

1 DAVID C. WEISS  
 Special Counsel  
 2 LEO J. WISE  
 3 Principal Senior Assistant Special Counsel  
 DEREK E. HINES  
 4 Senior Assistant Special Counsel  
 SEAN F. MULRYNE  
 5 CHRISTOPHER M. RIGALI  
 6 Assistant Special Counsels  
 7 950 Pennsylvania Avenue NW, Room B-200  
 Washington, D.C. 20530  
 8 Telephone: (771) 217-6090  
 9 E-mail: LJW@usdoj.gov, DEH@usdoj.gov  
 E-mail: SFM@usdoj.gov; christopher.rigali2@usdoj.gov  
 10 Attorneys for the United States

11  
 12 Attorneys for Plaintiff  
 UNITED STATES OF AMERICA

13 UNITED STATES DISTRICT COURT

14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 UNITED STATES OF AMERICA,

16 Plaintiff,

17 v.

18 ALEXANDER SMIRNOV,

19 Defendant.

No. CR 2:24-cr-00091-ODW

**GOVERNMENT’S THIRD MOTION  
 IN LIMINE TO EXCLUDE  
 IMPERMISSIBLE “SPECIFIC  
 INSTANCES OF CONDUCT”  
 EVIDENCE**

Hearing Date: November 25, 2024  
 Hearing Time: 10:00 a.m.  
 Location: Courtroom of the Hon.  
 Otis D. Wright

1 Plaintiff United States of America, by and through its counsel of record, hereby files  
2 its Third Motion in Limine to preclude Defendant Alexander Smirnov from seeking to  
3 introduce “specific instances of conduct” evidence.

4 This motion is based upon the attached memorandum of points and authorities and  
5 the declaration of Leo J. Wise, the indictment in this case, and any further evidence and  
6 argument as the Court may deem necessary.

7  
8 Dated: November 1, 2024

Respectfully submitted,

9  
10 DAVID C. WEISS  
Special Counsel

11 /s/ \_\_\_\_\_  
12 LEO J. WISE  
13 Principal Senior Assistant Special Counsel

14 DEREK E. HINES  
15 Senior Assistant Special Counsel

16 SEAN F. MULRYNE  
17 CHRISTOPHER M. RIGALI  
18 Assistant Special Counsels

19 Attorneys for Plaintiff  
20 UNITED STATES OF AMERICA  
21  
22  
23  
24  
25  
26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The defendant has indicated his intent to introduce at trial “specific instances of  
3 conduct” to prove his purported character for “truthfulness,” “honesty,” “helpfulness,” or  
4 “reliability.” *See* attached Decl. of Leo J. Wise, ¶ 5. But Federal Rule of Evidence 405(b)  
5 permits specific instances of conduct to be introduced *only* where a person’s character is  
6 an “essential element” of the charges or defenses. In this prosecution for violations of 18  
7 U.S.C. §§ 1001 and 1519, character for truthfulness or honesty is not an essential element  
8 of the charges, nor is it an actual defense. Accordingly, the Court should preclude the  
9 defendant’s “specific instances” evidence.

10  
11 **I. ARGUMENT**

12 In his *Touhy* request and elsewhere, the defendant has indicated his clear intent to  
13 introduce at trial “specific instances of conduct” evidence aimed at proving his alleged  
14 character for truthfulness, honesty, helpfulness, and/or reliability. *See* Decl. of Leo J.  
15 Wise, ¶ 5 (“It is anticipated that these [FBI employee] witnesses will, among other items  
16 of evidence value, provide testimony illustrating that . . . Mr. Smirnov performed  
17 numerous specific acts demonstrating honesty and trustworthiness during his many years  
18 of service to the United States.”); *see id.* (“This ‘specific acts’ evidence—which can only  
19 be provided by the witnesses listed above—is necessary and admissible in this case.”); *see*  
20 *id.* (“In this case, Rule 405(b) both compels the evidence detailing the numerous ‘specific  
21 instances’ of good ‘conduct’ that Mr. Smirnov rendered to the United States during his  
22 years of service.”). The crux of the defendant’s argument is that his character is an  
23 “essential element” of the charges or defenses in this prosecution for violations of 18  
24 U.S.C. §§ 1001 and 1519, and, as such, Rule 405(b) permits him to introduce “specific  
25 instances of conduct” to prove his character for truthfulness or honesty. Decl. of Leo J.  
26 Wise, ¶ 5 (“Thus, the issue of Mr. Smirnov’s character—*viz.*, whether he possesses a  
27 character for truthfulness or lying (as the Government urges)—is the quintessential  
28 ‘essential element’ of a defendant’s trial ‘defense’ under Rule 405(b).”). Because the law

1 is clear that character for truthfulness or honesty is **not an essential element** of the  
2 charges or an actual defense, the Rules of Evidence do not allow the defendant to introduce  
3 “specific instances of conduct” to prove his alleged character for truthfulness or honesty.  
4 As such, the Court should preclude the defendant from seeking to introduce “specific  
5 instances” evidence (or argument to that effect).

6 The default rule is that character evidence is prohibited “to prove that on a particular  
7 occasion the person acted in accordance with the character or trait.” Fed. R. Evid.  
8 404(a)(1). There is an exception, however, for a defendant in a criminal case: “[A]  
9 defendant may offer evidence of the defendant’s **pertinent** character trait, and if the  
10 evidence is admitted, the prosecutor may offer evidence to rebut it.” Fed. R. Evid.  
11 404(a)(2)(A) (emphasis added).

12 But the story doesn’t end there—Rule 405 governs the “methods of proving  
13 character,” and sets forth the rules of what type of character evidence is admissible, and  
14 under what circumstances. The main method of proving character is by reputation or  
15 opinion testimony: “When evidence of a person’s character or character trait is admissible,  
16 it may be proved by testimony about the person’s reputation or by testimony in the form  
17 of an opinion.” Fed. R. Evid. 405(a). Rule 405(b) provides another method for proving  
18 character—specific instances of conduct—but it is limited to circumstances where a  
19 person’s character is an “essential element”: “When a person’s character or character trait  
20 is an essential element of a charge, claim, or defense, the character or trait may also be  
21 proved by relevant specific instances of the person’s conduct.”

22 Because so much of the information the defendant seeks to introduce constitutes  
23 “specific instances” evidence, he seeks to smuggle that evidence into this trial by  
24 contending that truthfulness and honesty are “quintessential ‘essential element[s]’ of a  
25 criminal defendant’s planned trial ‘defense.’” Decl. of Leo J. Wise, ¶ 5. He similarly  
26 argues that “specific instances” evidence is required not only to establish truthfulness  
27 under Rule 405(b), but also to negate Mr. Smirnov’s specific intent to commit the charged  
28

1 offenses. *Id.* As explained below, the defendant is wrong on the law, and the Court should  
2 not permit evidence of “specific instances” of alleged truthfulness or honesty.

3 Even assuming for present purposes that a character for truthfulness or honesty is a  
4 “pertinent” character trait under Rule 404(a)(2)(A), such character or character trait is **not**  
5 an “essential element” of charges or defenses in this prosecution for violations of 18  
6 U.S.C. §§ 1001 and 1519. The Ninth Circuit, like other circuits, takes a narrow view of  
7 when character constitutes an essential element. *United States v. Keiser*, 57 F.3d 847, 856  
8 (9th Cir. 1995) (approving the formulation that “character trait is essential element if it is  
9 an operative fact that determines the rights and liabilities of the parties”); *see also United*  
10 *States v. Charley*, 1 F.4th 637, 647 (9th Cir. 2021). Relying on *Keiser*’s test, several  
11 district courts have squarely held that character for truthfulness or honesty is not an  
12 essential element in prosecutions for violations of 18 U.S.C. §§ 1001 and 1519. *See United*  
13 *States v. Covington*, No. 3:23cr68, 2023 WL 8482581, at \*3 (E.D. Va. Dec. 7, 2023);  
14 *United States v. Mixon*, No. CR-14-631-001, 2015 WL 13849032, at \*3 (D. Ariz. Dec. 11,  
15 *2015). Quoting *Keiser*, 57 F.3d at 856, these district courts set forth the pertinent analysis:*

16 In determining whether a person's trait is an essential element of the crime,  
17 the relevant question is: would proof, or failure of proof, of the character trait  
18 by itself actually satisfy an element of the charge, claim, or defense? If not,  
19 then character is not essential and evidence should be limited to opinion or  
20 reputation. . . . In other words, proof of the character trait itself, not an  
21 example of the trait, must be an essential element.

22 *Covington*, 2023 WL 8482581, at \*3 (internal quotation marks and citations omitted); *see*  
23 *also Mixon*, 2015 WL 13849032, at \*3. Asking and answering these questions, both courts  
24 expressly held that a character for truthfulness or honesty is not an essential element of a  
25 charge or defense in prosecutions such as this one.

26 Neither § 1001 nor § 1519 have the trait of untruthfulness as an element, nor  
27 would a character for truthfulness be a defense to these charges; these charges  
28 simply require proof that the Defendants were untruthful in a discrete

1 instance. *See United States v. Mixon*, No. 14CR00631-001-TUCJGZ, 2015  
2 U.S. Dist. LEXIS 195403, 2015 WL 13849032, at \*3 & n.3 (D. Ariz. Dec. 11,  
3 2015) (“[T]he character trait of honesty is not an element of 18 U.S.C.  
4 § 1001[] or 18 U.S.C. § 1519.”). In other words, even if the jurors were  
5 presented with evidence—and believed—that the Defendants Farley and  
6 Covington possessed general truthful or honest character, the jurors would be  
7 free to find that the Defendants nevertheless made the alleged false statements  
8 or false report in the instances in question. *See id.* Truthful *character* is thus  
9 not an "essential element" of either the § 1001 charge or the § 1519 charge;  
10 Defendants Farley and Covington thus cannot use evidence of specific  
11 instances (e.g., awards or commendations) to prove their truthful  
12 character. *See Fed. R. Evid. 405(b); cf. Ralston v. Garabedian*, No.  
13 19CV1539, 2022 U.S. Dist. LEXIS 49, 2022 WL 19273, at \*15 n.141 (E.D.  
14 Pa. Jan. 3, 2022) (refusing to admit specific-acts evidence  
15 under 405(b) because the proponent's “affirmative defense of truth does not  
16 make his *character* for truthfulness an essential element of his defense; his  
17 defense simply turns on whether the allegation was true” (emphasis in  
18 original)).

19 *Covington*, 2023 WL 8482581, at \*3.

20 Unlike the cases cited above, the cases cited by the defendant are not persuasive—  
21 among other things, they don’t address the specific criminal charges at issue in this case.  
22 For instance, *United States v. Thomas*, 134 F.3d 975 (9th Cir. 1998), concerned whether  
23 “prior good acts offered by a defendant in support of [an] entrapment defense” were  
24 admissible under Rules 404(b) or 405(b). In a case involving an entrapment defense, the  
25 court explained, “[t]he government must prove [a defendant’s] predisposition beyond a  
26 reasonable doubt.” *Id.* at 980. “For the jury to find predisposition beyond a reasonable  
27 doubt, it must consider the defendant’s character,” *id.*, as character is one of the “[f]ive  
28 factors . . . relevant in determining whether a defendant was predisposed to commit a

1 crime,” *id.* at 978. In short, *Thomas* held that prior specific instances of good conduct  
2 were admissible in a case involving an entrapment defense because overcoming an  
3 entrapment defense requires proof of the defendant’s character. As the *Covington* and  
4 *Mixon* courts explained, that is *not* the case for prosecutions involving 18 U.S.C. §§ 1001  
5 and 1519: “[E]ven if the jurors were presented with evidence—and believed—that the  
6 Defendants . . . possessed general truthful or honest character, the jurors would be free to  
7 find that the Defendants nevertheless made the alleged false statements or false report in  
8 the instances in question.” *Covington*, 2023 WL 8482581, at \*3.

9 The defendant also relies on *Schafer v. Time, Inc.*, 142 F.3d 1361 (11th Cir. 1998),  
10 and *United States v. Tangen*, No. 2:15-cr-73, 2016 WL 3676451 (E.D. Wash. July 7,  
11 2016), the first of which is a civil libel case and the second of which does not implicate  
12 the crimes at issue in this case. *Schafer* is not persuasive, as the court there explained that  
13 “a charge to defamation or libel commonly makes damage to the victim’s reputation or  
14 character an essential element of the case.” 142 F.3d at 1371–72 (quoting *Johnson v.*  
15 *Pistilli*, No. 95 C 6424, 1996 WL 587554 (N.D. Ill. Oct. 8, 1996) for the proposition: “It  
16 is rare that character is an essential element. The typical example of such a case is  
17 defamation where injury to reputation must be proven.”). *Tangen*, an unpublished district  
18 court decision, also did not involve the statutes at issue in this case; it was a prosecution  
19 for bank fraud under 18 U.S.C. § 1344. 2016 WL 3676451, at \*2. There, the court  
20 reasoned, without citing to any authority, that “because bank fraud requires knowingly  
21 executing a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of  
22 the moneys, funds, credits, assets, securities, or other property owned by . . . a financial  
23 institution, by means of false or fraudulent pretenses, representations, or promises, . . .  
24 specific instances of truthful or honest conduct by Defendant are admissible under Rule  
25 405(b) . . . .” *Id.* Notably, *Tangen* has subsequently been criticized by other courts, which  
26 observed that “*Tangen* appears not only to be incorrectly decided, but also contrary to  
27 Ninth Circuit precedent on the issue.” *United States v. Boutte*, 2019 WL 4261745, at \*4  
28 (D.N.M. Sept. 9, 2019); *see id.* (“*Tangen* did not cite to *any* case law to support its position

1 on Rule 405. Rather, it cites to an Eleventh Circuit decision, that . . . was quoting Rule  
2 404(a)(2)(A) and 405(a), *not* Rule 405(b).”).

3 The only other authority the defendant cites on this matter is *United States v. Giese*,  
4 597 F.3d 1170, 1188–91 (9th Cir. 1979). In *Giese*, the court **held** that the district court  
5 did not commit plain error by allowing the government to cross-examine the defendant,  
6 who opened the door to his own character when taking the stand, on various books that  
7 the defendant sold, owned, or read. *Id.* at 1191; *see also id.* (“[T]he government had a  
8 right to respond once the defendant had, of his own volition, chosen that method of proving  
9 he was a peaceable, law-abiding individual.”). In describing the defendant’s opening of  
10 the door to cross-examine on his character, the court said, *in dicta*, “unlike character  
11 witnesses, who must restrict their direct testimony to appraisals of the defendant's  
12 reputation, a defendant-witness may cite specific instances of conduct as proof that he  
13 possesses a relevant character trait such as peaceableness.” *Id.* at 1190. The court cited  
14 no authority for this observation, and the observation was not necessary to the holding of  
15 the case because it mattered not *how* the defendant opened the door to evidence of his  
16 character, it mattered only that he had opened the door. The Government is not aware of  
17 other authorities holding that a criminal defendant is not bound, even as a witness, by the  
18 limits of Rule 405(a) and 405(b).

19 Elsewhere, the defendant has raised *United States v. Ciccone*, 219 F.3d 1078 (9th  
20 Cir. 2000), and *Ciccone*’s discussion of *United States v. Thomas*, 32 F.3d 418 (9th Cir.  
21 1994), for the proposition that “specific acts” evidence is required to negate the  
22 defendant’s specific intent to commit the charged offenses. But these cases, too, are  
23 unavailing to the defendant’s attempt to smuggle specific acts evidence into this case. To  
24 begin with, the Ninth Circuit in *Ciccone* affirmed the district court’s decision to “exclude[]  
25 evidence of satisfied donors and charities to support his good faith defense at trial.” 219  
26 F.3d at 1082. Further, although *Thomas* “recognized that evidence of benefits customers  
27 received can be relevant to the issue of whether an accused had the requisite intent to  
28 defraud,” *id.*, *Thomas* was about evidence the defendant sought to introduce *related to the*



1 *charged scheme*. In other words, the situation in *Thomas* is nothing like the situation  
2 before us; here, the defendant seeks to inject alleged specific instances of good conduct or  
3 truthfulness into his trial even though those specific instances have absolutely nothing to  
4 do with the charged conduct.

5 As is clear from the defendant’s *Touhy* request, the evidence he seeks to elicit or  
6 introduce at trial constitutes “specific instances of conduct” (and he concedes as much).  
7 For example, he argues that certain FBI witnesses would “relevant to establish that Mr.  
8 Smirnov . . . contributed [to] the Eurasian organized crime provide, provided info to the  
9 AUSA in Los Angeles regarding person[s] of interest, and was used in an undercover  
10 operation targeting Armenian and Russian immigrants.” Decl. of Leo J. Wise, ¶ 5. As  
11 another example, he argues certain FBI witnesses “are relevant to Mr. Smirnov being  
12 helpful, suitable for continued operation, having his information corroborated, [and]  
13 having satisfied FBI Intelligence collection requirements . . . .” *Id.* The *Touhy* letter also  
14 notes that the defendant’s information “led to the identification or location of 20 criminal  
15 subjects, initiated six FBI criminal investigations, and led to the arrest of 13 subjects.” *Id.*  
16 All of these examples and the others that the defendant provides he seeks to introduce to  
17 establish not that the information he provided to Special Agent Walters in June of 2020  
18 was true, but that he was “truthful,” “honest,” “helpful,” or “reliable” on some *other*  
19 occasion. In other words, they are alleged “specific instances” intending to prove that he  
20 has a character for truthfulness, honesty, helpfulness, or reliability. As discussed above,  
21 because those character traits are not “essential elements” of the charges or defense in this  
22 case, Rule 405(b) simply does not permit this type of evidence.

23 This Court should adhere to the Ninth Circuit’s approach *Keiser* and find, as the  
24 *Covington* and *Mixon* courts found, that character for truthfulness or honestly is not an  
25 essential element in prosecutions for violations of 18 U.S.C. §§ 1001 and 1519. Upon  
26 making that finding, the Court should preclude the defendant from seeking to introduce  
27 “specific instances of conduct” evidence aimed at proving his alleged character for  
28 truthfulness, honesty, helpfulness, or reliability.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**II. CONCLUSION**

For these reasons, the Court should issue an order excluding impermissible “specific instances of conduct” evidence.