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ATTORNEYS FOR PLAINTIFF
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JORDAN LINN GRAHAM,** **Defendant.**	**CR 13-37-M-DWM** **TRIAL BRIEF**

The United States of America hereby submits the following trial brief. Defendant Jordan Linn Graham is proceeding to trial on December 9, 2013, in Missoula, Montana. She is charged in the

Indictment with one count of Murder in the First Degree in violation of 18 U.S.C. § 1111, one count of Murder in the Second Degree in violation of 18 U.S.C. § 1111, and one count of Making False Statements in violation of 18 U.S.C. § 1001.

The United States anticipates calling approximately 39 witnesses and introducing roughly 99 exhibits. The trial should last between five and eight business days.

Anticipated Proof

The United States intends to prove that on July 7, 2013, the defendant, Jordan Graham, intentionally pushed her husband of 8 days, Cody Johnson, off a cliff in Glacier National Park face first to his death. This unlawful killing was premeditated with malice aforethought—Murder in the First Degree. The United States also intends to prove that the defendant lied to Glacier National Park law enforcement and every other law enforcement agency she encountered in order to hide her crime.

The Defendant married Mr. Johnson on June 29, 2013, in Kalispell, Montana. Prior to the wedding, there were indications that the Defendant did not want to marry Mr. Johnson. Mr. Johnson's

friends expressed these concerns to him. During the week following the wedding, the Defendant expressly texted her doubts about the marriage to at least one of her friends. Also during this week, the Defendant began to make certain representations concerning Mr. Johnson that were untrue. The Defendant did not voice these concerns to Mr. Johnson during this period.

Approximately one week after the wedding, on July 7, 2013, the Defendant and Mr. Johnson attended a morning church service together in Kalispell, Montana. Mr. Johnson indicated to acquaintances that the Defendant had a "surprise" planned for him later that day. Following a subsequent service at church later that day Mr. Johnson and the Defendant, along with some friends and family traveled to a Dairy Queen in Kalispell, Montana, for dinner. According to witnesses, Mr. Johnson and the Defendant were in good spirits. According to witnesses, Mr. Johnson and the Defendant left Dairy Queen at approximately 8:20pm.

The Defendant and Mr. Johnson entered Glacier National Park ("GNP") at 9:17 pm on July 7, 2013. A picture taken by a security camera shows the couple driving into the park with Mr. Johnson driving

his Audi. The couple drove on Going to the Sun Highway to "The Loop" parking area where they parked their car and hiked to a dangerously steep area below the road. When they arrived at a cliff, the defendant pushed Mr. Johnson in the back with both hands. Mr. Johnson fell face first to his death. The defendant returned to the car and began driving back towards Kalispell. She did not call for help. She did not stop and seek assistance. Instead, approximately one hour and forty minutes after entering Glacier Park, the Defendant began to exchange text messages with her friends. In text messages to one friend, the Defendant began to plant one of multiple stories the Defendant would advance over the next few days concerning Mr. Johnson's disappearance. In text messages to another friend, the Defendant discussed her dance moves.

The next day, Mr. Johnson's friends and work colleagues began to inquire when he did not show up for work. They reached out to law enforcement and the Defendant to determine his whereabouts. The Defendant continued to represent different versions of a similar story; that Mr. Johnson had left with "friends" the evening before and never returned. That day, Mr. Johnson's mother and friends began to

actively look for him, including going through his cellular telephone and bank accounts for any clues as to his whereabouts.

On July 9, 2013, the Defendant was interviewed by law enforcement. During that interview she again told a variation of the same story she had been repeating; that Mr. Johnson had left with friends the evening of July 7, 2013.

On July 10, 2013, the defendant created an email account at an IP address belonging to the Defendant's step-father. The Defendant lived at that address before her wedding to Mr. Johnson and frequented it often following Mr. Johnson's death. Soon after that email account was created, the Defendant sent herself an email from that account pretending to be someone named "Tony." "Tony" wrote in the email that Mr. Johnson had gone hiking, fallen, was dead and that the search for him should be terminated. In addition to showing this email to acquaintances that day, the Defendant brought it to the attention of law enforcement. In showing this email from "Tony" to law enforcement, the defendant again denied having any involvement in Mr. Johnson's disappearance. Later that evening of July 10th, the Defendant led a group of family and friends into Glacier National Park to the area of the

Going-to-the-Sun road, known as "The Loop" in order to look for her husband. Upon arrival at The Loop, the Defendant began to look for Mr. Johnson but the late hour and impending darkness cut their effort short.

On July 11, 2013, the Defendant again led a group of individuals to Glacier National Park and directly to The Loop area in order to look for Mr. Johnson. Not long after parking the car and climbing down below the road, the Defendant announced that she had found Mr. Johnson's body.

The Defendant and the other members of the search party were interviewed by law enforcement that evening. When questioned by National Park Service rangers as to how the Defendant knew to look in that particular location for Mr. Johnson, the Defendant responded that Mr. Johnson's "car buddies from Washington probably came and got him. He always takes his out of state friends here."

The next day, Mr. Johnson's body was recovered from Glacier National Park near The Loop. He was found lying face-down in a stream at the bottom of a cliff. Also located downstream from the body were one of Mr. Johnson's shoes and a black cloth. An autopsy was

performed on Mr. Johnson on July 13, 2013.

On July 16, 2013, the Defendant was interviewed by law enforcement. The Defendant initially provided a variation of the same account she had given concerning Mr. Johnson's disappearance the night of July 7, 2013. However, the Defendant ultimately stated that she was with Mr. Johnson when they entered Glacier National Park on July 7, 2013. The Defendant confirmed a security camera photo of the two entering Glacier National Park at 9:17pm that evening in Mr. Johnson's car was them.

According to the Defendant, she and Mr. Johnson had attended church the evening of July 7, 2013, and went to Dairy Queen after church with family and friends. The Defendant stated that the couple proceeded back to their home in Kalispell and once inside, began to argue about their marriage. The Defendant said the couple then decided to drive to The Loop area in Glacier National Park, and parked their car. She asserted that the couple hiked for a short period of time and then climbed over a retaining wall down to the edge of a cliff. According to the Defendant, while the near edge of the cliff, Mr. Johnson said that he could walk at that location with a blindfold on. The

Defendant said the couple continued to argue and, at one point, Mr. Johnson grabbed the Defendant's arm. According to the Defendant, she then pulled Mr. Johnson's hand off of her arm, causing Mr. Johnson to rotate and face the edge of the cliff. The Defendant then pushed Mr. Johnson with two hands in his back and he fell, face first, off of the cliff.

Witnesses

The United States anticipates calling approximately 39 witnesses in connection with its case in chief. It may call additional rebuttal witnesses after the Defendant's case.

Approximately 16 of witnesses that the United States anticipates calling are in law enforcement. Of these, roughly 4 are witnesses who have been noticed as experts. With the exception of approximately 2 witnesses who may testify as to custodian of records, the remaining witnesses will testify to their interactions with the Defendant and Mr. Johnson in the weeks and days leading up to July 7, the events of July 7, and then their interactions with the Defendant subsequent to July 7, 2013.

Approximately 15 of the witnesses the United States anticipates calling during its case-in-chief will testify as to, among other things, text

messages that they exchanged with the Defendant. Law enforcement witnesses will testify as to their interactions with the Defendant and the collection of evidence in this case, including from the crime scene.

Finally, the United States anticipates calling approximately four or five experts in this case. They are expected to testify as to the following:

- Dr. Gary Dale will testify as to the autopsy that was performed on Mr. Johnson including, among other things, that the cause of death was consistent with a fall.

- Nate Allred will testify as to his analysis of cellular telephone activity on the Defendant and Mr. Johnson's phones the evening of July 7 and early morning of July 8, 2013. Among other things, he is expected to testify as to his analysis of the location and activity of their cellular telephones.

- Linda Otterstatter will testify as to a black cloth that was recovered from the crime scene. She is expected to testify that six human hairs were discovered on that cloth.

- Matt Salacinski is expected to testify as to a forensic analysis he conducted on the Defendant's cellular telephone.

- Erica Ames will testify as to human hairs that were found on a black cloth recovered from the crime scene and how those hairs cannot be excluded as belonging to Mr. Johnson.

The United States has filed a complete witness and exhibit list with the Court on the morning of December 5, 2013.

Elements of Charged Offenses

The elements of Count I of the Indictment, Murder in the First Degree pursuant to 18 U.S.C. § 1111 are the following:

First, the defendant unlawfully killed Cody Johnson;

Second, the defendant killed Cody Johnson with malice aforethought;

Third, the killing was premeditated; and

Fourth, the killing occurred at Glacier National Park.

The elements of Count II of the Indictment, Murder in the Second Degree pursuant to 18 U.S.C. § 1111 are the following:

First, the defendant unlawfully killed Cody Johnson;

Second, the defendant killed Cody Johnson with malice aforethought; and

Third, the killing occurred at Glacier National Park.

The elements of Count III of the Indictment, Making False Statements pursuant to 18 U.S.C. § 1001 are the following:

First, the defendant made a false statement in a matter within the jurisdiction of the United States National Park Service;

Second, the defendant acted willfully; that is, deliberately and with

knowledge that the statement was untrue; and

Third, the statement was material to the activities or decisions of the United States National Park Service; that is, it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities.

Evidence

The United States anticipates prosecuting its case through numerous witnesses, law enforcement, expert testimony, documentary, audio and video, still picture and demonstrative evidence. Much of the case against the Defendant will revolve around witnesses that interacted with the Defendant before and after July 7, 2013. Testimony of witnesses that interacted with Mr. Johnson before the events of July 7, 2013, will also be presented. The evidence will include statements of the Defendant and statements of Mr. Johnson.

The United States will introduce this evidence in a format that is efficient and easy for the jury to understand. To that end, certain demonstrative exhibits have been created. Many of the statements of the Defendant will be introduced through electronic communications she had with testifying witnesses, as more fully described below. These

electronic communications will be offered to the Court through separate PowerPoint presentations as statements of the Defendant and non-hearsay statements of the testifying witnesses.

The United States will also offer visual images from the crime scene. This will include, but not be limited to, photographs of The Loop area and the collection of evidence at the crime scene. Pictures of Mr. Johnson's body, both at the crime scene and before the autopsy may be offered into evidence. Finally, the United States will offer physical evidence recovered from the crime scene.

Specific issues relating to evidence are detailed below.

Legal Issues

Other than the Defendant, the United States is unaware of any direct witnesses to the death of Mr. Johnson in Glacier National Park on the evening of July 7, 2013. Because of that, the United States anticipates presenting a plethora of circumstantial evidence to the jury in order to prove the defendant committed the crime of First Degree Murder. This includes evidence as to the Defendant's conduct before and after July 7, 2013.

First, there is no doubt that "[c]rimes may be proven entirely by

circumstantial evidence, so long as the jury could fairly have found beyond a reasonable doubt that the defendant engaged in the charged criminal conduct." *United States v. Schlesinger*, 372 F. Supp.2d 711, 723 (E.D.N.Y. 2005). "[I]ndeed, circumstantial evidence alone may support a guilty verdict, including a verdict of guilty of murder in the first degree. *United States v. Espaillet*, 380 F.3d 713, 719 (2d Cir. 2004); *United States v. Russell*, 971 F.2d 1098, 1110 n.24 (4th Cir. 1992). For that reason, in the context of a murder prosecution, circumstantial evidence is often relied upon. *See e.g.*, *United States v. Begay*, 673 F.3d 1038 (9th Cir. 2011) ("Premeditation can be proved by circumstantial evidence."); *United States v. Free*, 841 F.2d 321, 325 (9th Cir. 1988) ("The elements of first-degree murder can be established by circumstantial evidence and inferences drawn from it.") (citing *United States v. Lesina*, 833 F.2d 156 (9th Cir. 1987) and *United States v. Steel*, 759 F.2d 706, 713 (9th Cir. 1985).

Indeed, it is often necessary for the United States to present circumstantial evidence to the jury in proving murder. That is, evidence of intent is "almost always demonstrated by circumstantial evidence." *Eckstein v. Kingston*, 460 F.3d 844, 850 (7th Cir. 2006);

United States v. Lawrence, 349 F.3d 109, 120 (3d Cir. 2003) ("Moreover, since it is impossible to photograph the mental processes of a killer, and since it is folly to expect that a killing will be explained by a killer's explanation of any specific intent accompanying the act, circumstantial evidence is usually the only possible proof of the mental processes involved."); *Dugmore v. Lattimore*, 2011 WL 560434, *1 (9th Cir. Feb. 16, 2011) (affirming state court first degree murder conviction because of adequate circumstantial evidence presented by the government).

The Ninth Circuit has specifically noted that "because premeditation necessarily describes a subjective state of mind about which the defendant rarely provides any direct testimony or evidence, it is almost always an element that must be proved by reference to 'the defendant's conduct…in light of the surrounding circumstances.'" *United States v. Begay*, 567 F.3d 540, 547 (9th Cir. 2009) (quoting LAFAVE § 14.7(a) at 480) (affirmed en banc). In this case, the United States will present that the "surrounding circumstances" of Mr. Johnson's death conclusively demonstrates the Defendant's guilt.

In the context of the Defendant, this was manifested in, among other ways, her conduct before, during, and following Mr. Johnson's

death. First, it is imperative to understand that in prosecuting First Degree Murder, the government "need not 'show that the defendant deliberated for any particular length of time.'" *United States v. Treas-Wilson*, 3 F.3d 1406, 1409 (10th Cir. 1993) (quoting *United States v. Slader*, 791 F.2d 655, 657 (8th Cir. 1986); *United States v. Brown*, 518 F.2d 821, 826 (7th Cir. 1975) ("[T]he authorities are in accord that no particular period of time is necessary for such deliberation and premeditation.") Indeed, "[i]t is clear that a killer can develop premeditation *during the incident at issue*." *Treas-Wilson*, 3 F.3d at 1409 (emphasis added); *People of the Virgin Islands v. Ward*, 2009 WL 2584760, *5 (V.I.Super. Aug. 5, 2009) ("…a brief moment of thought may be sufficient to form a fixed, deliberate design to kill."). This is why the Ninth Circuit's Model Criminal Jury Instructions specifically note that, in the context of premeditation pursuant to 18. U.S.C. § 1111, "[t]he amount of time needed for premeditation of a killing depends on the person and circumstances. It must be long enough, after forming the intent to kill, for the killer to have been fully conscious of the intent to have considered the killing." Therefore, in this case, the jury could infer that the Defendant developed the required premeditation immediately

before she pushed Mr. Johnson to his death.

Further, there is no question that premeditation can be established through the "conduct of the defendant after the incident. *See e.g.*, *United States v. Monroe*, 1988 WL 132593, *1-3 (9th Cir. Dec. 2, 1988) (affirming first degree murder conviction, in part, due to defendant's conduct after the murder); *United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993) (finding that "circumstantial evidence may include acts that exhibit a consciousness of guilt, such as false exculpatory statements."); *People of the Virgin Islands v. Ward*, 2009 WL 2584760, *5 (V.I.Super. Aug. 5, 2009) (noting that premeditation can be established through the "conduct of the defendant after the incident."). Here, in addition to the evidence relating to her pre-July 7, 2013, conduct, the Defendant engaged in a nine-day campaign to hide her crime from friends, family, and law enforcement. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("The petitioner's calculated behavior both before and after the killing demonstrated that he was fully capable of committing premeditated murder."). This included not only the destruction of potentially relevant evidence but also the affirmative tactic of attempting to mislead law enforcement as to the nature of Mr. Johnson's

disappearance.

Continuing, attempts to dispose of evidence are indicative of consciousness of guilt. *See Ashcraft v. Tennessee*, 327 U.S. 274, 277 (1946) ("[w]illfull concealment of material fact has always been considered evidence of guilt."); *United States v. Hacketti*, 638 Fed. 2d 1179, 1186 (9th Cir. 1980) (disposal of evidence permit inference of consciousness of guilt.). This is also true with respect to false exculpatory statements. *See United States v. Isaac-Sigala*, 448 F.3d 1212 (10th Cir. 2006); *United States v. Trala*, 386 F.3d 536, 546 (3d Cir. 2004); *United States v. Vannerson*, 786 F.2d 221, 224 (6th Cir. 1986).

> 'fabrication…[by defendant] is receivable against him an as indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit. The inference thus does not apply itself necessarily to any specific fact in the cause, but operates, indefinitely though strongly, against the whole mass of alleged facts constituting his cause.

II Wigmore, Evidence § 278(2)

Here, the Defendant engaged in a patterned conduct indicating her consciousness of guilt. This included, but was not limited, to numerous misrepresentations to member of the community and law enforcement,

as well as the destruction of evidence. Further supporting the proffered conduct of the Defendant before and after July 7, 2013, is that such evidence is "inextricably intertwined" with the evidence of the charged offense. Indeed, such "other acts" are relevant and admissible if the (1) "particular acts of the defendant are part of a…single criminal transaction" *or* when (2)

> "other act evidence…is necessary in order to permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime; it is obviously necessary in certain cases for the government to explain either the circumstances under which particular evidence was obtained or the events surrounding the commission of the crime"

United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012 (9th Cir. 1995)

All that is required is that there is "a sufficient contextual or substantive connection between the proffered evidence and the alleged crime." *Id*. at 1013; *United States v. Mundi*, 892 F.2d 817, 820 (9th Cir. 1989); *United States v. Troya*, 2013 WL 5461842, *3 (11th Cir. Oct. 2, 2013) (When the evidence is "necessary to complete the story of the crime," it supports its inclusion).[1]

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1 *See also United States v. Edwards,* 485 F.3d 1324, 1344 (11th Cir.

Evidentiary Issues

1. Statements of the Defendant

The United States anticipates introducing a number of statements the Defendant made to witnesses. These statements will be introduced through witness testimony, audio and video recording, text messaging, and social media. These statements are not hearsay and are admissible as admissions of a party opponent under Fed. R. Evid. 801(d)(2)(A). *See e.g., United States v. Workinger*, 90 F.3d 1409, 1415 (9th Cir. 1996) (noting the defendant's "statements in the transcript were admissions of a party-opponent"). Also, statements made by the defendant in documents are also admissible under Rule 801(d)(2)(A). *See, e.g., United States v. Pang*, 362 F.3d 1187, 1193 (9th Cir.) ("When offered against Pang, Pang's invoices were admissions, and therefore non-hearsay as defined by Rule 801(d)(2)."), *cert. denied*, 125 S. Ct. 372

2007) ("Evidence, not part of the crime charged but pertaining to the chain of evidence explaining the context, motive[,] and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or forms an integral and nature part of an account of the crime, or is necessary to complete the story of the crime for the jury.")

(2004); *United States v. Johnson*, 28 F.3d 1487, 1498-99 (8th Cir.) (Western Union money transfers portions completed by defendants properly admitted), *cert. denied*, 513 U.S. 1098 (1995).

What are inadmissible, however, based on well-established case law, are statements of the Defendant that *she* elects to elicit through statements (exculpatory or otherwise) through other witnesses or documents. The Defendant of course may testify at trial about these matters, should she elect to do so; of course, the Defendant may not be compelled to testify at trial under the Fifth Amendment. Under the Federal Rules of Evidence, a defendant's statement is admissible only if offered against him; a defendant may not elicit his own prior statements. Fed. R. Evid. 801(d)(2)(A).[2] The defendant is not permitted to include portions of these communications including "his own exculpatory statements" that are inadmissible hearsay and not required to be

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[2] Rule 801(d)(2)(A) provides:

> "A statement is not hearsay if–
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> (2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity."

included under the rule of completeness. Courts have consistently echoed this sentiment. *See, e.g., United States v. Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("Admissions by a party-opponent are not considered hearsay and therefore can be admitted against that party. Fed. R. Evid. 801(d)(2)); *United States v. Palow*, 777 F.2d 52, 56 (1st Cir. 1985) ("The requirement of Rule 801(d)(2)(A) that an admission be offered against a party is designed to exclude the introduction of self-serving statements by the party making them.") (emphasis added) (cited favorably in *Fernandez*), *cert. denied*, 475 U.S. 1052 (1986).

As one court noted, the defendant could not introduce his inculpatory or exculpatory statements made to an agent under Rule 801(d)(2), otherwise "parties could effectuate an end-run around the adversarial process by, in effect, testifying without swearing an oath, facing cross-examination, or being subjected to first-hand scrutiny by the jury." *United States v. McDaniel*, 398 F.3d 540, 544 (6th Cir. 2005).

Indeed, the Ninth Circuit addressed this issue in *Ortega*, a drug and firearms case where the district court precluded the defendant from "eliciting his own exculpatory statements, which were made within a broader, inculpatory narrative." In the excluded oral statements, the

defendant claimed that the guns and drugs found in his residence belonged to someone else. *Ortega*, 203 F.3d at 681-82. On appeal, the defendant argued that exclusion of the statements violated the rule of completeness, the Confrontation Clause, Fed. R. Evid. 801(d)(1) (exception for recent fabrication), and Fed. R. Evid. 807 (residual exception). *Id.* at 682. In affirming the exclusion of the defendant's "non-self-inculpatory statements," the Ninth Circuit explained:

> First, Ortega's non-self-inculpatory statements are inadmissible even if they were made contemporaneously with other self-inculpatory statements. The self-inculpatory statements, when offered by the government, are admissions by a party-opponent and are therefore not hearsay. . .but the non-self-inculpatory statements are inadmissible hearsay. . . .
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> Second, the rule of completeness. . .applies only to written and recorded statements. . . . Even if the rule of completeness did apply, exclusion of Ortega's exculpatory statements was proper because these statements would still have constituted inadmissible hearsay.[3]

United States v. Ortega, 203 F.3d 675, 682 (9th Cir. 2000).

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[3] *Ortega*, 203 F.3d at 682 (citations omitted); *see also United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) ("'Rule 106 does not compel admission of otherwise inadmissible hearsay evidence'") (citation omitted); *United States v. Dorrell*, 758 F.2d 427, 434-35 (9th Cir. 1985) (no violation of rule of completeness where edited statement does not distort meaning of passage).

As such, unless the Defendant elects to testify, she should not be permitted from eliciting testimony from witnesses or other evidence.[4]

2. Text Messages and other Electronic Communications

As indicated above, the United States anticipates introducing a number of electronic communications involving the Defendant. First, electronic communications *from* the Defendant are admissible under Fed. R. Evid. 801(d)(2)(A).[5] Further, electronic communications *from*

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[4] Of course the defendant is protected by the Fifth Amendment from being compelled to testify at trial. Toward this end, the United States proposes that the Court instruct the jury that no inference may be drawn from any decision of the defendant not to testify at trial, based on model jury instructions.

[5] *See, e.g., United States v. Burt*, 495 F.3d 733, 738 (7th Cir.) (on Yahoo! chat communication involving the defendant and a third party found on the defendant's computer, "[t]hose portions of the chat which represent Burt's writings were properly admissible as admissions by a party opponent under Fed. R. Evid. 801(d)(2)"), *cert. denied*, 128 S. Ct. 724 (2007); *United States v. Siddiqui*, 235 F.3d 1318, 1322 (11th Cir. 2000) (noting the e-mails "sent by Siddiqui constitute admissions of a party pursuant to Fed. R. Evid. 801(d)(2)(A)"), *cert. denied*, 533 U.S. 940 (2001); *United States v. Safavian*, 435 F.Supp.2d 36, 43 (D.D.C. 2006) ("The [e-mail] statements attributed directly to Mr. Safavian come in as admissions by a party opponent under Rule 801(d)(2)(A) of the Federal Rules of Evidence."); *In re Homestore.com, Inc. Securities Litigation*, 347 F.Supp.2d 769, 781 (C.D.C.A. 2004) (in civil securities action, "e-mails written by a party are admissible as non-hearsay under Fed. R. Evid. 801(d)(2)").

witnesses to the Defendant are also admissible non-hearsay evidence or hearsay that falls under a number of exceptions.[6]

First, the statements from the witnesses, who will be testifying at trial, are admissible as non-hearsay because they are not being offered for the truth of the matter asserted but rather to provide context. *See, e.g., United States v. Burt*, 495 F.3d 733, 738-39 (7th Cir.) (in prosecution for sexual exploitation of a minor, distributing child pornography, and possession of child pornography, in Yahoo! chat communication involving the defendant and a third party found on the defendant's computer, the portion from the third party was admissible as non-hearsay and provided context to the conversation); *United States v. Dupre*, 462 F.3d 131, 136-37 (2d Cir. 2006) (in wire fraud prosecution, e-mails from investors demanding information about defendant's fraudulent scheme were not hearsay when offered not for truth of the assertion that the scheme was fraudulent, but to provide context for the

[6] The United States intends to introduce most of the electronic communications between the Defendant and the testifying witnesses through PowerPoint presentations that include the text the witnesses will be testifying to. The documents reflect written, verbatim statements of the Defendant and witness. One of the PowerPoint presentations has already been provided to defense counsel as an example.

defendant's message sent in response and to rebut defendant's argument that she did not know scheme was fraudulent; no Confrontation Clause issues arose since the statements were offered for a non-hearsay purpose), *cert. denied*, 127 S. Ct. 1026 (2007); *United States v. Safavian*, 435 F.Supp.2d 36, 44 (D.D.C. 2006) (admitting some e-mails which "provide context for the defendant's statements and are not introduced for their truth").

Moreover, to the extent they are determined to be hearsay – which they are not – communications *from* a testifying witness to the Defendant likely fall under a number of hearsay exceptions. These include:

- Present Sense Impression. Fed. R. Evid. 803(1)
- Excited Utterance. Fed. R. Evid. 803(2)
- Existing Mental, Emotional, or Physical Condition. Fed. R. Evid. 803(3)

Similarly, the United States expects to introduce voicemails left for the Defendant by testifying witnesses. These statements are also not hearsay because they are not offered for the truth, or if they are, subject to an exception listed above.

3. Miscellaneous Electronic Evidence

The United States expects to offer additional electronic evidence in its case-in-chief that relates to, among other things, GPS cellular tower information, Internet Protocol addresses, and electronic information relating to logs, date and time, and screen names.[7] This machine-generated information is not hearsay as no "person" is making a statement. *See, e.g., United States v. Hamilton*, 413 F.3d 1138, 1142-43 (10th Cir. 2005) (computer-generated "header" information (including the screen name, subject of the posting, the date the images were posted, and the individual's IP address) was not hearsay; no "person" acting as a declarant).[8] Moreover, even if the Court were to

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[7] Much of this information will be introduced through a demonstrative exhibit pursuant to Fed. R. Evid.1006 that Mr. Allred will testify to and present to the Court.

[8] *See also United States v. Washington*, 498 F.3d 225, 231 (4th Cir. 2007) (in DUI case, machine-generated data used to determine whether a blood sample contained drugs or alcohol were not statements of the lab technicians and were not hearsay statements, since they were not made by persons but machines analyzing the sample; no Confrontation Clause issues); *United States v. Khorozian*, 333 F.3d 498, 506 (3d Cir.) (information automatically generated by fax machine is not hearsay since "nothing 'said' by a machine . . . is hearsay"), *cert. denied*, 540 U.S.

consider this evidence as hearsay they would fall under the business records exception. Fed. R. Evid. 803(6).[9] *See, e.g., United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982) ("The justification for this exception is that business records have a high degree of accuracy because the nation's business demands it, because the records are customarily checked for correctness, and because recordkeepers are trained in habits of precision."). A business record is admissible where a record "must (1) have been prepared in the normal course of business; (2) . . . have been made at or near the time of the events it records; and (3) . . . be based on the personal knowledge of the entrant or of an informant who had a business duty to transmit the information to the

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968 (2003).

[9] Fed. R. Evid. 803(6) excepts from the hearsay rule:

> "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness."

entrant." *Hertz v. Luzenac America, Inc.,* 370 F.3d 1014, 1017 (10th Cir. 2004) (admitting INS computer printout concerning amnesty application).

The business records rule expressly applies to a "memorandum, report, record, or *data compilation*, in any form." (Emphasis added.) The terms "data compilation" are "used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage." Fed. R. Evid. 803(6) Advisory Committee Notes.

Finally, there is no question that any of the electronic evidence the United States expects to offer into evidence are authentic under Fed. R. Evid. 901(a).[10] Rule 901(a) only requires the government to make a *prima facie* showing of authenticity or identification "so that a

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[10] *See United States v. Dhinsa*, 243 F.3d 635, 658-59 (2d Cir. 2001) (noting Rule 901 "does not erect a particularly high hurdle," and that hurdle may be cleared by "circumstantial evidence") (quoting *United States v. Ortiz*, 966 F.2d 707, 716 (1st Cir. 1992), *cert. denied*, 506 U.S. 1063 (1993)), *cert. denied*, 534 U.S. 897, 122 (2001).

reasonable juror could find in favor of authenticity or identification."[11] Once the threshold showing has been met to admit the document, any questions concerning the genuineness of the item normally go to the weight of the evidence.[12]

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[11] *United States v. Chu Kong Yin*, 935 F.2d 990, 996 (9th Cir. 1991), *cert. denied*, 511 U.S. 1035 (1994); *see also Lexington Ins. Co. v. Western Pennsylvania Hosp.,* 423 F.3d 318, 328-29 (3d Cir. 2005) ("Once a prima facie case is made, the evidence goes to the jury and it is the jury who will ultimately determine the authenticity of the evidence, not the court. The only requirement is that there has been substantial evidence from which they could infer that the document was authentic.").

[12] *Orr v. Bank of America*, 285 F.3d 764, 773 n.6 (9th Cir. 2002) ("Once the trial judge determines that there is prima facie evidence of genuineness, the evidence is admitted, and the trier of fact makes its own determination of the evidence's authenticity and weight."); *United States v. Paulino*, 13 F.3d 20, 23 (1st Cir. 1994) ("In respect to matters of authentication, the trial court serves a gatekeeping function. If the court discerns enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be, then Rule 901(a) is satisfied and the weight to be given to the evidence is left to the jury"); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 930 (3rd Cir. 1985) (once prima facie standard is met, the opposing party may "argue the documents are not genuine, or that they are somehow not worthy of great weight in the jury's deliberation"); *United States v. Black*, 767 F.2d 1334, 1342 (9th Cir.) (Once the government meets this burden, "the credibility or probative force of the evidence offered is, ultimately, an issue for the jury."; in fraud and tax prosecution, confirmation slips reflecting futures transactions in T-Bill and silver futures made by London Atlantic Market Brokers, Ltd., a commodities dealer were authenticated by the fact that they were found in the defendant's possession; "Whether the confirmation slips were forgeries,

Such authentication methods include, but are not limited to, any witness with knowledge,[13] an agent,[14] distinctive characteristics,[15] and computer-generated records.[16] Indeed, the United States anticipates that, in most instances, the testifying witness will attest to specific electronic communications sent to and received from the Defendant.

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whether the defendant obtained the documents in the fashion he described, or whether he was responsible for their fabrication were all issues for the jury to decide."), *cert. denied*, 474 U.S. 1022 (1985).

[13] Fed. R. Evid. 901(b); *see also United States v. Barlow*, 568 F.3d 215, 220 & n.17 (5th Cir. 2009) (trial testimony of other participant to chat conversation "could sufficiently authenticate the chat log presented at trial"); *United States v. Safavian*, 435 F.Supp.2d 36, 40 n.2 (D.D.C. 2006) (noting e-mails between defendant government official and lobbyist could have been authenticated by recipient and sender but government chose not to call the lobbyist during trial).

[14] *United States v. Whitaker*, 127 F.3d 595, 601 (7th Cir. 1997) (in conspiracy to distribute marijuana case, a computer seized from one defendant's residence contained computer records of drug transactions and the drug business; rejecting argument that government was required to supply a witness with personal knowledge of the computer system; agent testimony authenticated the computer printouts under Rule 901(a) including that the computer was seized during the execution of a warrant, the agent was present when the computer records "were retrieved from the computer using the Microsoft Money program," and the agent "testified concerning his personal knowledge and his personal participation in obtaining the printouts").

[15] Fed. R. Evid. 901(b)(4).

[16] Fed. R. Evid. 901(b)(9); *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040 (9th Cir. 1009).

Moreover, defense claims that the electronic evidence is capable of being altered or modified should not preclude authentication and should be readily rejected, as other courts have done. Questions concerning trustworthiness normally go to the weight of the evidence and not admissibility. *United States v. Safavian*, 435 F.Supp.2d 36, 41 (D.D.C. 2006); *United States v. Tank*, 200 F.3d 627 (9th Cir. 2000). Here, and as briefly addressed at the November 15, 2013, hearing, a number of text messages that the Defendant sent were not collected from her phone. The reasons for this include, but are not limited to, the fact that she deleted a large amount of data from her phone and Verizon does not maintain copies of instant messaging in its system. As such, many of the text messages that will be presented to the jury were collected from other individuals.

4. Electronic Summaries and Demonstrative Exhibits

The United States expects to introduce electronic evidence through certain demonstrative exhibits.[17] Electronic evidence may be admitted into evidence either as summary of evidence already introduced into

[17] As mentioned above, such exhibits may include, but not be limited to, PowerPoint presentations that capture portions of text message exchanges with the Defendant.

evidence at trial, or under Fed. R. Evid. 1006, as a summary of voluminous records. To the extent the information is utilized pursuant to Fed. R. Evid. 1006, the underlying material need not already have been introduced into evidence so long as the underlying materials are admissible. *United States v. Pelullo*, 964 F.2d 193, 2004 (3d Cir. 1992); *Coates v. Johnson and Johnson*, 756 F.2d 524, 549-50 (7th Cir. 1985); *United States v. Bakker*, 925 F.2d 728, 736 (4th Cir. 1991).[18]

5. Expert Testimony

The United States expects to call multiple witnesses in their capacities as experts. Where "scientific, technical, or other specialized knowledge will assist the trier of fact," a qualified expert may testify "in

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[18] See also *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1042 (10th Cir. 1993) (finding that the trial court did not err in allowing the plaintiffs to utilize the services and computer-generated evidence of "an expert in accident reconstruction. . .[who] testified to the manner in which the accident occurred and the movements of the [plaintiff's] body. . .following the collision"); *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 28 (1st Cir. 1992) (finding that the trial court did not err in allowing the defendant's engineering expert to "utilize an x-ray of [the plaintiff's] had" to reconstruct the cause of the plaintiff's injury); and *Caiazzo v. Volkswagenwerk A. G.*, 647 F.2d 241, 248 (2d Cir. 1981) (finding that the trial court did not err in allowing the plaintiff to use an accident reconstruction expert to testify and present computer-generated evidence "regarding the manner of [plaintiff's] ejection [from the vehicle] and the kinematic effects of the accident sequence").

the form of an opinion or otherwise" so long as:

> (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.
>
> Fed. R. Evid. 702.

An expert's opinion may be based on hearsay or facts not in evidence, where the facts or data relied upon are of the type reasonably relied upon by experts in the field. Fed. R. Evid. 703. An expert may provide opinion testimony even if it embraces an ultimate issue to be decided by the trier of fact. Fed. R. Evid. 704. Here, the United States expects to call experts relating to a forensic examination of the Defendant's cellular telephone, an autopsy performed on Mr. Johnson, an analysis of location-position information from the Defendant and Mr. Johnson's cellular telephones, and scientific evidence relating to evidence discovered at the crime scene.

6. Judicially Noticeable Facts

Pursuant to Fed. R. Evid. 201, it is likely that the United States will move to have certain adjudicative facts noticed by the Court. Pursuant to Fed. R. Evid. 201(d) and (e), the Court make take judicial

notice "at any stage of the proceeding" and "a party is entitled to be heard on the propriety of taking the judicial notice…"

Here, the United States anticipates asking the Court to take judicial notice of the following adjudicative facts:

- The computation of military time to Mountain Standard Time in June and July, 2013
- The computation of Greenwich Mean Time to Mountain Standard Time in June and July 2013
- The computation of Coordinated Universal Time ("UTC") to Mountain Standard Time in June and July 2013.
- Certain distance and time computations as detailed in reliably mapping websites (e.g., Google Maps)

7. Evidence Pursuant to Fed. R. Evid. 404(a)(2)

Through prior pleadings and hearing in this action, the Defendant has indicated that her defense to the charged conduct will revolve around a form of self-defense. *See Declaration of Jordan Linn Graham*, Doc. No. 56 at 3 (…"I was grabbed and how I pulled away and pushed Cody back."). This also includes statements the Defendant made to a witness during the week leading up to July 7, 2013. Indeed, to date the Defendant has appeared to contend that Mr. Johnson was the first aggressor on the evening of July 7, 2013.

Pursuant to Fed. R. Evid. 404(a)(2)(C), "in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor." Moreover, and "subject to the limitations in Fed. R. Evid. 412," if the Defendant should offer, and the Court admits, evidence of the victim's pertinent trait, the prosecutor may "offer evidence to rebut it" and "offer evidence of the defendant's same trait." Fed. R. Evid. 404(a)(2)(B); *Michelson v. United States*, 335 U.S. 469, 479 (1948). "Federal courts repeatedly have held that the government may offer evidence in its case-in-chief in *anticipation* of an expected aspect of the defense." *United States v. Curtin*, 489 F.3d 935, 940 (9th Cir. 2007) (emphasis added); *United States v. Nevels*, 490 F.3d 800, 804-06 (10th Cir. 2007) (crime scene testimony from homicide introduced to rebut defense of justification and self-defense); *United States v. Holman*, 680 F.2d 1340, 1349 (11th Cir. 1982) (evidence of prior acts to rebut duress).

8. Evidence Pursuant to Fed. R. Evid. 404(b)

The United States has offered evidence pursuant to Fed. R. Evid. 404(b) of prior acts of the Defendant. Notice was given on November 25, 2013 although discovery related to the prior acts was produced

before then. Doc. No. 114. As detailed in the Government's submission, such prior acts are relevant to the charged crimes and admissible under Fed. R. Evid. 404.

Respectfully submitted this 5th day of December, 2013.

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CERTIFICATE OF COMPLIANCE

Pursuant to D. Mont. LR 7.1(d)(2) and CR 12.1(e), the trial brief is proportionately spaced, has a typeface of 14 points or more, and the body contains 5,771 words.

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