UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| UNITED STATES OF AMERICA | ) | |
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| v. | ) | No. 08 CR 888 |
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| WILLIAM F. CELLINI, SR. | ) | Hon. James B. Zagel |

# GOVERNMENT'S EVIDENTIARY PROFFER SUPPORTING THE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

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The UNITED STATES OF AMERICA, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits this written proffer, pursuant to Federal Rule of Evidence 801(d)(2)(E) and *United States v. Santiago*, 582 F.2d 1128 (7th Cir. 1987), of the government's evidence supporting the admission of co-conspirators' statements at trial. This proffer summarizes evidence that the government will offer at trial relating to a conspiracy among defendant William F. Cellini, Sr. and co-conspirators to commit fraud and extortion. This proffer also summarizes the defendant's and his co-conspirators' statements that furthered the criminal conspiracy.

We begin by discussing the conspiracy charged in this case. Then, we discuss the law governing the admissibility of co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). Next, we summarize some of the evidence supporting the admission of co-conspirators' statements.

The government does not detail here all of its evidence showing the existence of the conspiracy charged in the indictment, or all of the statements that were made in furtherance of the conspiracy. Instead, we outline the law governing the admissibility of such statements, provide background to the Court for evaluating the admissibility of these statements, and highlight examples of the government's evidence. *United States v. McClellan*, 165 F.3d 535, 553-54 (7th Cir. 1999) (government not required to include in *Santiago* proffer each and every statement it intends to elicit at trial). In this manner, the government will establish to the Court the evidence available to complete the necessary foundation at trial and the roles of various witnesses, as well as the bases for admission.

## I. OVERVIEW OF THE CHARGED CONSPIRACY

Defendant William F. Cellini, Sr. was associated with a real estate asset-management firm, Commonwealth Realty Advisors, that managed hundreds of millions of dollars of pension money for the Teachers' Retirement System of Illinois, also known as TRS. As a prominent Republican fundraiser in Illinois, defendant built significant influence at state agencies over the years, particularly during those years when Illinois citizens elected Republican governors. To protect and grow Commonwealth's business with TRS, defendant used his influence within Republican administrations to cause appointment of TRS trustees and staff members who took direction from defendant, and caused TRS to act in ways favorable to defendant's interests.

In approximately 2002, there was a significant shift in Illinois politics: for the first time in 26 years, a Democrat, Rod Blagojevich, was elected governor. Defendant, behind the scenes, shifted his allegiance, agreeing secretly to raise money for Blagojevich. Defendant formed relationships with Blagojevich's closest advisers, Antoin "Tony" Rezko and Chris Kelly, and made a deal with them. In exchange for Rezko and Kelly's help in defeating a proposal that promised to reduce defendant's influence at TRS, defendant and his close ally, TRS trustee Stuart Levine, agreed that defendant would use his power at TRS and Levine would use his position on the TRS board to ensure that TRS invested money with and hired firms chosen by Rezko and Kelly, including to reward those who contributed money to Blagojevich's campaign fund.

By 2004, defendant was tight with Rezko and Kelly, conferring with them frequently on matters relating to state action. Defendant lobbied Rezko and Kelly, for example, to secure Stuart Levine's reappointment to the TRS board. Defendant continued to help Rezko and Kelly raise

money for Blagojevich's campaign fund, knowing that Rezko and Kelly were doling out state contracts in exchange for campaign contributions.

In approximately May 2004, another opportunity arose for defendant to fulfill the agreement he and Levine made with Rezko and Kelly. Capri Capital, like Commonwealth, was a real estate asset-management firm that managed hundreds of millions of pension dollars for TRS. Rezko and Kelly had recently learned that Capri and one of its owners, Thomas Rosenberg, were managing millions of dollars of TRS pension money but had not given any campaign contributions to Blagojevich. That's not how Rezko and Kelly wanted things to work in Illinois in 2004; for many who found themselves on the administration's radar, the rule was pay to play. Rezko and Kelly wanted Rosenberg to pay, or Capri would not receive its expected $220 million allocation of teachers' pension money from TRS. Levine informed defendant that Rezko and Kelly wanted money from Rosenberg, and defendant agreed to help.

Defendant and Levine agreed to a two-part approach. First, defendant would call Rosenberg to let him know that Capri had a problem: Rezko and Kelly had become aware that Capri was receiving a significant amount of state business without having contributed to Blagojevich, and Capri's business with TRS was therefore on hold. Defendant would direct Rosenberg to Levine, who would deliver part two of the extortionate message. Levine's job was to tell Rosenberg how to solve Capri's problem at TRS: a $1.5 million campaign contribution to Blagojevich, or a $2 million fee that Levine would share with Rezko.

Defendant, knowing that Rezko and Kelly were attempting to shake Rosenberg down for a campaign contribution to Blagojevich (although unaware of the alternative fee option that Levine intended to propose), took action. He spoke with Rosenberg, and delivered the message that he and

Levine previously agreed upon. Defendant told Rosenberg, in substance, that Rosenberg and Capri were now on Rezko and Kelly's radar screen, and Capri's state business was on hold because Rosenberg had not paid to the campaign. The next part, however, did not go as expected. Rosenberg insisted he would not pay to play. He was outraged at the extortion attempt, and threatened to expose the plot. Defendant was shaken and concerned. He and Levine circled the wagons, strategizing together and with Rezko and Kelly about how best to calm Rosenberg down. Ultimately, in an attempt to quiet Rosenberg and protect the conspiracy, defendant, Levine, Rezko, and Kelly agreed that Capri should receive its $220 million allocation from TRS, although that would be the end of Capri's state business.

Throughout the conspiracy, defendant and his co-conspirators, including Stuart Levine, Tony Rezko, Chris Kelly, Steve Loren, and Individual A (TRS's executive director), sought to conceal their agreement and acts. Defendant told multiple lies to Rosenberg in an effort to hide his own role, and Levine's, and Rezko and Kelly's, in the shakedown attempt. Defendant also took measures to placate people he thought might expose his role in the conspiracy. In addition, defendant and others discussed the possibility of removing the U.S. Attorney for the Northern District of Illinois in an effort to stop any investigation into the co-conspirators and others.

As a result of his actions, defendant was charged in an indictment with participating in a conspiracy. First, the indictment[1/] charges defendant with conspiring to defraud TRS beneficiaries and the people of the State of Illinois of their intangible right to Levine's honest services, all in violation of Title 18, United States Code, Section 371. Second, the indictment charges defendant

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[1/]The government notified defense counsel that it intends to proceed to trial on the original indictment against defendant, not the superseding indictment.

with conspiring to commit extortion by attempting to obtain political contributions for Blagojevich from Rosenberg and Capri in exchange for releasing the $220 million allocation of funds from TRS, all in violation of Title 18, United States Code, Section 1951.[2/] Defendant is also charged with attempted extortion under Title 18, United States Code, Section 1951, and solicitation of funds under Title 18, United States Code, Section 666(a)(1)(B).

## II. THE LAW GOVERNING THE ADMISSIBILITY OF CO-CONSPIRATOR STATEMENTS

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides that a "statement" is not hearsay if it "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." The admission of a co-conspirator statement against a defendant is proper where the government establishes by a preponderance of evidence that: (1) a conspiracy existed; (2) the defendant and the declarant were members of that particular conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *United States v. Westmoreland*, 312 F.3d 302, 309 (7th Cir. 2002).

### A. The *Santiago* Proffer Is the Approved Method of Proffering Co-Conspirator Statements

In this Circuit, the preferred way for the government to makes its preliminary factual showing as to the admissibility of such statements is by filing a pretrial written proffer of the government's evidence. *United States v. Hoover*, 246 F.3d 1054, 1060 (7th Cir. 2001); *United States v. Irorere,* 228 F.3d 816, 824 (7th Cir. 2000). In making its preliminary factual determinations, the court should consider the statements themselves as evidence of a joint conspiracy and whether the

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[2/]The Section 1951 conspiracy is a subset of the Section 371 conspiracy, based on the same facts.

statements the government seeks to admit were made in furtherance of that conspiracy. *United States v. Brookins*, 52 F.3d 615, 623 (7th Cir. 1995); *United States v. Maholias*, 985 F.2d 869, 877 (7th Cir. 1993). The court may consider all non-privileged evidence. *United States v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996).

**B. Co-Conspirator Statements Are Admissible as Non-Hearsay Regardless of the Criminal Intent of Each Co-Conspirator**

A co-conspirator for purposes of Federal Rule of Evidence 801(d)(2)(E) is not the same as a co-conspirator for purposes of criminal liability. The evidentiary rule applies to people who are part of the same joint venture as the criminal conspirator, even if such people do not have the intent that would be required to support a criminal charge:

> The distinction should be noted between "conspiracy" as a crime and the co-conspirator exception to the hearsay rule. Conspiracy as a crime comprehends more than mere joint enterprise. It also includes other elements, such as a meeting of the minds, criminal intent and, where required by statute, an overt act. . . . The co-conspirator exception to the hearsay rule, on the other hand, is merely a rule of evidence founded, to some extent, on concepts of agency law. It may be applied in both civil and criminal cases. . . . Its rationale is the common sense appreciation that a person who has authorized another to speak or to act to some joint end will be held responsible for what is later said or done by his agent, whether in his presence or not.
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> The substantive criminal law of conspiracy, though it obviously overlaps in many areas, simply has no application to this evidentiary principle. *Thus, once the existence of a joint venture for an illegal purpose, or for a legal purpose using illegal means, and a statement made in the course of and in furtherance of that venture have been demonstrated by a preponderance of the evidence, it makes no difference whether the declarant or any other "partner in crime" could actually be tried, convicted and punished for the crime of conspiracy*.

*United States v. Gil*, 604 F.2d 546, 549-550 (7th Cir. 1979) (citations omitted) (emphasis added).

This distinction was also explored in *United States v. Coe*, 718 F.2d 830 (7th Cir. 1983). In

*Coe*, the court explained that a co-conspirator statement's admissibility does not depend on the substantive law of conspiracy:

> Conspiracy as an evidentiary rule differs from conspiracy as a crime. The crime of conspiracy comprehends much more than just a joint venture or concerted action, whereas the evidentiary rule of conspiracy is founded on concepts of agency law. . . . Recognizing this, some courts refer to the coconspirator exception as the "joint venture" or "concert of action" exception. . . . A charge of criminal conspiracy is not a prerequisite for the invocation of this evidentiary rule. . . . Indeed, it may be invoked in civil as well as criminal cases. . . .
>
> The proposition that the government did have to establish by a preponderance of independent evidence was that [the individuals] . . . were engaged in a joint venture--that there was a "combination between them . . . ."

*Coe*, 718 F.2d at 835 (citations omitted).

### C. The Supreme Court's *Crawford* Decision Did Not Change the Admissibility of Co-Conspirator Statements

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), did not affect the admissibility of co-conspirator statements. The Court held that where the government offers an unavailable declarant's hearsay that is "testimonial" in nature, the Confrontation Clause requires actual confrontation. *Id.* at 51-52. The rule in *Crawford* does not apply, however, to statements that are not hearsay.[3/] Thus, the Seventh Circuit held that *Crawford* does not apply to, and did not change the law relating to, co-conspirator statements:

> As to the Confrontation Clause argument, *Crawford* does not apply. The recordings featured the statements of co-conspirators. These statements, by definition, are not hearsay. *Crawford* did not change the rules as to the admissibility of co-conspirator statements.

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[3/] The rule in *Crawford* also does not apply where: (1) a statement, though testimonial in nature, is not offered for the truth of the matter asserted, 541 U.S. at 59 n.9; (2) the declarant testifies at trial and is subject to cross-examination regarding the prior statement, *id.* at 59 n.9; (3) the statement is non-testimonial, *id.* at 60; or (4) the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination, *id.* at 59.

*United States v. Jenkins*, 419 F.3d 614, 618 (7th Cir. 2005). Because co-conspirator statements are not "testimonial" hearsay statements, *Crawford* is not implicated, and those statements may be admitted without offending the Sixth Amendment.

**D. The Proper Standard for Admissibility Is Preponderance of the Evidence**

A district court's preliminary determination of admissibility for purposes of Rule 801(d)(2)(E) is distinct from the standard on appeal in determining whether sufficient evidence exists to uphold a jury verdict. The standard to be applied in the context of admissibility under Rule 801(d)(2)(E) is a preponderance-of-the-evidence standard. *Lindemann*, 85 F.3d at 1238 (citing *Bourjaily*, 438 U.S. at 175-76).

**E. Principles for Determining Membership in and Existence of the Criminal Conspiracy**

***1. The court may consider the proffered statements themselves***

A district court may consider the proffered statements themselves in determining the existence of a conspiracy, and a defendant's participation in it. *Bourjaily,* 483 U.S. at 180; *United States v. de Ortiz*, 907 F.2d 629, 633 (7th Cir. 1990). However, the government typically must present some evidence, independent of the statements. *Lindemann*, 85 F.3d at 1238.

***2. Both direct and circumstantial evidence can be considered***

Once the conspiracy is established, the evidence may be either direct or circumstantial. *Irorere*, 228 F.3d at 823; *United States v. Patterson*, 213 F. Supp. 2d 900, 910-11 (N.D. Ill. 2002) (Bucklo, J.), *aff'd*, 348 F.3d 218, 225-26 (7th Cir. 2003). Indeed, "[b]ecause of the secretive character of conspiracies, direct evidence is elusive, and hence the existence and the defendants' participation can usually be established only by circumstantial evidence." *United States v. Redwine*,

715 F.2d 315, 319 (7th Cir. 1983). *See also Lindemann*, 85 F.3d at 1238 (secretive nature of conspiracies one reason for conspirator exception to hearsay rule).

***3. Requirements for determining if a person has joined the conspiracy***

A defendant joins a criminal conspiracy if he agrees with another person to one or more of the common objectives of the conspiracy; it is immaterial whether the defendant knows, has met, or has agreed with every co-conspirator. *United States v. Boucher*, 796 F.2d 972, 975 (7th Cir. 1986); *United States v. Balistrieri*, 779 F.2d 1191, 1225 (7th Cir. 1985); *see also Rodriguez*, 975 F.2d at 411 (defendant must have intended to join and associate himself with the conspiracy's criminal design and purpose). The government need not prove, however, that a defendant knew each and every detail of the conspiracy or played more than a minor role in the conspiracy. *United States v. Sims*, 808 F. Supp. 620, 623 (N.D. Ill. 1992) (Alesia, J.). As the Supreme Court has said, people who play a supporting role in a conspiracy are "as guilty as the perpetrators":

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. . . . The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. . . . If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

*Salinas v. United States*, 522 U.S. 52, 63-4 (1997) (citations omitted).

A defendant may be found to have participated in a conspiracy even if he joined or terminated his relationship with others at a different time than another defendant or co-conspirator. *United States v. Ramirez*, 796 F.2d 212, 215 (7th Cir. 1986); *United States v. Noble*, 754 F.2d 1324, 1329 (7th Cir.1985). Moreover, a defendant, even if not an "agreeing" member of a conspiracy, may nonetheless be found guilty of conspiracy if he knew of the conspiracy's existence at the time of his acts, and his acts knowingly aided and abetted the business of the conspiracy, *see United States v.*

*Scroggins*, 939 F.2d 416, 421 (7th Cir. 1991); *Sims*, 808 F. Supp. at 623 n.1, even if the defendant was not charged with aiding and abetting, *see United States v. Kasvin*, 757 F.2d 887, 890-91 (7th Cir.1985). A district court may consider the conduct, knowledge, and statements of the defendant and others in establishing participation in a conspiracy. A single act or conversation, for example, can suffice to connect the defendant to the conspiracy if that act leads to the reasonable inference of intent to participate in an unlawful enterprise. *Sims*, 808 F. Supp. at 623. Statements made during the course of and in furtherance of a conspiracy, even in its embryonic stages, are admissible against those who arrive late to join a going concern. *United States v. Potts*, 840 F.2d 368, 372 (7th Cir. 1987).

**F. Statements Made in Furtherance of the Conspiracy**

In determining whether a statement was made "in furtherance" of the conspiracy, courts look for a reasonable basis upon which to conclude that the statement furthered the conspiracy's goals. *United States v. Johnson*, 200 F.3d 529, 533 (7th Cir. 2000). Under the reasonable-basis standard, a statement may be susceptible to alternative interpretations and still be "in furtherance" of the conspiracy; the statement need not have been exclusively, or even primarily, made to further the conspiracy in order to be admissible under the co-conspirator exception. *Johnson*, 200 F.3d at 533 (citing *United States v. Stephenson,* 53 F.3d 836, 845 (7th Cir. 1995)).

The Seventh Circuit has found a wide range of statements to satisfy the "in furtherance" requirement. *United States v. Cozzo*, No. 02 CR 400, 2004 U.S. Dist. LEXIS 7391 (N.D. Ill. April 16, 2004) (Zagel, J.) (collecting cases). In general, a statement that is "part of the information flow between conspirators intended to help each perform his role" is admissible under Rule 801(d)(2)(E). *United States v. Santos*, 20 F.3d 280, 286 (7th Cir. 1994) (quoting *United States v. Johnson*, 927

F.2d 999, 1001 (7th Cir. 1991)); *accord United States v. Gajo*, 290 F.3d 922, 929 (7th Cir. 2002). These include statements made to (1) identify other members of the conspiracy and their roles, *United States v. Roldan-Zapata,* 916 F.2d 795, 803 (2d Cir. 1990); *United States v. Magee*, 821 F.2d 234, 244 (5th Cir. 1987); (2) recruit potential co-conspirators, *United States v. Curry*, 187 F.3d 762, 766 (7th Cir. 1999); (3) control damage to an ongoing conspiracy, *United States v. Van Daal Wyk,* 840 F.2d 494, 499 (7th Cir. 1988); *Kapp*, 2003 U.S. Dist. LEXIS 3989, at *3; (4) keep co-conspirators advised as to the progress of the conspiracy, *Potts*, 840 F.2d at 371; *Kapp*, 2003 U.S. Dist. LEXIS 3989, at *3; (5) conceal the criminal objectives of the conspiracy, *United States v. Kaden*, 819 F.2d 813, 820 (7th Cir. 1987); (6) plan or to review a co-conspirator's exploits, *United States v. Molt*, 772 F.2d 366, 368-69 (7th Cir. 1985); or (7) as an assurance that a co-conspirator can be trusted to perform his role. *United States v. Pallais*, 921 F.2d 684, 688 (7th Cir. 1990); *Van Daal Wyck*, 840 F.2d at 499. The Seventh Circuit has also said that "[s]tatements made to keep coconspirators informed about the progress of the conspiracy, to recruit others, or to control damage to the conspiracy are made in furtherance of the conspiracy." *Stephenson,* 53 F.3d at 845. *Accord United States v. Curtis*, 37 F.3d 301, 307 (7th Cir. 1994); *United States v. McCarroll*, No. 95 CR 48, 1996 U.S. Dist. LEXIS 2540 (N.D. Ill. Jan. 22, 1996) (Coar, J.).

***1. Statements made to execute the conspiracy***

Statements made by co-conspirators to conduct the business of the conspiracy and to accomplish its goals are "classic examples of statements made to conduct and further" a conspiracy. *Cox*, 923 F.2d at 527. Statements such as these, which are "intended to promote the conspiratorial objectives," should be admitted pursuant to Rule 801(D)(2)(E). Statements that prompt the listener to act in a manner that facilitates the carrying out of the conspiracy are also made "in furtherance"

of the conspiracy. Whether a particular statement tends to advance the objectives of the conspiracy or to induce the listener's assistance is determined by an examination of the context in which it is made. *Garlington v. O'Leary*, 879 F.2d 277, 284 (7th Cir. 1989).

***2. Statements regarding the conspiracy's activities***

Statements "describing the purpose, method, or criminality of the conspiracy," are made in furtherance of the conspiracy because co-conspirators make such statements to guide each other toward achievement of the objectives of the conspiracy. *United States v. Ashman*, 979 F.2d 469, 489 (7th Cir. 1992). Similarly, statements that are part of the information flow between co-conspirators made in order to help each co-conspirator perform his role are "in furtherance" of the conspiracy. *Godinez,* 110 F.3d at 454; *Garlington*, 879 F.2d at 283-84; *Van Daal Wyk,* 840 F.2d at 499. Statements to assure that a co-conspirator can be trusted to perform his role also satisfy the "in furtherance" requirement. *United States v. Romo*, 914 F.2d 889, 897 (7th Cir. 1990); *de Ortiz*, 907 F.2d at 635-36.

***3. Statements to recruit co-conspirators***

Statements made to recruit potential members of the conspiracy are made "in furtherance" of the conspiracy. *Curry*, 187 F.3d at 766; *Godinez*, 110 F.3d at 454; *United States v. Doerr*, 886 F.2d 944, 951 (7th Cir. 1989); *Garlington*, 879 F.2d at 283.

***4. Statements regarding the activities of other co-conspirators designed to inform or reassure the listener***

Statements made by conspirators to other individuals who participate in, or interact with, the conspiracy contribute to the conspiracy. *Van Daal Wyk*, 840 F.2d at 499 (wholesaler instructed his courier not to deliver any additional quantities of cocaine to the defendant, a dealer).

> The exchange of information is the lifeblood of a conspiracy, as it is of any cooperative activity, legal or illegal. Even commenting on a failed operation is in furtherance of the conspiracy, because people learn from their mistakes. Even identification of a coconspirator by an informative nickname. . . is in furtherance of the conspiracy, because it helps to establish, communicate, and thus confirm the lines of command in the organization. Such statements are "part of the information flow between conspirators intended to help each perform his role," and no more is required to make them admissible.

*Pallais*, 921 F.2d at 688. The same logic dictates that discussions concerning a conspiracy's successes are admissible as statements in furtherance of the conspiracy. *See id.*; *Van Daal Wyk*, 840 F.2d at 499.

Statements intended to reassure the listener regarding the progress or stability of the conspiracy also further the conspiracy. *United States v. Sophie*, 900 F.2d 1064, 1073 (7th Cir. 1990) (description of past drug deals). Likewise, statements made to reassure and calm the listener may further the conspiracy, *see Garlington*, 879 F.2d at 284; *United States v. Molinaro*, 877 F.2d 1341, 1343-44 (7th Cir. 1989) (upholding admission of statements designed to iron out disputed details of the conspiracy and to control the damage apparently done to the conspiracy).

***5. Statements relating to the progress and past accomplishments of the conspiracy***

Statements made by co-conspirators concerning past exploits by members of the conspiracy are in furtherance of the conspiracy when made to assist in managing and updating other members of the conspiracy. *Potts*, 840 F.2d at 371; *Molt*, 772 F.2d at 368-69. Similarly, statements regarding a co-conspirator's failure fully to accomplish the objective of the conspiracy are admissible "as updates on the status of the conspiracy" and how that status affected the future of the conspiracy. *United States v. Doyle*, 771 F.2d 250, 256 (7th Cir. 1985).

***6. Statements to conceal the criminal objectives of the conspiracy***

Finally, statements made to conceal the criminal objectives of the conspiracy are made "in furtherance" of the conspiracy where, as here, ongoing concealment is one of its purposes. *United States v. Maloney*, 71 F.3d 645, 660 (7th Cir. 1995); *Kaden*, 819 F.2d at 820; *United States v. Bouzanis,* No. 00 CR 1065, 2003 U.S. Dist. LEXIS 16218, at *21 n.5 (N.D. Ill. Sept. 15, 2003) (Lefkow, J.). "Avoiding detection by law enforcement officials clearly furthers the aims of a conspiracy." *United States v. Troop*, 890 F.2d 1393, 1404 (7th Cir. 1989). Statements made to control damage to an ongoing conspiracy have also been found to have been made in furtherance of the conspiracy. *See Stephenson*, 53 F.3d at 845; *Van Daal Wyk*, 840 F.2d at 499.

**G. Alternative Bases for Admissibility of Statements**

Some of the statements of co-conspirators set forth in this proffer should be admitted as non-hearsay under the co-conspirator doctrine. Many of the statements, however, should be admitted on other bases, which do not require a Rule 801(d)(2)(E) analysis. Such statements are included in this proffer to demonstrate the existence of the conspiracy, and to provide context.

***1. Defendant's own statements***

A defendant's own statements are admissible against him pursuant to Fed. R. Evid. 801(d)(2)(A), without reliance on the co-conspirator-statement rule.[4/] *Maholias*, 985 F.2d at 877. A defendant's own statements, moreover, are relevant to establishing the factual predicates for the

[4/] Rule 801(d)(2)(A) provides in pertinent part that a "statement" is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or a representative capacity."

admission of co-conspirator statements against him. *Godinez*, 110 F.3d at 455; *Potts*, 840 F.2d at 371-72.[5/]

***2. Non-hearsay statements***

The co-conspirator statement analysis also is not triggered when the relevant verbal declaration is not a "statement" within the meaning of Federal Rule of Evidence 801(a) and when it is not hearsay. This rule defines "statement" as "an oral or written assertion" or "nonverbal conduct of a person, if it is intended by the person as an assertion."

Thus, a statement that is incapable of verification, such as an order or a mere suggestion, is not hearsay and does not invoke a Rule 801(d)(2)(E) analysis. *United States v. Tuchow*, 768 F.2d 855, 868 n.18 (7th Cir. 1985). Accordingly, statements by alleged co-conspirators may be admitted into evidence without establishing the *Bourjaily* factual predicates, but with corresponding limiting instructions, when such statements are offered simply to show, for example, the existence, illegality, or nature and scope of the charged conspiracy .[6/] In addition, when words are being introduced as a verbal act, or as background for an alleged statement, they are not admitted for the truth of the matter asserted. For that reason, they are not hearsay, and may be admitted. *United States v. Robinzine*, 80 F.3d246, 252 (7th Cir. 1996).

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[5/] Other sections of Rule 801(d)(2) provide alternative bases of admissibility that may apply. Rule 801(d)(2)(B), for example, provides for the admissibility of "adopted" statements.

[6/] *United States v. Herrera-Medina*, 853 F.2d 564, 565-66 (7th Cir. 1988); *Van Daal Wyk*, 840 F.2d at 497-98; *Tuchow*, 768 F.2d at 867-69. In some cases, statements by an alleged co-conspirator will include a combination of declarations offered for the truth of the matters asserted and declarations offered for other non-hearsay purposes.

Many of the statements in this proffer – even though made by co-conspirators – are non-hearsay statements, and should be admitted without resort to Rule 801(d)(2)(E).

## III. THE GOVERNMENT'S PROFFER REGARDING THE EXISTENCE OF A CONSPIRACY

The government submits the following summary of evidence, which establishes the existence of a conspiracy, the identities of the co-conspirators, and examples of co-conspirator statements in furtherance of the conspiracy:[7/]

### A. Background Concerning the Teachers' Retirement System of the State of Illinois

TRS was a public pension plan that provided retirement, survivor, and disability benefits for teachers and administrators employed in Illinois public schools, except in Chicago. Teachers paid a portion of their salary to TRS, school districts and the state contributed, and TRS earned income on its investments. In 2004, TRS's assets exceeded $30 billion.

TRS's staff, led by its executive director, managed the system, including reviewing and recommending investments to TRS's board of trustees. In 2004, TRS had an 11-member board of trustees. Some of the trustees were appointed by the governor, while other trustees were elected by active and retired teachers. The trustees decided how to invest TRS's assets, and paid selected companies to manage TRS's investments.

In 2004, TRS invested some of its assets in real estate. Commonwealth Realty Advisors was one of five companies that managed TRS's real estate investments at that time. Defendant had a

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[7/]This summary is based on information contained in investigative reports, grand jury transcripts, trial transcripts, wiretap transcripts, and documents obtained during the investigation. Pursuant to the protective order, defendants have been provided relevant investigative reports, as well as grand jury and trial transcripts of likely government witnesses. In addition, defendant has been given electronic copies of many documents, and have been given access to (along with an index of) other documents collected by the government during its investigation.

long-standing relationship with Commonwealth, which was originally his company. TRS was Commonwealth's largest client, and in 2004, Commonwealth managed hundreds of millions of dollars of TRS real-estate funds. By 2004, defendant had arranged for his ownership interest to be placed into trusts held for his children, and defendant remained heavily involved in Commonwealth's management.

**B. Defendant's Influence at TRS**

Defendant was not a member of the TRS staff or a trustee on the TRS board. His only surface connection to TRS was as a money manager, by virtue of his relationship with Commonwealth. Nevertheless, defendant had significant influence over TRS's decision-making, because he used his clout to install staff and board members at TRS who were loyal to defendant and who took direction from him. In particular, in 2001, defendant sought and secured appointment of a loyal executive director, Individual A, for TRS. The TRS executive director was very important to defendant, because the executive director was the key person at TRS controlling the TRS board's agenda, including the investment opportunities that were presented to the TRS board. If the TRS executive director approved an investment and proposed it to the board, it was rare for the board to reject the executive director's proposal.

In approximately 2000 Keith Bozarth was TRS's executive director. He decided as a policy matter that TRS should invest less money in real estate. This decision was bad for Commonwealth, because it meant that Commonwealth would receive smaller allocations from TRS and earn lower fees. At some point after TRS decreased its real-estate allocation, defendant invited Bozarth to lunch. Defendant told Bozarth about an executive director from another state agency who had "gotten out of step politically." Defendant told Bozarth that the executive director was then

removed. Bozarth understood that defendant was communicating the message that this could happen to Bozarth.

At around the same time, defendant and Levine took advantage of several developments that gave them the opportunity to orchestrate Bozarth's removal and the appointment of a new executive director, Individual A, who was loyal to defendant. In approximately December 2000, TRS's general counsel resigned. Levine, acting at defendant's instruction, turned his attention to the executive director. Levine applied so much pressure that the executive director resigned. The TRS board retained a firm to search for a new executive director to lead TRS.

Meanwhile, in early 2001, an Illinois law created a new slot on the TRS board, to be filled by a retired teacher. Although the typical way to fill such a slot was by holding an election, the slot was created outside the normal election cycle. As a result, it was up to the board to appoint the new trustee. Around this time, defendant told Levine that retired teacher Individual B should receive the new slot, because Individual B was defendant's friend and would vote with Levine and other trustees loyal to defendant. The initial votes, in May 2001, were a deadlock: five elected teachers voted for one candidate, and five trustees appointed by the governor voted for Individual B. Levine told Loren at the time that Individual B was "Cellini's guy," meaning that defendant was the person who caused Individual B to be presented as the appointed trustees' favored candidate for the open slot.

In June 2001, one of the elected teachers retired. Levine and Loren discussed this development, as did Levine and defendant. Levine and defendant understood that Loren would inform the TRS board that the elected teacher's retirement would mean he could no longer serve as a board member. Levine and defendant agreed that they should use this opportunity to secure Individual B's appointment as a trustee, and Individual A's appointment as executive director.

Among other things, defendant told Levine that he had known Individual A for a long time, had helped him get his initial job at TRS, and wanted Individual A to be the executive director of TRS because Individual A would do as defendant asked. Levine told Loren that he planned to use the teacher's retirement to change the composition of the board, and secure the appointment of Individual A as executive director.

At the August 2001 TRS board meeting, Loren presented the board with an opinion that the newly retired teacher could no longer serve on the TRS board. Levine made a motion that had the effect of removing the newly retired teacher from the TRS board. A new vote was taken to fill the trustee slot. This time, there was no 5-5 deadlock, because the newly retired-teacher trustee had just been removed from the board. The governor's appointees prevailed in seating Individual B as a new TRS trustee, out-voting the elected teachers by 5-4. Individual B was sworn in and immediately took his seat on the board. As the next order of business, Levine moved that Individual A should be appointed as TRS's new executive director. There was an uproar by the elected-teacher trustees, because the search process was incomplete. Indeed, a finalist for the position was waiting outside the room during the board meeting, expecting to be interviewed by the board. Nevertheless, the governor's appointees had the votes necessary to push the appointment through, and they did. Individual A became TRS's new executive director.

**C. Defendant Strikes a Deal with the Blagojevich Administration**

In 2002, Democrat Rod Blagojevich was elected Governor of Illinois. This was a problem for defendant, a long-time and prominent Republican. Defendant knew that to maintain his state business at TRS and elsewhere, he needed to forge a relationship with the new administration. Defendant allied himself with Tony Rezko and Chris Kelly, who were Governor Blagojevich's top

fundraisers and closest advisors. Levine, too, reached out to Rezko, and developed a relationship with him. In multiple discussions beginning in approximately summer 2003, Rezko described to Levine how Rezko and Kelly were part of Blagojevich's "kitchen cabinet," and controlled many aspects of state business, including appointing people to state boards.

In 2003, the state's finance director proposed a change to how investments were made for the three Illinois pension funds: the Illinois State Board of Investments, also known as ISBI; the State Universities Retirement System, also known as SURS; and TRS. Instead of each fund choosing its own investments, all of the investment decisions would be consolidated with ISBI, and the ISBI staff and board would control investment of all the pension money in Illinois. This, too, was a problem for defendant. If the consolidation proceeded, defendant's influence at TRS would be threatened; the critical investment decisions would be made elsewhere, by people with whom defendant did not have long-established relationships.

Defendant and Levine discussed the possibility that if the consolidation occurred, Levine would no longer be a trustee at TRS, and defendant risked losing Commonwealth's business at TRS. Defendant said that he would talk to Rezko and Kelly about using their influence with the governor to stop the consolidation. Defendant and Levine agreed that defendant would offer Rezko and Kelly an accommodation: in exchange for Rezko and Kelly's help maintaining defendant and Levine's control at TRS, defendant and Levine would use their influence and position at TRS to reward people whom Rezko and Kelly selected with TRS business. At that time, Levine understood that Rezko and Kelly sought to reward people and businesses who made or planned to make political contributions to Governor Blagojevich.

At a May 2003 TRS board meeting, the state's finance director made a presentation advocating the consolidation. The TRS board passed a resolution opposing the measure. Around this time, defendant met with Rezko and Kelly and presented the accommodation proposal. Defendant told Levine that Rezko and Kelly had agreed to the deal, and that they agreed to talk with the governor and attempt to persuade him not to proceed with the consolidation. Later, defendant reported to Levine that a meeting had taken place among the governor, the state's finance director, Kelly, and possibly Rezko. According to defendant's account, the governor asked why he should listen to Kelly, a roofer, over his finance director. Defendant told Levine that he wanted a memo delineating the reasons why the proposed consolidation was not in TRS's best interest, which defendant would pass to Rezko and Kelly for the governor.

Levine told Loren that defendant wanted a talking-points memo identifying problems with the proposed consolidation. Loren agreed to and did prepare the memo, and Levine arranged with defendant to get the memo to Rezko and Kelly. Later, in approximately October 2003, Levine told Loren details about the discussion defendant had with Rezko and Kelly about the consolidation. Levine told Loren this because Levine expected to and did call upon Loren to help Levine and defendant fulfill their agreement with Rezko and Kelly. Levine also described the agreement to Individual C in a recorded April 12, 2004 phone call,[8/] stating, "you know I sat down talked Bill a long time ago I said if can convince those guys [Rezko and Kelly] to let us stay in place... We got a great machinery and if there's an accommodation you know we'll certainly try to accommodate...."

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[8/] The recorded calls referenced in this proffer were intercepted in 2004 via a court-authorized wiretap on one of three phone lines used by Levine. The government has provided defendant unredacted versions of the recordings, and with linesheets and transcripts. The government will provide defendant with the redacted versions and final transcripts of the recordings it will seek to introduce at trial.

Individual C was fiduciary counsel for TRS, and had a close relationship with defendant. Levine explained to Individual C the agreement between defendant and Rezko and Kelly as part of Levine's effort to preserve the control that Levine and defendant had established at TRS.

In addition, in approximately mid-2003, shortly after defendant agreed to assist Rezko and Kelly at TRS, Individual A told Levine that defendant instructed him to accommodate Rezko and Kelly's requests to influence matters at TRS, to the extent possible. Levine told Individual A that he was aware of defendant's agreement with Rezko and Kelly, that Rezko and Kelly had been very helpful in stopping the consolidation, and that Levine wanted Individual A to help accommodate Rezko and Kelly.

The consolidation did not proceed.

## D. By Virtue of His Agreement with Rezko and Kelly, Defendant Maintains Control at TRS

### *1. Defendant Doubles the Amount of Money Commonwealth Receives in February 2004*

Consistent with the agreement defendant reached with Rezko and Kelly, defendant maintained his control and influence at TRS. In 2003, the state issued pension obligation bonds to fund its contributions to the various Illinois pension systems. The agenda for the February 2004 TRS board meeting included the allocation of approximately $4.8 billion that TRS had received from the state as proceeds from the bond sale. Before the February 2004 TRS board meeting, Levine invited Loren to attend a meeting with TRS's executive director, Individual A, at Levine's Chicago office. Levine told Loren that the meeting's purpose was to preview what Individual A planned to propose to the trustees about how the investment money should be allocated. Levine did not tell Loren that defendant would attend the meeting, but defendant was present.

Upon arriving, defendant said that he had just come from a meeting with Rezko and Kelly, and he was upset with them. Defendant stated that he had told Rezko and Kelly that they were moving too fast and were going to get themselves in trouble. Defendant said he told Rezko and Kelly that they should take defendant as an example: he had been doing this for 30 years and had always stayed above the fray. Defendant said he told Rezko and Kelly that they needed to slow down with what they were doing, and to leave the investment decision-making to TRS.

After defendant's comments about Rezko and Kelly, Individual A identified the allocations he intended to propose at the February 2004 TRS board meeting. Individual A said that in addition to $120 million from the pension-obligation-bond money, he planned to propose a $50 million allocation to Commonwealth. Defendant objected, and communicated that the amount was too low. Individual A crossed out his proposed $50 million allocation for Commonwealth.

At the February 2004 TRS board meeting, when TRS staff announced the proposed allocations of investment money, the proposal was for Commonwealth to receive, in addition to the pension-obligation-bond money, another $100 million – rather than the $50 million Individual A had initially suggested at the meeting in Levine's office. The board approved a total allocation to Commonwealth of $220 million.

***2. Defendant and Levine Solidify Their Relationship with Rezko and Kelly***

Levine's term on the TRS board was scheduled to expire in 2004, and the May 2004 TRS board meeting would have been his last absent a reappointment by the governor. Defendant requested that Rezko and Kelly cause Stuart Levine to be reappointed to his board position at TRS. In a May 7, 2004 recorded call between defendant and Levine, for example, defendant said he had just been with Chris Kelly, and told him, "you know I believe that Stuart has to be named at this

next, before this next meeting." Levine responded, "Well, if I'm not named before the next meeting...this next meeting is the last official meeting uh, during my term....There is,...my appointment is up in July. The next meeting is in August. So...the teachers to them this would be Stuart's finished after this...After the May meeting." Defendant said he reminded Kelly that Levine needed to be reappointed, and Kelly said there "sure as hell wouldn't be any problem with that." Defendant told Kelly, "well, you say that...," and Kelly asked if Rezko was taking care of Levine's reappointment. Defendant said that he had written down on a yellow sheet, "TRS appointment Stuart?," and Kelly asked defendant to give him the piece of paper to remind him to check. Defendant said he told Kelly, "it's very important, but I don't know if anybody's addressed it." Levine responded, "I mean you know Tony says that he has and the paperwork is goin' through, but you know who the hell knows...." Defendant and Levine continued to discuss the importance of Levine's reappointment to the TRS board. Rezko used his influence to help Levine's re-appointment to the TRS Board by calling a high-ranking individual in the state's Office of Boards and Commissions, ultimately securing Levine's reappointment to the TRS Board.

At the same time, there were two vacant spots on the TRS board that needed to be filled, and defendant and Levine worked with Rezko and Kelly to cause the appointment of people who would vote with Levine. Rezko told Levine that he would have the vacancies filled in time for the May meeting. As Levine stated to Individual C in an April 12, 2004 recorded conversation, "Yeah by the next meeting [referring to the May 2004 TRS board meeting] we will have uh, our new Board, Board members. We will be in full control...." In a May 18, 2004 recorded conversation, Levine discussed the same issue with Rezko, and Rezko described his efforts to ensure appointment of a loyal trustee before the upcoming board meeting.

Also in spring 2004, defendant was speaking with Levine and others about moving Individual A to another state position. In the view of defendant and Levine, Individual A was getting too worried about accommodating Rezko and Kelly, because of negative public attention about Rezko and Kelly. Explaining the situation, Levine told Individual C in an April 12, 2004 recorded conversation, "[Individual A] might, might not be around too much longer... And it's gonna be one of Bill's folks [referring to defendant] that'll replace him." Levine further said, "[Individual A] almost got off the reservation. Uh, and we have to calm him down." And he said that Individual A "was digging in his heels and nothin' was gonna happen and, and things that should happen," meaning that Individual A was refusing to take actions to accommodate Rezko and Kelly.

## E. Defendant Agrees to Help Rezko and Kelly Extort Thomas Rosenberg and Capri Capital

### *1. Levine Initially Stalls Capri's Allocation, and Defendant Helps Capri Fix the Problem*

Another of TRS's major real estate asset-management firms at that time was Capri Capital. Thomas Rosenberg was one of Capri's owners. In early 2004, Levine heard that Capri's owners were exploring the possibility of selling the company. Levine, who held a grudge against one of Capri's owners, Thomas Rosenberg, based on prior dealings, saw the potential Capri sale as an opportunity to interfere with Capri's business at TRS. Levine also hoped that he might be able to extract a payment from Rosenberg by putting Capri's allocation at TRS on hold. Levine told TRS's executive director, Individual A, what he'd learned about the potential sale of Capri, and told Individual A that TRS policy required Capri to notify TRS of any possible management change. Levine did not tell Individual A about Levine's plan to attempt to extort a fee from Rosenberg in order to get the allocation back on track. Individual A agreed to inform the TRS board of the issue

concerning the potential sale of Capri and to place Capri's expected $220 million allocation on hold pending further investigation.

At the February 2004 meeting at Levine's office among Levine, Loren, Individual A, and defendant, Individual A and Levine told Loren and defendant about the issue with Capri. At the February 2004 TRS board meeting, Capri did not receive any allocation.

After the board meeting, Rosenberg called defendant and told him that Capri did not receive its allocation. Rosenberg wanted to know what the problem was. Defendant told Rosenberg that he would check with Individual A and get back to Rosenberg. Defendant told Levine about this call with Rosenberg. He told Levine that Rosenberg had called defendant, was very unhappy, and wanted to know if defendant could help. Levine told defendant that Levine was the person who caused Individual A to stall Capri's allocation, based on Levine's past dealings with Rosenberg.

Shortly afterwards, defendant and Rosenberg spoke again. Defendant told Rosenberg that Individual A was going to ask Rosenberg's partner at Capri to write a letter denying that Capri was being sold, and that would solve the issue. Rosenberg's partner reported to Rosenberg that Individual A requested the letter. Around the same time, Individual A reported his discussion with defendant to Levine. In approximately March 2004, Capri submitted a letter to TRS, along the lines Individual A had suggested. Rosenberg believed that once the letter was sent, there was no longer any issue about whether Capri would receive its $220 million allocation. Indeed, Individual A told defendant that Capri's letter was satisfactory, and that there was no longer any obstacle to Capri's receiving its $220 million allocation of the pension-obligation-bond funds.

No action was taken on Capri's allocation at the April 2004 TRS board meeting. The next scheduled TRS board meeting was May 25, 2004. A few weeks before the May meeting, after

learning from his partner that Capri's allocation still had not proceeded, Rosenberg spoke to defendant again. Rosenberg told defendant that the allocation did not go forward. Rosenberg told defendant that Individual A had informed Rosenberg's partner that a fiduciary had held up Capri's allocation. Defendant said he would look into it and get back to Rosenberg.

***2. Rezko and Kelly Learn that Capri Has Received Millions in State Business Without Contributing to Blagojevich***

Meanwhile, in April 2004, Levine met privately with Rezko and discussed ways to make money from TRS. One of the items Levine mentioned was that Capri was due to receive a $220 million allocation from TRS, and that Levine and Rezko could make money from the transaction by requiring Capri to pay a fee in order to get the TRS business. The day after the meeting, on April 15, 2004, Levine told Individual D, his closest business and criminal associate, in a recorded phone call, "Great meeting last night. And I got everything all uh, laid out and um, full steam ahead...."

Approximately several weeks later, Levine was with Rezko and Kelly at Rezko's office. Rezko said that he had been approached by an African-American man whose skin was white, Individual E, who told Rezko that Rosenberg was interested in raising money for the governor, and had a matter pending before TRS. Rezko said that when Individual E mentioned Rosenberg and Capri, Rezko remembered what Levine had mentioned about Capri at their private meeting a few weeks earlier. Kelly asked Levine about the extent of Capri's state business, and Levine explained that Capri was due to receive a $220 million allocation at TRS and, overall, was managing hundreds of millions of dollars of TRS's assets. Kelly responded that with that much state business, Capri and Rosenberg should be contributing a great deal of money to Blagojevich. Levine suggested that Rosenberg be given a choice: make a $1.5 million campaign contribution to Blagojevich, or pay a $2 million fee. Levine also told Rezko and Kelly that defendant had already had one conversation

with Rosenberg, in which Rosenberg sought defendant's help to get the allocation. Rezko suggested that Levine call defendant and make him aware that Rosenberg had approached Rezko about raising money for the governor. Further, Rezko suggested defendant should contact Rosenberg to make him aware that by approaching Rezko about fundraising, defendant was no longer in a position to help Capri get its allocation; this was now a fundraising issue that Rosenberg would have to address with Rezko and Kelly.

On May 1, 2004, in a recorded phone call, Levine described this sequence of events to Individual D. Levine described the discussion he had with Rezko:

> Uh, so at any rate Tony tells me that um, some uh black uh, real estate guy came up to him....Tony says this is a guy [whose] skin is as white...as ours you can never tell that he's black, but he happens to be black....And uh, he said...that Rosenberg would like to become involved in raising money for Blagojevich and uh, he'd really like to get uh, heavily involved in...by the way he's got a matter before TRS....Tony says I remember Stuart you're telling me somethin' about this. So I reiterated the story. So I says $220 million dollars it should be a $2 million fee....I said you know he's got almost a billion dollars....Tony says what?....he said you know, fuck him! And I said well I said you know...he could raise a lot of money....

Levine also told his associate that now, the stall on Capri's allocation was not solely Levine's doing: "I have nothing to do with this, ...this is Blagojevich's people." Levine shared this information with Individual D because if Rosenberg chose to pay the $2 million fee instead of the $1.5 million campaign contribution, Levine planned to collect his portion of the extortion money via Individual D.

### *3. Defendant Agrees to Help with the Plan to Extort Campaign Money from Rosenberg*

Following his discussion with Rezko and Kelly, Levine spoke with defendant. Levine told defendant what Rezko had said about Individual E's approach to Rezko on Rosenberg's behalf. Levine told defendant that because Rosenberg had sent someone to approach Rezko about

fundraising, Capri's allocation would not go forward. Levine asked defendant to contact Rosenberg, to let Rosenberg know that his approach to Rezko had caused a problem: now, the allocation would be stalled not because of some rumor about Capri's owners selling their interests in the company, but because Rezko and Kelly wanted campaign money for Blagojevich before they would agree to release Capri's TRS allocation. Defendant agreed to call Rosenberg, who had again inquired about why Capri had not yet received its allocation. Defendant told Levine that as a cover story, he would tell Rosenberg that he – defendant – was concerned that now maybe he, too, was going to be asked to make political contributions. This was false: defendant was not concerned about his standing with the Blagojevich administration.[9/] Defendant planned to lie to Rosenberg to make it appear that defendant was on Rosenberg's side; in fact, defendant had agreed to advance Rezko and Kelly's objective of forcing a campaign contribution from Rosenberg in exchange for TRS business.

On May 6, 2004, after speaking with defendant, Levine spoke with Individual A in a recorded call. Because Levine needed Individual A to go along with the plan, keeping the brick in place on Capri's allocation, Levine told Individual A what defendant intended to do with Rosenberg. Levine said:

> You know I saw...Bill, uh yesterday and um, because...Tommy [Rosenberg] had...called him and he's calling back...Tommy and telling the following...you know everybody was, was so happy and you gave the staff uh, whatever they needed and everything was moving along and then apparently you sent somebody to go talk to uh, to Tony and indicate that you had some matters there and you'd like to be helpful. And Tony inquired as...to uh Stuart as to what it was that you had there and

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[9/] To the contrary, defendant had a close relationship with Rezko and Kelly. In 2002 and 2003, defendant helped raise significant funds for Blagojevich. In January 2003, defendant held a dinner for Blagojevich staffers at his house in Springfield during the inauguration. Defendant, Rezko, and Levine, together with their spouses, had attended a White House function together in December 2003. And during the time period of early 2004, defendant was in frequent contact with Rezko and Kelly about TRS and other matters.

> he was so aghast at the magnitude of what you, what you wanted to get and, and what you had without ever having helped...and had gotten without doing anything for anybody all these years that...you're gonna have a problem, you gotta deal with him.

In other words, Levine relayed the plan to Individual A, so that Individual A would assist in the plan. Levine said that defendant intended to call Rosenberg and say that even though defendant had fixed Capri's problem with TRS staff – TRS staff was fully satisfied with the letter Capri had sent in March 2004, assuring TRS that there was no imminent management change – Rosenberg had a new problem, because he'd sent someone to Rezko, who was now expecting Rosenberg to pay if he wanted Capri to receive its allocation.

## F. Rosenberg Rejects the Extortion Attempt, and Defendant Tries to Protect the Conspiracy

### *1. May 7, 2004 Calls*

#### *a. Defendant Delivered the Extortionate Message to Rosenberg*

On May 7, 2004, defendant spoke with Rosenberg. Defendant told Rosenberg that Rosenberg's name had come up during a political fundraising strategy session among Rezko, Kelly, and "a black man that looks like a white man," whom Rosenberg understood was Individual E. Defendant told Rosenberg that Rezko and Kelly were discussing how to raise money for Blagojevich from Illinois pension fund managers. Individual E suggested Rosenberg and told Rezko and Kelly that Rosenberg had not previously been involved in raising money for Blagojevich. Defendant said that when Rezko and Kelly realized the extent of the funds from TRS that Capri was managing, they put a brick on Capri's allocation.

Defendant recounted this conversation to Levine in a recorded telephone call the same day. Defendant told Levine: "I just had a uh, an interesting conversation." Defendant explained that he said to Rosenberg,

> I said Tom uh, geez I don't know how to uh, uh, uh how, how to indicate this....And I said but I did a little bit of preliminary checking and I said you may have uh, caused uh, us both some problems. And he says how. And I said well, I said when I made a call to find out where the status was I was told that uh, yeah, things have been, have been put on hold and that uh, that somebody had indicated that they were just flabbergasted at the amount of uh, funds that uh,...that you and, and others have gotten on real estate, when they evidently weren't aware of all that. And I said so, I don't know if we're both gonna get harmed over this uh, or what....evidently I said the best thing I could gather is that somebody must have made a run at this administration in your behalf...and TRS was mentioned...which caused somebody in this administration to uh, to check into and that's when they were flabbergasted at, at what was uh, what's happenin'.

Later in the call, defendant again told Levine that he had made clear to Rosenberg that Capri no longer had any problem at TRS due to a potential Capri sale, and the only existing problem was Rezko and Kelly's interest in receiving a payout from Rosenberg:

> I [defendant] said [to Rosenberg] after you and I chatted I called the people who are, who I have known for years over there [TRS] and asked if there were difficulties with you and was told that your shop has sufficiently explained to them whatever the difficulties may have been to their satisfaction and therefore they felt as though that you would be uh, able to get an increased allocation. And I said and...maybe I shouldn't have said this to him, but I did. I said it's [Individual A]. When I asked [Individual A], I said [Individual A] refers to me as the Pope and Stuart as the Rabbi and I said [Individual A] said yes things are [all ready] to go uh, but of course I have not yet talked to the Rabbi who is the person who...clears this stuff.

Thus, defendant delivered the key message to Rosenberg: Capri had a problem at TRS, and it had nothing to do with a rumor about Capri's principals selling their interest. Instead, defendant informed Rosenberg that Capri and Rosenberg had landed squarely within Rezko and Kelly's sights, and Rezko and Kelly were "flabbergasted" that Rosenberg was receiving so much state business without having contributed to Blagojevich.

Defendant also put in motion the second part of the extortionate plan, specifically, pushing Rosenberg to reach out to Levine. In telling Rosenberg that Individual A had stated, "I have not yet talked to the Rabbi [Levine] who is the person who...clears this stuff," defendant was sending Rosenberg the message that Levine's blessing was necessary for Capri's allocation to proceed. Defendant echoed this message later in the call, when defendant told Levine that defendant had asked Rosenberg, "did you ever by chance...touch base with Stuart?" Similarly, defendant later recounted to Levine the following conversation with Rosenberg:

> [R]emember Tom I [defendant] told you that after I had talked to [Individual A] that I called Stuart and I said to Stuart that I had talked to [Individual A] and that uh, you evidently had resolved to their satisfaction the situation and I said to Stuart is there any problem that uh, that you could see that has anything to do with uh, Tom and the allocation. And I said, and Stuart said no not at all. And I said but you recall I left you the message that said there was just a little bit of a two second lag before he said no not at all that made me feel that it would be good for you to probably talk to Stuart to shore that up.

Here again, defendant was communicating to Rosenberg that he should reach out to Levine, which would give Levine the opportunity to deliver the second part of the extortionate message: pay up.

***b. Rosenberg Fought Back***

As defendant related to Levine during the recorded May 7 call, Rosenberg denied sending anyone, including Individual E, to approach Rezko:

> [H]e said it absolutely did not happen. And I said what do you mean. He said I have never reached out for anybody...to go to this administration....I said all I know is what was alluded to me and, and it was somebody I said that, that evidently a very light complected uh, black gentleman was supposed to have made the, the inquiry on your behalf. And he said it absolutely didn't happen....

Next, as defendant told Levine in the same call, defendant started to emphasize to Rosenberg that all of this was related to Tony Rezko; but as he started down that road, Rosenberg became incensed:

> I said well, the guy that I was gonna check with was Tony Rezko but he's in London and before I could finish it he cut me off and he said and let me tell you I don't want any interfacing with that guy. He said he would never be somebody that I would go to. He said there are two people in this administration that in my opinion that if they're not under investigation already they're bein' monitored every step of the way and that's Tony Rezko and Chris Kelly. Now that scared the shit out of me when he said that, you know.

Observing Rosenberg's ire, defendant began to shift gears, lying to Rosenberg about his true relationship with Rezko and Kelly. Defendant told Levine:

> Well, so then...when I said to him and you know when he was hammerin' at that [at how awful Rezko and Kelly were] I said Tom,...I have done some interfacing here because that's they're in charge of fundraising and I've been asked to do some fundraising for the road people and that's who I've interfaced with you know. I said so I know them from that standpoint and I said...the only thing I said while I'm sittin' here talkin' to you is goin' through my mind is if some black guy made some approach maybe it's your folks from Capri that did that. He said when I get off this phone heads are gonna roll if they did. I said well, you're saying you never talked to anybody. Somebody did. You know or...somebody at least is sayin' that they, they talked in your behalf.

Defendant's message to Rosenberg was that whether Rosenberg was responsible for the approach to Rezko or not, someone from Capri had reached out – and now, Rosenberg and Capri had to deal with the consequence: Rezko and Kelly's demand for a campaign contribution.

During the May 7 call, Levine and defendant discussed next steps with respect to Rosenberg. Levine said that Rosenberg's resistance did not matter, because "Tony said don't give him anything and I'm gonna send the message back to him from the guy who was sent to me [Individual E]." Defendant responded, "Oh, Tony's gonna do it to through that guy, okay...Alright."

Defendant told Levine that during his call with Rosenberg, he protected Levine by hiding Levine's role in the conspiracy. Defendant said to Levine:

> And I said you know did you ever by chance talk to Stuart. I said now I never got a chance to talk to Stuart either because I said Stuart, Stuart was gone somewhere...you

> know my nose is gonna grow here. But, but at that point I didn't think it would be wise to say, you know that I talked to you about it.

In other words, although defendant was encouraging defendant to reach out to Levine as a potential solution to Capri's problem, defendant was trying to conceal from Rosenberg that Levine was part of Capri's problem.

***2. May 8, 2004 Call***

The next day, defendant spoke again with Rosenberg. Rosenberg was angry, and told defendant that he had confirmed it was Individual E who spoke with Rezko and Kelly. Rosenberg told defendant that he would walk away from business at TRS before giving Rezko and Kelly any money for a campaign contribution. Rosenberg told defendant that he would take Rezko and Kelly down, telling the public and the governor himself about the attempted shakedown.

After his call with Rosenberg, defendant contacted Levine, and the call was recorded. At the outset, defendant characterized how he approached Rosenberg: "I, I uh, acted like I was an innocent uh, uh, know nothing uh, guy on the sideline who was worried that this maneuver may be harmful to me and what I was doing." Defendant said that Rosenberg had confirmed that Individual E spoke with Rezko and Kelly about Rosenberg's ability to raise funds for the administration. He said:

> [Individual E] was asked by them [Rezko and Kelly] who are some people that they can raise some funds for this June event uh, from the various pension systems. And he said and [Individual E] then mentioned uh, uh, Tom.

Defendant reported that Rosenberg was even angrier in this conversation than he had been the previous day. Defendant said:

> And he [Rosenberg] said you know I wouldn't go to those guys [Rezko and Kelly]. Those two they are, I mean he was, I mean and the more he talked the more uh, angry he got. He would, he said I don't have a problem they have a real problem. I'm outraged. I'll take them down. They've been advertising themselves as fixers and they're known by the G as what they're doin'. I wouldn't have any association with

> these guys...they got 48 hours if they're going to do this to me and think they're gonna blackmail me...I'll take 'em down. He said I'll stand on 5th and Monroe. Or, or State and Madison. He said their, their approach is, is outrageous. He said uh, uh, you know I'll take a flu shot in uh, and this extortion he said is it's known by too many people what they're doing.

Levine told defendant, "There's nothin' for us to handle." Defendant responded, "Hope so." Defendant assured Levine that he still had not mentioned Levine's involvement to Rosenberg. Defendant said that he and Levine needed to alert Rezko.

Defendant and Levine discussed what to do about Rosenberg. Levine said, "I mean the way I think that this, this should be handled is that they [Rezko and Kelly] shouldn't take a political contribution from him. He shouldn't get, he shouldn't get an allocation." Defendant responded, "Well, ...we don't wanna play chicken with him though." Later in the call, defendant offered an alternative to cutting Rosenberg off completely, to placate Rosenberg: "There's, there's a middle ground. Give him an insignificant amount...more....You know give him 25 million. (chuckling)...You know what I mean....You, you, you deserve 25 million, you did a good job. What's he gonna do say I want more. I mean what's he gonna say publicly of somethin' like that." Levine said, "Well that's a good idea. That's a, that's a very good idea. Let him get something and that's the end of it."

Defendant said he did not think Levine should go near Rosenberg. He said that given Rosenberg's state of mind, it was a good thing that Rosenberg and Levine didn't connect (referring to the original plan, in which Levine was going to arrange to collect money from Rosenberg in order to get the brick lifted on Capri's TRS allocation). Defendant said it was also a good thing that defendant concealed Levine's participation from Rosenberg.

Defendant and Levine discussed how Rosenberg's attitude posed significant risks, including to defendant. Defendant said, "He's talkin' about these guys Tony and Chris because they are out uh, according to him...essentially hammerin' people for contracts uh, with with contracts for fundraising....And, and I gotta tell you I'm a nervous wreck over it myself." Levine asked, "You think they are?" Defendant said, "Oh, oh..." Levine asked, "Oh you know they are?" Defendant said, "I know they are....I know they are."

Defendant then told Levine about a recent situation in which a road builder approached defendant, wanting to secure a state contract. The road builder came to defendant for help, and said he would do a fundraising event for Blagojevich. Defendant spoke with Kelly, vouched for the road builder, and the road builder got the contract. Defendant set up the fundraiser with Kelly, but the road builder backed out. As defendant explained to Levine, the road builder got cold feet because there was so much talk in the industry about how companies were getting state contracts in exchange for making political contributions: "he [the road builder] said Billy [defendant], too many people are talkin' about all this. He said all of these, his competitors, they have been, they have been making matrixes of what donations have been given, what contracts have been gotten....They're all talkin' about it....He says,...I don't know what damage it's gonna cause me, but he says, my partner says, my partners all say we do not wanna participate." Defendant concluded, "You know now I got egg on my face," because defendant had secured the state contract for the road builder in exchange for a campaign fundraiser, and now the road builder was backing out of the fundraiser.

Levine suggested that he and defendant attempt to talk to Rezko and Kelly about how obvious the shakedowns were becoming. Defendant said, referring to law enforcement, "It, it may be that there is nobody checking yet....That there is nobody investigating anything they're doin'

yet....Maybe....But there's so much going on that is no question that it will happen....Because too many people are talkin' uh, about how you get things done. Too many people are talking." Defendant described how he had already warned Rezko and Kelly that if law enforcement came to question them, they had to be prepared with a cover story about their relationship with defendant. Defendant said:

> I think I told you that I walked in their office a couple, about a month ago and...Chris was beside himself sittin' on the couch because it was simply that uh, that the newspaper was doing an investigative job on him....And he was beside himself and I said you know guys, this is a small piece of the investigation and the hits you're gonna get. And I said now let me just say somethin' to you here. If somebody comes in with badges and flashes them at you an in the course of the conversation says do you know Bill Cellini. Just know before they ask that question that they have already checked all your phone logs and they know that we have talked on the phone, or we have called each other 4700 times so you can't say, oh, I've heard of him or I barely know him....Because they know that we've called, talked back and forth....So you gotta be prepared with what it is. Well he [Kelly] said well it's fundraising, you know you helped me with money. Well, I don't know that I even want that to be in the paper (UI) the Republicans (UI). (laughs)...You know it may clear me legally.

When Levine sought to encourage defendant about the unlikelihood of an investigation, defendant described how Rezko and Kelly were acting more blatantly than defendant had in the past, creating risks. He said:

> I know that their [modus] operandi is different than what ours was....I know that uh, we would not call somebody after they got something or before they were gonna get something...Again it may be somewhat of a coincidence but as a general rule we would not....As the general rule they do. That will set up a pattern that could be used and then all they [investigators] gotta do is ask some of these people and these guys will cave in like a herd of turtles.

Levine asked whether this meant that he and defendant should cut ties with Rezko and Kelly. He asked the defendant, "Well I mean is, is, is the question do you stop dealing with these guys?" Defendant responded, "Phew, you know neither one of us wanna do that, you know." Levine and

defendant agreed that talking to Rezko and Kelly about the risks was unlikely to cause them to change their behavior.

Defendant and Levine concluded by reiterating the need to talk with Rezko (who was out of the country) to warn him about Rosenberg, and to plan next steps.

***3. May 10, 2004 Calls***

On May 10, 2004, defendant spoke with Kelly, to let him know about the road builder's decision to cancel the fundraiser. During that conversation, defendant told Kelly that there was another issue that they and Rezko needed to discuss, concerning Rosenberg. As defendant told Levine in a recorded call on May 10, 2004, defendant explained to Kelly that Rosenberg "thinks that he uh, is getting hammered for something....the guy thinks that he's uh, gotten something...pulled from him and uh, he thinks he's getting hammered." A meeting was scheduled to discuss the matter.

In preparation for the meeting, defendant and Levine reviewed the situation. Defendant said that Rosenberg had made some very strong statements, "You know by god I'll, you know take 'em down I'll do this. You know they got 48 hours to correct this....I resent these strong arm guys, you know." Levine said, referring to Rosenberg, "Well...nobody's asked him for anything." Defendant responded, "No but he, you know he, he's makin' his assumptions." Levine said, "Well he can make all the assumptions he wants nobody's asked him for anything yet," meaning that even though Rosenberg had correctly concluded that he was the target of a shakedown, the conspirators had not explicitly asked Rosenberg for money yet. Defendant said he'd spoken to Individual A over the weekend, and confirmed with Individual A that TRS could give Capri the full allocation or just part of it. Defendant repeated the suggestion that perhaps they could give Capri a small allocation, which would be enough to placate Rosenberg, and at the same time take steps eventually to terminate

Capri's business with TRS. Defendant and Levine agreed that Levine should fill Kelly in, but postpone a more complete planning discussion until Rezko could participate.

Meanwhile, defendant spoke with Rosenberg. Defendant lied to Rosenberg, telling Rosenberg that he had spoken with Rezko and Kelly and they had nothing to do with stopping Capri's allocation and nothing to do with wanting Rosenberg to contribute to Blagojevich. Defendant told Rosenberg that Kelly said to tell Rosenberg that Kelly was crazier than Rosenberg. Defendant then suggested that he could contact Levine to see if Levine was involved with the brick. Rosenberg said that defendant should go ahead and call Levine to see if he was involved.

Later the evening of May 10, 2004, Levine and defendant spoke again. Levine proposed that defendant try to convince Rosenberg that the reason Capri was still having a problem getting its allocation was that it lied to TRS staff in early 2004 about selling the company. Defendant questioned Levine about the proposed script, asking whether Individual A would back up the story. Defendant wanted to go over the script again and again, saying, "let's you and I talk about how we can make sure that we don't , we don't get middled here....you gotta tell me again so I know...what it is I gotta do." Levine suggested that defendant repeat that Capri's problem was its lie to TRS staff about selling the company, and said that defendant should tell Rosenberg that Levine was outraged at the notion that Levine was involved in stalling Capri's allocation, and that Levine had done nothing but try to help Rosenberg at TRS since day one that Levine joined the TRS board. The objective, as Levine described it, was to "get [Rosenberg] off his business about he's being gamed and then we'll see what we do with him." After going through the story a few times, defendant said, "I gotcha. I gotcha. No I, I think I understand now and I know how to couch it to him."

***4. May 11, 2004 Meeting***

On May 11, 2004, Levine, Rezko, and Kelly gathered in Rezko's office, and patched defendant in by phone. The purpose of the meeting was to decide what to do about Rosenberg. Defendant informed Rezko and Kelly of his discussions with Rosenberg about Capri's allocation. Kelly was very aggravated and said that if it were up to him, Capri would not receive its allocation from TRS. Rezko said the situation should be dealt with dispassionately. He said that Rosenberg was a dangerous individual, and nobody wanted to be in a dangerous situation. Rezko said that no one should talk with Rosenberg about a campaign contribution. Rezko said that Capri should get its pending TRS allocation, but that would be the last business Rosenberg did with the State of Illinois. By the conclusion of the meeting, the four agreed that because the situation was so dangerous, Capri should receive its TRS allocation at the next TRS board meeting.

After the meeting, Levine spoke further with Rezko and Kelly. Rezko said he had spoken with Governor Blagojevich about the situation and the things that Rosenberg said. Rezko said that Blagojevich agreed with how Rezko wanted to handle the matter, but felt that this was the last time Rosenberg should get any business from the state.

***5. May 12, 2004 Calls***

Around May 12, 2004, defendant spoke with Rosenberg. Defendant again lied to Rosenberg (as defendant and Levine planned), telling him that Levine was outraged that Rosenberg could think that Levine was involved in stalling Capri's allocation, and Levine had nothing to do with it. Rosenberg said that because everyone was denying involvement, Capri's allocation should not have any problem going through at the next board meeting. Defendant told Rosenberg that he would speak with Individual A, and would get back to Rosenberg.

On May 12, 2004, defendant and Levine spoke, and the conversation was recorded. Defendant told Levine that he'd spoken with Rosenberg. Defendant described his discussion with Rosenberg, telling Levine, in essence, that he'd succeeded in calming Rosenberg down. Defendant said he told Rosenberg, "everyone ought to get their testosterone in check and everyone stop uh, pointing fingers and...going back and forth at each other. I said and if everybody calms down uh, you know it could be a win-win." Defendant said he left dangling with Rosenberg the issue of whether Capri would be able to get its allocation at the upcoming TRS board meeting. Levine told defendant he'd seen Rezko and Kelly again that day, and their positions were the same: Rezko said "solve this with your head not your heart," and Kelly said "smack 'em over the head." Defendant responded, "Yeah, I mean I think what their position is, or at least Tony's is, okay so he may have to get something here, but he ain't gonna get anything more....You know that's the end." Defendant confirmed that he'd spoken with Individual A, who was prepared to do whatever they asked with respect to Capri.

Within approximately a day, defendant and Rosenberg spoke again. Defendant told Rosenberg that he'd spoken to Individual A, and Individual A said that Capri's allocation would go through. According to defendant, Individual A said that if the Pope (defendant) did not have a problem with the allocation proceeding, Individual A did not have a problem with the allocation proceeding.

On May 20, 2004, the FBI approached Levine and revealed the government's wiretap. Levine was not arrested at that time. Levine attended the May 2004 TRS board meeting, at which Capri received a $220 million allocation of TRS funds.

**G. Defendant Takes Additional Steps to Conceal the Conspiracy**

In summer 2004, TRS fired Loren's law firm as its outside counsel. Loren spoke with defendant, who offered to solicit Rezko and Kelly to provide Loren with substitute legal work from the state. Loren asked whether defendant had heard anything about the investigation, referring to an ongoing federal criminal investigation that had received some publicity. Loren said he was concerned about the investigation's taking a turn toward TRS. Defendant agreed that was a concern, and said he was worried that TRS's executive director, Individual A, would spill the beans and have enough information to bury everybody. Defendant told Loren that he had been in touch with Rezko, and that he and Rezko were trying to determine whether there was a possibility they had been intercepted on the government's wiretaps of Levine.

In approximately November 2004, Loren again spoke with defendant about the status of the federal investigation. When defendant asked Loren if there was anything defendant could do to help Loren, Loren said defendant should do something about the lawyer across the street at the federal building, referring to U.S. Attorney Patrick Fitzgerald. Defendant said it was Individual F's job to take care of the U.S. Attorney, meaning to have him removed from office.

## IV. CONCLUSION

The above is an outline of the evidence that the government will introduce to establish that a conspiracy existed involving defendant William Cellini and his co-conspirators Stuart Levine, Tony Rezko, Chris Kelly, Steve Loren, and Individual A. This Court should find, based upon this proffer, that co-conspirator statements are admissible pending the introduction of evidence to support this proffer.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned Assistant United States Attorney hereby certifies that the following documents:

Government's Evidentiary Proffer Supporting the Admissibility of Co-Conspirator Statements

were served on September 6, 2011 in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers.

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