 and 3, I don't care.

THE COURT: Four through 8, why don't you go-- talk about those, 'cause I didn't have any problem with those under the co-conspirator statement rule, unless you can persuade me otherwise. That was my thinking, that those would come in.

MR. SIMEONE: Inflammatory, I think, to the jury, your Honor, so it's-- we're still getting down to the basic analysis that you have to have when deciding the admissibility of any of these kinds of conspiratorial statements as they're used. If you look at the Guloy case we still have to have the-- whether or not the probative value outweighs the prejudicial effect. And we can start talking a lot about what he did and the quantities and that kind of thing. All I feel that that kind of information does, we start talking about 10,000 or 70,000 dosage units of LSD, which is to the common individual and juror going to be something that's totally socially unacceptable and would horrify them. I don't know that it's necessary, even as background information or whatever else you want to categorize it. I don't

see where that's specifically something that helps them lay a foundation that there's this conspiracy to sell-- to sell drugs.

THE COURT: Okay. You know what? Something else just occurred to me, Mr. Wetle, that is a problem with this, and it's the same problem that I indicated that I had with the so-called confidential source at the top of page 5. This is Mr. Kaiser making these statements to a federal agent that he knows to be a federal agent. It's not-- It's not a statement in furtherance of the conspiracy at that point.

MR. WETLE: It's also a declaration against interest, your Honor.

THE COURT: It's also by a dead man that we can't--

MR. WETLE: He's unavailable.

THE COURT: --cross examine.

MR. WETLE: He's unavailable.

THE COURT: But my thought is that you're trying to offer some of this just to prove that it occurred, not that-- just to prove that the arrest occurred and that the turning of state's evidence occurred.

MR. WETLE: And the connection to San Francisco.

THE COURT: And the connection to San Francisco. Not--

MR. WETLE: And the LSD.

THE COURT: Why the LSD?

MR. WETLE: Because that's the connection with Josh and San Francisco. That's the business they're in.

THE COURT: But--

MR. SIMEONE: I think at that point-- He's saying declaration against interest. I think at that point he's already fashioned a deal between him and the authorities, so I don't know that that exception applies, your Honor. The court well notes that this is after the fact of any kind of buying and selling activity. All he's doing is talking to the officers now. That's not in furtherance of a conspiracy.

THE COURT: Okay. But you want to get in as much detail as you can, Mr. Wetle?

MR. WETLE: We need--

THE COURT: Because--

MR. WETLE: We need to show the overall picture to the jury, your Honor, and to sanitize it and, you know, say he got arrested, you know, and not get the background and circumstances in what he's doing and the connections, I think are-- are not giving the jurors the overall picture.

THE COURT: But don't you have to do that through admissible evidence?

MR. WETLE: Well, you do, and you can either do it under 801, co-conspirator statements, or you can do it under--

THE COURT: But--

MR. WETLE: I see what you're saying.

THE COURT: You don't concede that that's not a--

MR. WETLE: Yes. And then--

THE COURT: --a statement-- You don't concede that it's not a statement-- Well, let me put it this way. How is it a statement during the course and in furtherance of the conspiracy if it's made to a federal agent, or any kind of law enforcement agent? Knowingly. Now, I can see if it was an undercover agent and he didn't know he was--

MR. WETLE: I agree with you, it's not a-- that statement to the officers about how he gets his drugs is not in furtherance of the conspiracy. But I also say that that is a declaration against interest, and if there's some other exception to the hearsay rule, then whether it be an admission or a declaration against interest or a statement of intent, then that evidence would come in. And so I think there's another exception that allows this evidence to come in.

THE COURT: Okay. Anybody remember the declaration against interest exception rule number, off the top of their head?

MR. SIMEONE: Eight-o-three. I think it's-- But I don't know what sub-section.

THE COURT: Just a second here. Okay, so he's an unavailable witness.

MR. WETLE: That's correct.

THE COURT: Eight-o-four (b) (3) is an unavailable witness who has a statement against their interest, ...which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

So your argument, Mr. Simeone, is--

MR. SIMEONE: My argument--

THE COURT: --that it wasn't against his interest, he was-- he was doing it because it was in his interest.

MR. SIMEONE: Precisely, your Honor. And if you look at paragraph 8 you'll see that he entered into an agreement. That's something that they're going to produce in evidence in their case. He entered into an agreement to cooperate for leniency, so I don't see how that-- I mean that militates directly against their position that this is against his interest. It's in furtherance of his interest.

THE COURT: Okay. All right. Well, in reading through 804 (b) (3) and the comments, the court is required to make a determination of trustworthiness of the information offered. It has to be sufficiently trustworthy as shown by corroborating

circumstances. And I think that we have adequate corroborating circumstances that Mr. Kaiser was involved in the LSD trade, so to speak, and that in spite of the fact that this is an agreement to turn state's evidence in order to obtain leniency, which is perhaps in favor of his interest, as opposed to contrary to his penal interest, nonetheless he is admitting to major crimes without any promise that he will get completely off the hook for his admissions, but instead that the officers would do the best they could with the U.S. attorneys, in accordance with that agreement.

The Ryan, State v. Ryan, guidelines that we're to consider are-- And that's 103 Wash. 2d 165. Or whether the declarant had an apparent motive to lie. And I don't think he had a motive to lie, as shown by the content of the information itself. He had a motive to tell the truth in order to-- to develop trust, so to speak, with the officers and not-- not cut his own throat later. Let's put it that way.

Whether the general character of the declarant suggests trustworthiness, that is hard to determine in this case, other than that the information itself is so detailed that it seems to speak of trustworthiness.

Whether more than one person heard the statements, and yes, there were statements within the Family, so to speak, by these co-conspirators, but also a statement to more than one law

enforcement officer about the-- about the situation.

And whether the timing of the statements and the relationship between the declarant--that's Mr. Kaiser--and the witness--that's Officer Dogeagle--suggest trustworthiness, I think they do when all is said and done, in spite of the fact that it is-- in order to obtain leniency it doesn't have-- the content of the statement doesn't have the-- it has the ring of truth as opposed to a hollowness or a faking kind of content. It's very, very detailed, as I've indicated.

Whether the statements contained express assertions of past fact. They did, and they were detailed, as I've indicated.

Whether cross examination could not help to show the declarant's lack of knowledge. I don't think that cross examination would be all that helpful here. Certainly, it would have some benefit to knowing what the basis of his knowledge was, but it's pretty clear from the content of the statement that he's admitting that he was an active participant.

Whether cross examination-- excuse me. Whether the possibility of the declarant's recollection being faulty is remote.

I'd say that the declarant's recollection being faulty is a very remote possibility here. Remote to none.

And then finally, whether the circumstances surrounding his statements give no reason to suppose that the declarant misrepresented the defendant's involvement. We're not talking

about the defendant's involvement, but we are talking about the involvement of other, potentially, Family members, but I don't think that there's any reason to suppose that he would give up to the officers someone that-- that wasn't one of his suppliers, because it would at that point be misrepresenting-- or be cutting his own throat, so to speak, so I--

MR. SIMEONE: Your Honor--

THE COURT: --do think it has internal reliability, and it is a statement against interest, it is an unavailable witness. Go ahead, Mr. Simeone.

MR. SIMEONE: I want to be heard a little bit further, your Honor. Going down the Ryan checklist here, I don't know whether or not cross examination here wouldn't help, because I don't know that there's been any-- ever any proof that this individual they refer to as Gabe was ever arrested, whether there's any proof that any of this information that he gave them actually took place. And we're accepting that this all happened. I didn't hear anything from Dogeagle to the effect that this really happened or that they followed up on these leads, and that that somehow led to a conviction. So therein lies some question of the credibility of all these-- these various impressive numbers that he's using in terms of numbers of units and dollars and that kind of thing. So I-- I don't think that it passes the Ryan tests-- those parts of the Ryan tests that call for cross

examination, and whether not that cross examination wouldn't help elicit and further the truth of what it is he's saying.

The other thing I want to say here is that--

THE COURT: Let me clarify on that one point. Mr. Wetle, is Dogeagle going to testify that this Gabe character was later arrested? That's the person that went down in California.

MR. WETLE: I think it's still under investigation.

THE COURT: I see. So he hasn't been arrested?

MR. WETLE: I don't know that, but I think it's under investigation. I thought--

THE COURT: Okay, well--

MR. WETLE: At some point I--

THE COURT: Can you clarify that, because I was under the impression that Gabe was the person that went down and that was the whole reason the hit went out. That that was what your theory of the case was.

MR. WETLE: I'm not-- I can't say that he went down. I-- I'll have to-- If the court needs to-- wants to know that, I'll have to ask.

MR. SIMEONE: So therein lies the objection. But I'll go even further--

THE COURT: Okay, go ahead, Mr. Simeone.

MR. SIMEONE: Further, your Honor, now that we're back to

like the traditional kinds of Rules of Evidence that we ordinarily deal with instead of these esoteric and exotic exceptions under what isn't hearsay, I still want to know, I need to see it and clarify it in my mind, what the relevance of all this information is to proof of the State's case, and why it is that a simple statement to the effect that he was arrested and he turned state's evidence isn't-- isn't sufficient. I think these kinds of statements here about the numbers, and they're very impressive numbers, they would intend to inflame, I think, and I think the jury's going to walk away from testimony like that just with the understanding that wow, there's a major kind of an operation involved here and something really bad is happening. And for that reason I don't think that any of this information is relevant.

MR. WETLE: Your Honor, there is a major operation and there are hundreds of thousands of dollars going through here, and I think it's important for the jury to know that.

THE COURT: Okay. I want to reserve that for now and see whether Dogeagle says that there were any arrests made, other than the-- I guess there was the one arrest that was made--before we get into talking about the specifics of who Gabe was. And, by the way, Dogeagle didn't talk about that yesterday on his-- on his testimony. He talked about Mr. Kaiser turning in one of his suppliers and--

MR. WETLE: An arrest was made.

THE COURT: --making a reverse on one of his buyers.

MR. WETLE: Which would tend to corroborate his statements, your Honor.

THE COURT: Correct. But turning in the supplier and whether or not there was an arrest from that, my understanding was that one of his buyers was not in San Francisco or the Bay area, but, instead, was in Seattle.

MR. WETLE: No, that was-- Gabe was thought to have been located in the Seattle area and they would fly to San Francisco and make the transactions. That's where they pick it up. And then both would take separate planes back to the Seattle area. Yeah, the transactions occurred in San Francisco, but Gabe had a base in Seattle as well.

THE COURT: Okay. The person who gave up, so to speak, was Petee?

MR. WETLE: Yes.

THE COURT: In Seattle?

MR. WETLE: Yes, I believe it was-- he sold \$10,000 worth in Seattle. Or in Washington.

THE COURT: Okay. All right. I need to clarify, then, whether-- whether there were any arrests in California as a result of the Kaiser investigation.

MR. WETLE: I don't know that it's that important, your Honor,

but I would ask him. I mean--

THE COURT: When you say it's not important, when I was getting the whole impression from you that the whole purpose of this was to show the San Francisco hit order--

MR. WETLE: Yes.

THE COURT: Based on people in San Francisco or Oakland or Berkeley going down on account of Nick Kaiser's information.

MR. WETLE: I don't know whether the investigation is still going on or whether they have put together their case. I guess I hate to have the court make a major decision based on whether or not the person's actually been arrested. I think that--

MR. SIMEONE: Or any-- Or anybody.

MR. WETLE: --the information is there and they may be in the process of investigating that circumstance, or he may have fled the area, and so I guess I will try to find out for the court some of the background for it, but I would hope there's enough reliability, trustworthiness, corroboration on the overall picture to not have that by itself slant the court's view of the whole basis for this information.

THE COURT: Well, forgive me, but the whole basis of my rulings in this regard has been the fact that there was this conversation that Doug Grange overheard at Rob Schultz's house about the people in San Francisco going down and the people-- the leadership in the Family in San Francisco being upset and loaded for bear,

so to speak, about them going down on account of the unnamed nark, later determined, we think, to be Mr. Kaiser. If Mr. Kaiser--

MR. WETLE: I think it was Seattle and San Francisco people going down or got burned.

MR. SIMEONE: I never-- I never heard that before.

MR. WETLE: Both-- Both areas had--

MR. SIMEONE: And we're-- I think we're now tailor-making what the background is, ____ what he means here, your Honor.

THE COURT: Okay. Well, find out from Dogeagle, because I-- you know, that was a major part of my ruling, Mr. Wetle.

MR. SIMEONE: I agree with that, your Honor, and I'll also say he's going to have an opportunity now to talk to Mr. Dogeagle. They tailor his testimony to say oh, Seattle or San Francisco, where I know exactly what's been said in the information so far, is that the reason that all of this retribution is happening is because these people in San Francisco feel that Nick, who is a trans-- a transaction-oriented guy in the San Francisco area has brought heat down on him. We got investigation now of people in San Francisco. That's what Mr. Wetle's saying. We don't have any convictions of anybody in San Francisco, plus how-- If we just have investigation of people, how do they know that there's anything that's really troublesome to them if they've not been arrested or any heat's been brought down on them? And it-- Really, it's-- It's totally inconsistent.

THE COURT: Okay, let me rule on the issue of the inflammatory nature of the ten to 70,000 dosage units, \$4500 per 10,000, et cetera. You know, I think that adds credibility to the-- to the internal credibility. That is to say, to the statements given against interest by Nick Kaiser to the police, and because it is such a serious admission, without an overall promise to do anything but try to do their best to be-- to give a good-- put in a good word to the U. S. Attorney. By the same token, the-- it does show-- has a tendency to show the major nature of the drug trafficking activities, the dollar value, the magnitude of the drug operation, and that is, then, probative of the conspiracy theory, and so that is relevant and it's also, I think, more probative than it is prejudicial.

I'm troubled by this-- Very, very troubled, Mr. Wetle, about the fact that now we say there weren't any arrests that resulted from Mr. Kaiser's-- or that the Family even thought resulted from Mr. Kaiser's turning state's evidence. So if you'll clarify that we'll get back to that.

MR. WETLE: Well, your Honor, the other problem is that, you know, the main witness against Gabe just got killed, and so that is sort of another issue that may have affected that investigation, and I--

THE COURT: Who's that?

MR. WETLE: Kaiser was the person that was talking--

THE COURT: Oh, I see.

MR. WETLE: --about Gabe, and he's been murdered.

THE COURT: Okay.

MR. WETLE: And that's part of our motive in conspiracy and I just-- The other thing is that there may be-- You know, this is what people in San Francisco thought, that people in Seattle and San Francisco were going down and, you know, I don't know that I can-- I hope I can shed some light on that for the court.

THE COURT: Okay, so your idea is that they knew about the arrest of Mr. Kaiser.

MR. WETLE: They knew he got out--

THE COURT: The people in the "Family" knew about the arrest of Mr. Kaiser, knew that he got out quick, knew that he must have, then, turned-- rolled over. But I thought part of your picture there was that then all of a sudden people went down.

MR. WETLE: Well, Petee did go down, and-- and remember the girlfriend was released and then the information was given against Gabe, and then within a month Kaiser's dead. So if that short-circuited that arrest of Gabe, then I can understand there may be a problem with the arrest at this point.

THE COURT: Oh, I see. So you're saying that maybe the connection is through Shauna Daniels--

MR. WETLE: Could-- could--

THE COURT: --telling the Family members that Nick told her--

Nick Kaiser told her that he had turned state's evidence against Gabe, and therefore, then, even though an arrest hadn't occurred, that there was about to occur.

MR. WETLE: He could have been protecting her. You know, I'm-- I have to turn so you can go. Who knows? All I'm saying is that--

MR. SIMEONE: That's exactly it, who knows?

MR. WETLE: --to base it on-- We do know that there is an arrest, there is a quick release, there is the reverse, and there-- and we have information on another person who's higher up the chain, and all of a sudden the informant, Mr. Kaiser, is dead. So there may or may not be a prosecution of Gabe.

THE COURT: All right. Okay. All right, now, on paragraph-- page 5, Mr. Simeone, let's go ahead and get through this. Paragraph 1 is excluded. Paragraphs 2 and 3 you had no objection to. Paragraph 4--

MR. SIMEONE: The other thing I want to say before we leave that point, your Honor, was Mr. Dogeagle was pretty-- he was pretty clear yesterday that at the time Nick was at the barter fair he was bolting, so whatever information--

THE COURT: He was what?

MR. SIMEONE: He was-- He was on the lam.

THE COURT: He was on the lam. Uh-huh.

MR. SIMEONE: That's right. He was clear on that. He was

out on his own, and he probably was out of their radar screen. He wasn't supposed to be doing what he was doing, so whatever information he had given about these people, it had already been given, and if you've got investigations going on, and nobody being arrested in San Francisco, which is exactly what he was talking about. We still have a very real question here of whether or not there should be anybody who's offended to the point where there are going to be hits out.

THE COURT: Okay.

MR. SIMEONE: _____ specifically talked about.

THE COURT: Okay.

MR. SIMEONE: We're on page 5?

THE COURT: Page 5, paragraphs-- Paragraph 4.

MR. SIMEONE: Item 1 was excluded? Correct, your Honor?

THE COURT: Yes. Two and 3, you had no objection to. Four, 5, 6, 7?

MR. SIMEONE: Is that a statement in furtherance of a conspiracy in Number 4, that he sold marijuana at barter fairs? I think that's a hearsay objection there.

THE COURT: This is Williams talking to--

MR. SIMEONE: Dogeagle.

THE COURT: Dogeagle.

MR. WETLE: No, this is to Sean Cummings and-- and Phil Hart.

MR. SIMEONE: _____

THE COURT: Am I missing that?

MR. WETLE: Starting with bullet 3. On October 18, Sean Cummings and Phil Hart interviewed Dane Williams. The rest of these bullets are those statements to Sean Cummings, and that's what he testified to.

MR. SIMEONE: It wasn't clear from the context. Either way. Even if it's those two people. ____ can testify that he sold marijuana at barter fairs. I suppose that could all be testimony that comes through Williams. I don't see where that's conspiratorial necessarily, that he sells marijuana at barter fairs.

THE COURT: Well, okay. The next paragraph?

MR. SIMEONE: Number five? I think that's supposed to read that Williams told the officer that Cunningham was--

THE COURT: Right.

MR. SIMEONE: --selling out of state.

THE COURT: Uh-huh.

MR. SIMEONE: All right. Your Honor, if it's the court's opinion that that's part of a conspiracy here to sell LSD, for a Family member or a sub-unit of the Family, then I-- I would just understand what the court's ruling is, but it would be over my objection.

THE COURT: Okay. As to paragraph 4, that can come in if it comes through Williams only, not through the officers.

MR. SIMEONE: That would be--

THE COURT: Paragraph 5, that can come in if it comes through Williams, because Williams can testify about a co-conspirator's statement. If it comes through Cunningham, for that matter, it can come in as well.

Number 6, and this is Williams talking. If it comes through Williams--

MR. SIMEONE: _____

THE COURT: Okay, and Number 7, if it comes through Williams.

MR. SIMEONE: That's right.

THE COURT: All right, Number 8, you had no objection to. Number 9, you objected on hearsay and speculation.

MR. SIMEONE: And speculation.

MR. WETLE: And I-- In there-- I do have evidence on that, your Honor.

THE COURT: On the foundation?

MR. WETLE: Yes.

THE COURT: Okay, then it'll come in if you can lay the proper foundation for it. In February-- Let's see, Number 10, my thought is admit it if it comes through Williams. Any problem?

MR. SIMEONE: I would agree with that.

THE COURT: Okay. Given my previous ruling you'd agree. I know you still disagree with my previous ruling.

Number 11, my thought is admit by Williams or Cunningham, but anything else to say about that one, Mr. Simeone?

MR. SIMEONE: Well, enforcer-- The objection I have here is that it's 404 (a) evidence, your Honor, and I think what we're going to get into here is that he's an enforcer, that he enforced before and going to enforce again.

THE COURT: Okay, and I do find by a preponderance that that so-called prior bad act has been established and that it is admissible for the other purpose, for the proper purpose of showing that not-- not necessarily action in conformity therewith, although it does reflect poorly on his character, it does-- the probative value under the legitimate reason for admitting it for showing motive and premeditation is-- outweighs the prejudicial effect. So that'll come in.

Number 12, same thing would be my theory on that.

MR. SIMEONE: _____ same objection that I had.

THE COURT: All right.

MR. SIMEONE: It's also speculation.

THE COURT: Okay, and I think that-- that assuming Mr. Williams is testifying from information he received from Family members, then he would be able to testify about that. And 801 (d) (2) (v).

You indicated on 13 and 14 you had no objection.

MR. SIMEONE: Right, without it being _____

THE COURT: Okay, Number-- Page 6, paragraph 1. That's--

MR. SIMEONE: I'm wondering how that ties in Mr. Grange.

THE COURT: Well, it's an 801 (d)(2)(v) statement of co-conspirator, Mr. Schultz, would be my analysis of that, if it comes in through Williams. We've heard it. So that'll be my ruling on that one.

On paragraph 2--

MR. SIMEONE: Where's the verbal act is my comment there? I don't see how it is that the verbal act exception is going to really make any difference in the court's ruling.

THE COURT: I think that it's part of the verbal activities, so to speak, of the-- of the conspiracy, and so that will be admitted, Number 2, if Williams says it.

MR. SIMEONE: Yeah, if--

THE COURT: If Williams testifies to it.

MR. SIMEONE: From whom? There's another question I had there.

THE COURT: Right.

MR. SIMEONE: To _____ whom.

THE COURT: I'm assuming it's at a Family party with Family members, as Mr. Wetle indicated and clarified in his offer of proof. You're right, it needs to be clarified that that's-- That's the court's assumption in ruling that way.

Paragraph 3.

MR. SIMEONE: My opinion there is no-- Without admitting the truth of the same, I have no objection to that.

THE COURT: Okay. Number 4. We have it, Mr. Wetle, in San

Francisco-- Oh, and Seattle, it does say, went down because of Kaiser's involvement with the feds. Okay, any problem with that, other than what you've already stated, Mr. Simeone?

MR. SIMEONE: No, it would be the same objections.

THE COURT: Okay, that'll be admitted. Number 14-- excuse me, Number 5 at line 14, same ruling would be my theory. You didn't have any objection to the first sentence; the second sentence you did.

MR. SIMEONE: That's right. And my objection is any testimony from Dogeagle as to what Grange saw. My objection is hearsay.

THE COURT: Well, true. I'm assuming that it's Mr.-- Some of this isn't too artfully worded, Mr. Wetle, but I'm assuming you meant that Williams said that Grange saw Cunningham. But how did Williams know that Grange saw him?

MR. WETLE: Right, your Honor. This-- All in this context about what Williams is saying.

THE COURT: How did Williams know Grange saw Cunningham and Kaiser?

MR. WETLE: I think he-- he said they went over there to the vehicle, but I can-- I mean he'll-- In his testimony he'll elaborate further.

THE COURT: Right, assuming he observed that Grange was seeing those people when he himself was also seeing them.

MR. WETLE: I think they were there together, yes.

THE COURT: Okay, then that can come in if there's a foundation.

MR. SIMEONE: Foundation.

THE COURT: Yes. And 6, Grange was worried that Cunningham was telling Kaiser to leave the fair. That is-- You don't have any problem with that, Mr.--

MR. SIMEONE: Well, except that it's directly contradictory to anything that he said in his statement so far, so my objection there is that we're still in this analysis of whether or not all of these things are met, and I don't know that there's a preponderance of evidence to the effect that that really occurred. And I think Mr. Dogeagle-- I think I reviewed with him yesterday--maybe I didn't--that Cunningham had said things that were way to the contrary of what's stated here.

THE COURT: Right. This is Williams saying that Grange was worried that Cunningham was telling Kaiser to leave the fair. The other one was Cunningham was saying that Kaiser was telling-- excuse me. That Grange was telling him to get Kaiser to leave the fair.

MR. SIMEONE: Right.

THE COURT: But I'll go ahead and admit this one, even though it's contradictory, as coming from a co-conspirator. I'm not sure that hurts you at all, since you can capitalize on the inconsistency, I suppose.

Number 7?

MR. SIMEONE: Williams, with Grange, tried to contact the Family and let them know that Kaiser was at the barter fair. I-- I don't know where it is that he garnered that knowledge that Grange tried to contact the Family. So far as I can tell, there is going to be an attempt to prove that ____ a phone call to _____. I don't think the officers are willing to say they've got any good evidence that those phone calls have been made, so I don't see where that-- I don't see how that's proved by a preponderance, and I don't think he should be allowed to say that.

THE COURT: He certainly can't say, Mr. Wetle, I believe that Mr. Grange tried to contact the Family. He can't say that unless he has some-- He can say what it is that he observed or saw. See what I mean on that, Mr. Wetle?

MR. WETLE: Yes, I do, your Honor.

THE COURT: Okay. Then on paragraph 8, you indicated that you had no problem with that--

MR. SIMEONE: That's right.

THE COURT: --from an evidentiary standpoint.

MR. SIMEONE: That's right, your Honor.

THE COURT: Page 7, top of page 7, paragraph 1. Any problem with that from the previous theory?

MR. SIMEONE: Well, knowing something bad was going to happen.

THE COURT: Okay.

MR. SIMEONE: That's kind of what I underlined and what I came away with there, your Honor.

THE COURT: Right. Mr. Wetle, my ruling on this will be that if he can describe what it is he's talking about there, maybe it can come in, but he can't just say I knew something bad was going to happen, without talking about what he was basing it on, but certainly with previous statements that you're saying he made about the comments that Grange made to him on the way to the cabin, that would be all right.

Paragraph 2, if Williams says it, it's admissible, I would assume, Mr.--

MR. SIMEONE: I understand, your Honor. Without admitting the truth of the same.

THE COURT: Right. Paragraph 3, that would be admissible as a direct observation by--

MR. SIMEONE: I have no objection.

THE COURT: Assuming Mr. Williams testifies to it.

MR. SIMEONE: Right.

THE COURT: Okay, paragraph 4 through 10, my notes say admit if it comes in via Cunningham's testimony. And I know you have your previous objections about the conspiracy evidence and so on.

MR. SIMEONE: That's right.

THE COURT: But other than that, anything more you want to

say about those?

MR. SIMEONE: The remainder of those, or just 4?

THE COURT: All of them. Four though ten.

MR. SIMEONE: Well, Number 10, your Honor, would be the same kind of objection that I've had before with regards to the preponderance of the evidence. I don't know-- Here we are, Cunningham told Kaiser he had heard people from San Francisco wanted to kill Nick. And it goes right back to the essence of the objection to the use of that conspiratorial evidence at all, and that is that we don't have any information right now that anybody in San Francisco really knew that there was any people brought down because nobody's been arrested yet. So I think that's a preponderance kind of thing, and I don't know why Cunningham should have to be able to testify that he told Mr. Kaiser.

THE COURT: Okay.

MR. SIMEONE: _____ proof of that.

THE COURT: All right. Well, this is some corroboration from Mr. Cunningham that he had heard through the Family-- I'm assuming the people he heard it from were Family members, Mr. Wetle. Mr. Wetle?

MR. WETLE: I'm thinking it is, your Honor. I'm not-- I can't-- It may be that he heard it from Schultz. Cunningham told Kaiser he heard people from San Francisco wanted him-- to kill him. I think the whole barter fair had heard that people

wanted him dead, but-

THE COURT: Okay. Well-- All right, then, that can-- that can come in if it's from Family members. And comes in by Mr. Cunningham.

Okay, top of page 8.

MR. SIMEONE: And we're where, your Honor, on page 8?

THE COURT: Eight. I have written down all the way through the end of the page there that I don't have any problem with those, so if you have any objections, speak now or forever hold your peace.

MR. SIMEONE: Item 4, I mentioned the-- a relevance objection in my written memo.

THE COURT: Yes.

MR. SIMEONE: And in Number 5, I think that plans as to what other State witnesses wanted to do with Nick Kaiser could be elicited through their testimony directly.

THE COURT: Number 5?

MR. SIMEONE: Right.

THE COURT: I'm sorry. Say that again?

MR. SIMEONE: Well, I think it can be elicited directly through those people's testimony. In other words--

THE COURT: From Mr. Kaiser?

MR. SIMEONE: If-- If Cunningham-- No, Cunningham. Cunningham-- well, actually--

THE COURT: We're talking about Mr. Cunningham's testimony.

MR. SIMEONE: Okay, and I don't know where that's in furtherance of a conspiracy and how that's going to be part of the conspiracy so that could be admitted under that exception. Or that it's not hearsay, I guess, is technically what we're saying.

THE COURT: Okay. Well, I think it's admissible under 801 (d) (2) (v), just showing how the conspiracy operates to avoid detection, avoid prosecution, et cetera. Financing themselves by mushrooms. But also the 803 (a) (3). It's a statement against interest in a trustworthiness setting, namely, to a co-conspirator. And so I would admit that.

And Number 4, I do find that there's some tangential relevance there and that can come in to the effect that both Josh and-- Josh Schaefer and Nick Kaiser intended to speak to Rob Schultz themselves, if they could, and smooth the waters.

Anything else on that page?

MR. SIMEONE: I think there's a preponderance problem with Number 11 because I don't think they have the proof to the effect that he did that.

THE COURT: Okay, that's a good point, but I do find that there is a preponderance of the evidence that-- And, of course, they-- This isn't an issue of whether I need to have a preponderance, in any event. This is just testimony of Mr. Cunningham about the event and events leading up to it.

MR. SIMEONE: Okay.

THE COURT: So-- But I think that it's-- It's certainly evidence enough to admit it, and you can obviously--

MR. SIMEONE: Make my objections at the time as to speculation.

THE COURT: Make your objections and make your cross examination on that.

MR. SIMEONE: And I understand 12.

THE COURT: Twelve and 13 and 14 I had that you said okay on those.

MR. SIMEONE: Without admitting the truth. Is that right?

THE COURT: Right. Uh-huh. Now, on page 9, everything through paragraph 5 you had indicated-- 6, rather, you had indicated was okay, with the exception of the last clause in paragraph--

MR. SIMEONE: You're on paragraph--

THE COURT: Six.

MR. SIMEONE: Six?

THE COURT: Right.

MR. SIMEONE: On page 9, that it would take a couple of weeks--

THE COURT: To get the money to be paid for the hit job, basically.

MR. SIMEONE: Right.

THE COURT: And you objected on the basis of the--

MR. SIMEONE: Well, at that point--

THE COURT: --hearsay?

MR. SIMEONE: At that point I think it's hearsay. If the court's going to rule this is part of a conspiracy, then I understand that's an exception.

THE COURT: All right, so all these are admitted then. And then Number 7, we agreed that that is speculative and will not be admissible unless there's proper foundation about-- about--

MR. SIMEONE: _____

THE COURT: --his speculation there. Okay you said on paragraph 8. Okay you said on 9. Okay you said on 10, except for the last-- Well, let's see. You said the first paragraph-- the first clause of paragraph 10, you had no problem with.

MR. SIMEONE: As to 9, your Honor, actually I want to renew-- or reconsider my position there. I don't know how he knows that this is the way a Family would normally get rid of somebody, and where he found that out.

THE COURT: Cunningham?

MR. SIMEONE: That's right.

THE COURT: Okay. Well, I think he can testify about his involvement in the Family, and so, Mr. Wetle, I assume you'll be fleshing that out, how he--

MR. WETLE: Sure, your Honor.

THE COURT: --came by that information. The Schultz-- Paragraph 10, you indicated the first clause was okay, and from

then on you had an objection.

MR. SIMEONE: That's right. Other-- Others believed. I guess if we're going on what Schultz believed that he's an undercover agent, I think we're okay.

THE COURT: Okay. Well, this, I think, would be a 801 (d) (v) -- (d) (2) (v), anything coming from Schultz. So that will come in.

And then I have that you had a hearsay objection to paragraph 1, but--

MR. SIMEONE: Are we talking about page 10 now, your Honor?

THE COURT: Page 10, uh-huh. Excuse me.

MR. SIMEONE: I think I didn't really object to anything until we get to that paragraph. Objection, hearsay, as to anything that Schultz may have said in the alleged phone call. I understand what the court's ruling is going to be there.

THE COURT: Right. Okay, then on paragraph 4, the second sentence:
Chewy also mentioned that he used to do this, threaten people, before for the Family; that he was going to make sure that he didn't come around his area anymore, make sure he didn't visit Family, let Kaiser know he wasn't wanted.

Any objection to that?

MR. SIMEONE: Close call here, your Honor, but I think it's prior act evidence, it's character evidence they're trying to say, and I think that the way it's going to be interpreted by

a jury, they're going to blow right by the fact that this is just to ___ motive, intent, et cetera. They're going to blow right by that and say well, he did this before, he's going to do it again. I think the court has to rule on this one that it's highly prejudicial to say that. The other thing is I don't know that there's any proof that this is anything other than just words. I used to do this before. So it's a corpus delicti kind of an argument that goes along with the preponderance argument that I add to the 404 (a) reason for excluding it.

THE COURT: Okay. Well, I do note your objection, but I overrule it and that information will come in. I do find that there's a preponderance that establishes it, and that, furthermore, that it's admissible for the proper purpose of showing motive and premeditation.

You indicated on paragraphs 5 and 6 you were okay with those.

MR. SIMEONE: That's right.

THE COURT: Paragraph 7?

MR. SIMEONE: Well, I think the whole thing's prior--

THE COURT: And the same problem. This is the clarification we're going to reserve on, but I think I know your objection, that this is too inflammatory, too prejudicial, and there's no corpus delicti to show he got rid of people in the sense of killing them.

MR. SIMEONE: I don't know that that-- I don't know that that shows motive. I think it really is squarely 404 (a) _____.

THE COURT: All right, we're going to reserve that paragraph. Then paragraph 8 was okay from your notes.

Paragraph 9, any more comments on that, or do you concede that given my prior ruling that would be admissible?

MR. SIMEONE: That's right, considering your prior rulings. It's over my objection, but I understand what your ruling is.

THE COURT: Okay. Paragraph 10, again we're reserving that part about that Chewy had done this before, that he had taken care of people, that he's been a collector for the Family for years. The collector for the Family part could come in, but-- I've already ruled, but the prior alleged getting rid of people in the sense of killing them is reserved.

MR. SIMEONE: And how-- Reserving it, again I'll _____ about how it is that we go about giving the court the further information it needs to make a ruling?

THE COURT: Okay. We're going to hear directly from Mr. Cunningham in a hearing outside the--

MR. WETLE: We will exclude the jury.

THE COURT: --presence of the hearing-- outside the presence of the jury to see whether or not that evidence can come in. The same with page 11, paragraph 1, that's the same category. And paragraphs 2, 3 and 4 you indicated, on page 11, you had

no problem with.

MR. SIMEONE: That's right.

THE COURT: As well as paragraph 5. And then paragraph 6 through 14, the information about Josh Schaefer, you want to state generally your concern about that?

MR. SIMEONE: Yeah, my argument here is that there's never any mention that there's supposed to be a hit out on Josh Schaefer at all, and then now Mr. Wetle's saying this is all part of the-- part of the whole conspiracy that went on to kill people. Well, we might say that there are other people who got killed too, and I don't know that we can necessarily, without more proof, say that that's part of a conspiracy. It sounds like his argument is this just shows the bigger picture. Well, you know, everything will show a bigger picture, but the fact is that there's no evidence that they have whatsoever that there was any kind of a hit out for Schaefer. So for them to-- Yeah, you know, that's a very good point. They still have identity problems as to whether or not that's the person that's killed. They can't even identify whether that individual whose remains were found is male or female. And now what we're trying to say is that Josh Schaefer was killed. He's somebody who's an informant, and therefore he comes under the same category. But we might find, you know, half a dozen more people throughout the country who were killed for their-- because they're informants. Can he bring that information in

too? And as well, to me it's just a coincidence that he happens to be an informant and he happens to have got killed at the same time. But I think that it becomes very speculative that this is all part of a common plan or scheme here to kill people who are informants. There's just no information and no evidence to support that.

THE COURT: Okay. Well, I think you've made your record on that, but here's my reason for allowing it to come in, and that is that there is a connection between-- that's been made by a preponderance of the evidence in terms of this preliminary hearing, between Mr. John Grange and Mr. Rob Schultz, and there's an allegation of communication between the two of them just prior to the murders. There's an allegation and substantial evidence, a preponderance of the evidence, to indicate that the-- that there was frequent communication between the San Francisco and-- or Bay area and Portland and Seattle branches of the Family, the portion of the Family having to do with drug trafficking, and that there was-- to the extent that there was this bust of Josh Schaefer where he turned State's evidence, and there was a resulting arrest of a Michael Watkins in late April as a result of the bust of Josh Schaefer in early February of 2000 in Oakland, then that could have been additionally communicated to Mr. Grange from Mr. Schultz, and so there is some circumstantial link there that would provide additional motive for the murders.

And so that would be admissible for those reasons.

Now, moving to the additional offer of proof that-- the one-- couple of lines, pages, of having to do with what Detective Loren Erdman provided from, I gather, an interview from Mr. Cunningham. My notes to myself say:
Okay if this information comes from Cunningham's lips
on the witness stand.

Would you agree that those could come in--

MR. SIMEONE: If it comes--

THE COURT: If it comes from Mr. Cunningham.

MR. SIMEONE: --from Mr. Cunningham. I would have to agree.

THE COURT: All right, then, of course, paragraph 4 on page 2, the Irish Mafia tattoo has been excluded.

Okay, I think that's all we had to cover then on the record, and is it clear enough then for you, Mr. Wetle, in terms of clarifying it with your witnesses before they blurt out the wrong thing?

THE COURT: I thank you, your Honor, for going through this, and hopefully we can get it prepared well enough so that we can avoid--

THE COURT: Okay. We're going to take a brief recess and launch into jury selection.

COURT COMMENTS ON WHERE JURORS WILL BE SEATED

COLLOQUY REGARDING SCHEDULE OF WITNESS

COLLOQUY REGARDING TESTIMONY OF PARENTS OF VICTIMS

PARENTS WILL NOT BE ALLOWED TO BE IN COURTROOM

UNTIL AFTER THEY HAVE TESTIFIED

COLLOQUY REGARDING EXCLUSION OF WITNESSES

MR. WETLE PROVIDES LIST OF WITNESSES TO COURT
FOR USE DURING VOIR DIRE OF JURORS

COURT INDICATES SEATING ARRANGEMENT OF JURORS AND COUNSEL
DURING VOIR DIRE OF WHOLE PANEL

COURT RECESSED