IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
_____

UNITED STATES OF AMERICA,   SECOND
                                                          FINAL PRETRIAL
                          Plaintiff,   CONFERENCE ORDER

          v.   10-cr-134-wmc

ERIC GARVEY,

                          Defendant.
_____

On June 28, 2011, this court held a second final pretrial conference. Defendant Eric Garvey was present with his attorney, William Jones. The government was represented by Assistant United States Attorney Peter Jarosz.

First, the court arraigned Garvey on the superseding indictment.

Next, the court confirmed with both sides that they had no proposed changes to the voir dire. The court, however, has made a few minor changes to comport the voir dire with Judge Conley's new voir dire template. The parties had no proposed changes to the universe of jury instructions other than concurring with the court that the elements instructions in the post-trial instructions had to be modified to mirror the charges in the superseding indictment. Copies of the voir dire and jury instructions are attached to his order.

Third on the agenda were in limine issues. The government filed a new notice of intent to offer evidence (dkt. 169). There were no disputes over subsections (A), (B), (E), (F), (G), (J) or (K).

Subsection (C) is hotly contested. The government has identified eleven bad acts by Garvey and his alleged coconspirators that it intends to offer at trial. The government argues first that these acts all were presented to the grand jury and are direct evidence of the charged conspiracy; as a fallback position, the government argues that these bad acts are admissible under Rule 404(b) to prove Garvey's knowledge of and intent to join the charged conspiracy. Garvey

strongly disagrees, arguing that this evidence is simply propensity evidence, it's highly prejudicial, it's cumulative and it does not involve interstate commerce. The parties will be arguing their positions to the court at the final hearing.

Subsection (D) is the government's notice of its intent to rely on the coconspirator exception to the hearsay rule, which Garvey does not oppose in theory, but he is entitled to his *Santiago* proffer at the final hearing, and he might have other evidentiary concerns about certain proffered evidence. It will be up to Garvey, by counsel, to flag any specific concerns for the court at the final hearing.

Subsections (H) and (I) are contested: the parties dispute how the government may lay a foundation for the telephone records it intends to offer and they dispute whether the government's summary charts are admissible. The parties asked to brief these issues, so the government will provide its supporting brief by July 1, 2011, Garvey will respond by July 5 and the government will reply by July 7. (The government briefed this issue once already, *see* dkt. 103).

Garvey filed a three-part motion in limine, *see* dkt. 167. His main concern is the government's "other acts" evidence, which is discussed above. His second concern is to exclude evidence of drug use by Garvey, pursuant to Rules 403 and 404(b). The government agrees with the bulk of Garvey's request, but still deems some evidence of drug use directly relevant to proving up the charged conspiracy and Garvey's membership in it. The parties should be prepared to argue this at the final hearing. Garvey's third concern is that the court limit any Rule 609 impeachment to the most basic facts. The parties predict that they will be able to work this one out on their own.

As for housekeeping, Garvey, by counsel, reported that obtaining street clothes was not as easy as they expected; the court responded that this is the defense team's responsibility, but if it has insurmountable problems, it had better let the court know before the final pretrial

2

conference. The court will seat two alternative jurors. The parties are aware they must present evidence on the court's ELMO. The parties had no other matters to bring to the court's attention.

Entered this 1st day of July, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge