

**UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON**

**UNITED STATES OF AMERICA**

**v.**

**CRIMINAL NO. 2:18-cr-00134**

**ALLEN H. LOUGHRY II**

**UNITED STATES MOTION *IN LIMINE* FOR ORDER  
TO PRECLUDE IMPROPER CHARACTER EVIDENCE**

The United States files this Motion *in Limine* to preclude impermissible character evidence about defendant Allen H. Loughry II at trial and to ensure that any relevant evidence of defendant Loughry's character is admitted following the methods permitted by the Federal Rules of Evidence.

The Federal Rules of Evidence circumscribe when and how a party may introduce evidence of a person's character at trial. Generally, "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a)(1). In a criminal case, however, "a defendant may offer evidence of the defendant's *pertinent* trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it." Fed. R. Evid. 404(a)(2) (emphasis supplied).

So what is a *pertinent* trait? "In the criminal context, a pertinent character trait is one that is relevant to the offense charged." *United States v. John*, 309 F.3d 298, 303 (5th Cir. 2002); *see also United States v. Angelini*, 678 F.2d 380, 381 (1st Cir. 1982) (in Rule 404(a), "pertinent is read as synonymous with relevant"). In this case, in which defendant Loughry stands charged

with fraud, tampering with a witness, obstruction of justice, and lying to an FBI agent, the character traits of being honest or being a law-abiding citizen are relevant. *See, e.g., United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981).

But, defendant Loughry might seek to introduce evidence of other character traits that are not pertinent or relevant to the case. For example, he might try to present evidence of a character trait for generosity or for having an abiding love of West Virginia. Generosity, however, is not a pertinent character trait in this case. *See United States v. Langford*, 647 F.3d 1309, 1329 (11th Cir. 2011) (trial court properly barred evidence of a defendant’s “generous and philanthropic character” in a bribery, fraud, and money laundering case); *United States v. Manfredi*, 2009 WL 3762966, at \*3 (W.D. Pa. 2009) (holding that “generosity” or “charitableness” not germane to issue of willfulness for tax charges). Nor is love for his home state. *Cf. United States v. Hedgorth*, 873 F.2d 1307, 1313 (9th Cir. 1989) (trial court properly excluded evidence that defendant was “patriotic” and “pro-government” in case involving firearms, explosives, and conspiracy to destroy property charges); *United States v. Morison*, 622 F. Supp. 1009, 1010 (D. Md. 1985) (holding that defendant could not present evidence of his patriotism where he was charged with willfully passing national defense photographs to persons not entitled to receive them).<sup>1</sup>

These are but examples of possible character traits that defendant Loughry might try to offer at trial. The United States seeks to avoid having inadmissible evidence even solicited. Consequently, the United States respectfully requests an order from this Court directing defendant

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<sup>1</sup> Indeed, defendant Loughry should not be permitted to present an irrelevant defense, such as that he could not have intended, and indeed did not intend, to defraud the State of West Virginia, because he has such a deep and abiding love for his home state.

Loughry to proffer any character evidence at the beginning of the defense case, before calling any witnesses, so that the parties may litigate whether any particular trait is in fact pertinent.

Furthermore, even if a particular trait is deemed pertinent, the Rules of Evidence limit how such evidence may be presented. Under Rule 405(a), a defendant may prove a relevant character trait about himself through testimony about his reputation or testimony in the form of an opinion. To be sure, when a character trait is an essential element of a charge or a defense, the defendant may present evidence of relevant specific instances of his conduct. Fed. R. Evid. 405(b). The Rule, however, confines evidence of specific instances of conduct “to instances in which character is in issue ‘in the strict sense,’ [Rule 405 advisory committee’s Note], which occurs where ‘a material fact that under the substantive law determines rights and liabilities of the parties.’” *United States v. Piche*, 981 F.2d 706, 713 (4th Cir. 1992) (quoting *McCormick on Evidence* § 187, at 551 (3d ed. 1984) and omitting case quoting *McCormick*). Thus, according to the Advisory Committee Notes to Rule 405, “[w]hen character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.” See *Hedgorth*, 873 F.2d at 1313 (defendant may show a character for lawfulness through opinion or reputation testimony, but not through evidence of specific acts).

Accordingly, even if defendant Loughry has evidence of a *pertinent* character trait, the Rules set strict limits on how that evidence may be presented. These limited methods of proving character under Rule 405 offer yet another reason to require defendant Loughry to proffer any anticipated character evidence, and to explain how he intends to prove it, before the beginning of the defense case at trial.

For the foregoing reasons, the United States respectfully requests this Court to order that, prior to the beginning of the defense case at trial, defendant Allen H. Loughry II proffer to the

Court any anticipated character evidence and explain his intended methods of proof, to ensure that the anticipated evidence will satisfy the Rules of Evidence.

Respectfully submitted,

MICHAEL B. STUART  
United States Attorney

By:

s/Philip H. Wright  
PHILIP H. Wright  
Assistant United States Attorney  
WV State Bar No. 7106  
300 Virginia Street, East  
Charleston, WV 25301  
Telephone: 304-345-2200  
Fax: 304-347-5104  
E-mail: [philip.wright@usdoj.gov](mailto:philip.wright@usdoj.gov)

CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing “MOTION *IN LIMINE* FOR ORDER TO PRECLUDE IMPROPER CHARACTER EVIDENCE” has been electronically filed and service has been made on opposing counsel by virtue of such electronic filing on this 28th day of August, 2018, to:

John A. Carr, Esq.  
John A. Carr Attorney at Law, PLLC  
179 Summers Street, Suite 209  
Charleston, WV 25301

s/Philip H. Wright  
PHILIP H. Wright  
Assistant United States Attorney  
WV State Bar No. 7106  
300 Virginia Street, East  
Charleston, WV 25301  
Telephone: 304-345-2200  
Fax: 304-347-5104  
E-mail: [philip.wright@usdoj.gov](mailto:philip.wright@usdoj.gov)