

Not To Be Published:

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES LEE SCHRAGE,

Defendant.

No. CR 07-3033-MWB

**MEMORANDUM OPINION AND
ORDER REGARDING
DEFENDANT’S MOTION IN
LIMINE**

FILED UNDER SEAL

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I. INTRODUCTION

A. Procedural Background

In an Indictment (docket no. 1), handed down August 23, 2007, defendant Charles Lee Schrage was charged with a “felon in possession of a firearm” offense in violation of 18 U.S.C. §§ 922(g)(1), 922(g)(9), and 924(a)(2). More specifically, the single count of the Indictment charges that, on or about June 27, 2006, having previously been convicted of one or more crimes punishable by imprisonment for a term exceeding one year, defendant Schrage knowingly possessed, in and affecting commerce, one or more of the following firearms and ammunition: (1) a Winchester Model 88, .243 caliber lever action rifle with serial number H254499; (2) a Remington Model 1100, 12-gauge shotgun with serial number M114860M; (3) a Harrington and Richardson Model SB2 Ultra, .223 caliber single shot rifle with serial number HG325500; (4) a Ruger M77, .22 x 250 caliber rifle with serial number 73-19955; (5) a High Standard, .22 caliber revolver with serial number 001925 (W-106); and (6) various rounds of ammunition. The Indictment alleges that Schrage’s prior convictions were the following: (1) a conviction for OWI 3rd, a felony, in Franklin County, Iowa, case number OWCR004759 on May 21, 1998; (2) convictions for possession of a firearm by a felon, possession of a firearm by a domestic abuser, distributing marijuana to persons under age 21, and possession of methamphetamine, all felonies, in the United States District Court for the Northern District of Iowa, case number CR 00-3015-MWB, on March 7, 2001; and (3) a misdemeanor crime of domestic violence,

first offense, on May 28, 1996. The Indictment includes a forfeiture allegation concerning forfeiture of any firearms or ammunition used in the knowing violation of 18 U.S.C. §§ 922(g)(1) and 922(g)(9), including but not limited to the firearms and ammunition listed in **Count 1**, all pursuant to 18 U.S.C. § 924(d)(1) and 28 U.S.C. § 2461(c). Trial on the “felon in possession of a firearm” charge against defendant Schrage is set to begin on October 6, 2008.

Schrage filed his original Motion In Limine (docket no. 25) in this case, through different counsel, on February 28, 2008. After Schrage’s original counsel was allowed to withdraw, the court entered an order (docket no. 32), dated March 25, 2008, directing new counsel to reaffirm, modify, or withdraw the pending motion in limine and, if appropriate, file a new motion in limine, on or before June 2, 2008. Schrage’s current counsel did reaffirm prior counsel’s motion by filing a Renewed Motion In Limine (docket no. 36) on May 30, 2008. Pursuant to another order (docket no. 37), the prosecution filed its Response (docket no. 52) to Schrage’s Renewed Motion on September 29, 2008. The court finds that Schrage’s Motion In Limine, as renewed, is now fully submitted on the parties’ written submissions.

B. Factual Background

The parties assert that the following factual background is relevant to Schrage’s Renewed Motion in Limine. On July 1, 2006, police in Parkersburg, Iowa, executed a search warrant at the home of Schrage’s girlfriend, Ashley Youngberg, based on information from a neighbor that Schrage had been observed carrying gun cases into the residence on June 27, 2006. During the search, law enforcement officers found and seized several hunting rifles and various rounds of ammunition inside the residence. At the time that the firearms were discovered, Schrage was in custody in Linn County, Iowa, on

revocation of his supervised release on a prior conviction. Schrage was subsequently arrested on state firearms charges. Schrage was in custody until the spring of 2007. Eventually, the state firearms charges were dropped, and the federal indictment in this case was filed on August 23, 2007. Schrage was arrested on the federal charges shortly after the Indictment was filed and has remained in custody since that arrest.

The prosecution contends that, while in custody for his supervised release violation, Schrage attempted, through others, to regain custody of the firearms in question in this case and attempted to direct where the guns were to go and how they were to be disposed of. The prosecution also contends that some of the challenged evidence in this case is recordings of Schrage's conversations with others in which he referenced the firearms at issue here and letters that Schrage wrote to attempt to manufacture witnesses or to attempt to intimidate or influence witnesses.

II. LEGAL ANALYSIS

A. Rule 104

As a preliminary matter, the court notes that Rule 104 of the Federal Rules of Evidence provides, generally, that “[p]reliminary questions concerning . . . the admissibility of evidence shall be determined by the court. . . .” FED. R. EVID. 104. Such preliminary questions may depend upon such things as whether the factual conditions or legal standards for the admission of certain evidence have been met. *See id.*, Advisory Committee Notes, 1972 Proposed Rule. This rule, like the other rules of evidence, must be “construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that truth may be ascertained and proceedings justly determined.” FED. R. EVID. 102. The court concludes that preliminary determination of the admissibility of the evidence put at

issue in Schrage's motion in limine will likely serve the ends of a fair and expeditious presentation of issues to the jury. Therefore, the court turns to consideration of the admissibility of the evidence challenged in that motion.

B. Defendant Schrage's Motion In Limine

In his Motion In Limine, as renewed, Schrage seeks to exclude the following eight categories of evidence: (1) any and all items designated in the prosecution's discovery file as Item F-7, further described as a handwritten log of Schrage's phone calls from the Linn County Jail, consisting of some 52 entries; (2) a copy of a letter from Charles Schrage to Mark Youngberg, designated in the prosecution's discovery file as Item F-12; (3) a copy of a letter from Charles Schrage to Howard Sawyer, designated in the prosecution's discovery file as Item F-13; (4) any and all items designated in the prosecution's discovery file as Item F-15, further described as notes from a phone call from the O'Brien County Jail on September 16, 2007, and Item F-16, which purports to be a CD of the same call; (5) a copy of an unaddressed and undated letter from Charles Schrage to an unidentified person from the O'Brien County Jail, designated in the prosecution's discovery file as Item F-17; (6) any reference to or evidence in the form of recordings or transcriptions of purported telephone calls to unidentified individuals from the Linn County Jail, designated in the prosecution's discovery file as Items F-18 through F-42, inclusive, and Item F-46; (7) any and all evidence relating to the criminal history of a witness, Kevin Dann, which is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, as indicated in Item D-6 and D-7 of the prosecution's discovery file; and (8) any and all evidence relating to Schrage's own criminal history that is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, where he has indicated his intention to testify at trial. In his motion, Schrage contends that

evidence in categories (1) through (6) constitutes inadmissible hearsay under Rules 801 and 802 of the Federal Rules of Evidence and is not relevant to any issue at trial and, as such, should be excluded pursuant to Rules 401 and 402 of the Federal Rules of Evidence. In his brief, he also contends that all of the evidence in categories (1) through (6) is inadmissible pursuant to Rule 403 as potentially unfairly prejudicial. He contends that evidence in categories (7) and (8) is inadmissible pursuant to Rule 609 of the Federal Rules of Evidence.

In its Response, the prosecution represents that it intends to present some of the challenged evidence in its case in chief, not present other challenged evidence, except in rebuttal or for impeachment, as appropriate, and not to present the criminal records of the defendant or defense witnesses, except to the extent allowed by Rule 609. Therefore, the court will consider the admissibility of the challenged categories of evidence in turn.

1. The phone call log

The first category of evidence that Schrage seeks to exclude is any and all items designated in the prosecution's discovery file as Item F-7, further described as a handwritten log of Schrage's phone calls from the Linn County Jail, consisting of some 52 entries. The prosecution represents that it intends to offer only the agent's testimony as to the admissions made by Schrage during the calls in question, but agrees that the agent's handwritten notes should not be admitted into evidence. Because the prosecution agrees that the handwritten notes are inadmissible, this portion of Schrage's Renewed Motion In Limine will be granted.

2. The letter from Schrage to Mark Youngberg

Next, Schrage seeks to exclude a copy of a letter that he sent to Mark Youngberg, designated in the prosecution's discovery file as Item F-12. Schrage does not offer any argument concerning this specific item; rather, he argues generally that all of the

challenged evidence in the first six categories is irrelevant, because it does not have any tendency to make the existence of any fact that is of consequence in this action any more or less probable, because such evidence does nothing to show his actual or constructive possession of the firearms or ammunition at issue in the charged “felon in possession of a firearm” offense. Schrage characterizes all of the “correspondence” evidence as relating to his present custody situation and his attempts to locate witnesses on his behalf. He also argues, again generally, as to all of the challenged evidence in the first six categories, that such evidence is potentially unfairly prejudicial, because it might induce the jurors to decide the case on an improper, emotional basis, because the jurors could conclude that Schrage possessed one or more firearms at some point in time and must be guilty of the charged offense. Schrage does not clarify, however, why jurors might reach such a conclusion on an emotional basis, in light of the challenged evidence. Schrage also asserts that this and other challenged evidence may invite a confusing “mini-trial” over what was actually discussed in the correspondence, would be cumulative of other evidence of his involvement in the charged offense, and would waste trial time.

The prosecution argues that this letter is not hearsay, but an admission of a party opponent excluded from the hearsay rule by Rule 801(d)(2). The prosecution argues, further, that in the letter, Schrage attempts to influence a witness’s testimony, so that the letter is relevant and admissible to show Schrage’s consciousness of guilt. More specifically, the prosecution argues that the letter is to the father of Schrage’s girlfriend and attempts to have the father use his influence to persuade his daughter to change her testimony. The prosecution characterizes the letter as clearly illustrating that Schrage was threatening to tell law enforcement officers that Ashley Youngberg was involved in a drug conspiracy unless her father could influence her to find it hard to remember certain facts relating to the charges against Schrage.

The prosecution asserts that the pertinent part of the challenged letter runs as follows:

I was asked a while back if I knew some of her [Ashley Youngberg's] friends, has she talked about them. He told me they [law enforcement] have an ongoing investigation and wanted to no if I new anything. I said I wasn't sure, course I wouldn't want to put ol girl out there or get her into any trouble, and now they have approached me again involving the same investigation. They are pressuring me for two reasons, one they know that with my current charge that she is a witness in, they feel I will roll on her and her friends she used to hang out with and be caught up in a drug conspiracy. They want a couple of people bad and don't care who else gets hit in the meantime. The second reason is apparently one of her friends already told them I knew something. Once they start this shit its hard to get out of it. . . . Here's is how this sad situation could turn out happy for all the above legally. Its vary hard in court, when the witness testifies to the fact they she jest can't remember for sure how it was. Something tells me that people with clouded minds would find it hard to remember. I wonder how this would apply to us?

Discovery File, Item F-12.¹

¹Contrary to what appears to be a common belief among attorneys in criminal cases, the court does not live in the discovery file for each case. Indeed, prior to trial, the court has little or no access to the evidence in the case apart from what the parties may present in support of or resistance to a motion to suppress or a pretrial evidentiary motion. Thus, it is critical that the parties adequately identify—and where possible provide the court with—the evidence that is at issue in a pretrial evidentiary motion. This court has, with some regularity, denied or reserved for trial ruling on pretrial evidentiary motions where the parties did not identify the evidence at issue sufficiently for the court to make a pretrial determination of admissibility. Here, the prosecution has quoted in its Response what it believes to be the pertinent part of the first letter at issue that the prosecution argues demonstrates its admissibility. The court does not, however, have any independent ability
(continued...)

Rule 801(c) of the Federal Rules of Evidence defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 802(d)(2)(A), however, provides that a party’s “own statement,” in either an individual or representative capacity, is an admission of a party-opponent and, as such, is “not hearsay.” Statements in a letter by the defendant are, of course, admissible as statements of a party-opponent. *See, e.g., United States v. Walker*, 60 Fed.Appx. 637, 638 (8th Cir. 2003) (unpublished op.); *see also United States v. Gilliam*, 167 F.3d 628, 636 (D.C. Cir. 1999) (even if the trial court erred in admitting a letter by the defendant as a statement against interest, the letter could have been introduced against the defendant as an admission by a party-opponent under Rule 801(d)(2)(A)); *United States v. Moran*, 759 F.2d 777, 786 (9th Cir. 1985) (letters and deposit slips signed by the defendant were admissible as admissions of a party-opponent under Rule 801(d)(2)(A)). Thus, Schrage’s hearsay objection cannot stand.

Moreover, the Eighth Circuit Court of Appeals has recognized that “[e]vidence of threats against witnesses is routinely admitted against criminal defendants to show consciousness of guilt.” *United States v. Garrison*, 168 F.3d 1089, 1093 (8th Cir. 1999). Thus, to the extent that the letter in question shows threats to a witness, and thereby shows consciousness of guilt, it is relevant to the proof of the present charges, even if the letter does not pertain more directly to Schrage’s actual or constructive possession of the firearms and ammunition. Thus, the evidence is relevant and admissible pursuant to Rules

¹(...continued)

to verify the contents of the letter in full. Even if the prosecution has adequately identified the evidence at issue, for this item of challenged evidence, as well as the factual context of this evidentiary dispute for the court to determine pretrial the admissibility of this letter, the court has not necessarily been able to do so for all of the challenged evidence or to assess the admissibility of all of the evidence on all of the grounds asserted.

401 and 402. The court also finds that the prosecution’s characterization of the excerpted portion of the letter as an attempt by Schrage to influence Ashley Youngberg’s testimony, and more specifically, to induce her to testify that she “jest can’t remember for sure how it was,” by threatening to expose her involvement in drug trafficking, is not so implausible as to bar its presentation to the jury. The evidence may be “prejudicial” to Schrage’s case, to the extent that it reasonably suggests consciousness of guilt and could reasonably suggest to the jurors that Schrage should be found guilty *because of* his attempt to influence this witness, but that kind of prejudice is not “unfair,” so that this letter is not inadmissible under Rule 403. *See, e.g., United States v. Jiminez*, 487 F.3d 1140, 1145 (8th Cir. 2007) (“Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party’s case.”). Similarly, while Schrage will certainly be entitled to attempt to explain away the inference that the letter was an attempt to induce Ashley Youngberg to testify in a certain way—for example, by characterizing the letter as simply an attempt to locate witnesses on his behalf—the court finds it highly unlikely that any dispute about the reasonable inferences to be drawn from the letter will devolve into the sort of “mini-trial” that Rule 403 should preclude.

Therefore, this portion of Schrage’s Motion In Limine will be denied.

3. *The letter from Schrage to Howard Sawyer*

Schrage also seeks to exclude a copy of a letter he sent to Howard Sawyer, designated in the prosecution’s discovery file as Item F-13. Schrage makes no specific arguments concerning this evidence, only his general arguments concerning the admissibility of the “correspondence” evidence. The prosecution also argues that this letter is not hearsay pursuant to Rule 801(d)(2), but represents that it does not intend to

introduce this letter in its case in chief. Therefore, the court concludes that this portion of Schrage's Motion In Limine should be denied as moot.²

4. *Notes and recording of a phone call*

Next, Schrage seeks to exclude any and all items designated in the prosecution's discovery file as Item F-15, further described as notes from a phone call from the O'Brien County Jail on September 16, 2007, and Item F-16, which purports to be a CD of the same call. Again, Schrage makes no separate argument concerning the admissibility of this evidence. The prosecution represents, however, that it does not intend to offer the notes or recording of this particular call in its case in chief. Therefore, the court concludes that this portion of Schrage's Motion In Limine should also be denied as moot.

5. *The unaddressed letter from Schrage*

The fifth item of evidence that Schrage seeks to exclude is a copy of an unaddressed and undated letter from him to an unidentified person from the O'Brien County Jail, designated in the prosecution's discovery file as Item F-17. Again, Schrage makes no specific arguments concerning this evidence, only his general arguments concerning the admissibility of the "correspondence" evidence. The prosecution asserts that this letter was, in fact, from Schrage to his brother, Dennis. Again the prosecution argues that this letter is not hearsay, but an admission of a party-opponent pursuant to Rule 801(d)(2). The prosecution argues that the letter is also relevant, because it refers to the testimony that Schrage intends to elicit from Craig Walmer, a witness that he has listed. The prosecution

²The court will only deny this portion of Schrage's motion as moot, rather than grant it, because the prosecution does not concede that the evidence is inadmissible, as it did with regard to the agent's phone log, but only represents that it will not present the evidence in its case in chief. Thus, the question of the admissibility of this evidence remains open, should the prosecution attempt to offer the evidence, for example, for impeachment purposes.

contends that, because the letter indicates an attempt by Schrage to coordinate testimony on his behalf, it is admissible over relevance and prejudice objections pursuant to *United States v. Allee* 299 F.3d 996, 1002-3 (8th Cir. 2002).

Schrage does not deny that he is the author of the letter. The prosecution asserts that the letter includes the following statements:

Hacksaw told dude he seen ol girl loading up guns at ol man's house on night. I thought you and Craig were there right around that time allso, mite a seen her pulling away? Sints ya fed the dogs an check the recorder every day, something mite of been missing?

Again, statements in a letter by the defendant are, of course, admissible as statements of a party-opponent. *See* FED. R. EVID. 801(d)(2)(A); *Walker*, 60 Fed.Appx. at 638; *see also Gilliam*, 167 F.3d at 636 (even if the trial court erred in admitting a letter by the defendant as a statement against interest, the letter could have been introduced against the defendant as an admission by a party-opponent under Rule 801(d)(2)(A)); *Moran*, 759 F.2d at 786 (letters and deposit slips signed by the defendant were admissible as admissions of a party-opponent under Rule 801(d)(2)(A)). Thus, Schrage's hearsay objection to this letter cannot stand.

The court also agrees that the letter is admissible over relevance and prejudice objections pursuant to Rules 401, 402, and 403. As the prosecution points out, the Eighth Circuit Court of Appeals recognized in *United States v. Allee*, 299 F.3d 996 (8th Cir. 2002), that statements by the defendant, in that case, on a recording, from which jurors could infer that the defendant was attempting to create an alibi, to implicate others in the crimes, or to persuade witnesses to remain quiet about his role in the crimes "[a]re not only relevant but [a]re particularly probative on the issue of the veracity of [the defendant's] alibi [or other] defense." *Allee*, 299 F.3d at 1002. Thus, such evidence is

admissible over Rule 401, 402, and 403 objections. *Id.* (also finding that recordings indicating that the conversations in question were recorded while the defendant was in jail were admissible over a Rule 404 objection, because the recordings were introduced to allow the jury to evaluate the truthfulness of the defendant's alibi defense, not to show his criminal character). Similarly, here, jurors could reasonably infer from the excerpt of the letter provided by the prosecution that Schrage was attempting to create an alibi or otherwise to manufacture helpful testimony or to influence witnesses not to offer incriminating evidence. Thus, the letter is relevant and highly probative of the truthfulness of evidence that the defendant may elicit. *Id.* Because this evidence also provides reasonable inferences that Schrage was attempting to influence witnesses' testimony, the letter is also admissible to show Schrage's consciousness of guilt. *See Garrison*, 168 F.3d at 1093. Again, the court does not believe that the "prejudice" from such evidence, in the form of reasonable suggestions of guilt, is the sort of "unfair" prejudice that Rule 403 was intended to guard against, *Jiminez*, 487 F.3d at 1145 ("Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case."), nor does the court find it likely that any dispute about the reasonable inferences to be drawn from the letter will devolve into the sort of "mini-trial" that Rule 403 should preclude.

Therefore, this portion of Schrage's Motion In Limine will be denied.

6. *Recordings and transcripts of telephone calls*

The last of the "calls and correspondence" evidence that Schrage challenges is any reference to or evidence in the form of recordings or transcriptions of purported telephone calls to unidentified individuals from the Linn County Jail, designated in the prosecution's discovery file as Items F-18 through F-42, inclusive, and Item F-46. Again, the court finds no specific argument from Schrage concerning the admissibility of this category of

evidence. The prosecution asserts that this evidence is admissible and that it intends to use such evidence at trial. Again, the prosecution asserts that Schrage's statements on the recordings are admissions of a party-opponent and, therefore, not hearsay pursuant to Rule 801(d)(2). The prosecution also argues that two separate kinds of statements in the recordings are relevant and admissible: statements demonstrating Schrage's continued attempts to exercise control over the firearms, even though he was incarcerated, and statements suggesting that he was recruiting others to influence testimony by Ashley Youngberg. Somewhat more specifically, the prosecution contends that the recordings include statements showing that Schrage was attempting to reacquire the seized firearms and attempting to direct where they were stored or to arrange a sale. The prosecution explains that, in one call, Schrage states that if "I" get the guns back, "I" will have someone sell them for "me," thereby demonstrating that Schrage owned the guns and had constructive possession of the guns. The prosecution also asserts that the calls include references to getting Youngberg "back on track."

Although the court's ability to review precisely what is in the challenged recordings is limited to the prosecution's characterization of what Schrage states in the recordings, the court agrees that, to the extent that the recordings include such statements, they are admissible. The statements by Schrage are plainly admissions of a party-opponent. *See* FED. R. EVID. 801(d)(2)(A).³ Moreover, the statements, as characterized, are relevant and admissible pursuant to Rules 401, 402, and 403. The court agrees with the prosecution that the statements raise a reasonable inference that Schrage was still attempting to exercise control over the firearms after their seizure, and that such

³ Schrage does not appear to challenge the admissibility of the recordings on foundational grounds. *See, e.g., United States v. McMillan*, 508 F.2d 101, 104 (8th Cir. 1974) (identifying the seven foundational requirements for a recording in this circuit).

statements, therefore, are probative of his possession of the firearms, either actual or constructive, which is a critical element of the “felon in possession of a firearm” charge. Schrage has failed to identify in what way such evidence is unfairly prejudicial. *Jiminez*, 487 F.3d at 1145 (“Rule 403 does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case.”). To the extent that the recordings tangentially reveal that Schrage was incarcerated at the time of the recordings, the recordings are offered for the legitimate purpose of showing his attempts to exercise control over the firearms, not to show his criminal character. *Allee*, 299 F.3d at 1002 (finding that recordings indicating that the conversations in question were recorded while the defendant was in jail were admissible over a Rule 404 objection, because the recordings were introduced to allow the jury to evaluate the truthfulness of the defendant’s alibi defense, not to show his criminal character). To the extent that the recordings reveal that Schrage was encouraging others to try to get Ashley Youngberg “back on track,” they raise a reasonable inference that Schrage was attempting to influence a witness’s testimony and, thus, show consciousness of guilt. *See Garrison*, 168 F.3d at 1093 (evidence of threats or attempts to influence a witness are probative, and not unfairly prejudicial, in that they show consciousness of guilt).

Therefore, this part of Schrage’s Renewed Motion In Limine will also be denied.

7. *Evidence of the defendant’s and a witness’s criminal histories*

The last two categories of evidence that Schrage seeks to exclude are any and all evidence relating to the criminal history of a witness, Kevin Dann, which is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, as indicated in Item D-6 and D-7 of the prosecution’s discovery file, and any and all evidence relating to Schrage’s own criminal history that is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, where he has indicated

his intention to testify at trial. As to Dann's criminal history, Schrage argues that none of Dann's prior convictions for a variety of offenses concern an act of dishonesty or false statement, so that evidence of his prior offenses is not admissible, even for impeachment, pursuant to Rule 609. As to his own criminal history, Schrage argues that he has indicated that he will testify, and he has stipulated to the predicate felony as an element of the "felon in possession of a firearm" offense pursuant to *Old Chief v. United States*, 519 U.S. 172 (1997). Thus, he contends that his other earlier convictions are highly prejudicial under Rule 403 and impeachment using any other earlier convictions should not be allowed. In response, the prosecution argues that Dann has a conviction for a felony OWI 3rd offense in 1998, but that he was sent to prison on the charge in 2000, and was out on parole after that. Therefore, the prosecution argues that this felony conviction falls within the ten-year time frame for admissibility pursuant to Rule 609. The prosecution argues that evidence of Schrage's criminal history outside of what it describes as an "anticipated" stipulation will not be used for impeachment in the event that Schrage does testify, unless Schrage somehow "opens the door," and the prosecution obtains prior court approval.

Rule 609 permits evidence of a defendant witness's prior conviction to be admitted for purposes of attacking the defendant witness's truthfulness, if the crime was punishable by imprisonment in excess of one year, and "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." FED. R. EVID. 609(a)(1). Rule 609 also provides that "evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." *Id.* Rule 609 also permits a prior conviction of "any witness" to be admitted to attack the character for truthfulness of the witness, "regardless of punishment," if the prior conviction involved an act of dishonesty or false statement. *See*

FED. R. EVID. 609(a)(2). Evidence of a prior conviction is not admissible under Rule 609 “if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” FED. R. EVID. 609(b).

Witness Dann’s prior conviction for OWI 3rd is admissible, pursuant to Rule 609(a)(1), without regard to whether the offense involved an act of dishonesty or false statement, because it is a felony conviction within ten years of his conviction or release from confinement for that conviction. *See* FED. R. EVID. 609(a)(1) and (b). The “act of dishonesty or false statement” limitation in Rule 609(b)(2), on which Schrage relies to exclude evidence of this prior conviction against Dann, would exclude only a *non-felony* conviction lacking an “act of dishonesty or false statement.” The court does not find any Rule 403 “prejudice” ground for excluding evidence of Dann’s prior felony conviction. *See* FED. R. EVID. 609(a)(1) (admissibility pursuant to this portion of the rule is “subject to Rule 403”). Thus, Dann’s prior felony conviction for OWI 3rd will be admissible, and that part of Schrage’s Renewed Motion In Limine seeking to exclude any evidence of Dann’s prior convictions will be denied as to Dann’s prior conviction for OWI 3rd.

As to defendant Schrage’s prior convictions, the prosecution represents that it will not use for impeachment evidence of convictions outside of any stipulation in the event that Schrage does testify, unless Schrage somehow “opens the door,” and the prosecution obtains prior court approval. The prosecution’s representation may be narrower than the limitations on evidence of a prior conviction to which the defendant has stipulated imposed

by *Old Chief*.⁴ Nevertheless, the court will hold the prosecution to its representation about the extent to which it will use evidence of Schrage's prior convictions. In light of that representation, the part of Schrage's Renewed Motion In Limine seeking to exclude evidence of his own prior convictions, even if he testifies, will be denied as moot.

III. CONCLUSION

Upon the foregoing, defendant Schrage original February 28, 2008, Motion In Limine (docket no. 25), as renewed by defendant Schrage's May 30, 2008, Renewed Motion In Limine (docket no. 36), is **granted in part and denied in part**, as follows:

1. That part of Schrage's motion seeking to exclude any and all items designated in the prosecution's discovery file as Item F-7, further described as a handwritten log of Schrage's phone calls from the Linn County Jail, consisting of some 52 entries, is **granted**.
2. That part of Schrage's motion seeking to exclude a copy of a letter that he sent to Mark Youngberg, designated in the prosecution's discovery file as Item F-12, is **denied**.

⁴In *Old Chief*, the Supreme Court ruled that evidence of prior felony convictions, used to support a charge under 18 U.S.C. § 922(g)(1), should not be heard by the jury, if the purpose of the evidence is to prove the defendant's *status as a felon*, where the defendant offers to stipulate to the existence of such convictions. *Old Chief*, 519 U.S. 180-92, 117 S. Ct. 644. The Supreme Court explained, however, that the general rule is that "the prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, that a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Id.* at 186-87, 117 S.Ct. 644; *see also id.* at 189, 117 S.Ct. 644 ("[T]he accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense.").

3. That part of Schrage's motion seeking to exclude a copy of a letter he sent to Howard Sawyer, designated in the prosecution's discovery file as Item F-13, is **denied as moot**.

4. That part of Schrage's motion seeking to exclude any and all items designated in the prosecution's discovery file as Item F-15, further described as notes from a phone call from the O'Brien County Jail on September 16, 2007, and Item F-16, which purports to be a CD of the same call, is **denied as moot**.

5. That part of Schrage's motion seeking to exclude a copy of an unaddressed and undated letter from him to an unidentified person from the O'Brien County Jail, designated in the prosecution's discovery file as Item F-17, is **denied**.

6. That part of Schrage's motion seeking to exclude any reference to or evidence in the form of recordings or transcriptions of purported telephone calls to unidentified individuals from the Linn County Jail, designated in the prosecution's discovery file as Items F-18 through F-42, inclusive, and Item F-46, is **denied**.

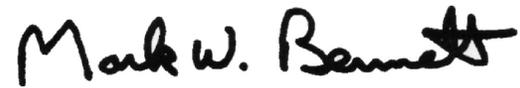
7. That part of Schrage's motion seeking to exclude any and all evidence relating to the criminal history of witness, Kevin Dann, which is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, as indicated in Item D-6 and D-7 of the prosecution's discovery file, is **denied** as to witness Dann's prior felony conviction for OWI 3rd.

8. That part of Schrage's motion seeking to exclude any and all evidence relating to defendant Schrage's own criminal history that is more than ten years old or does not constitute a conviction for an act of dishonesty or false statement, where he has indicated his intention to testify at trial, is **denied as moot** in light of the prosecution's representation that it will not use for impeachment evidence of convictions outside of any

stipulation in the event that Schrage does testify, unless Schrage somehow “opens the door,” and the prosecution obtains prior court approval.

IT IS SO ORDERED.

DATED this 2nd day of October, 2008.

A handwritten signature in black ink that reads "Mark W. Bennett". The signature is written in a cursive style with a horizontal line extending from the end of the name.

MARK W. BENNETT
U. S. DISTRICT COURT JUDGE
NORTHERN DISTRICT OF IOWA