



The court finds that the evidence at trial was sufficient to support the jury's verdict on both the obstruction of justice and conspiracy to possess and distribute methamphetamine counts and, therefore, the defendant is not entitled to a judgment of acquittal. The court further finds that the evidence of defendant's involvement in the purchase of marijuana was inadmissible pursuant to Federal Rule of Evidence 404(b) and the court cannot find that it was highly probable that the effect of this evidence on the jury's verdict is not

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acts which occurred in October 1998, although the indictment charged that the conspiracy began in or about January 1999. Grass argues that this variance between the date of evidence produced at trial and the time period contained in the indictment is fatal error. "[A] defendant is entitled to know what he is accused of in violation of the criminal law, so that he can prepare a defense, and be protected against another prosecution for the same offense." United States v. Tsinhnahjinnie, 112 F.3d 988, 991(9<sup>th</sup> Cir. 1997). However, where the variance is "not of a character which could have misled the defendant at trial," the variance is not fatal error. Id. (quoting Berger v. United States, 295 U.S. 78, 83 (1935)). "The government ordinarily need prove only that the crime occurred on a date reasonably near the one alleged in the indictment, not on the exact date." Id. A three month variance meets this "reasonably near" test, particularly in light of the fact that the indictment uses "in or about" language and the acts charged in the indictment are the same as those presented at trial.

Grass also argues that the court impermissibly allowed the hearsay statements of two alleged co-conspirators, Richard Marshall and Sam Zucharo, on the obstruction of justice charge, despite the fact that the government failed to show that these declarants were co-conspirators. However, the court finds the government met its burden of proving that the two declarants were co-conspirators for purposes of the co-conspirator admission exception to the hearsay rule.

Lastly, the court rejects Grass' argument that the evidence about threats on the life of a co-conspirator were erroneously admitted because defendant has not shown how this evidence has prejudiced him or the proceedings in any way.

harmless. Thus, a new trial on the conspiracy to possess and distribute methamphetamine count will be granted.

A. Sufficiency of the Evidence.

Grass argues that the evidence produced at trial by the government to show that Grass obstructed justice or that he conspired to possess and distribute ten pounds of methamphetamine was insufficient for a reasonable jury to find him guilty of those offenses. Thus, Grass seeks an acquittal on both counts for lack of sufficiency of the evidence.

Because Grass is appealing a jury verdict against him, the court "must view the evidence in the light most favorable to the government and must sustain [the] jury's verdict if a reasonable jury believing the government's evidence could find beyond a reasonable doubt that the government proved all the elements of the offense." United States v. Rosario, 118 F.3d 160, 163 (3d Cir. 1997) (quoting United States v. Salmon, 944 F.2d 1106, 1113 (3d Cir. 1991)).

1. Obstruction of Justice.

On or about March 8, 2000, Grass was originally charged in a one-count indictment with conspiracy to distribute and possess with intent to distribute methamphetamine. Trial was scheduled to begin on April 24, 2000, but was later continued to September 11, 2000. Charles McKee and Jay Haefele were scheduled

to be witnesses against Grass. On August 16, 2000, Grass was charged in a superceding indictment, with an additional count of obstruction of justice. In that count, the government alleged that Grass' co-defendant, Richard Marshall, on behalf of Grass, paid Charles McKee approximately \$3,000 as inducement to make a false statement exculpating Grass and leave the jurisdiction prior to the pending criminal trial against Grass.

In order to sustain its burden of proof for the crime of obstruction of justice, the government must prove that: (1) a judicial proceeding was pending at the time of the alleged obstruction; (2) the defendant knew that the proceeding was pending; and (3) the defendant then corruptly endeavored to influence, obstruct or impede the due administration of justice in the criminal proceeding against him. United States v. Simmons, 591 F.2d 206, 208 n.2 (3d Cir. 1979). As Grass had already been indicted and criminal proceedings had begun and Grass had knowledge of the pendency of the proceedings, the first and second elements of this offense are satisfied in this case. Thus, the issue is whether the government proffered sufficient evidence for a reasonable jury to find that Grass "corruptly . . . endeavored to influence, obstruct or impede the due administration of justice." 18 U.S.C. § 1503.

The government's case on the obstruction charge rested largely on the testimony of Grass' co-defendant, Richard Marshall. On direct examination, Marshall testified that after

Grass had been arrested on the drug charges, Marshall was approached by an individual named Sam Zucharo and asked to see Charles McKee about buying a motorcycle. McKee is an alleged co-conspirator in the distribution scheme in which Grass is charged as a co-conspirator. Zucharo told Marshall that McKee may assist in Grass' defense.

Marshall proceeded to meet with McKee, who expressed a desire to help Grass. After this meeting, Marshall relayed this information to Grass and Grass suggested that McKee write a letter exculpating Grass from the distribution scheme. At this point, according to his testimony, Marshall believed Grass to be innocent of the allegations against him. Over a course of meetings between Marshall and McKee between April and August 2000, Marshall agreed that McKee would draft a fake suicide note exculpating Grass and then leave the country. Marshall testified that Grass agreed to pay \$4,000 to McKee in exchange for the letter.

At trial, Marshall testified that McKee delivered the letter and that he gave it to Grass and Grass' lawyers. The letter was a suicide note signed by McKee exculpating Grass from any involvement in the conspiracy to distribute methamphetamine. Marshall testified that Grass was satisfied with the content of the letter and that he was told by Grass that an individual named Mike would be getting in touch with Marshall to give Marshall the \$4,000 to pass on to McKee. Some time thereafter, Grass called

Marshall inquiring whether Mike had gotten in touch with Marshall and Marshall responded that he had not. Grass told Marshall that he would "take care of it". Ten minutes later, Marshall received a call from Mike to set up a time for Marshall to get the money from Mike. Marshall then met Mike and received an envelope of cash, and thereafter, Marshall turned the money over to McKee.

Marshall's testimony on cross-examination varied from his direct in significant respects. He stated on cross that he gave McKee the money not to influence his trial testimony but in exchange for a motorcycle which McKee and Grass believed had been stolen by Jay Haefele, another member of the distribution conspiracy. Marshall further testified that he never suggested to McKee that he use the money to flee the jurisdiction. Although he knew that McKee was planning on using the money to get a fake passport, Marshall believed that McKee was leaving the country to avoid his own prosecution. Marshall said that although he knew that McKee was to be a witness at Grass' trial, he did not give McKee the money in order make McKee leave and be unavailable to testify. Marshall also testified that the suicide portion of the note and leaving the jurisdiction was completely McKee's idea.

The government rebutted Marshall's cross examination testimony by introducing the video and audio tapes of conversations between Marshall and McKee made during the time McKee was cooperating but Marshall was not. During these

conversations, McKee asked Marshall if he had spoken to Grass about getting money for McKee to get a fake passport. Marshall would then make vague responses, indicating that Grass was waiting for McKee to write the letter. During one of the conversations, Marshall stated that he would give McKee the \$4,000 after he got the letter from McKee. In another conversation, Marshall stated that after he got the letter from McKee, he went over the content of the letter with Grass.

The government proffered additional evidence linking Grass to the money allegedly paid to McKee.<sup>2</sup> The envelope in which Marshall delivered the money to McKee contained a note which stated "Nick - I used the money for car payments, and so the family could go on vacation, will leave balance no later than Friday. Nancy doesn't know about this. Thank you. Mike. I know you will be mad about this, but trust me Friday." The government argues that this note was from Mike to Grass and indicates that the money Marshall received from Mike was owed by Mike to Grass and was given to Marshall to give to McKee on Grass' behalf.

The meetings between Marshall and McKee as to which Marshall testified at trial were held between April and August 2000. The government introduced evidence that on April 14, 2000, a pen register was activated on Marshall's cellular phone.

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<sup>2</sup> The amount of the money recovered was \$3,000 and not the \$4,000 to which Marshall and McKee had agreed.

Between April 14, 2000 and August 13, 2000, there were a total of 78 telephone calls between Marshall and Grass. Many of these calls followed immediately after the various recorded meetings between McKee and Marshall. Ten minutes after McKee received the \$3,000 from Marshall on August 8, 2000, there was an outgoing call from Marshall's cellular telephone to Grass' cellular telephone, followed 15 minutes later by an incoming call to Marshall's cellular telephone from Grass' cellular telephone. The government argues that, from the course of meetings immediately followed by the course of calls to Grass, a reasonable jury could conclude that Grass was involved in the efforts to obstruct justice.

The court finds that the foregoing evidence is sufficient for a reasonable jury to find Grass guilty of obstruction of justice. At trial, Marshall testified on direct to the allegations which comprise the factual basis for the charge that Grass "corruptly . . . endeavored to influence, obstruct, or impede the due administration of justice." 18 U.S.C. § 1503. Although Marshall's testimony on cross differed from that on direct, the question of Marshall's credibility is one for the jury to determine. Essentially, Marshall presented two versions of the facts and the jury in its province chose to believe Marshall's version on direct examination.

Furthermore, Marshall's direct testimony was corroborated by additional evidence. Namely, the tape recorded

conversations between Marshall and McKee link Grass to the payment of the \$4,000 in exchange for the letter. In addition, Marshall's testimony is corroborated by the suicide letter which exculpated Grass from any involvement in the conspiracy to distribute methamphetamine and the payment of the money. It was reasonable for the jury to conclude that the note located within the envelope containing the money to be paid to McKee in exchange for the letter clearly was addressed to "Nick," indicating that the money within the envelope was money owed to Grass. The fact that this money was then passed on to McKee further links Grass up to the payment of the money and the obstruction of justice, as testified to by Marshall. Lastly, the records of cell phone calls between Marshall and Grass, permitting the inference that on many occasions Marshall called Grass immediately after meeting with McKee, is additional circumstantial evidence linking Grass to the alleged obstruction scheme. The court finds from the total of this evidence that there was sufficient evidence from which a reasonable jury could find Grass guilty of obstruction of justice.

2. Conspiracy to Distribute Methamphetamine.

The basis of the government's evidence against Grass on the conspiracy charge is that Grass joined a conspiracy to distribute methamphetamine for profit. Two alleged co-conspirators, Jay Haefele and Charles McKee, are the individuals

from whom Grass allegedly purchased methamphetamine.

a. Legal Principles.

To prove a conspiracy, the government must establish a unity of purpose between the alleged conspirators, an intent to achieve a common goal and an agreement to work together toward that goal. United States v. Gibbs, 190 F.3d 188, 197 (3d Cir. 1999). The government may prove these elements entirely by circumstantial evidence. See United States v. McGlory, 968 F.2d 309, 321 (3d Cir. 1992) (citing United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986)). The existence of a conspiracy "can be inferred from evidence of related facts and circumstances from which it appears as a reasonable and logical inference, that the activities of the participants . . . could not have been carried on except as the result of a preconceived scheme or common understanding." Gibbs, 190 F.3d at 197 (quoting Kapp, 781 F.2d at 1010). However, the government must proffer sufficient evidence from which a jury could have concluded that each drug transaction in which defendant was involved was "a step in achieving the conspiracy's common goal of distributing [drugs] for profit." United States v. Theodoropoulos, 866 F.2d 587, 593 (3d Cir. 1989), overruled on other grounds by United States v. Price, 13 F.3d 711, 727 (3d Cir. 1994).

"It is well-settled that a simple buyer-seller relationship, without any prior or contemporaneous understanding beyond the sales agreement itself is insufficient to establish

that the buyer was a member of the seller's conspiracy." Gibbs, 190 F.3d at 197 (citing McGlory, 968 F.2d at 324-25; Kapp, 781 F.2d at 1010). Thus, if the agreement is only for the seller to sell and the buyer to buy, even if the buyer buys a "distribution quantity" of drugs, no conspiracy exists. Gibbs, 190 F.3d at 197. However, an occasional buyer for redistribution can be shown to be a member of a conspiracy by evidence, direct or inferential, of knowledge that he was part of a larger drug operation. See Price, 13 F.3d at 728; Theodoropoulos, 866 F.2d at 594. Thus, in cases such as this one, where the defendant's only involvement in the conspiracy appears to be drug purchases, courts look to the surrounding circumstances to determine whether defendant had knowledge of the conspiracy to the extent that his drug purchases are circumstantial evidence of his intent to join the conspiracy. Gibbs, 190 F.3d at 199.

There are various factors which instruct this determination including the length of the affiliation between the defendant and the conspiracy and the number of transactions committed; whether there is an established method of payment; the extent to which the transactions are standardized; and whether there is a demonstrated level of mutual trust. Gibbs, 190 F.3d at 199 (citing United States v. Hach, 162 F.3d 937, 943 (7<sup>th</sup> Cir. 1998)). Whether a buyer purchased his drugs on credit may be relevant to the existence of mutual trust. See Price, 13 F.3d at 728; United States v. Dortch, 5 F.3d 1056, 1065-66 (7<sup>th</sup> Cir.

1993); United States v. Carbone, 798 F.2d 21, 27 (1<sup>st</sup> Cir. 1986) (“If the sale had not been made on credit, a credible argument might be made that it was a single transaction.”). “A credit relationship may well reflect [mutual trust] and often evidences the parties’ mutual stake in each other’s transactions.” Gibbs, 190 F.3d at 200.

Other indicia regarding the method of payment may also lead to a determination of mutual trust between the parties, providing circumstantial proof of defendant’s participation in the conspiracy. For example, in United States v. Samuels, 741 F.2d 570, 575 (3d Cir. 1984), where the evidence showed one co-conspirator arranged to have defendant pay money defendant owed to that co-conspirator to a different co-conspirator and the defendant knew that the money would be used to fund a drug deal, the court found that the prosecutor had put forward enough evidence to “reasonably conclude that on this occasion Samuels knowingly acted in furtherance of the conspiracy.” Id. at 575. Courts have also examined whether the buyer’s transactions involved a large amount of drugs, indicia that it is more likely that the buyer intended to redistribute the drugs. See, e.g., Gibbs, 190 F.3d at 199; United States v. Flores, 149 F.3d 1272, 1277 (10<sup>th</sup> Cir. 1998).

“Though no one of these factors alone will necessarily be sufficient - without more - to establish a mere buyer’s agreement to join the conspiracy and his intent to achieve a

common goal with that conspiracy, the presence of one or more of these factors furthers the inference that the buyer knew that he was part of a larger operation and hence can be held responsible as a co-conspirator." Gibbs, 190 F.3d at 200.

b. Application to the Facts.

The government contends that it has proven by sufficient evidence that Grass intended to join and in fact joined the Haefele and McKee conspiracy, with its attendant goal of distributing methamphetamine for profit. In determining whether the government has met its burden, this court will look at the evidence, drawing all reasonable inferences in favor of the government, the winner of the jury's verdict. Furthermore, the court will examine the proffered evidence with "an eye towards whether [the evidence] reflect[s Grass'] interest or stake in the success of the operation or . . . a simple buyer-seller relationship between" Grass and McKee and Haefele. Gibbs, 190 F.3d at 200.

The government's main witnesses with respect to the conspiracy charge were Haefele and McKee who testified at trial as to their course of dealings with Grass. Additional evidence against Grass consists of audio-taped recordings of conversations between Haefele and McKee beginning in July 1999 through March 2000, when McKee was arrested and became a cooperating witness. These tape recordings corroborate Haefele and McKee's trial testimony regarding their course of dealings with Grass

concerning the methamphetamine distribution.

This course of dealing is as follows. In October 1998, Haefele delivered five pounds of methamphetamine to Grass. Over the next few months, Grass made a series of payments to Haefele totaling \$50,000 for the October 1998 delivery of methamphetamine. In March 1999, on completing payment of the \$50,000 for the first five pound delivery, Haefele delivered a second five pounds of methamphetamine to Grass. According to Haefele, the terms of both transactions were the same. Haefele was to give Grass five pounds of methamphetamine along with five pounds of "cut"<sup>3</sup> in exchange for \$50,000.

Intercepted conversations between Haefele and McKee after Haefele's arrest in July 1999 contain statements by McKee that Grass paid McKee for the second five pound delivery of methamphetamine. McKee then gave the money to Haefele who turned the money over to the DEA. McKee also testified that when Grass gave him the payment for the second delivery, Grass asked McKee to resupply Grass with a third five pound delivery of methamphetamine. During intercepted conversations held in late August 1999, Haefele and McKee discussed the possibility of delivering a third shipment of methamphetamine to Grass.

Perhaps the most direct evidence of Grass' involvement with Haefele and McKee in the distribution of methamphetamine is

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<sup>3</sup> "Cut" is a term used to identify a dilutant which is added to the methamphetamine to increase its volume.

a tape recorded conversation between Grass and Haefele.<sup>4</sup> The transcript of the conversation is as follows:

Haefele: . . . I need some money for the  
fucking lawyer.  
Haefele: What?  
Grass: Whatta you need?  
Haefele: I gotta, I gotta give him about 50  
grand. I think . . .  
Haefele: What?  
Haefele: What Doc?<sup>5</sup>  
Grass: I just seen him.  
Haefele: Oh, I didn't just see him.  
Grass: I did.  
Haefele: OK, I didn't see him. We're doing  
all right then?  
Grass: Yeah.

Haefele testified that after Haefele stated "I gotta give him about 50 grand," Grass made a hand signal where he put up a five and a zero. Haefele understood this signal to mean \$50,000 and that Grass had given the \$50,000 to McKee. After this conversation, Haefele recovered \$50,000 from McKee and handed it over to the DEA.

The defendant argues that because the government never introduced evidence of Grass' direct possession or redistribution of drugs, the evidence is insufficient for a reasonable jury to find him guilty of conspiracy to distribute methamphetamine. However, the court finds that the evidence sufficiently shows a course of dealing among Haefele, McKee and Grass whereby on two occasions, Haefele and McKee delivered a five pound shipment of

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<sup>4</sup> There is also a silent videotape in which Grass and Haefele can be seen getting into Haefele's pickup truck.

<sup>5</sup> Haefele testified that "Doc" refers to McKee.

methamphetamine to Grass along with five pounds of "cut." It was reasonable for the jury to infer that Grass' purchase of the dilutant along with the drugs evidences an intent by Grass to increase the volume of drugs available in order to increase profits made on redistribution of the drugs. Furthermore, it was reasonable for the jury to conclude that Haefele and McKee were aware that Grass bought the "cut" in order to increase the amount of drugs available for redistribution. The fact that all three were aware of Grass' redistribution of the drugs evinces a common understanding that Grass was furthering the purpose of the conspiracy to distribute methamphetamine for profit. See Theodoropoulos, 866 F.2d at 593.

Additionally, the evidence shows that Grass continually paid for the drugs on credit; a reasonable inference thereby could be drawn by the jury that there was a mutual trust between Haefele, McKee and Grass, whereby the latter two entrusted Grass with \$100,000 worth of methamphetamine with the knowledge that Grass would repay them once he resold the drugs for a profit. See Price, 13 F.3d at 728.

Furthermore, the fact that Grass purchased on credit evinces a mutual stake in the overall operation. "By extending credit to a buyer, the seller risks the possibility that the buyer will be unable to resell the drugs: even if the buyer does resell the drugs, in this generally thinly capitalized 'business,' the seller will likely have to wait until the buyer

collects the money from his resale before he can pay the seller back for the initial purchase." Gibbs, 190 F.3d at 200. In addition, "the buyer has a vested interest in the seller's ability to maintain a good working relationship with his supplier, since the buyer will not profit unless the drugs continue to flow from the seller's supplier to the seller." Id. Thus, the payment schedule between Haefele, McKee and Grass shows that there was a mutual interest in each other's transactions, a fact which further supports a reasonable jury finding of a conspiracy.

Lastly, according to McKee's testimony, corroborated by intercepted conversations between McKee and Haefele, Grass expressed a desire to purchase additional methamphetamine from Haefele and McKee after Grass made the second payment. Thus, Grass wanted to continue his relationship with Haefele and McKee and purchase additional methamphetamine from the other two on credit, further evidence of an established course of conduct between the three with the ultimate goal being the distribution of methamphetamine.

In total, the evidence is sufficient<sup>6</sup> for a reasonable

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<sup>6</sup> It is noteworthy that most of the evidence proffered by the government to prove Grass' participation in the distribution conspiracy is comprised of testimony of and surreptitious interceptions of conversations between alleged co-conspirators. The only evidence which directly implicates Grass is the recorded conversation between Haefele and Grass containing Grass' admission of making a \$50,000 payment to McKee. However, the government may prove the elements of conspiracy by circumstantial evidence provided that it does so by proof beyond a reasonable

jury to conclude that Grass participated in a conspiracy to distribute methamphetamine.<sup>7</sup>

B. Evidence Implicating Grass in Drug Dealings Involving Marijuana.

Alternatively, Grass argues that he is entitled to a new trial because the government improperly elicited testimony from Haefele that he sold marijuana to a number of people including Nick Grass.<sup>8</sup> After the testimony was elicited, defense

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doubt. See McGlory, 968 F.2d at 321.

<sup>7</sup> Defendant's reliance on the recent case of United States v. Pressler, 256 F.3d 144 (3d Cir. 2001) is misplaced. In Pressler, although the government presented sufficient evidence to show that defendant had distributed a large quantity of heroin, the government failed to present sufficient evidence that defendant had entered a conspiracy to distribute because it presented no independent evidence of the existence of an overarching conspiracy. "[A] conspiracy conviction may stand only if the Government proves the existence of an underlying agreement." Id. at 157 (emphasis in original). The Pressler court distinguished United States v. Gibbs on the ground that in Gibbs, there was no question that an agreement to distribute drugs existed; the only dispute was whether the defendant in question had agreed to join the conspiracy. Pressler, 256 F.3d at 151. This is the case here where it is clear that Haefele and McKee formed a conspiracy to distribute methamphetamine and the issue is whether Grass joined it.

<sup>8</sup> The testimony at issue was elicited during the government's direct examination of Haefele.

Government: Now, did you engage in other unlawful activities besides that involving P2P, the distribution of P2P and methamphetamine?

Haefele: Yes.

Government: Did you also distribute marijuana?

counsel objected and at sidebar moved to strike the testimony and for a mistrial. Defense counsel argued that the basis for the indictment is the distribution of methamphetamine and the government gave no notice under Federal Rule of Evidence 404(b) of its intention to introduce evidence of prior marijuana sales by the defendant.<sup>9</sup> Thus, defense counsel argued that the testimony was inadmissible under Federal Rules of Evidence 404(b) and 403, and created substantial prejudice against Grass which could not be remedied by a limiting instruction to the jury. After discussion with counsel at sidebar, the court denied Grass' motion for a mistrial, but gave the following instruction to the jury:

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Haefele: Yes.  
Government: Who did you distribute marijuana to?  
Haefele: Gene Marusa, Eddie from the fish store, Jill Kohn, Sue Madden, Nick Grass.

Tr. Trans., 2/23/01, p. 122, lines 16-25.

<sup>9</sup> Federal Rule of Evidence 404(b) provides:

Evidence of crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

. . . disregard any references that were made by the witness to Mr. Grass being involved in any way, shape or form with the distribution of marijuana, that the distribution of marijuana is not a part of this case, and that the defendant would deny and does deny that he was in any way, shape or manner involved in the distribution of marijuana. So in short, this is stricken from the record, it had nothing to do with this case, and we'll go on with that.

Tr. Trans., 2/23, p. 144.

In determining whether Grass is entitled to a new trial based on the jury's exposure to the marijuana testimony, the analysis is two-fold. First, was the evidence inadmissible under Rule 404(b)? If so, was the jury's exposure to the testimony harmless error or did it affect a substantial right of the defendant? As part of this second inquiry, the court must determine whether the instruction to the jury to strike and disregard the evidence safeguarded defendant's rights. See United States v. Morley, 199 F.3d 129, 140 (3d Cir. 1999) (finding jury instruction insufficient to safeguard defendant's rights).

As to the first issue, the court finds that the evidence was inadmissible under Rule 404(b). "If the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [a similar bad act] before, he therefore is more likely to have committed this one." United States v. Sampson, 980 F.2d 883, 887

(3d Cir. 1992). “The government must therefore proffer a logical chain of inference consistent with its theory of the case.” Id. at 888.

As a basis for admissibility, the government proffered that the testimony about the sale of marijuana was part of an overall conspiracy to distribute controlled substances and that it was intrinsic in nature to the evidence of the charged methamphetamine trafficking. However, the crime charged here was conspiracy to distribute methamphetamine; there is no mention of marijuana in any of the charging documents. This proffer does not constitute a “logical chain of inferences.” In Sampson, the Third Circuit rejected the government’s argument that the evidence of past drug convictions should be admitted to show part of a plan or scheme, refuting an accident or mistake defense. Here, the evidence does not even go that far. The argument that a conspiracy to distribute marijuana is intrinsic in a conspiracy to distribute methamphetamine is almost an admission that the evidence is being offered for the improper purpose of propensity. Thus, the evidence was inadmissible under Rule 404(b).

The next question is whether the jury’s exposure to the evidence of marijuana purchases by Grass, in light of the limiting instruction given, was harmless error or did it affect a substantial right of the defendant. See Becker v. Arco Chemical Company, 207 F.3d 176, 205 (3d Cir. 2000). Under harmless error analysis, unless it is highly probable that the error did not

affect the judgment of the jury, the court should grant a motion for a new trial. Government of the Virgin Islands v. Toto, 529 F.2d 278, 284 (3d Cir. 1976). In Toto, the jury heard improper evidence of a prior conviction. Although the court instructed the jury to completely disregard the evidence, the appellate court stated that because it could not state that it is highly probable that the evidence did not contribute to the jury's judgment of conviction, the judgment was reversed and the case remanded for a new trial. Id. at 284. "When such evidence inadvertently reaches the attention of the jury, it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence." Id. at 283. In explaining why the limiting instruction to the jury was not sufficient to erase the harm to defendant, the court explained that a "drop of ink cannot be removed from a glass of milk." Id.

Similarly, in United States v. Clarke, 343 F.2d 90 (3d Cir. 1965), despite their asserted defense of entrapment, defendants were found guilty of conspiring to violate federal narcotics laws and making unlawful sales of narcotics. During the direct examination by the prosecutor of a federal narcotics officer, the witness testified that one of the defendants had told the witness that he had "furnished a considerable amount of cocaine to a fellow in New York City. . . ." Id. at 91. After the testimony was given, the defense objected and the court immediately instructed the jury to disregard the testimony. Id.

at 91-92. The court held that because the stricken testimony that defendant had admitted unlawful trafficking of cocaine in the past "struck at the heart of the defense of entrapment," the "most valiant effort on the part of a conscientious juror to obey the trial judge's admonition to disregard the testimony could only be an exercise in futility." Id. at 93.

In this case, Haefele's testimony regarding prior marijuana sales made to Grass cannot be said to be harmless error with respect to the government's case against Grass on the conspiracy to distribute charge. As detailed above, a large part of the government's evidence against Grass on this charge is contained in the testimony and intercepted conversations of Haefele. Haefele testified in detail how he distributed two five pound shipments of methamphetamine to Grass. Based on Haefele's testimony regarding the payment arrangements between Haefele, McKee and Grass, this court concluded that the three operated on the basis of trust and that this special relationship was an important part of the evidence from which a reasonable jury could find Grass guilty of the conspiracy charge. The fact that the very same witness against Grass on the methamphetamine conspiracy testified that he also sold marijuana to Grass is highly prejudicial to Grass. In light of this prejudice, this court cannot say that it was highly probable that the jury's exposure to the testimony regarding prior marijuana sales did not affect the judgment of the jury. As such, defendant's motion for a new

trial on the charge of conspiracy to distribute methamphetamine will be granted.<sup>10</sup>

#### CONCLUSION

The court finds that the government presented sufficient evidence to support the jury's verdict of guilt as to both the obstruction of justice and the conspiracy to possess and distribute methamphetamine counts. The defendant's motion for a judgment of acquittal as to both of these counts, therefore, will be denied. However, the court finds that the evidence of defendant's involvement in the purchase of marijuana with co-conspirator Jay Haefele was inadmissible under Federal Rule of Evidence 404(b) and the court cannot find that such error was harmless. Thus, defendant's motion for a new trial on the conspiracy to possess and distribute methamphetamine count will be granted.

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<sup>10</sup> Because the obstruction of justice count involved different evidence and different witnesses, a new trial on that charge will not be granted.